CHARTER SCHOOL LEGAL BRIEF

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Disclaimer: **The New York City Charter School Center was part of the Amicus Briefs supporting Success Academy in this lawsuit.**

THE ISSUE:

Charters Operating UPK with Operational Freedom from NYC DOE

Background:
In 2014, New York State passed Universal Pre-Kindergarten (UPK) legislation that dramatically increased state funding for full-day pre-kindergarten. Education Law Section 3602-ee (the "UPK Statute"). The UPK Statute granted charter schools, for the first time, the authority to offer UPK.[1] Previously, the Charter Schools Act's grant of authority to charter schools was limited to operation of grades kindergarten through twelfth grade. Education Law Section 2854(2)(c). The UPK statute makes clear that charter schools may operate UPK as part of a New York State school district's consolidated application (subject to district approval); if denied inclusion, a charter school may apply to offer the program directly through the New York State Education Department (NYSED). Education Law Section 3602-ee(3)(a-b). In keeping with the level of autonomy that charter schools are granted, the UPK Statute provides that "all such monitoring, programmatic review and operational requirements" of a charter school's UPK program (regardless of whether it offered the program through the district or under direct state authorization) are reserved to a charter school's authorizer (Board of Regents, SUNY Board of Trustees, or DOE). Education Law Section 3602-ee(12). However, while granting authorizers substantive oversight authority, the UPK Statute also provided that charter schools' UPK programs are subject to inspection by NYSED and the district (if the program is offered through the district). 3602-ee(10).[2]

In 2014, the New York City Department of Education (DOE) submitted a consolidated application to NYSED and invited charter schools and other community based organizations to provide UPK pursuant to that program. Six charters applied in the first year to provide UPK as part of the DOE's consolidated application and were accepted. Upon accepting these charter schools, DOE created a 38-page contract which contained numerous programmatic and operational restrictions and requirements including proscribing programmatic requirements around instruction, field trips, student discipline policies, and maximum and minimum time allocations on exercise and technology. The contract also purported to require charter schools

[1] Prior to enactment of this provision, charter schools could use associated but separate not-for-profit entities to provide pre-k.

[2] "[A] universal full-day pre-kindergarten provider shall be inspected by the department, the school district with which it partners, if any, and its respective licensing, permitting, regulatory, oversight, registration, or enrolling agency or entity no fewer than two times per school year, at least one inspection of which shall be performed by the eligible agency's respective licensing, permitting, regulatory, oversight, registration or enrolling agency, as applicable." Education Law Section 3602-ee(10).

to have their UPK teachers attend DOE professional development programs or receive approval for professional development that the charter school provided directly.[3] Notably, the contract contained a provision that gave the DOE the "right to require [the school] to implement certain curriculum and activities…in the [DOE's] sole discretion."[4] When charter schools balked at signing the contract, pointing to the UPK Statute's provision placing substantive regulatory authority in the hands of the authorizer, schools were informed that the contract was effectively non-negotiable and that executing the contract was a condition precedent to receiving funding.[5] Faced with a tight deadline, the six charter schools declined to seek legal relief and signed. Subsequently, Success Academy Charter Schools (Success) applied and was accepted as part of DOE's consolidated application for the 2015-16 school year, but refused to sign the contract with DOE as a precondition of payment. The DOE refused to pay Success, and Success sought legal relief.

The Case:

Pursuant to Education Law Section 310[6], Success filed an appeal with the Commissioner of the New York State Education Department (Commissioner) seeking (i) a declaration that the DOE's contract was unlawful and contrary to the UPK Statute and (ii) an order directing DOE to remit the correct payment to Success for the operation of their UPK programs in the 2015-16 school year. The Commissioner found as an initial matter that it was reasonable for DOE to require Success to sign a contract as a precondition of payment for funds. Appeal of DeVera[7] ("Commissioner's Appeal"). The Commissioner relied on the fact that districts often use contracts in their procurement process and reasoned that it was similarly proper here for DOE to disburse funds only to providers that had met requirements for payment under a contract. With respect to the numerous programmatic and operational requirements that DOE had inserted into the contract, the Commissioner agreed with DOE's argument that its "inspect[ion]" authority allowed the DOE to regulate the program. Education Law Section 3602-ee(10) ("a [UPK] provider shall be inspected by …the school districts with which it partners"). The Commissioner found that while charter authorizers had responsibility for monitoring and overseeing the programmatic review and operational requirements – this was not "exclusive or sole responsibility." And despite the use of the word "all" in front of the authorizer's responsibilities, the Commissioner "harmonize[d]" the two sections of the statute, finding that DOE, as well as the authorizer, were jointly responsible for ensuring the charter school complies with the requirements of the UPK Statute. Finally, the Commissioner analyzed specific provisions in the contract and found that only two provisions in DOE's contract conflicted with the Charter Schools Act and interpreting law: DOE could not subject charters located in New York City to state comptroller audits (the Charter Schools Act provides NYC charter schools are subject to audits by the City Comptroller) and DOE could not impose the prevailing wage on charters through the contract when the Court of Appeals had "determined that the prevailing wage provision of the State's labor law does not apply to charter schools."[8]

Success appealed the Commissioner's decision to the Supreme Court in Albany, arguing that there had been an error of law because there was no plain meaning reading of the statute that would provide joint monitoring of the charter's UPK program to the authorizer and DOE when the UPK Statute had granted responsibility for "**all** such monitoring, programmatic review and operational requirements" to the authorizer. Education Law Section 3602-ee(12) (emphasis added). The Court had the authority to overrule an administrative agency determination where it was "arbitrary and capricious, irrational, affected by an error of law or an abuse of discretion." CPLR 7803(3). Additionally, Success argued that the Commissioner incorrectly interpreted DOE's statutory power to "inspect" as meaning they had pervasive regulatory authority over charters.

In support of Success's appeal, the New York City Charter School Center and several charter schools filed an *amicus* brief (a friend of the court brief). The *amici* argued that the clear wording and intent of the UPK Statute was to preserve charter school autonomy in UPK programs by assigning monitoring and programmatic review to the charter school's authorizer, not the DOE. In addition, the *amici* stated that the Commissioner's decision would substantially impede charter schools' ability to successfully operate their programs, causing at least two *amici* to not offer UPK because of the contract.[9]

The standard of review on appeal that involves a question of pure statutory interpretation is *de novo* (literally meaning "new trial" or in other words, as if no determination had been made as of yet),

[3] DOE provided a similar contract to all non-charter school not-for-profits electing to provide UPK through DOE.

[4] *DeVera* v. Elia, 32 N.Y.3d 423, 438, FN. 8. (2018)

[5] *Id*.

[6] For example, another part of the 2014 facilities access legislation provides "[i]f the appeal results in a determination in favor of the city school district, the city's offer shall be final and the charter school may either accept such offer and move into the ***space*** offered by the city school district at the school district's expense." Education Law Section 2853(3)(e)(4) (emphasis added).

[7] 55 Ed Dept Rep, Decision No. 16882, p. 5-6, February 26, 2016, available at http://www.counsel.nysed.gov/Decisions/volume55/d16882.

[8] Commissioner's Appeal at p. 11.

[9] Brief for Success Academy as Amicus Curiae, *Matter of DeVera*, No. 1014-16, 22 (Albany Sup. Ct. 2016)

meaning a court owes no deference to the determination of the administrative agency, here the Commissioner. However, in a somewhat puzzling opinion, the Supreme Court opined that this case did not merit *de novo* review "there [was] nothing left for judicial interpretation" and therefore limited the court's review to whether or not the Commissioner's decision was rational and not arbitrary and capricious. *Matter of DeVera*, No. 1014-16, 22 (Albany Sup. Ct. 2016) Having determined that the Commissioner should be afforded great deference as an expert on education, the Supreme Court upheld the Commissioner's decision as rationale and reasonable. *Id*. at 24-26. Success appealed this decision to the Appellate Division (and the New York City Charter School Center and others filed another *amicus* brief in that appeal).

In a unanimous 5-0 decision, the Appellate Division reversed the Supreme Court's decision. The Appellate Division agreed with Success and *amici* that this was a matter of pure statutory interpretation and therefore no deference was owed to the Commissioner's decision. *DeVera v. Elia* (152 A.D.3d 13 (3d Dept 2017) The Appellate Division reviewed the statutory language at issue and found that it was "unambiguous" that authorizers, not the DOE, had "all" the authority with respect to overseeing the programming and operations of charters' UPK programs. *Id*. at 3. The Court found that since the Legislature used "all" to modify "monitoring, programmatic review and operational requirements," there was no reading of the statute that would equate DOE's ability to "inspect" the program with "concurrent responsibility or authority" to oversee and set substantive standards for the program together with the authorizer. *Id*. at 4. The court then focused on the plain meaning of the word "inspect" (using Merriam Webster's dictionary definition) to find that this provision "does not indicate that the school district has the power to create the standards against which the prekindergarten program is tested." *Id*. at 4. The court also referred to the use of the word inspect in the Charter Schools Act, where it states "the school district in which the charter school is located [has] the right to visit, examine and **inspect** the charter school for the purpose of ensuring that the school is in compliance with all applicable laws, regulations and charter provisions." *Id*. at 21 and Education Law Section 2853(2-a) (emphasis added). The court found that the plain meaning of the word and the use of the term "inspect" in the Charter Schools Act made clear that the "Legislature did not intend for a school district's right of inspection to empower a school district to regulate a charter school's prekindergarten programming and operations when the charter school is included in the district's [UPK application]." *Id* at 4. The court remitted the matter back to the Commissioner for "further proceedings not inconsistent with this Court's decision." *Id*.

The DOE and the NYSED appealed the Appellate Division's decision to the Court of Appeals, the highest court in the state. Similar to the Supreme Court of the United States, the Court of Appeals has leeway in most cases on which appeals it chooses to hear. Here, the Court's rules provide that reasons for review include "issues are novel or of public importance, present a conflict with prior decisions of this Court, or involve a conflict among the departments of the Appellate Division." 22 NYCRR Part 500.22(b)(4). Without stating the reason, the Court decided to hear the appeal and affirmed the Appellate Division's unanimous decision in a 5-2 ruling. The Court agreed with the Appellate Division that no deference to the Commissioner's decision was required as the question raised was one of pure statutory interpretation – namely "where and with whom the Legislature house oversight authority." *DeVera v. Elia,* 32 N.Y.3d 423, 434 *(2018) ("DeVera")*. The Court also found that the language ("all such monitoring, programmatic review and operational requirements…shall be the responsibility of the charter entity") used in the UPK Statute was clear in that it "vests exclusive oversight authority in the charter entity, and thereby acts to divest the school district of any existing authority to set curricular or programmatic requirements for approve, state-funded charter school prekindergarten programs." *Id*. at 435. The Court dismissed DOE and

WHAT'S NEXT?

There are no avenues of appeal available for the DOE and NYSED. There could, of course, be further litigation if future contracts presented by the DOE fail to conform to the Court of Appeals' ruling. It must be noted that this case took almost three years to wind its way through the initial petition and three appeals. As explained above, the case was decided on rather straightforward language and may illustrate the clash between simple interpretation of statutory words and policy desires. Ultimately, and as should be the case, the actual meaning of the statute won out.

NYSED's other arguments, finding that there was no ambiguity in the statute with districts being granted the power to "inspect" a charter school UPK program, citing that the Charter Schools Act also permits districts to "inspect" charter schools for compliance but "no one argues that this inspection provision somehow carries an implied oversight authority for school districts." *DeVera* at 436. The Court also reasoned that by requiring charter schools to sign an unlawful contract the DOE placed charters in a "no-win situation: accept those contractual terms, or decline them without recourse to apply directly to NYSED." *Id*. at 437. While there was a dissent from two judges, the five judge majority affirmed the Appellate Division's decision, remitting the matter back to the Commissioner. In January 2019, the Commissioner finally awarded Success Academy the $720,000 it had originally sued to collect for the operation of UPK programs in the 2015-16 school year.[10]

WHAT DOES THIS MEAN FOR OTHER CHARTER SCHOOLS IN NEW YORK CITY?

The decision makes clear that DOE is not allowed to regulate a charter school's UPK program and the contract currently in use with the fifteen charter schools is unlawful and contrary to law. It is now the sole responsibility of the charter authorizers to oversee the implementation of the UPK program and the make sure the charter is complying with the UPK Statute. The DOE does have the power to "inspect" the program. In the intervening months since the Court of Appeals decision, the DOE released a new Request for Proposals (RFP) for charter schools operating UPK through the DOE's consolidated application. This RFP (released in January 2019 for schools seeking to offer UPK in fall 2019) removes many provisions from DOE's original application and, instead, closely tracks language in the UPK Statute and resulting regulations. *See* 8 NYCRR Part 151. The DOE just recently released this same RFP for schools that are interested in offering UPK in fall 2020 (the response to this RFP is due December 17, 2019). Along with this RFP, the DOE has recently released Additional Policy Guidance for charter UPK operators that clarifies after *DeVera*, DOE's role is to select charters to participate in the DOE's consolidated application, contract with charters to disburse funds and ensure fiscal oversight of those funds and inspect the programs for compliance. The DOE has still not publicized a new contract that schools must sign to receive funds from DOE to operate a UPK program. But if the Policy Guidance is any indication, it would seem (and is required) that DOE will produce a trimmed down contract that contains basics such as number of children served, assurances that the UPK program will be run consistent with applicable law, and payment schedules. We'd also note that while we hope the resolution of this case would allow more charters to offer UPK programs (currently only 16 schools participate in the program), we are aware that the *DeVera* lawsuit only settled the issue of what entity oversees charters' UPK programs, there is still not sufficient funding and space provided for charters operating these programs. As long as there is not equitable access to funding and space for charters, it will be hard for schools to offer UPK. The Charter Center will continue to advocate for a comprehensive UPK solution by pushing for legislative language that incorporates offering prekindergarten (for three and four-year-olds) as a right of all charter schools, with access to per-pupil funding and rental assistance.

[10] 58 Ed Dept Rep, Decision No. 17,574, January 29, 2019, available at http://www.counsel.nysed.gov/Decisions/volume58/d17574