

**UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD**

CIVITAS SCHOOLS, LLC,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 13-RM-1764
	)	
CHICAGO ALLIANCE OF CHARTER	)	
TEACHERS AND STAFF, <i>et al.</i> ,	)	
	)	
Respondents.	)	

**PETITIONER CIVITAS SCHOOLS, LLC's POST-HEARING BRIEF**

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## I. INTRODUCTION

Civitas Schools, LLC ("Petitioner" or "Civitas") employs all of the teachers and other professionals in three of Chicago Charter School Foundation's ("CCSF's") 12 Chicago International Charter School campuses.<sup>1</sup> On April 14, 2009, Civitas filed a petition with the National Labor Relations Board in response to a showing of interest by the teachers and professionals at the three aforementioned campuses to be represented by the Chicago Alliance of Charter Teachers and Staff, Illinois Federation of Teachers, AFT, AFL-CIO (the "Respondent" or "Union").

In response to Civitas' petition, the Union has raised three equally meritless arguments in an attempt to evade the Board's broad jurisdiction. Initially, the Union argues that Civitas is exempt from the jurisdiction of the National Labor Relations Board because Civitas is a political subdivision of the State of Illinois. This argument fails because Civitas was neither "(1) created directly by the state, so as to constitute departments or administrative arms of the government, nor (2) administered by individuals who are responsible to public officials or to the general electorate" as the Supreme Court has held is required to fall within Section 2(2)'s exemption for political subdivisions. NLRB v. Natural Gas Utility Dist. of Hawkins County, 402 U.S. 600, 604-605 (1971); Charter School Admin. Servs., Inc., 353 NLRB No. 35 (2008) (management company that contracted with public charter school was an employer within the meaning of Section 2(2) of the Act and was not an exempt political subdivision).

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<sup>1</sup> CCSF does business as Chicago International Charter School. (R. 40). CCSF and Chicago International Charter School are sometimes jointly referred to as CCSF/CICS.

Second, the Union asserts that Civitas and CCSF/CICS constitute a "single employer," exempt as a political subdivision due to the allegedly "public" nature of CCSF/CICS. Initially, this argument fails because CCSF/CICS, like Civitas, was neither created directly by the state, nor administered by individuals who are responsible to public officials or to the general electorate, as is required to fall within the narrow exemption to Section 2(2).

Moreover, even if CCSF/CICS were a political subdivision of the State of Illinois, which it is not, the Union's second argument fails because Civitas and CCSF/CICS do not have centralized control of labor relations, common management or interrelations of operations – which the Supreme Court held were necessary for two separate entities to constitute a single employer under the National Labor Relations Act. Radio Technicians Local 1264 v. Broad. Serv. of Mobile, 380 U.S. 255, 256 (1965).

In order to avoid the Board's broad jurisdiction, the Union must carry its burden of proving that Civitas and CCSF/CICS are a single employer *and* that one or both of Civitas and CCSF/CICS are political subdivisions of the State of Illinois. Because the evidence will not support either conclusion, the Board should conduct an election in the agreed bargaining unit.

## **II. FACTS**

### **A. Procedural History**

On April 3, 2009, the Union filed a majority interest recognition petition with the Illinois Educational Labor Relations Board naming "Civitas Schools" and "Chicago International Charter School" as employer. On April 14, 2009, after being presented with evidence of a showing of interest from the Union, Civitas filed the RM petition at issue in

this case. It is agreed between Civitas and the Union that an appropriate bargaining unit for the purpose of collective bargaining in this matter encompasses:

All full-time and part-time teachers, counselors, and social workers employed at the Wrightwood Campus, currently located at 8130 South California Avenue, Chicago, 60652, Northtown Academy currently located at 3900 West Peterson Avenue, Chicago, Illinois 60659, and the Ralph Ellison Campus currently located at 1817 West 80th Street, Chicago, Illinois 60620 and excludes all confidential employees, managerial employees and guards and supervisors as defined by the National Labor Relations Act.

(R. 9). (The individuals included in the proposed bargaining unit are sometimes referred to "petitioned-for employees").

The issues presented at hearing and addressed in this brief are: (1) "whether Civitas Schools, LLC and Chicago Charter Schools Foundation or Chicago International Charter School constitute a single employer;" (2) "whether Civitas Schools, LLC is exempt from the jurisdiction of the National Labor Relations Board because it is a political subdivision of the State of Illinois within the meaning of Section 2(2) of the National Labor Relations Act;" and (3) "whether the Chicago International Charter School itself is exempt from the Board's jurisdiction because it is a political subdivision of the State of Illinois." (R. 9-10).

It is Civitas' position that (1) the Board has jurisdiction over Civitas who is the sole employer of the petitioned-for employees, (2) Civitas and CCSF/CICS do not constitute a single employer under the National Labor Relations Act, and (3) CCSF/CICS is not exempt from the Board's jurisdiction as a political subdivisions of the State of Illinois or otherwise.

**B. The Background of Civitas Schools, LLC**

The Petitioner, Civitas, is an educational management organization ("EMO"). (R. 50). An EMO is a private company that manages schools. (R. 50). Civitas was formed as an Illinois limited liability corporation, with a single member and manager – CCSF. (R. 54, 56; Employer Ex. 7). As a limited liability company, Civitas is managed by its sole member, CCSF. (R. 110; Employer Ex. 7). Dr. Elizabeth Purvis, the Executive Director of CCSF, acts on CCSF's behalf with respect to Civitas. (R. 110).<sup>2</sup>

At one point in time, Civitas had an advisory board that advised Civitas' CEO, but it had no governing authority and could not remove Civitas' CEO. (R. 114). Since 2007, Civitas has not had an advisory board. (R. 318-319).

***1. Civitas' Relationship with CCSF***

Civitas is one of four different EMOs that provide services to CCSF; the other three EMOs are Edison Schools, Victory Schools and American Quality Schools. (R. 50; Employer Exs. 4-6). Each EMO enters into its own contract with CCSF that governs its relationship with CCSF. (R. 53; Employer Exs. 3-6). CCSF negotiated each EMO contract separately. (R. 53). All four EMOs and CCSF were represented by separate counsel during the negotiations. (R. 53-54). During its contractual negotiations with CCSF, Civitas was represented by Seyfarth Shaw and CCSF was represented by Goldberg Kohn. (R. 54, 178-179). Notwithstanding the fact that each EMO conducted separate negotiations with CCSF, each of the contracts contain many similar terms in regard to use of funds and implementation of a rigorous and relevant curriculum. (R. 53). Indeed, the terms of the

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<sup>2</sup> Union Ex. 23, which was entered into evidence over Civitas' objection, is a purported tax return filed by Civitas Foundation – an entity not before the Board. No witness was able to verify the accuracy or authenticity of the document. (R. 337-339). Moreover, it is undisputed that Civitas Foundation has no relationship with Civitas. (R. 318).

Civitas/CCSF contract are similar to those in the contracts between CCSF and the three other EMOs. (Employer Exs. 3-6). Civitas has contracted with CCSF for the last four to five years and currently performs EMO services only for CCSF. (R. 55, 233).

Pursuant to their contracts with CCSF, the EMOs must employ and are responsible for all of the personnel who work on the various CICS campuses. (Employer Exs. 3-6). The campus directors (principals), teachers and other employees at the various campuses are interviewed, hired, terminated, and disciplined by the EMOs without approval of anyone at CCSF or the CCSF Board of Directors. (R. 72). There are occasions, however, when CCSF's Executive Director or Associate Director are contacted to consult about whether a candidate's credentials meet applicable legal requirements or are asked to meet a candidate even though they have no say in the decision. (R. 75). Each EMO, however, determines its own pay and benefits, without input from CCSF. (R. 92). In fact, CCSF does not even see the contracts that the various EMOs enter into with their respective teachers. (R. 94).

Currently, Civitas manages three CICS campuses for CCSF: the CICS Northtown Academy Campus, the CICS Wrightwood Campus and the CICS Ralph Ellison Campus (R. 54; 234, Employer Ex. 3, § 1(f)). Previously, Civitas had also managed the CICS Basil Campus, but CCSF decided, after notice and an opportunity to cure, not to renew its contract with Civitas for the Basil Campus because the students there had not made adequate progress in reading. (R. 68-69, 174). The contract at the Basil Campus was subsequently awarded to Victory Schools. (R. 69-70).

Pursuant to its contract with CCSF, Civitas is responsible for all individuals (including all of the petitioned-for employees) who work at the three campuses that Civitas

manages for CCSF. (R. 71, 76; Employer Ex. 3, § 11(b)). CCSF does not compensate any Civitas employees, including each of the petitioned-for employees who perform work at these three campuses. (R. 76). Civitas pays the salaries, fringe benefits, employment taxes and other employment-related costs and expenses for all employees working on the three campuses that it manages for CCSF. (R. 77; Ex. 3, § 11(c)). Civitas is responsible for disciplining, as necessary, all employees (including all petitioned-for employees) located at the three campuses that it manages for CCSF. (R. 77).

There has been very limited interchange of employees between CCSF/CICS and Civitas in the past four years. Specifically, one CCSF/CICS employee left CCSF/CICS to take a job at Civitas – Dr. Thresa Nelson, former Civitas CEO. Similarly, one former Civitas employee, Nelson Acevedo, was hired as the facility manager for CCSF/CICS. (R. 88, 341-343). Although never a CCSF employee, Simon Hess, the current CEO of Civitas was formerly CEO of ChicagoRise, which was a separate entity owned by CCSF. (R. 87). In each of these cases, the individual applied for a position within the new organization prior to receiving the position. (R. 88, 127-128).

Approximately 90% of Civitas' revenues are derived from its contractual relationship with CCSF. (R. 322). The remaining revenues come from private grants and passive investments. (R. 321-322). Sixty to 65% of Civitas' revenues cover the salary and benefits of its employees; the remainder of its revenues went to cover student costs, administrative fees, facility expenditures and professional services. (R. 323).

## **2. *Civitas' Management***

Simon Hess is the CEO of Civitas', its top company official. (R. 230, 234). Reporting directly to Hess are: Civitas' Chief Academic Officer, Stacey Beardsley, Civitas'

Chief Financial Officer, David Savage, Director of Human Resources, Doris Badillo, Director of External Relations, Erika Callahan, and Civitas' Director of Family and Community Engagement, Linda Andrejek. (R. 235). Civitas' Curriculum Directors and Campus Directors (principals) report directly to Civitas' Chief Academic Officer. (R. 235). Civitas' Director of Technology, accounting and finance staff report directly to Civitas' Chief Financial Officer. (R. 235). All of these individuals are employed by Civitas and only Hess has any type of reporting relationship with anyone at CCSF. (R. 235).

Hess is a Civitas employee and draws his paycheck from Civitas. (R. 57, 230). Hess reports to and was hired by Dr. Elizabeth Purvis, Executive Director of CCSF, which is the member/manager of Civitas. (R. 56-57, 236). Purvis does not, however, control any of the day-to-day operations or labor relations of Civitas. (R. 281). For example, Civitas has all the authority related to discipline and discharge decisions – not CCSF/CICS. (R. 280-281). No other Civitas employee is hired by or reports to Purvis. (R. 56-57, 59).

**C. Background related to CCSF/CICS**

CCSF is a privately run 501(c)(3) non-profit organization, with a mission to provide through innovation and choice a high quality college preparatory education for today's children. (R. 41; Employer Ex. 1). CCSF does business as CICS. (R. 40). Two of the purposes for which CCSF was organized are to own and operate a charter school and to make distributions to charitable and educational organizations that are qualified under Section 501(c)(3) of the Internal Revenue Code. (R. 43; Employer Ex. 1). CCSF has its own Board of Directors, members of which can be appointed and removed only in accordance with the CCSF's bylaws. (R. 40-41, 192, 194; Employer Ex. 11).

### ***1. CCSF/CICS Management***

CCSF/CICS has approximately 18 full-time employees and 4 part-time employees none of whom have any employment relationship with Civitas. (R. 78, 85, 88-89). CCSF/CICS' top company official is its Executive Director, Dr. Elizabeth Purvis. (R. 40). Reporting directly to Purvis are: Tom McGrath, Chief Operating Officer; Michael Barnhill, Development Director; Erin Lanoue, Associate Director; Megan Schmidt, Director of Special Projects; Christine Poindexter, Chief Data Analyst; and Andrea-Brown Thirston, the Chief Academic Officer. (R. 74, 115, 137, 223-224, 268; Employer Ex. 10; Union Ex. 11). CCSF/CICS' Accounting Clerk, Office Manager and Nelson Acevedo, Facilities Manager report directly to McGrath, CCSF/CICS' Chief Operating Officer. (R. 224; Employer Ex. 10).

### ***2. Chicago Charter School Foundations' Charter***

Charter schools in Illinois are authorized by the local school board in the school district where the school is located. (R. 102-103; see also JX 1 at § 5/27A-6). For charter schools in Chicago, the "authorizer" is the Office of New Schools of the Chicago Public Schools ("CPS"). (R. 101-102). For the charter school that CCSF/CICS is opening in Rockford, the Rockford Public School District is the authorizer. (R. 102-103).

A charter is a contract with the state that allows a private organization to run a public school. (R. 49; JX 1 at § 5/27A-6(a)). A charter school is a privately run public school of choice that is not subjected to the same rules and regulations as a typical Chicago public school. (R. 47; see also JX 1 at § 5/27A-5(g)). The charter contracts are five year contracts, which can be renewed. (R. 106).

CCSF holds the charter for CICS, that was granted to CCSF in 1997 by the Chicago Public Schools Board of Education and approved by the State Board of Education. (R. 43, 102, 123). Through its single charter, CCSF operates 12 different CICS campuses throughout Chicago and will be opening a campus in Rockford, Illinois in 2010. (R. 47). The campuses include elementary and high schools, as well as early childhood development schools which predominantly reflect the neighborhoods in which they are located. (R. 48-49). Included in those 12 campuses are CICS Northtown Academy, CICS Wrightwood and CICS Ralph Ellison campuses run by Civitas. (R. 9, 234).

Pursuant to the charter agreement, CCSF/CICS is paid a *per capita* tuition payment for each pupil enrolled at CCSF/CICS. (R. 197, 213; Employer Ex. 10). As part of its charter agreement, CCSF is required to submit a number of educational, operational, and financial reports to CPS as its authorizer under its contractual relationship with the State of Illinois. (R. 156-157, 160-162). Pursuant to its charter contract CCSF has agreed to comply with various applicable federal and state laws. (R. 163; Union Ex. 10, § 5(a)). Every five years, the CPS Office of New Schools, as part of the renewal of charter information reviews the curriculum in place at the various campuses. (R. 161).

**D. Neither Civitas Nor CCSF/CICS Is a Political Subdivision of the State of Illinois.**

***1. Civitas is Not a Political Subdivision***

Civitas is a for-profit, limited liability company and was not created by the State of Illinois. (R. 95; Union Ex. 22). No public official or government person can remove Civitas' CEO or manager. (R. 96). No statute or regulation mandates the identity of Civitas' manager, which is instead privately determined. (R. 104). Civitas' officers and managers are not appointed by or subject to removal by any government official. (R. 236-237). Civitas'

CEO is not accountable to any government official. (R. 237). Civitas is not subject to governmental civil service requirements, competitive bidding or purchasing practices. (R. 237). Civitas does not have a state-issued insurance policy. (R. 237). Civitas employees do not participate in any type of state or local government wage scale. (R. 237). No city, state or other governmental entity owns any of the property or improvements on which Civitas operates. (R. 237). Civitas teachers, counselors, social workers and technology professionals (including all of the petitioned-for employees) are hired, fired, disciplined, compensated, provided benefits, without approval from the CPS of any other government entity. (R. 241-248). Civitas also creates its own budget and is not required to submit its budget to CPS or any other government entity. (R. 308).

With respect to its students, Civitas determines the curriculum that will be used at its campuses without review or oversight from the State Board of Education. (R. 159-160). Civitas does not submit any educational related reports to CPS or the State Board of Education. (R. 289).

## ***2. CCSF/CICS Is Not a Political Subdivision***

Like Civitas, CCSF/CICS was not created by the State of Illinois. (R. 95). CCSF officers or directors are not appointed by anyone in the government and they do not take an oath as public officials. (R. 95, 199). No government person can remove a CCSF board member and no state regulation mandates a specific composition of CCSF's Board of Directors, which is instead privately determined by its Bylaws. (R. 104; Employer Ex. 11). Neither CCSF's Executive Director nor any CCSF board member has any direct personal accountability to a government official. (R. 96). No CCSF Board member is a government official. (R. 96, 194). No member of CPS has the authority to make recommendations with

respect to hiring or terminating any CCSF/CICS personnel. (R. 102). No government official, including anyone involved with CPS or the State Board of Education, can or has ever asked to have a person put on or removed from the CCSF Board of Directors. (R. 96-97, 98-99, 195). Similarly, the state cannot determine the EMOs with which CCSF/CICS contracts. (R. 198).

CCSF/CICS employees are not subject to state or local civil service requirements. (R. 97). CCSF/CICS employees do not participate in any type of state or local government or CPS wage scale. (R. 104). No government official has ever asked CCSF/CICS to change a personnel decision, hire someone he/she preferred or got involved in the day-to-day operations of CCSF/CICS. (R. 101, 104). No CCSF/CICS employee is eligible to participate in the Chicago Teachers Pension Plan. (R. 91). CCSF/CICS does not have any state-issued insurance policies. (R. 104).

CCSF/CICS receives its funding from both public and other private sources, with approximately 95% coming from a variety of state and federal funds, and approximately 5% coming from private donations. (R. 97, 181). CCSF/CICS owns or leases all of the buildings in which the students at the various campus are schooled. (R. 71). None of the property or buildings in which CCSF/CICS operates is owned by the government. (R. 104). CCSF/CICS provides budgets to the CPS Office of New Schools on a quarterly basis pursuant to its charter agreement, but neither anyone employed by CPS nor any other government official has ever required that the budgets be modified. (R. 100). Similarly, CCSF/CICS is not required to provide any type of annual presentation to any government body to justify its annual expenditures. (R. 105). No government official has ever requested CCSF/CICS not to invest in specific real estate or any other capital expenditure. (R. 105).

A student can be expelled from a CCSF/CICS campus without being expelled from Chicago Public Schools. (R. 120). In fact CCSF/CICS has a different code of conduct than does CPS. (R. 158). Pursuant to the EMO contracts, that code of conduct is in place at all CCSF/CICS campuses, regardless of EMO. (R. 158).

**E. Civitas and CCSF/CICS Have Separate Operations**

***1. Civitas Operations***

Civitas has its main office located at 1033 West Van Buren. (R. 291, 305). Civitas leases the space from a private property manager (not CCSF/CICS) and pays its own rent. (R. 305, 290-291). Civitas' office space is not shared with any other organization. (R. 305). The Civitas office has an administrative staff that does not perform services for any other organization. (R. 305). The administrative staff is made up of Civitas employees, none of whom are employees of CCSF/CICS. (R. 292). Civitas has its own letterhead and its own website maintained by its External Relations Director. (R. 204, 272). Civitas also has its own bank accounts, telephone systems, computers, software licenses, and other office supplies and equipment, none of which is shared with any other organization. (R. 306-307). Civitas does not have access to any CCSF/CICS computer system at its main offices. (R. 329). Similarly, Civitas has its own purchasing software, to which no other entity (including CCSF/CICS) has access. (R. 307-308). Civitas carries its own workers' compensation insurance and general liability insurance. (R. 306; Employer Ex. 3, §12). The premiums for these policies are paid for by Civitas and the policies do not cover any entity other than Civitas. (R. 306-307).

With respect to its financial management, Civitas' financial books, accounting procedures and policies are controlled by its own Chief Financial Officer. (R. 304). Civitas'

budget is also created, coordinated and managed by its Chief Financial Officer without involvement from CCSF/CICS. (R. 308). Pursuant to its contract with CCSF/CICS, Civitas submits its budget to CCSF/CICS as does every other EMO. (Employer Ex. 3, §§ 8(h)(v), 10(a); see also, Employer Ex. 4, §§ 9(h)(v), 11(a); Employer Ex. 5 §§ 9(h)(iv), 11(a); Employer Ex. 6 §§ 8(h)(v), 10(a)). Civitas, submits its own quarterly payroll filings and annual statement of deposits and filings to the IRS. (R. 309; Employer Ex. 12). CCSF/CICS has not provided Civitas with any loans. (R. 202).

As to the operations of the three campuses at issue, Civitas purchases all text books and other school materials without consultation with CCSF/CICS. (R. 285). Pursuant to contract, the books and materials purchased by Civitas remain property of CCSF/CICS at the termination of the Civitas/CCSF/CICS contract. (R. 333, 344-345, Employer Ex. 3, § 9(a)). This transfer of property provision is contained in all of CCSF/CICS' EMO contracts. (Employer Ex. 3, §§ 9(a), 15(f); Employer Ex. 4, §§ 10(a), 16(f); Employer Ex. 5 §§ 10(a), 16(f); Employer Ex. 6 §§ 9(a), 15(f)). Civitas can and does subcontract with other entities and outside vendors, without input or approval from CCSF/CICS. (R. 286, 288). Civitas provides CCSF/CICS with regular information *vis a vis* enrollment and attendance information, through CCSF/CICS' PowerSchool software. (R. 157, 315). Civitas pays CCSF/CICS for its use of the PowerSchool software. (R. 315). Civitas also pays CCSF/CICS a per student rent for the use of CCSF/CICS facilities. (R. 202; Employer Ex. 3, § 1(hh)).

## **2. CCSF/CICS Operations**

CCSF/CICS has its own offices located at 228 South Wabash Avenue, Suite 500, Chicago, Illinois 60604, which are separate from Civitas offices. (R. 40, 84-85). No

one employed by Civitas works out of the CCSF/CICS offices. (R. 85). CCSF/CICS has its own separate property and casualty insurance. (R. 85). CCSF/CICS has its own administrative staff, maintenance/janitorial staff, office equipment, telephones, facsimile machines, printers and software licenses. (R. 85-86). CCSF/CICS has an officers and directors insurance policy that does not cover Civitas employees. (R. 91). Additionally, CCSF/CICS has its own bank accounts. (R. 86).

**F. There Is No Centralized Control of Civitas' and CCSF/CICS' Labor Relations**

***1. Labor and Employment Relations For Civitas Employees***

Civitas has its own Director of Human Resources, charged with administering the labor and employment relations issues for Civitas. (R. 78, 236, 246-247). Civitas' Director of Human Resources performs no duties for CCSF/CICS. (R. 236). Civitas also has its own employee policy manual drafted with the assistance of its outside employment counsel – Seyfarth Shaw. (R. 188, 209, 237; Union Ex. 15).

Civitas employs all of the petitioned-for employees (including all of the teachers, counselors, social workers and technology professionals) at the CICS Northtown Academy, CICS Wrightwood and CICS Ralph Ellison campuses – 121 individuals in total. (R. 239, 277). Civitas alone determines the number of teachers, counselors, social workers and technology professionals it will employ at each campus. (R. 286). With the exception of the CEO, employees at Civitas, including all of the petitioned-for employees and Campus Directors (principals) are interviewed, hired, terminated, disciplined by Civitas without approval by anyone at CCSF/CICS or the CCSF Board of Directors. (R. 61-62, 72, 281). The petitioned-for employees are hired by Civitas with input from Civitas' campus team leaders, Campus Directors, Human Resource Director and possibly the Chief Academic

Officer. (R. 240). For Director-level administrative hirings, Civitas' CEO would have input in the decision as well. (R. 240). These hiring decisions are made without input or approval from CCSF/CICS. (R. 240, 279).

The teachers at the three campuses at issue are employed by Civitas pursuant to individual employment contracts. (R. 248; see, e.g., Employer Exs. 13, 14, 15). The contracts are negotiated and entered into between the teacher and Civitas. (R. 248, 443). The contracts are signed by the teacher and Civitas' CEO and specifically state "Civitas Schools hereby employs teacher." (R. 435, 444; Employer Exs. 13, 14, 15). Pursuant to these contracts, the teachers are obligated to provide services "in accordance with the mission and expectation of Civitas Schools." (R. 435; Employer Exs. 13, 14, 15). Under each contract, the teacher is obligated to cooperate and follow the disciplinary policies of Civitas. (R. 435). Pursuant to section 6.1 of the contract, Civitas is obligated to pay the teacher. (R. 436). These contracts are not approved in any way by CCSF/CICS. (R. 248).

If any of the petitioned-for employees must be disciplined or terminated by Civitas it is done with input from Civitas' Campus Directors, Human Resource Director, Chief Academic Officer and CEO. (R. 241-42, 246-47). Such termination and discipline decisions are made without input or approval from CCSF/CICS. (R. 241-42, 246-47, 280). All compensation and benefits decisions with respect to the petitioned-for employees are made by Civitas with input from the Chief Academic Officer, Human Resource Director and the CEO. (R. 243-44). Like the decisions to hire and terminate, decisions about compensation and benefits (including healthcare, long-term disability, short-term disability, dental, vision and 401(k) benefits) are made without input or approval from CCSF/CICS. (R. 244-45). The petitioned-for employees are assigned work and evaluated solely by

Civitas, typically at the direction of Civitas' Campus Directors (principals). (R. 281-82). Day-to-day decisions, such as vending machine contracts, are also made by Civitas. (R. 284).

Certain of Civitas' certified professionals and teachers are also required to participate in the Chicago Teachers' Pension Fund. (R. 311). At its own discretion, Civitas has chosen to provide 7% of the 9% of salary that those eligible teachers and professionals are required to pay into that pension plan. (R. 311, 313). These eligible teachers and professionals are also permitted to participate in Civitas' 401(k) plan. (R. 311-12).

Civitas management, without consultation from CCSF/CICS, determines the number of individuals that it will employ. (R. 78-79). Similarly, Civitas, without input from CCSF/CICS, determines how much Civitas employees are paid and designs its own compensation system. (R. 79, 237). Civitas issues its own payroll, and all Civitas employees get paychecks issued from Civitas. (R. 309-10, 397). CCSF/CICS does not compensate any Civitas employees (including the petitioned-for employees).<sup>3</sup> (R. 76, 152).

If teachers voice complaints, they are directed to employees an internal Civitas resource. (R. 145). The only exception is if the complaint involves Civitas' CEO, in which case the complaint would be addressed by Dr. Purvis acting as Civitas' manager on behalf of CCSF. (R. 146-147). For example, in 2007 Civitas teachers from the Wrightwood Campus voiced complaints about Civitas' then – CEO, along with a number of other issues. (R. 418). Purvis met with the teachers, determined that it was not a CEO issue, took no action and the remainder of the complaints were taken up by the Civitas CEO. (R. 148-151). This was the

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<sup>3</sup> The testimony related to Dr. Venegoni's compensation is consistent; he is neither an employee of CCSF/CICS nor of Civitas. Instead he is an independent contractor and is paid as such (like a vendor) with funds from a private grant. (R. 315).

only occasion when Purvis' met alone with Civitas teachers at the Wrightwood Campus in the past three years. (R. 417).

## **2. *Labor and Employment Relations For CCSF/CICS***

CCSF/CICS' Executive Director is charged with handling its human resource matters. (R. 78). CCSF/CICS has its own employee handbook that is separate and distinct from Civitas' handbook. (R. 88, 209-10; Employer Ex. 8). CCSF/CICS has its own payroll, separate from Civitas' payroll. (R. 88-89). CCSF/CICS sets its employees' hours, without trying to coordinate in relation to Civitas employees' hours. (R. 89). CCSF/CICS employees' breaks and paid holidays are different than those received by Civitas employees. (R. 89-90). CCSF/CICS employees receive vacation pursuant to CCSF/CICS own policy. (R. 91). CCSF/CICS has its own workers' compensation policy, which it does not share with Civitas and files its own state unemployment documents. (R. 91). CCSF/CICS employees are allowed to participate in Civitas' 401(k) plans and health plans – which are provided by Civitas at a cheaper rate than what CCSF/CICS would be able to provide its employees on its own. (R. 153, 215-16). CCSF/CICS, however, reimburses Civitas for the costs that Civitas incurs as a result of CCSF/CICS employees participating in the health plan. (R. 313). With respect to the 401(k) plan, Civitas does not incur any costs as the CCSF/CICS employees payment go directly to a third party trustee. (R. 313, 334-35).

### **III. ARGUMENT**

#### **A. Respondent Failed to Prove That Civitas and/or CCSF/CICS Are Political Subdivisions of the State**

##### **1. *Applicable NLRB Jurisdictional Principles***

Pursuant to the National Labor Relations Act ("NLRA"), the National Labor Relations Board's ("NLRB's") jurisdiction extends to enterprises whose operations affect

interstate commerce. There is no dispute in this case that Civitas is such an enterprise. (Board Ex. 2, ¶ 6).<sup>4</sup> Instead, Respondent, asserts that Civitas is exempt from the definition of "employer" under the Act, based on its view that Civitas is a "political subdivision" of the State of Illinois.<sup>5</sup> (R. 38-39). Whether an employer is a political subdivision within the meaning of the Act is determined pursuant to federal law, not state law. Hawkins County, 402 U.S. at 602-603 ("Federal, rather than state, law governs the determination, under § 2(2), whether an entity created under state law is a 'political subdivision' of the State and therefore not an 'employer' subject to the Act").

"The NLRB's jurisdiction is to be interpreted broadly." NLRB v. Parents and Friends of the Specialized Living Ctr., 879 F.2d 1442, 1448 (7th Cir. 1989) (internal citations omitted) (enforcing Board's order exercising NLRB jurisdiction over not-for-profit corporation that received 99% of its funding from public sources). As such, the party asserting that the Board is without jurisdiction bears the burden of persuading the Board not to exercise its jurisdiction. Int'l Ass'n of Firefighters, 292 NLRB 1025 (1989) (citing NLRB v. Austin Develop. Ctr., Inc., 606 F.2d 785, 789 (7th Cir. 1979) (holding that the NLRB had jurisdiction over nonprofit corporation engaged in providing educational and counseling services to school age children and noting that "[t]he statutory limitation contained in Section 2(2) has not been broadly construed.")). Here, the Union asserts that the Board is without jurisdiction over Civitas (and, to the extent applicable, CCSF/CICS) and therefore bears the

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<sup>4</sup> Indeed, there is no dispute that Civitas far exceeds the Board's jurisdictional thresholds. For example, Civitas derived gross revenues pursuant to its contract with CICS in excess of \$9.3 million. (Employer Ex. 3, §§ 1(c) and 7(b)).

<sup>5</sup> The Act, at 29 U.S.C. § 152(2), defines the term "employer" to include any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, . . . or any State or political subdivision thereof, . . . or any labor organization

burden of proof on the central issue presented. For the reasons stated below, it cannot sustain that burden.

The general test for determining whether an employer is an exempt political subdivision is whether or not it was "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) [is] administered by individuals who are responsible to public officials or to the general electorate." Hawkins County, 402 U.S. at 604-05; Specialized Living Ctr., 879 F.2d at 1448; Charter School Admin. Servs., 353 NLRB No. 35.

In Charter School Admin. Servs., the Board considered and rejected the precise argument on which the Union relies in this case. Specifically, the Board found that a for-profit Michigan corporation that managed a Michigan charter school was an employer within the meaning of Section 2(2) of the Act. The charter school involved, The Academy of Waterford, was a "public charter school" under Michigan law. Id. at 1. The management company received a fixed fee from the charter school based on a percentage of the funds the charter school received from the State of Michigan. The management fee, as in the present case, was paid to the management company as consideration for services provided pursuant to its contract with the charter school. Id.

As in the present case, the charter school remained ultimately responsible for the management company's compliance with its charter and all applicable laws. Unlike the present case, the charter school was expressly defined by state law as a "government agency" and all of its officers and directors had to take an oath of office as public officials. As such, and distinct from this matter, it was undisputed in Charter School Admin. Servs. that the

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(other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor

charter school itself was a governmental body. As is the case here, however, the management company in Charter School Admin. Servs. was contractually responsible for all day-to-day operations of the school, including preparing budgets, hiring teachers, counselors and other staff, and supervising the charter school's employees. Id. at 2-3. As with Civitas, the school employees were paid by the management company, which was responsible for setting wage and benefit rates. Id.

The Board found that there was no argument under Hawkins County that the management company was created directly by the State. Moreover, the Board rejected the Union's argument that the management company was "administrated by individuals who are responsible to public officials," based primarily on the fact that no individual responsible for the management company's operations, including no member of its administrative staff, was "appointed by and subject to removal by any public officials." Id. at 5. Because the same is true in the present case, as set forth in more detail below, the same result is mandated here.

Along the way, the Board rejected several arguments that the Union in the present case suggested by its questioning of witnesses at the hearing. For example, the Board completely rejected the argument that "policy and legal issues unique to education involving State legislation and outside the Board's expertise and mission" were involved in a case involving a public charter school. Id. at 6, n. 21. Further, the Board noted that it "routinely asserts jurisdiction over private employers that provide services to public entities." Id. at n.23 (citations omitted). The Board also rejected the idea that a public body's oversight of the management company's contractual compliance was sufficient to show control akin to that over a political subdivision: "It would be a rare government contract that did not afford  

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organization.

the government oversight of the contract, and the ability of the government to correct or cancel a contract does not, without more, change the private nature of the contracting entity." *Id.* at 5, n. 20 (citations omitted).

## ***2. Civitas is an Employer Within the Meaning of the Act***

Civitas is a private, for-profit corporation established by a private foundation under the laws of Illinois, and is engaged in the management of three charter school campuses in Illinois. (R. 234; Union Ex. 22). Civitas manages three campuses for CCSF/CICS, a privately run public charter school in Illinois. (R. 54). The relationship between Civitas and CCSF/CICS is governed by the terms of their 2008 management agreement, which vests in Civitas responsibility not only for the management, operation, and administration of the campuses, but also for the educational services that CCSF/CICS' three campuses provide to their students. (R. 50-51, 53; Employer Ex. 3, 8). Civitas receives 90% of its operating funds as consideration for its services under this management contract. (R. 114-115; Employer Ex. 3, § 1(c) and 7(a)-7(e)).

The management contract between Civitas and CCSF spells out the responsibilities and rights of the parties. The management contract and the testimony at the hearing make apparent Civitas' control, in its role as an independent contractor with CCSF/CICS, over Civitas employees and labor relations, including without limitation all mandatory subjects of bargaining with the petitioned-for employees. (R. 241-248; Employer Ex. 3, § 20). For example, Civitas has the power and indeed owes the contractual responsibility to:

- Engage all personnel working at the three campuses it manages and compensate them according to Civitas' compensation policies (*id.*, § 11(c));

- Select its own directors (principals) and hold them accountable (*id.*, § 11(b));
- Determine and pay bonuses to its "teachers, staff and administrators" (Employer Ex. 3, § 8(aa));
- Determine its own staffing levels (*id.*, § 11(a));
- Train its employees (*id.*, § 11(d)); and,
- Secure and maintain its own property/casualty, errors and omissions and other insurance coverage, including workers' compensation insurance (*id.*, § 12).

Significantly, these contractual rights and obligations of Civitas include the "bread and butter issues of collective bargaining" of having final decision-making authority over wages, fringe benefits, hiring, firing, staffing, personnel policies, and grievances. (R. 240-246; Specialized Living Ctr., 879 F.2d at 1451-52 (citing Jefferson County Cmty. Ctr. v. NLRB, 732 F.2d 122, 126-27 (10th Cir. 1984) for the proposition that these are the "most important incidents of the employer-employee relationship, and they comprise the 'bread and butter issues of collective bargaining.'" (internal citations omitted)).<sup>6</sup>

Although the Board determined, in Management Training Corp., 317 NLRB 1355, 1358 (1995) that it would no longer use the "extent of control" test, the Board and the Seventh Circuit, continue to examine the amount of control the employer has over matters relating to the employment relationship. See, e.g., Charter School Admin. Servs., 353 NLRB No. 35 at 6 (citing Recana Solutions, 349 NLRB 1163, 1164 (2007)). Civitas easily meets

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<sup>6</sup> Indeed, perhaps the only employee-related aspect over which Civitas does not have complete control is that it cannot unilaterally, without the approval of CCSF/CICS, agree to be a joint employer with CCSF/CICS for collective bargaining purposes. (R. 79-80, 298-299; Employer Ex. 3 at § 11(f)); see also, e.g., Board's R-Case Outline, § 14-200 (citing Van Eerden Co., 154 NLRB 496 (1965) for the proposition that "As multiemployer bargaining is a voluntary agreement, dependent upon the real consent of the participants to bind themselves to each other for bargaining purposes, the 'ultimate question . . . is the actual intent of the parties.'")

this standard, given that it has unfettered control over Civitas' wages, benefits, and other terms and conditions of employment. It is undisputed that Civitas' makes all of the decisions relating to hiring, firing, discipline, assignment and direction with respect to the petitioned-for employees (as well as all other Civitas employees) independently and without input from CCSF/CICS or any governmental entity. (R. 61-62, 72, 240-242, 246-247, 279-282). Similarly, it is undisputed that Civitas, without input from CCSF/CICS, determines how its employees are paid and designs its own compensation system. (R. 79, 237). Accordingly, it cannot be asserted in good faith that collective bargaining with Civitas would not be "meaningful." Because Civitas has ample authority to meaningfully collectively bargain with the petitioned-for employees, it is not exempt from the Board's jurisdiction.<sup>7</sup>

Civitas was not created, directly or indirectly, by the State of Illinois and is neither a department nor agency of the State. (R. 95). No government officer is employed by Civitas. (R. 237). Like the management company in Charter School Admin. Servs., it does not receive any revenue directly from the State or any other agency or government body. (R.202). Instead, it receives the vast majority of its non-investment revenues as consideration for its management agreement with CCSF/CICS. (R. 202).

Civitas does not receive public funds directly and does not make any submissions directly to CPS. (R. 289). Nor is Civitas "administered by" officials who are responsible to public officials or to the general electorate. (R. 237). Indeed, no public official has the authority to or has ever tried to manage Civitas. (Id.). Civitas is managed

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<sup>7</sup> Respondent cannot begin to meet this burden because the government exercises no control over Civitas employees' terms and conditions of employment. Specialized Living Ctr., 879 F.2d at 1449-51 (finding that Illinois did not exercise such substantial control, even though the State controlled the nonprofit's total expenditures); Kemmerer Village, 907 F.2d 661, 664 (even though government had substantial control over Kemmerer's wages and benefits, it was not "so much control" as to render collective bargaining over employee compensation futile).

internally in all respects by its CEO; the manager of Civitas is CCSF. (R. 56-57). Civitas employs no one who is appointed by, or subject to, removal by any public official. (R. 236-237). The government cannot remove Civitas' CEO or anyone else at Civitas. (R. 96).

Because Civitas is a limited liability corporation, it has a manager instead of a board of directors. (R. 56). There is no "direct personal accountability" of Civitas to any government public officials. (R. 237). Civitas' sole manager is CCSF/CICS. (R. 56). No members of CCSF's Board are governmental officials and Civitas' manager is not a governmental official. (R. 56, 194). Government officials have no involvement in appointing Civitas' manager and are not involved in the day-to-day operations of Civitas. (R. 104).

Nor is there "significant governmental control" over Civitas' budget or expenditures. It makes its own decisions about all of these issues without governmental guidance or oversight. (R. 237, 308). Civitas does not submit its budget for approval directly to any government agency or official. (R. 237, 308). Civitas does not submit any education-related reports directly to CPS or the State Board of Education. (R. 289). The only limitations Civitas has on its expenditures and its sole reporting responsibilities are those to which it contractually agrees with CCSF/CICS, which are parallel to those the other three EMOs have with CCSF/CICS. (R. 308; Employer Exs. 3-6). The government does not require or receive any type of annual presentation from Civitas about its budget or expenditures. (R. 308-309). The State of Illinois does not cap the amounts reimbursed for employees' wages or benefits, it does not prescribe maximum or minimum wage ranges or the substantive terms of specific employee benefits such as sick leave pay, vacation accrual, and the number of paid holidays. (R. 244-245). Nor does Civitas need prior approval from the State for changes in wages paid to employees. (R. 244-245).

Civitas' teachers do not "share common working conditions with state employees." For example, Civitas is not subject to governmental competitive civil service requirements, competitive bidding or purchasing practices. (R. 237). Indeed, it has its own employee handbook that was created by its legal counsel, Seyfarth Shaw. (R. 188, 209, 237 and Union Ex. 15). Almost none of Civitas' terms and conditions of employment are the same as those for State teachers. For example, Civitas' teachers and professionals are not subject to any type of government-employee pay scale and are eligible to receive merit pay. All Civitas employees also have the opportunity to participate in Civitas' private 401(k) program. Finally, they work different hours and pursuant to different personnel policies promulgated in a Civitas-specific policy manual.

The only evidence whatsoever in the hearing record that Civitas shares any parallel benefit with State-hired teachers and professionals is that certain—but not all—of the Civitas teachers and professionals are entitled to participate in the Chicago Teachers' Pension Fund. (R. 311-13). Even this fact, however, shows the differentiation between Civitas employees and state employees. First, although all public school CPS teachers/professionals are entitled to participate in the Chicago Teachers' Pension Fund, only a subset of Civitas teachers/professionals are entitled to participate. Second, Civitas makes its own determination about the amount and extent to which it contributes to the Chicago Teachers' Pension Fund on behalf of these employees. (R. 271-272, 313). Third, Civitas supplements the Chicago Teachers' Pension with its 401(k) plan—to which no state CPS teachers/professionals are eligible to contribute.

3. *CCSF/CICS is an Employer Within the Meaning of the Act*

Nor is CCSF/CICS an exempt political subdivision. The evidence shows that although it is subject to infrequent, ministerial reporting requirements by the charter authorizer (CPS), it operates independent of meaningful government control. CCSF was not created by the government or any public body; instead, it was incorporated as a private, 501(c)(3) not-for-profit corporation under Illinois law. (R. 41 and Employer Ex. 1). CICS is the charter school contemplated by its Articles of Incorporation and operated by CCSF. (R. 43-44; Employer Ex. 2). Although the Union argues that any entity that operates a charter school is a political subdivision, neither the facts nor Board precedent support this conclusion.

Most significantly, CCSF/CICS is and always has been governed by a private board of directors (the "Board"). The government plays literally no role in the selection of these directors. (R. 95, 104, 194-195; Employer Ex. 11). The government has no authority to appoint, recommend, approve, remove or otherwise influence who serves on the Board. (R. 96, 104). Contrary to the sworn public officials on the Board of the public charter school in Charter School Admin. Servs., there are no government officials on the Board of CCSF/CICS. (R. 96). For this reason alone, CCSF/CICS cannot be found to be "administered by individuals who are responsible to public officials or to the general electorate" within the meaning of Hawkins County. 402 U.S. at 605. When the sole decisionmaking body for an entity operates independently of government control, the Hawkins County test cannot be met.

In addition, CCSF/CICS has none of the other hallmark characteristics of a political subdivision. Unlike entities that have been found to be political subdivisions, it was

not created by a legislative act or court order. Compare, e.g., Hinds County Human Resource Agency, 331 NLRB 1404 (2000). The Union's suggestion at the hearing that CCSF/CICS was created to take advantage of the new charter law is irrelevant. If any entity that was created to contract with the government or to that exists to further a government purpose were a political subdivision, the list of exempt corporations would swell beyond imagination. For example, as Judge Posner has noted, if heavy subsidy by the state of a company is the criterion, to exempt it from Board jurisdiction, "then every tobacco farmer in the nation is a political subdivision. Kemmerer Village, 907 F.2d at 662 (although the funding of the foster home gave the government "substantial control" over Kemmerer's wages and benefits, it did not render collective bargaining over employee compensation futile).

CCSF/CICS, although currently reliant on the varied government funds it receives pursuant to its charter contract (R. 181), also funds a significant portion of its operations privately. (R. 97, 99). It is clear, however, that even operations that are completely subsidized by the government are not found to be political subdivisions or arms of the government on that basis alone.<sup>8</sup> Specialized Living Ctr., 879 F.2d at 1448, *supra*. This is significant, among other reasons, because the Board has held, and the Seventh Circuit has reinforced, that even organizations whose total expenditures are limited by the government (which is not the case for CCSF/CICS) are not political subdivisions. Id. at 1451 (holding that even though employer received 99% of its funding from a per diem (client) rate paid by the Illinois Department of Public Aid, and even though the State limited

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<sup>8</sup> The Union, which has the burden of proving that CCSF/CICS is exempt from the Board's jurisdiction, did not proffer any evidence that this ratio of private-to-public funding might not grow as time goes on if CCSF/CICS remain successful or in the event that any part of its public funding were placed into jeopardy.

the total amount reimbursed for wages and benefits, because "the State's limitations in these matters extend only to the total amounts available for spending thereon," the employer was not exempt under the NLRA). As such, because the government is not responsible for funding and does not exercise even loose limitations over the total amounts available for spending by CCSF/CICS, CCSF/CICS can not be exempt under the NLRA. (R. 98-99).

Additionally, CCSF/CICS operates its campuses through four separate contractual entities (the EMOs, discussed above). Each EMO, including Civitas, has the discretion to hire, fire, offer different fringe benefits and personnel policies and determines its own staffing levels for the types of employees that are petitioned-for in this case. Specialized Living Ctr., held that even an employer who shared control over these issues with the State of Illinois was an employer within the meaning of the Act because the not-for-profit corporation retained "considerable discretion" in these matters. 879 F.2d at 1452. In that case, the State imposed numerical requirements on staff levels and, on a macro level, placed limitations on the amount of funding that could be spent on wages and benefits. Id. at 1451-53. Nonetheless, even though it recognized limitations in the employer's ability to bargain with the union about these issues, the Board and the Seventh Circuit found that "collective bargaining can clearly be meaningful" and concluded that the not-for-profit corporation was an employer within the meaning of the Act. Id. at 1452-1454. CCSF/CICS is subject to far less government control than the employer in Specialized Living Ctr.; thus, CCSF/CICS cannot possibly support a finding that it is an exempt subdivision.

CCSF/CICS also is not subject to hands-on interference of any type by any governmental official or public officer. (R. 95-96). CCSF/CICS operates pursuant to its charter which both parties described as a contract with the State. The State, however,

exercises little authority or control over CCSF/CICS. It has never tried to alter CCSF/CICS' budgets or the budgets of any of its four EMOs. (R. 98-99). Although certain reporting requirements are included in CCSF/CICS' contractual obligations to the State, these are at most evidence of ministerial oversight by the government and in any event are insufficient to differentiate CCSF/CICS from any government contractor. (R. 190, 196-97).

Although no petition is pending before the Board relative to CCSF/CICS' employees, the relationship CCSF/CICS has with its own employees proves that it is not a political subdivision or a political arm of the government. CCSF/CICS's employees report to private individuals (R. 191-192), are not supervised in any way by any government body (R. 95-96), personnel or the electorate, are not subject to civil service requirements (R. 97), have their own, privately created policies and handbooks (R. 209-210), do not participate in any state-funded pension or benefits. (R. 91). Accordingly, CCSF/CICS would be able to meaningfully bargain with these employees were they ever to file a petition for representation at the NLRB (which they have not done and no party has done on their behalf).

Another factor mitigating against a finding that CCSF/CICS is exempt from the Act is that it does not depend on the government for any of its real property needs. Neither the city nor the State of Illinois owns any of the property or improvements upon which any of the CCSF/CICS schools operate. (R. 104). Nor does CCSF/CICS lease any of its properties from the government. (R. 105).

Finally, CCSF/CICS cannot be dissolved or otherwise closed down by the government. CCSF/CICS is not owned by or controlled by any government entity. There is little or no evidence that the government has the power to revoke or fail to renew

CCSF/CICS' charter as long as it continues to meet the terms of its contract with the State. (R. 208; JX 1, § 9(c) and 9(e); Union Ex. 10, § 13). This makes it identical in character to any other private governmental contractor, over whom the NLRB "routinely asserts jurisdiction." Charter School Admin. Servs., Inc., 353 NLRB No. 35 at 6, n.23 (citations omitted).

Indeed, even though the State or any delegated authorizer has the theoretical authority to take such actions if CCSF/CICS were to violate applicable law or its charter, there is no record evidence that a single step has ever been taken by any government entity to do so or that it would ever do so.<sup>9</sup> Theoretical constructs and hypothetical scenarios have no place in determining whether CCSF/CICS is currently subject to the Board's jurisdiction—what is valuable is the actual record of how the organization runs with limited government oversight akin to that which the government would apply toward any vendor.

Moreover, even in the unlikely and purely hypothetical event that one or more of CCSF/CICS' authorizers were ever to revoke or to not renew its charter, it would still exist as a viable 501(c)(3) not-for-profit corporation and be capable of conducting business.<sup>10</sup> For example, CCSF/CICS could choose to open a school under a different charter, as the evidence shows it is about to do now, in Rockford, Illinois (R. 102-103). CCSF/CICS could

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<sup>9</sup> In fact, the only evidence of record is that CCSF/CICS' charter was renewed after filing its last application and that its authorizer, CPS, desires to continue the relationship (Union Ex. 10, p. 2; see also note 6).

<sup>10</sup> In addition to the utter lack of evidence that CCSF/CICS' charter might be revoked or non-renewed, the record is replete with evidence of CCSF/CICS' success and commitment to quality. (R. 166; Union Exh. 11, p. 2-3, 5, 7-8, 23; Union Ex. 12, p. 18, 36-39; Union Ex. 18, 16-17, 33). For example, in its last renewal application, CCSF/CICS was able to boast that it had the third highest college placement rate of all Chicago high schools (Union Ex. 11, p. 3); as Dr. Purvis testified, CCSF/CICS has a waiting list at each CICS campus (R. 165-66). In light of this history of success, there is absolutely no grounds for the Union to base an argument on the potential for revocation or non-renewal, and there is even less basis for the Board to countenance any such argument.

also act as the creator of a non-charter, choice school such as the ChicagoRise project which it created but chose to table for the time being (R. 128-129) or otherwise act in a manner consistent with the broad purposes described in its Articles of Incorporation (R. 251; Employer Ex. 1, Article 4). The Respondent has failed to prove that CCSF/CICS is vulnerable to having its charter revoked or that it would cease to be a Section 2(2) employer even if it did.

**4. *Cases Finding Employers to be Exempt Political Subdivisions Are Starkly Different than Civitas and CCSF/CICS***

A stark contrast is found when comparing CCSF/CICS to entities that have been found to be political subdivisions. In Hawkins County, for example, the employer (a county gas utility district) was found to be a political subdivision of the State of Tennessee because (a) it was created by a judge's order, "administered by a Board of Commissioners appointed by an elected county judge [who were] subject to removal proceedings at the instance of the Governor," (b) any removed commissioners were replaced by appointment of a county judge, (c) it had the power to administer oaths, investigate and subpoena witnesses and of eminent domain, and (d) it was declared by its creating statute to be a "'municipality' or a public corporation in perpetuity." None of those facts is true with respect to Civitas or CCSF/CICS.

In Shelby County Health Care Corp., 343 NLRB 346, 348 (2004), the Board's finding that the county hospital was a political subdivision depended on the following facts: (a) the hospital was, for many years, run as a county organization whose workers were represented by a labor union, with attendant civil service protections and county employee benefits, (b) the entirety of its operations were funded by government appropriations,

(c) once the county commissioners dissolved the hospital authority,<sup>11</sup> the county issued \$40 million in municipal bonds to fund the construction/modernization of a not-for-profit hospital, (d) the administrator of the hospital and its ten directors were all appointed by the mayor and, at the time of the decision, and all but one were subject to "concurrence of the board of county commissions," (e) the appointment and length of term of the mayoral-nominated directors was approved by the county, (f) the mayor had the ability to institute proceedings for the removal of board members, (g) all of the hospital property and improvements were leased to the "new" entity for \$1 by the county, (h) the annual budget was subject to the approval of the county and the county board of commissioners was required to determine the amount of appropriations to be provided to fund the budget as approved, (i) the budget was specifically adopted and approved each year by the county which simultaneously appropriated the necessary funding to pay the budgeted costs, (j) the mayor had a line-item veto over all budgeting appropriations, (k) evidence showed that the county made interest-free loans when the hospital needed them for payroll and monitored expenditures by requiring reports every two months when it had issues with the management of the hospital, and (l) the entity reported in its application for tax exemption that the county government "in effect controls the organization through its power to appoint the directors of the organization." 343 NLRB at 348. None of those facts is true with respect to Civitas or CCSF/CICS. Indeed, CCSF/CICS has never received a single dollar of government

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<sup>11</sup> Although Shelby County took specific steps in its resolutions and its lease agreement to document its belief and intention that the not-for-profit hospital was "neither an agency of the county nor any other Government agency." 343 NLRB at 347. This fact, combined with the Board's finding that this entity was a political subdivision, emphasize the Supreme Court's ruling in Hawkins County that the creating-government's position on whether an entity is "public" is not determinative when in contrast to the record facts.

appropriation in contrast to the government payments CCSF/CICS has earned for the services it provides.

Similarly, in Hinds County Human Resource Agency, 331 NLRB 1404 (2000), the employer (a County Board of Supervisors) was found to be a political subdivision of the State of Mississippi because (a) the entity itself—rather than merely authorization of its form—was expressly created by an enabling statute, (b) the county reserved the right to ratify and approve bylaws for the entity, including subsequent changes, (c) the county had the right to approve and remove directors, (e) annual presentations were held to make the entity justify its budget, (f) directors were limited in their right to delegate responsibilities, (g) the "amount and use" of government funds was specified and controlled by the government. None of these facts is true with respect to Civitas or CCSF/CICS.

As in most cases where the Board or a court finds an employer to be exempt as a political subdivision, these cases show that the government's control of the employer's board of directors and/or governing executive, including the ability to appoint and remove controlling persons, is a hallmark of a political subdivision. "This requirement is consistently evidenced throughout Board decisions." Shelby County Health Care, 343 NLRB at 359. This critical analysis was also at the center of the Board's decision in Charter School Admin. Servs., 353 NLRB No. 35 at 5. No such government control of any type is present with respect to the management or governance of Civitas or CCSF/CICS.

**5. *The Charter School Law Does Not Make CCSF/CICS or Civitas a Political Subdivision***

Charter schools in Illinois are exempt from the vast majority of Illinois School Code provisions and regulations that regulate publicly run schools. Indeed, the Charter School Law expressly exempts charter schools from all such laws except those it specifically

delineates. "A charter school is exempt from all other State laws and regulations in the School Code governing public schools and local school board policies, except the following [listing seven sections]." JX 1 at § 5/27A-5(g). Only one of those enumerated sections (§(9)(1) requiring background checks for employees), relates specifically to the terms and conditions of employment for the petitioned-for employees.

Respondent relies heavily on the fact that Illinois has statutorily deemed each charter school to be a "public, nonsectarian, nonreligious, non-home based, and non-profit school."<sup>12</sup> The Charter School Law does not, however, state that a private employer who manages a charter school is an "employer" within the meaning of the NLRA or otherwise. Indeed, Section 105 ILCS 5/27A-5(h) expressly authorizes a charter school to contract with a "for-profit" private entity for the purpose of operating the charter school and does not take a position in that section or otherwise whether such private entity would be deemed an "employer" within the meaning of the Act. Nonetheless, as stated above, whether an employer is a political subdivision within the meaning of the Act is determined pursuant to federal—not state—law. Hawkins County, 402 U.S. at 602-603. Indeed, instead of relying on state characterizations, the Board must instead look "to the actual operations and characteristics of [the employer]." As such, it is the facts of record about the operation of the employer of the petitioned-for employees rather than the characterization of a charter school as "public" that controls the Board's determination.

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<sup>12</sup> See JX 1 at § 5/27A-5(a). The Union's entire argument that CCSF/CICS is exempt from Act because CCSF/CICS' operations were enabled by Illinois' Charter School Law collapses under its own weight. Indeed, Illinois' Charter School Law specifically exempts CCSF/CICS from every section of the Illinois School Code that references the Illinois Education Labor Relations Act – the same act that the Union has asserted applies to CCSF/CICS and Civitas in the current situation. 105 ILCS 5/27A-5.

Moreover, even if the characterization of the Illinois Charter School Law is analyzed, the result in this case can not be altered. First, as demonstrated above, the actual employer of the petitioned-for employees is Civitas—a private employer that is not subjected to any meaningful governmental controls. Second, CCSF/CICS is not a political subdivision within the meaning of the Act. As was true in Shelby County, the state or local government's characterization of an entity cannot override the facts and circumstances prosecuted to the Board, which in this case lead to only one conclusion – CICS/Civitas are not exempt from the Board's Jurisdiction.

Finally, to the extent that the Union attempts to rely on an order from the State of Illinois Educational Labor Relations Board issued in Cambridge Lakes Educ. Ass'n, 2008-RC-0013, to assert that Civitas and/or CCSF/CICS are a political subdivision of the State of Illinois, such reliance would be misplaced. First, Cambridge Lakes does not even address the issue raised in this case: whether Civitas and/or CCSF/CICS are political subdivisions of the State of Illinois. Indeed, Cambridge Lakes is devoid of any analysis into whether the employer in that case, a charter school holder, was exempt under Section 2(2) of the Act. Rather, that case addressed whether the employer was an "educational employer" under the Illinois Educational Labor Relations Act without even mentioning or considering Section 2(2). As such, the Cambridge Lakes order does not include any analysis of the Act, which as stated above, governs the question of whether an employer is a political subdivision. See Hawkins County, 402 U.S. at 602-603.

Second, Cambridge Lakes, would have no application to the present case because that case does not involve a private EMO. Third, the case is completely distinguishable because the employer/charter holder agreed to be bound by the Illinois

Educational Labor Relations Act in its charter school agreement – CCSF/CICS made no such agreement. Finally, the Union's reliance on Cambridge Lakes, would be misplaced because the minimal precedential value Cambridge Lakes may provide, if any, is obviated by the fact that the order is currently on appeal to the Illinois Appellate Court. (Case No. 4-08-0881, pending in the Fourth District of the Illinois Appellate Court) Accordingly, for all of the reasons set forth above, neither Civitas nor CCSF/CICS are exempt from the Board's jurisdiction.

**B. Civitas and CCSF/CICS Are Not a Single Employer**

Civitas and CCSF/CICS do not constitute a single employer under the Act. In determining whether two nominally separate employing entities constitute a single employer, the Board looks to four factors – common ownership, common management, interrelation of operations, and common control of labor relations. No single factor is controlling, and not all need be present. Dow Chemical Co., 326 NLRB 288 (1998) (citing Radio Technicians Local 1264 v. Broadcast Service of Mobile, 380 U.S. 255, 256 (1965)). Rather, single-employer status depends on all the circumstances, and is characterized by the absence of an arm's-length relationship found between unintegrated entities. Id. The burden is on the Union to prove that Civitas and CCSF/CICS constitute a single employer. Masland Indus., 311 NLRB 184, 186 (1993).

Initially, the Union's single-employer argument fails because the record clearly reveals that Civitas and CCSF/CICS have an "arm's-length relationship." Civitas and CCSF/CICS' relationship is governed by contract. (Employer Ex. 3). Civitas and CCSF/CICS were each represented by separate counsel during the negotiation of their contract. (R. 54, 178-179). The terms of their contract are similar to the terms of the three

other EMO contracts that CCSF/CICS has with its other EMOs. (R. 53; Employer Exs. 3-6). Moreover, CCSF/CICS has treated Civitas in the same businesslike manner as its other EMOs with respect to their contractual relationship. This is best-evidenced by the fact that CCSF/CICS did not renew Civitas' contract to manage the CICS Basil Campus when the students at that campus had not made adequate progress in reading. (R. 68-69, 174).

Indeed, applying the Radio Technicians four-factor test to Civitas and CCSF/CICS only confirms that the Union cannot meet its burden of proving that these two legally separate and distinct entities constitute a single employer under the Act.

***1. Civitas and CCSF/CICS Do Not Constitute A Single Employer Because There Is No Centralized Control of Labor Relations Between Civitas and CCSF/CICS***

The Union cannot meet its burden of proving that Civitas and CCSF/CICS constitute a single employer because there is no centralized control of labor relations between Civitas and CICS. A finding of centralized control of labor relations is "critical" to a finding of single-employer status. Dow Chemical Co., 326 NLRB at 289. In analyzing the centralized labor relations prong of the "single-employer test," the Board will look at control over the setting of compensation, benefits, discipline, assignment, direction, and establishment of employment policy guidelines. See e.g., Dow Chemical Co., 326 NLRB at 292; Research Foundation, 337 NLRB 965, 970-971 (2002).

In Dow Chemical Co., the Board found that a subsidiary and its parent did not have centralized control of labor relations, where the subsidiary had its own employees, its own Vice President of Human Resources who had no reporting relationship to the parent, and set its own compensation and benefits. 326 NLRB at 289. In Research Foundation, the employer was responsible for the post-award fiscal administration of grants and contracts

awarded by public and private entities to units of City University of New York ("CUNY"), a large, multi-campus public university located throughout the City of New York. In Research Foundation, the Board found a lack of a centralized control of labor relations noting that the employer employed a director of human resources, various program directors and other supervisors to administer labor relations. 337 NLRB at 971. The Board also relied on findings that the employer's labor relations decisions, such as hiring, firing, discipline, assignment and direction, and employee benefits were made by the employer, independently of CUNY's management. Id.

Here, each of the factors that the Board examined in Dow Chemical Co. and Research Foundation mitigate against a finding of centralized control of labor relations between Civitas and CCSF/CICS. Initially, it is undisputed that all negotiations with the petitioned-for employees have been between Civitas and its individual employees. Indeed, the undisputed evidence reveals that petitioned-for employees have negotiated and entered into employment contracts with Civitas. (R. 248; Employer Exs. 13, 14, 15). The contracts are signed by the teacher and Civitas' CEO and specifically state "Civitas Schools hereby employs teacher." (R. 435, 444). Pursuant to the contract, the individual is obligated to provide services "in accordance with the mission and expectation of Civitas Schools." (R. 435). These contracts are not approved in any way by CCSF/CICS. (R. 248). Dr. Purvis, Executive Director of CCSF/CICS with delegated responsibility for managing Civitas had never even seen the form of Civitas teacher contract. (R. 94).

Moreover, just as with the employer in Dow Chemical Co., Civitas, sets its employees' compensation and benefits without input from CCSF/CICS, and employs its own Director of Human Resources that reports to only to Civitas' CEO and who performs no

duties for CCSF/CICS. (R. 78, 235-235, 246-247). Moreover, just as with the employer in Research Foundation, it is undisputed that Civitas' makes all of the decisions relating to hiring, firing, discipline, assignment and direction with respect to the petitioned-for employees (as well as all other Civitas employees) independently and without input from CCSF/CICS. (R. 61-62, 72, 77, 240-242, 246-247, 279-282). Additionally, like in Research Foundation, Civitas' health and 401(k) plans were chosen by Civitas and not by CCSF/CICS. (R. 244-245).

It is also undisputed that CCSF/CICS does not compensate any Civitas employees (including the petitioned-for employees). (R. 76, 152). Civitas management, without consultation from CCSF/CICS, determines the number of individuals that it will employ. (R. 78-79). And, Civitas, without input from CCSF/CICS, determines how its employees are paid and designs its own compensation system. (R. 79, 237).

The only evidence presented by the Union in its attempt to show a centralized control of labor relations was a single letter sent out to each of CCSF/CICS, EMOs (including Civitas) in which CCSF's executive director outlined that organization's position on the question of unionization. Additionally, the Union suggested at the hearing that CCSF's Executive Director addresses Civitas' teachers' complaints. The record, however, shows that the only occasion in which that would occur is if the teachers' complaints dealt with Civitas' CEO, the only Civitas employee who reports to CCSF's executive director. (R. 146-147). The Union may also attempt to assert that CCSF/CICS and Civitas have centralized control of labor relations because certain CCSF/CICS employees have participated in the training of Civitas' teachers. The record reflects that a number of outside parties and vendors, including CCSF/CICS, the Chicago Police Department and others have

participated in Civitas' teachers training. (R. 121-122, 168-169, 287-288). Moreover, the record reflects that CCSF/CICS was paid by Civitas for the limited training that it did provide to Civitas' teachers. (R. 293, 314). The Union may also argue that because CCSF/CICS staff occasionally observe classroom instruction, they somehow are responsible for reviewing Civitas' teachers' performance. The record is clear, however, that Civitas is solely responsible for the evaluation of its teachers' performance. (R. 246-247).

Accordingly, Respondent cannot meet its burden of proving centralized control of labor relations between Civitas and CCSF/CICS.

***2. Civitas and CCSF/CICS Do Not Constitute A Single Employer Because Civitas and CCSF/CICS Do Not Share Common Management***

The Union's theory that Civitas and CCSF/CICS constitute a single employer also fails because Civitas and CCSF/CICS do not share common management. In determining whether two entities share common management, the Board examines factors including the separateness of management structure, separateness of reporting lines, and one company's day-to-day control of the other. See Dow Chemical Co., 326 NLRB at 288-89. In Dow Chemical Co., the Board found that a subsidiary and its parent did not have common management despite the fact that the president of the subsidiary reported to the board of directors of the parent. Id. In making its ruling, the Board relied on the fact that each company had its own president with separate vice presidents who managed and ran the company who were accountable only to the respective president. Id.

Under similar circumstances, the Board in Pennsy Supply, 313 NLRB 1148 (1994), found a lack of common management where two companies – one who supplied truck drivers to the other – operated in separate offices and had separate management that

exercised the authority to manage all aspects of separate day-to-day operations without supervision by or reporting responsibility to its customer. Id. at 1166. In Research Foundation, the Board found a lack of common management where the employer's managers, supervisors, and project directors managed the employer independently of any control by CUNY. 337 NLRB at 970-971.

Here, just as in Dow Chemical Co., Pennsy Supply, and Research Foundation, the record is devoid of evidence showing that Civitas and CCSF/CICS have common management. Civitas has its own CEO – Simon Hess. Reporting directly to Hess are: Civitas' Chief Academic Officer; Chief Financial Officer; Director of Human Resources, Director of External Relations; and Civitas' Director of Family and Community Engagement Chief Financial Officer. (R. 235). Civitas' Curriculum Directors and Campus Directors (principals) report directly to Civitas' Chief Academic Officer. (R. 235). Civitas' Director of Technology, accounting and finance staff report directly to Civitas' Chief Financial Officer. (R. 235). All of these individuals are employed by Civitas and only Hess has any type of reporting relationship with anyone at CCSF. (R. 235). All employees at Civitas are ultimately reportable to Civitas' CEO. (R. 59). It is these employees who control Civitas' day-to-day operations. (R. 284-285).

Here, as in Dow Chemical Co., the only management relationship between Civitas and CCSF/CICS is the fact that the Civitas' CEO ultimately reports to Dr. Elizabeth Purvis, the Executive Director of CCSF, which is the manager of Civitas. (R. 40, 56-57, 236). That relationship, however, does not provide Purvis with any input into the day-to-day operations or labor relations decision of Civitas. (R. 235). Because there is no common

management between Civitas and CCSF/CICS, particularly of any petitioned-for employees, the Union's assertion that the two entities constitute a single employer must fail.

***3. The Operations Of Civitas And CCSF/CICS Are Not Sufficiently Interrelated To Warrant A Single-Employer Finding***

The Union also cannot meet its burden of proving that there are sufficient interrelations of operations between Civitas and CCSF/CICS to warrant a finding that the two entities constitute a single employer. Factors that the Board considers when determining interrelations of operations between two entities include: keeping of separate books and records, separate financial planning, separate operating locations, separate payroll, separate legal counsel. See, e.g., Pennsy Supply, 313 NLRB 1148, 1166-1167 (1994); Research Foundation, 337 NLRB at 970-971. The mere fact that the two businesses share a customer supplier relationship, even where one company is wholly dependent upon the other for business does not outweigh otherwise separateness of operations. Pennsy Supply, 313 NLRB 1148, 1166-1167 (1994) (holding that two companies that had separate business purposes, offices, and labor relations had no interrelations of operations despite the fact that one firm was virtually totally dependent on the other for business).

In Research Foundation, the Board found that the employer and CUNY were not substantially integrated even though the employer's outreach programs operate on CUNY's campuses. In making its finding, the Board relied on the fact that the employer's central administration is housed and operated separately from CUNY's administration. In addition, the Board noted that CUNY is reimbursed for any expenses related to the use of its facilities, the two employers had separate computer and payroll operations and separate workers' compensation plans.

Here, as in Research Foundation, much of Civitas' work is done within schools owned or leased by CCSF/CICS. (R. 105, 202). But like the employer in Research Foundation, Civitas pays CCSF/CICS a per student rent for the use of the facilities. (R. 202, Employer Ex. 3, § 1(hh)). Moreover, just as with the employer in Research Foundation, Civitas and CCSF/CICS have separate computer and payroll operations, separate general liability insurance plans, and separate workers' compensation insurance. (R. 306-307, 397).

Like the relationship between the entities in Pennsy Supply, Civitas is currently dependant on CCSF/CICS for business. But, just as in Pennsy Supply, Civitas' central administration is housed and operated separately from CCSF/CICS' administration and Civitas and CCSF/CICS have separate books, records, financial planning, payroll, and legal counsel. (R. 264, 291, 304-305, 308). With respect to the last fact, the Union has hinted that Civitas and CCSF/CICS do not have separate counsel because both were represented by the same counsel at the hearing of this matter. The record reflects, however, that historically the two entities have had separate counsel – Civitas was represented by Seyfarth Shaw and CCSF/CICS was represented by Goldberg Kohn. (R. 178, 209264). The two entities shared counsel at the hearing simply as a cost saving method to deal with the Union's argument that the two entities constituted a single employer. (R. 266).

Additionally, Civitas has an administrative staff that does not perform services for any other organization. (R. 305). The administrative staff is made up of Civitas employees, none of whom are employees of CCSF/CICS. (R. 292). Civitas has its own letterhead and its own website maintained by its External Relations Director. (R. 204, 272). Civitas also has its own bank accounts, telephone systems, software licenses, and other office supplies and equipment none of which is shared with any other organization. (R. 306-307).

Civitas has its own purchasing software, for which no other entity (including CCSF/CICS) has access. (R. 307-308). Civitas does not have access to any CCSF/CICS computer system at its main offices. (R. 329). Lastly, Civitas submits its own quarterly payroll filings and annual statement of deposits and filings to the IRS. (R. 309; Employer Ex. 12). Because Civitas and CCSF/CICS do not have interrelations or operations, there can be no "single-employer" finding in this case.

**4. *Common Ownership Is Not Sufficient to Find that Civitas and CCSF/CICS Are a Single Employer***

Of course, because Civitas is owned by CCSF/CICS, the factor of common ownership is present. Common ownership alone, however, does not establish a single-employer relationship. Masland Industries, 311 NLRB at 186 ("It should be noted, however, that merely because M T is a wholly owned subsidiary of M I, that legal relationship does not, of itself, cause the parent and subsidiary to constitute a single employer within the meaning of the Act"). "Common ownership by itself indicates only potential control over the subsidiary by the parent entity; a single-employer relationship will be found only if one of the companies exercises *actual or active* control over the day-to-day operations or labor relations of the other." Dow Chemical Co., 326 NLRB 288 (emphasis included in original). As was shown above, CCSF/CICS exercised absolutely not "actual or active control over the day-to-day operations or labor relations" of Civitas. Accordingly, there cannot be a finding that Civitas and CCSF/CICS constitute a single employer.

**IV. CONCLUSION**

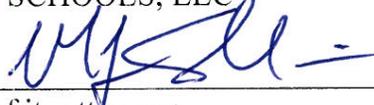
For the reasons set forth above, Petitioner asks that the Board assert jurisdiction over this matter and conduct a representation election in the agreed bargaining unit.

Dated: May 6, 2009

Respectfully submitted,

CIVITAS SCHOOLS, LLC

By: \_\_\_\_\_



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## CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that on May 6, 2009, he caused a copy of Petitioner Civitas Schools, LLC Post-hearing Brief to be served by electronic mail delivery upon the following:

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