



January 28, 2019

VIA ELECTRONIC SUBMISSION

Ms. Roxanne Rothschild
Associate Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570-0001

Re: Notice of Proposed Rulemaking on the Standard for Determining Joint-Employer Status (RIN 3142-AA13).

Dear Ms. Rothschild:

This comment is submitted on behalf of the National Alliance for Public Charter Schools, and in support of the National Labor Relations Board's proposed joint-employer rulemaking. Charter schools are operated and structured in a multitude of different ways, which can involve several different entities all working together to serve students and improve educational outcomes. There is no one-size-fits-all structure for charter schools, and the structure preferred by a charter school will vary based on state law, local conditions, authorizer policy and other education-related considerations. This structural variance has a profound impact on which entities, and under what circumstances, qualify as joint employers under the law. Accordingly, greater clarity in determining which entities should be, and should not be, treated as joint employers will help charter schools structure their operations across the nation.

The National Alliance is the leading national nonprofit organization committed to advancing the public charter school movement. The National Alliance aims to lead public education to unprecedented levels of high academic achievement for all students by fostering a strong, high-quality public charter school sector across the country. The National Alliance works to fuel the growth of high-quality public charter schools by advocating for increased public funding of charter schools, shaping federal and state policy to create a climate in which high-quality charter schools can grow, and improving the overall health and perception of the movement in order to influence policymakers.

Charter Schools and Charter School Student Performance

Charter schools are independent, public, and tuition-free schools that are given the freedom to be more innovative while being held accountable for advancing student achievement. There are more than 7,000 charter schools in the United States serving nearly 3.2 million students. These charter schools employ more than 100,000 teachers, administrators and support staff across 44 states, plus the District of Columbia.

These numbers are expected to grow. In fact, there is substantial, unmet demand for charter schools, according to studies by respected educational journals such as THE PHI DELTA KAPPAN and EDCHOICE. (PHI DELTA KAPPAN, *The 49th Annual PDK Poll of the Public's Attitudes Toward the Public Schools K6* (Sept. 2017); EDCHOICE, *2017 Schooling in American Survey 19* (Nov. 2017)). Together, these two surveys indicate that the potential number of charter school students in the United States is between 8 and 8.5 million, almost three times larger than today's estimated enrollment.

Many research studies have found that students in charter schools perform better in school than their traditional public school peers. For example, a 2013 national study by the Center for Research on Education Outcomes (CREDO) at Stanford University found that charter schools are more effective at minimizing achievement gaps among traditionally underserved students of color, students in poverty, and students who are still learning English compared to traditional public schools. ([CENTER FOR RESEARCH ON EDUCATION OUTCOMES, *National Charter School Study 2013* \(2013\)](#)).

In a 2014 study by Mathematica Policy Research, researchers found that charter school students are also more likely to graduate from high school and enroll in college, and obtain higher earnings in early adulthood. (MATHEMATICA POLICY RESEARCH, *Charter High Schools' Effects on Long-Term Attainment and Earnings* (Jan. 2014)).

Continued Growth of High-Quality Charter Schools and Efficiencies Created by CMOs

The National Alliance seeks to support the continued growth of charter schools and to promote their success at providing quality schools for underserved communities. For this reason, the National Alliance also supports the Board's proposed rulemaking (29 C.F.R. § 103.40).

This proposed rule would specifically help charter schools and/or charter school networks subject to the National Labor Relations Act identify and define which entity is the employer of charter school teachers and staff, rather than let this determination be subject to an erratic, and unpredictable test under *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (2015), *partially enforced*, 2018 WL 6816542, F.3d (D.C. Cir. Dec. 28, 2018). This proposed rulemaking will no doubt have a substantial, positive impact on the charter school sector where this issue has great importance to the structure of many charter school networks.



The management of charter schools is sometimes delegated to third-party management companies that have educational expertise. These management companies are referred to by several monikers, including "Charter School Management Organizations" ("CMOs"), School Management Organizations ("SMOs"), and Education Management Organizations ("EMOs"). For simplicity and because the differences are not important in the context of this comment, the National Alliance will refer generically to such management organizations as CMOs.

Many CMOs hold charter contracts with their respective states and are tasked with managing two or more charter schools—or different campuses of the same charter school. Other charter schools are independently operated without CMOs (for instance, they are managed by their respective non-profit governing boards, which hold their charter contracts with their states), while still other charter schools are hybrids in which the charter-holding entity contracts with a CMO either for support or to operate its campuses (including, for instance, by overseeing school personnel).

Charter schools might prefer any one of these options, and, in any structure involving a CMO, whether the charter school or the CMO will be recognized as a joint employer has significant impact.

A. Innovation.

CMOs can further the ability of charter schools to be innovative and to provide educational opportunities for students across grade-levels and communities. CMOs are frequently formed because charter schools have brought success to one school community or student population, and they desire to expand to serve more students. Often times, charter schools must obtain a new charter from a different charter school authorizer in order to achieve those goals, either to operate in a new geography or to service more grade-levels. Utilizing a CMO structure is an effective way for charter schools to expand their work, while preserving uniformity in curriculum, pedagogy and outcomes.

B. Growth and Economies of Scale.

Furthermore, commentators such as the Center on Reinventing Public Education (CPRE) have observed that the CMO model helps address significant constraints underlying the growth of high-quality public charter schools. Charter schools generally receive fewer dollars per pupil than their traditional public school counterparts, yet they are typically expected to pay for the buildings they occupy, purchase business services and instructional support, and recruit their own staff. A 2010 study by CPRE confirmed that CMOs play an important role in the scalability of the charter school movement by enabling the replication of charter models that work, creating economies of scale, encouraging collaboration between similar schools, and building support structures for charter schools. Moreover, where they exist, CMOs often are able to utilize the economies of scale to provide back-office functions for charter schools.



C. Increasing Use of CMOs.

Given the benefits of these CMO-created efficiencies, charter schools' affinity for using CMOs continues to grow. According to a recent 2017 CREDO report, 22 percent of all charter schools were part of a CMO in 2014-15. In many places, the number of charter schools using CMOs is rising. This highlights the important role quality CMOs can play in improving public education.

Charter School and CMO Employment Models

The employment model, and how CMOs may be used, varies from one charter school network to the next. Indeed, these differences are important to the entrepreneurial nature of charter schools, allowing them to organize strategically under highly variable local conditions and situations. In addition, some CMOs provide a wider range of services, including personnel, professional development and curriculum decisions, as well as other decision-making authority directly affecting charter school operations.

Furthermore, in some cases, CMOs directly hire teachers and administrators who operate the schools in their network. Notably, however, in other cases, CMOs do not employ school-level teachers and staff; hiring, firing and other employment decisions are instead strategically and intentionally vested with the charter schools themselves.

Increasingly, some charter schools, including CMO-managed charter schools, have unionized workforces. There is a nationwide movement by teachers' unions to unionize charter schools. Therefore, the determination of the proper employer between the charter school and the CMO is a critical question in this sector.

The National Labor Relations Board's Proposed Rule

The Board's proposed rulemaking, in turn, has direct implications for the charter school movement, as multiple Board decisions (with one recent exception) have held that charter schools fall within the Board's jurisdiction because they are created and operated by private employers. See, e.g., *Hyde Leadership Charter School – Brooklyn*, 364 NLRB No. 88 (2016); *Pennsylvania Virtual Charter School*, 364 NLRB No. 87 (2016); *Chicago Math & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (2012); but see *LTS Charter School, Inc. d/b/a Universal Academy*, 366 NLRB No. 38 (2018).

Specifically, the Board's proposed rule provides necessary clarity for charter schools regarding the proper test for joint employer liability. Absent such clarity, charter schools are hampered in their ability to effectively structure their relationships with CMOs in the ways that they choose.

In short, without predictability around who will be deemed a joint employer, charter schools are limited in their use of CMOs, which can improve their ability to serve students. In many instances, because CMOs often provide essential functions—such as back-office support, professional development, data analysis, public relations and



advocacy—by working with CMOs, charter schools are, in turn, able to focus their attention on teachers, staff and students, and focus their resources on educating the millions of students they collectively serve.

Uncertainty in this area of law has led to confusion about efficient organizational structure and about whether one or more putative employers may be held liable for collective bargaining and other obligations under the Act. The import of the Board's proposed rule cannot be overstated. Charter schools and CMOs, as well as the students they serve and the teachers and staff they employ, will be better served by returning to the more circumscribed approach to the joint employer analysis that existed for nearly 30 years before *Browning-Ferris*.

The recent, expansive view of joint employer liability under *Browning-Ferris* complicated the relationship between charter schools, CMOs and the charter school workforce, for reasons akin to those raised by the restaurant and other franchise-based industries. Small businesses in and out of the educational industry need the ability to make informed decisions about employment structure. The Board's proposed rule will eliminate unnecessary confusion, allowing charter schools to continue to advance the needs of parents and students, as well as the charter school movement generally.

The Board's proposal also will bring consistency to charter schools and CMOs given that, in assessing joint-employer and other employment issues, many state authorities use some version of the "economic reality" test that will typically bear a much closer resemblance to the proposed rule than to the expansive *Browning-Ferris* standard. That is, under the *Browning-Ferris* standard there are sure to be many cases where federal labor law and many valid and applicable state employment laws conflict in their definitions of who constitutes the employer. Under the proposed rule that potential inconsistency is markedly reduced and will be in many cases eliminated.

The Board's exercise of rulemaking authority in this instance will, therefore, be beneficial to the charter school movement. The Board's technical expertise to define the proper scope of joint- employer liability may lead to more foreseeable and desirable outcomes for stakeholders in the charter school sector – outcomes which are far less guaranteed by a case-by-case approach in the judiciary. For these reasons, the National Alliance requests that the Board adopt its proposed rule bringing this frequently adjudicated issue to a resolution.

/s/ National Alliance for Public Charter Schools

