

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY**

In the Matter of ELAINE DE VERA, individually and on behalf of her son, M.F., Susana Taveras, individually and on behalf of her son, K.R.R., Jesus Hernandez, individually and on behalf of his daughter, L.N.H., Tsuru Benhorin, individually and on behalf of his son, L.B., Slawomir Brzozowski, individually and on behalf of his son, G.B., Pierre Delsoin, individually and on behalf of his daughter, E.C.D.P., Said Dib, individually and on behalf of his son, S.R.D., Fatoumata Haidara, individually and on behalf of her daughter, A.H., Alimatou Kaba, individually and on behalf of her daughter, T.C., Ebony Langhorne, individually and on behalf of her son, M.C., Joseph Luders, individually and on behalf of his daughter, R.L., Jackie Martineau-Ngoyi, individually and on behalf of her daughter, L.A.T., Ana Minaya, individually and on behalf of her daughter, A.W., Beverly Persad, individually and on behalf of her daughter, R.P., Lovely Pierre, individually and on behalf of her son, N.P., Nicholson Pierre, individually and on behalf of his son, N.P., Sarah Polanco, individually and on behalf of her daughter, A. C., Milagros Rodriguez, individually and on behalf of her daughter, S.R., Nerita Sewell, individually and on behalf of her son, S.S., Michael Toney, individually and on behalf of his daughter, A.T., Richard Vargas, individually and on behalf of his son, D.B.V., Jamie Viera, individually and on behalf of her daughter, R.V., Nicole Wilson, individually and on behalf of her daughter, A.D., Rhodesha Wise, individually and on behalf of her son, A.C., and Success Academy Charter Schools-NYC on behalf of Success Academy Charter School - Harlem 1, Success Academy Charter School - Cobble Hill, and Success Academy Charter School - Williamsburg,

Petitioners,

and

Osei Bacchus, individually and on behalf of his daughter, M.B., Sarah Burke, individually and on behalf of her son, J.M., Shamica Charles, individually and on behalf of her daughters, A.C. and J.M., Michelle Jonas, individually and on behalf of her son, J.J., and Catherine Rey, individually and on behalf of her son, T.R.,

Proposed Intervenor-Petitioners,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

Index No. 1014/2016

-against-

MARYELLEN ELIA, as Commissioner of Education, New York  
City Department of Education, Board of Education of the School  
District of the City of New York,

Respondents.

**MEMORANDUM OF LAW OF AMICI CURIAE ACHIEVEMENT FIRST, BROOKLYN  
CHARTER SCHOOL, CONEY ISLAND PREPARATORY PUBLIC CHARTER  
SCHOOL, NEW YORK CITY CHARTER SCHOOL CENTER, AND TFOA  
PROFESSIONAL PREPARATORY CHARTER SCHOOL  
IN SUPPORT OF PETITIONERS**

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Charter School*

## TABLE OF CONTENTS

|                                                                                                                                                                                                                                           | Page |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------|
| PRELIMINARY STATEMENT AND INTEREST OF AMICI CURIAE .....                                                                                                                                                                                  | 1    |
| ARGUMENT .....                                                                                                                                                                                                                            | 1    |
| I. AMICI SUPPORT PETITIONERS' POSITION .....                                                                                                                                                                                              | 1    |
| II. AUTONOMY ALLOWS CHARTER SCHOOLS TO THRIVE.....                                                                                                                                                                                        | 3    |
| A. Autonomy Is An Indispensable Characteristic Of Charter Schools,<br>Including In New York State .....                                                                                                                                   | 3    |
| B. Autonomy Enables Charter Schools To Develop Innovative Educational<br>Approaches That Can Then Be Adopted by Public Schools, And To<br>Successfully Serve A Variety of Students, Including High Need And<br>Underserved Students ..... | 6    |
| C. Autonomy Is Crucial In Pre-K Programs.....                                                                                                                                                                                             | 8    |
| III. AUTONOMY IS CRUCIALLY IMPORTANT TO AMICI .....                                                                                                                                                                                       | 9    |
| CONCLUSION.....                                                                                                                                                                                                                           | 12   |

## **PRELIMINARY STATEMENT AND INTEREST OF AMICI CURIAE**

Amici Curiae are New York City charter schools and charter school advocates. They stand with Petitioners here in asking the court to overturn the New York State Commissioner of Education’s determination that the New York City Department of Education (“NYC DOE” or “DOE”) could require charter schools that wish to offer Pre-Kindergarten (“Pre-K”) to sign a 38-page, detailed contract that pervasively regulates every facet of the Pre-K offered by charter schools. The Commissioner’s erroneous decision is flatly contrary to New York law, which recognizes that charter school autonomy is an indispensable and defining feature of these institutions. Amici believe that the Commissioner’s decision will substantially impede charter schools’ ability to participate in the statewide Pre-K program. In fact, at least two Amici decided not to proceed with their plans to offer Pre-K in significant part because of this unlawful contract. Amici submit this brief to express the importance of charter school autonomy from local school districts to charter schools generally and to Amici specifically. Amici urge the Court to grant the relief requested by Petitioners.

## **ARGUMENT**

### **I. AMICI SUPPORT PETITIONERS’ POSITION**

The undersigned all stand together with the Petitioners in resisting the erroneous interpretation of Education Law § 3602-ee reached by the New York State Commissioner of Education. As Petitioners demonstrated in their briefing, oversight of Success Academy and all charter schools is vested with the charter school’s charter authorizer or (“charter entity”); for Success Academy, this authorizer is the State University of New York (“SUNY”). *See* Petition ¶¶ 17, 29. Autonomy from local school district oversight is enshrined in both the Charter Schools Act and in the Statewide UPK statute. Indeed, the opening sentence of the Charter Schools Act declares that the Act’s purpose is “to authorize a system of . . . schools that operate

independently of existing schools and school districts.” N.Y. Educ. Law § 2850(2). The Legislature vested oversight of charter schools with the charter entities and the Board of Regents, rather than with local school districts, deeming such oversight “sufficient to ensure that the charter school is in compliance with all applicable laws, regulations and charter provisions.” *Id.* § 2853(2); *id.* § 2854(2)(c). While requiring charter schools to “meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools,” the Legislature nonetheless exempted them “from *all other* state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school’s charter or in this article.” *Id.* § 2854(1)(b) (emphasis added).

In 2014, the Legislature extended charter school programs to include Pre-K, and it did so with the express purpose of “incentiviz[ing] and fund[ing] state-of-the-art innovative prekindergarten programs and to encourage program creativity through competition.” *Id.* § 3602-ee(1). Not surprisingly, as with other charter school programs, the Legislature again vested oversight with a charter school’s “charter entity” (charter authorizer). *See id.* § 2854(1)(b)-(2)(c).

Despite the UPK statute vesting oversight of the Pre-K program with the charter authorizer, charter schools in New York City wishing to offer Pre-K, such as Success Academy, were required to sign a 38-page contract with DOE prior to receiving funding for the program. This contract purports to regulate every facet of charter school Pre-K—from the curriculum, to play time, to the use of computers and field trips, to teacher training, and to hours of operation. *See* Petition ¶¶ 41, 99. As Petitioners explain, this contract is flatly inconsistent with numerous provisions of the New York Education Law. *See id.* ¶¶ 46-101. New York law recognizes that, as shown below, charter school autonomy is an indispensable and defining feature of these

institutions—and the DOE’s proposed contract, in violation of the statutory construct for Pre-K oversight, would encroach upon the charter autonomy that such provisions were expressly designed to protect.

The undersigned include various New York charter schools and the New York City Charter School Center, a support and advocacy organization working on behalf of New York City charter schools. Amici believe that the Commissioner’s decision ignores the plain language of the statute, is inconsistent with charter school autonomy provided for in New York law, and will substantially impede charter schools’ ability to participate in the statewide Pre-K program. In fact, at least two Amici decided not to proceed with their plans to offer Pre-K in significant part because of this unlawful contract.

## **II. AUTONOMY ALLOWS CHARTER SCHOOLS TO THRIVE**

The defining feature of a charter school is the autonomy and independence from the traditional public school bureaucracy to experiment, innovate, and devise new methods to improve students’ educational outcomes, while remaining accountable to the charter authorizer. As shown in Part I and as amply demonstrated by the Petitioners, this is precisely what New York charter school legislation establishes. As a result, charter schools excel in innovative and successful approaches to education, including of students of need and underserved children.

### **A. Autonomy Is An Indispensable Characteristic Of Charter Schools, Including In New York State**

“[T]he charter concept has been described as ‘simple but powerful’: a method of offering school choice in public education without the typical micromanagement by government bureaucracies.” Robert J. Martin, *Rigid Rules for Charter Schools: New Jersey As A Case Study*, 36 RUTGERS L.J. 439, 442-43 (2005) (citation omitted). Unlike other public schools, charter schools “receive considerably more autonomy from state and local regulation in terms of student

recruitment, curriculum, budget, and staffing.” Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1291 (1998). Charter schools are “granted autonomy to operate outside of traditional school frameworks in exchange for higher levels of accountability” regarding “student performance [and] transparency of operations.” Nicole Nielson, *Comparable Populations and Charter Schools in New York State: Autonomy and Accountability?*, 4 ALB. GOV’T L. REV. 562, 569 (2011). “[T]he point of charter schooling is autonomy as an enabling condition for greater educational effectiveness.” Dana Brinson and Jacob Rosch, *Charter School Autonomy: A Half-Broken Promise*, THOMAS B. FORDHAM INSTITUTE at 5 (2010).<sup>1</sup> See also Benjamin Michael Superfine, *Stimulating School Reform: The American Recovery and Reinvestment Act and the Shifting Federal Role in Education*, 76 MO. L. REV. 81, 116-17 (2011) (the goal is to “decentraliz[e] authority away from unresponsive, centralized bureaucracies to schools and neighborhoods in order to increase teacher autonomy and ultimately efficiency”). As early as 1998, a state-by-state legislative analysis of charter schools, including in New York, concluded that “increased autonomy is what set charter schools apart from traditional public schools,” including legal autonomy to make personnel and day-to-day decisions, enabling creative and innovative approaches to education. JENNIFER HAMILTON, A STATE-BY-STATE LEGISLATIVE ANALYSIS OF CHARTER SCHOOLS at 85 (M.A. Thesis, submitted to George Washington University, Graduate School of Education and Human Development, 1998).<sup>2</sup>

New York’s charter school legislation is likewise premised on the idea that charter schools should operate autonomously and independently of the traditional public school

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<sup>1</sup> Available at [http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Charter%20School%20Autonomy%20-%20May%202010\\_8.pdf](http://edex.s3-us-west-2.amazonaws.com/publication/pdfs/Charter%20School%20Autonomy%20-%20May%202010_8.pdf).

<sup>2</sup> Available at <http://ssrn.com/abstract=152230>.

bureaucracy—allowing them the freedom to innovate, experiment, and thrive while remaining accountable to the charter authorizer. “The Legislature created charter schools as ‘independent and autonomous public school[s].’” *New York Charter Sch. Ass’n v. Smith*, 15 N.Y.3d 403, 409-10, 940 N.E.2d 522, 525 (2010) (quoting Education Law § 2853(1)) (emphasis omitted). This legislation was designed “to provide opportunities for teachers, parents, and community members to establish and maintain schools that operate independently of existing schools and school districts.” *New York Charter Sch. Ass’n, Inc. v. DiNapoli*, 13 N.Y.3d 120, 123, 914 N.E.2d 991, 992 (2009) (internal quotation marks omitted). Its animating idea was that “children and educators have a better chance of thriving if they are freed from local educational bureaucracies that . . . can stifle innovation.” Clifford J. Levy, *Senate Passes Charter Plan For Schools*, N.Y. TIMES (Dec. 18, 1998).<sup>3</sup> Thus, charter schools “are, with limited exceptions, exempt from all laws and regulations typically imposed upon public schools.” *Intl. High School: A Charter School at LaGuardia Community Coll. v Mills*, 276 A.D.2d 165, 169 (3d Dep’t 2000). While allowing charter schools substantial autonomy and freedom, the law ensures that they remain “accountable for meeting measurable student achievement results,” N.Y. Educ. Law § 2850(2)(f), and vests the charter school’s authorizer or “charter entity”—here SUNY—with oversight responsibility. *See* Petition ¶¶ 47-101.

New York is not alone—other states have likewise recognized the importance of charter school autonomy. While charter schools are creatures of state statutes and the specific terms of their operations vary, there is a consistent theme running through court opinions addressing such schools—that autonomy is an indispensable feature of charter schools. In New Jersey, the “underpinning to the charter school movement was to foster ‘an alternative vision for schooling’

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<sup>3</sup> Available at <http://www.nytimes.com/1998/12/18/nyregion/senate-passes-charter-plan-for-schools.html>.

and . . . the desire to gain autonomy from State or district regulation.” *In re 1999-2000 Abbott v. Burke Implementing Regulations*, 792 A.2d 412, 447 (N.J. Super. Ct. App. Div. 2002). As the Supreme Court of New Jersey has recognized, charter schools are defined by the fact that they have “more autonomy than other public schools in staffing, curriculum and spending choices.” *In re Grant of the Charter Sch. Application of Engelwood on the Palisades Charter Sch.*, 753 A.2d 687, 689 (N.J. Super. Ct. App. Div. 2000). New Jersey courts have recognized that imposing onerous regulatory standards on charter schools threatens to “erode the schools’ autonomy and flexibility to offer ‘innovative learning methods’ and ‘educational choices’ and their ability to ‘establish a new form of accountability for schools.’” *In re 1999-2000 Abbott*, 792 A.2d at 447.<sup>4</sup>

**B. Autonomy Enables Charter Schools To Develop Innovative Educational Approaches That Can Then Be Adopted By Public Schools, And To Successfully Serve A Variety Of Students, Including High Need And Underserved Students**

Charter school autonomy is essential because they “are encouraged to devise highly innovative teaching methods to foster opportunities for students to actualize their potential while

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<sup>4</sup> See also, e.g., *Waters of Life Local Sch. Bd. v. Charter Sch. Rev. Panel*, 126 Haw. 183, 187, 268 P.3d 436, 440 (Ct. App. 2011) (“[T]he legislature described the charter school system as ‘an important complement to the [Hawaii public] school system, one that empowers local school boards and their charter schools by allowing more autonomy and flexibility and placing greater responsibility at the school level.’”) (quoting 2006 Haw. Sess. Laws Act 298, § 1 at 1200); *Idea Public Charter Sch. v. Belton*, No. 05-467, 2006 WL 667072, at \*2 (D.D.C. Mar. 15, 2006) (explaining that D.C. Public Charter Schools “were established in the District of Columbia to provide public schools, among other things, ‘an option for more autonomy over their administration, operations and expenditures’”); *Patterson Park Pub. Charter Sch., Inc. v. Balt. Teachers Union*, 399 Md. 174, 178-79, 923 A.2d 60, 63 (2007) (“The Federal Charter School Program was created in 1994 to provide ‘financial assistance for . . . implement[ing] charter schools’ . . . only to those States having legislation . . . grant[ing] the charter schools autonomy over their budget and expenditures. In support of the Federal Charter School Grant Program, the United States Department of Education undertook a nationwide campaign to present its model public charter school and encourage the States to adopt public charter school enabling legislation.”); *Racine Charter One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 682 (7th Cir. 2005) (emphasizing charter schools’ administrative autonomy).

providing community members a choice of education alternatives . . . .” *Mills*, 276 A.D.2d at 167. “Charter schools control their own lessons, budgets, staff, schedules, and culture, with an autonomy no district school enjoys.” NYC CHARTER SCHOOL CENTER, *The State of the NYC Charter School Sector* at 12 (2012).<sup>5</sup> “This flexibility makes the charter school sector a place for new educational ideas to be tried, and for existing ideas to be applied, refined, and re-combined.” *Id.*

Charter schools are “philosophically diverse,” and have used their autonomy to institute a variety of creative and exciting educational and student-support practices. *Id.* Just some examples include: use of a “rooftop greenhouse” to teach “environmental stewardship”; field trips to learn about the history of the civil rights movement; civics education including student-run get-out-the-vote campaigns; Japanese language instruction; a mock doctor’s office for students with special needs to practice social interaction; robot-building enrichment activities; healthier lunch options for students; and the provision of free legal and mental health services to at-risk students. *Id.* at 12-13. Many charter schools “operate with a longer school day” that provides students with substantial “additional instruction”—which allows, for example, one charter school’s kindergarteners to complete 135 science experiments over the course of a year. *Id.* at 12. Granting charter schools the autonomy to innovate and thrive has paid off for students: a recent study found that “charters have had even greater success compared to [New York] state schools than traditional schools in [New York] city,” and another has found that “New York City charter students outperform their district peers by significant margins.” James D. Merriman, *The Facts Are in: NYC’s Charter Schools Are a Smashing Success*, N.Y. POST (Mar. 11, 2016).<sup>6</sup>

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<sup>5</sup> Available at <http://c4258751.r51.cf2.rackcdn.com/state-of-the-sector-2012.pdf>.

<sup>6</sup> Available at <http://nypost.com/2016/03/11/the-facts-are-in-nycs-charter-schools-are-a-smashing-success/>.

“[C]urrently, for many low-income black and Latino students, charter schools are the only realistic alternative to underperforming public schools.” Edwin Cespedes, *My Son Got a Chance; Your Child Should Too*, N.Y. DAILY NEWS (Oct. 7, 2015).<sup>7</sup> In fact, in 2013-14, charter public schools in New York served a significantly higher percentage of racial and ethnic minority students (42 percentage points more) and of free- and reduced-price lunch students (28 percentage points more) compared to traditional public schools. NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS, *The Health of the Charter Public School Movement: A State-by-State Analysis* at 118 (Mar. 2016).<sup>8</sup>

Moreover, charter schools’ autonomy and related ability to innovate benefit not only their students, but the public school system as a whole. One of the reasons “[c]harters should continue to open and innovate [is] because they are bringing fresh ideas for improving achievement to a once-stagnant public school system.” James D. Merriman, *De Blasio’s Charter School Envy: His PROSE Schools Show Why We Need To Lift The Cap On Innovative New Educational Models*, N.Y. DAILY NEWS (May 29, 2015).<sup>9</sup>

### **C. Autonomy Is Crucial In Pre-K Programs**

Autonomy to innovate is especially essential in Pre-K, and state law was changed specifically to allow charters to provide Pre-K classes. Charter schools, which predominantly serve children of color in low-income neighborhoods, were eager to offer Pre-K classes to give children from underserved communities an early start on their education. *See Success Academy*

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<sup>7</sup> Available at <http://www.nydailynews.com/opinion/edwin-cespedes-son-chance-child-article-1.2387758>.

<sup>8</sup> Available at [http://www.publiccharters.org/wp-content/uploads/2016/03/Health-of-the-Movement\\_2016.pdf](http://www.publiccharters.org/wp-content/uploads/2016/03/Health-of-the-Movement_2016.pdf).

<sup>9</sup> Available at <http://www.nydailynews.com/opinion/james-merriman-de-blasio-charter-school-envy-article-1.2239414>.

*Families Fight Back at Threat to High-Quality Pre-K, SUCCESS ACADEMY CHARTER SCHOOLS* (Oct. 29, 2015).<sup>10</sup>

The enthusiasm for charter Pre-K programs was, however, quickly dampened by the proposed DOE contract: “‘We were thrilled as a public charter school to finally be given the right to run a high-quality UPK, and bring all the innovations to enhance the education of young learners,’ said Ian Rowe, CEO of the Public Prep charter school network. ‘But this contract, including provisions such as mandated curriculum or limited exposure to technology, suppresses the very innovations our kids need to thrive.’” *Id.*

### **III. AUTONOMY IS CRUCIALLY IMPORTANT TO AMICI**

For each of the undersigned Amici, autonomy is vitally important. They have used that autonomy to innovate, experiment, and thrive in their own unique ways. They stand united with Petitioners in defending charter school autonomy.

Amicus the New York City Charter School Center believes strongly that the DOE’s contract, whether intentionally or not, has the potential to stifle the autonomy of charter schools. “With greater autonomy and high standards of accountability, charter schools are well poised to serve all kinds of students, regardless of their backgrounds.” James D. Merriman, *The Facts Are in: NYC’s Charter Schools Are a Smashing Success*, N.Y. POST (Mar. 11, 2016).

For Amicus Coney Island Preparatory Public Charter School (“Coney Island Prep”), which serves approximately 800 students in grades K-2 and 5-11, autonomy allows it to tailor its programs to its students’ unique needs. More than 23 percent of its students are classified as special education students, and over 82 percent qualify for free- or reduced-price lunch. This can require innovating on previous programmatic decisions and changing those decisions quickly

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<sup>10</sup> Available at <http://www.successacademies.org/press-releases/success-academy-families-fight-back-at-threat-to-high-quality-pre-k/#sthash.8Q0VXu0Z.Uvd8g84h.dpuf>.

when they are not working—which is only possible with autonomy. *See generally* CONEY ISLAND PREP, *2014-2015 Annual Report* (2015).<sup>11</sup> Autonomy allows Coney Island Prep to “respond to community needs, try new approaches, and put student learning first.” CONEY ISLAND PREP, *FAQs*.<sup>12</sup> Coney Island Prep operates with a “longer school day and year[, which] mean[s] more time in the classroom and more opportunities to succeed.” *Id.* Its “autonomy allows [it] to hire the best teachers, adopt educational tools and technologies that promote achievement, and offer more for students at no cost to their families.” *Id.*

For Amicus Achievement First—which operates 17 SUNY-authorized public charter schools in Brooklyn, including nine elementary schools—autonomy allows it to design and tailor its programs to suit its students’ educational needs. *See* ACHIEVEMENT FIRST, *The Achievement First Approach: Curriculum and Instruction*.<sup>13</sup> Given the high demand for seats at Achievement First schools and interest from existing families with students at the schools, Amicus was initially enthusiastic about changes to the law that gave charter schools the opportunity to offer Pre-K education to public school students. *See* Affidavit of Peter Cymrot ¶ 3 (Oct. 29, 2015), Pet. Ex. 14. However, in light of the DOE’s proposed contract, which reserves the right to require that Pre-K providers implement certain curriculum and activities specified by the DOE—including requiring certain professional development activities, limiting the number of certain types of field trips, and specifying the maximum number of minutes of screen time—Achievement First decided not to proceed with the Pre-K program. *Id.* ¶¶ 4-5. In its view, the

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<sup>11</sup> Available at [http://coneyislandprep.org/storage/2014-15\\_Annual\\_Report.pdf](http://coneyislandprep.org/storage/2014-15_Annual_Report.pdf); *see also* CONEY ISLAND PREP, *Academics*, available at <http://coneyislandprep.org/about-us/academics>.

<sup>12</sup> Available at <http://coneyislandprep.org/about-us/faqs>.

<sup>13</sup> Available at <http://www.achievementfirst.org/our-approach/curriculum-and-instruction/>.

contract would “undermine [its] ability to educate pre-Kindergarten students by regulating aspects that are inconsistent with [its] design and approach.” *Id.* ¶ 5.

For Amicus TFOA Professional Preparatory Charter School, the autonomy guaranteed under New York law is essential and integral to its ability to serve students in innovative ways that its students and their caregivers greatly value. From culturally relevant pedagogy, to its teacher-led organizational model, to its focus on social-emotional health, TFOA Professional Preparatory Charter School depends on autonomy to innovate and thrive. This innovation has yielded strong academic achievement, low suspension rates, high satisfaction and self esteem, and success in giving students the skills to succeed and stay out of the criminal justice system. *See generally* TFOA PROFESSIONAL PREPARATORY CHARTER SCHOOL, *Homepage*.<sup>14</sup>

Amicus Brooklyn Charter School, which offers kindergarten through fifth grades, highly values autonomy. The school is best able to suit the needs of children it serves by using a variety of methods to teach them. It has found that children all learn differently, so the ability to deliver focused pedagogy aimed at students’ specific needs is critical. The school follows the inclusion model, working with students of varying needs, but without singling them out. The classroom instruction creates a well-rounded academic program, reaching students as individuals, not just as numbers. *See generally* BROOKLYN CHARTER SCHOOL, *About BCS*.<sup>15</sup> Brooklyn Charter School also wanted to offer Pre-K classes, but declined to do so based on its view that the DOE contract that would stifle its autonomy and limit its ability to best serve students.

Thus, as shown above, autonomy is crucially important for Amici. Amici stand with Petitioners in agreeing that the Court should overturn the New York State Commissioner of Education’s decision as contrary to the clear language and intent of the relevant statutes, thereby

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<sup>14</sup> Available at <http://tfoaprofessionalprep.org/>.

<sup>15</sup> Available at <http://brooklyncharter.org/about/our-proven-approach/>.

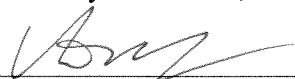
protecting the autonomy charter schools rely on to innovate, experiment with new educational approaches, and provide their students with the best possible education.

### **CONCLUSION**

For the foregoing reasons, the Court should grant the relief requested by Petitioners.

Dated: March 30, 2016

Respectfully submitted,



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