CHARTER SCHOOL LEGAL BRIEF

Table of Contents

In this update, we will look at three cases that: examine changes to labor law governing charters, a judicial review of authorizers' non-renewal decisions, and a constitutional challenge to the funding system for New York's charter schools.

Please feel free to **contact Corey Callahan, Director of Legal Affairs**, should you or your legal team have any questions about any of these matters.

THE ISSUE:

Jurisdiction and Applicable Law over Employee/Employer Labor Relations

Background: Collective bargaining rights and unionization are generally governed for private employers/employees by the federal labor law known as the National Labor Relations Act (NLRA). State law, in contrast, governs public employers/employees including employees of school districts. The New York Charter Schools Act of 1998 as amended (the "CSA") delineates that charter school employers and their employees are public and therefore asserts that labor relations are governed by New York state law, the New York Public Employee's Fair Employment Act, otherwise known as the Taylor Law. See Education Law Section 2854(3). The federal NLRA and the state's Taylor law differ in important ways. For example, under the Taylor Law a public section union can be formed by a majority of employees signing a card authorizing a union to represent them, known as the "card check" method of creating a union. In contrast, under the federal NLRA, an employer can require that a secret ballot election be held to determine whether a majority of employees want to form a union. Whether federal or state labor law applies is a function of whether the employer is deemed a public or private sector employer. Importantly, a state cannot make an employer "public" for purposes of labor law simply by having its state labor law declare that employer to be public.

In a 2013 dispute before the board that administers the state's Taylor Law (the Public Employment Relations Board or "PERB"), a charter school first raised the issue of whether PERB properly had jurisdiction over charter school teachers. The charter school argued that the matter

fell within the scope of the NLRA because the employees were not in fact public employees; therefore the appropriate body to adjudicate the dispute was not PERB, but the NLRB pursuant to federal labor law and not state law. *See Buffalo United Charter Sch. v. New York State Pub. Empl.*, 107 A.D.3d 1437 (4th Dept 2013). In the Buffalo United Charter case, the New York State court declined to decide, instead asking that the federal board that administers the NLRA (the National Labor Relations Board or "NLRB") "determine in the first instance" whether they had jurisdiction over the case. Id. at 1438. Other charter schools followed suit bringing labor disputes not before PERB but before the NLRB arguing that this federal body had jurisdiction and that the NLRA applied. Finally, in August 2016, the NLRB ruled on the issue of whether or not it had jurisdiction over New York State charter schools and their employees in the *Hyde Leadership Charter School Matter.* 364 NLRB No. 88 (2016).

The Case: In *Hyd*e, the NLRB found that a charter school was a private sector employer as defined by the NLRA, and not, as the CSA asserts a political subdivision/ public employer. In reaching its decision, the NLRB relied on the test set forth by the United States Supreme Court case in *NLRB v. National Gas Utility District of Hawkins County*, 402 U.S. 600 (1971). That test, known as the "*Hawkins County*" is a two-prong test that looks at (1) whether the entity was created directly by the state and (2) whether the entity is "administered by individuals who are responsible to public officials or the general electorate." *Id*. at 604-605.

In *Hyde*, the NLRB found that the school, the entity serving as the employer, was not created directly by the state as it was the charter school's founding board of trustees that prepared the comprehensive application to establish the school and once the school was approved by the Board of Regents, it was the founding board that promulgated the school's governing and operating documents. Furthermore, under the second prong of the *Hawkins County* test, the NLRB determined that a charter school in New York is not administered by individuals who are responsible to public officials or to the general electorate. The NLRB reasoned that the school's board is run as a private corporation with members privately appointed and removed. The NLRB was unpersuaded by the argument that since the Board of Regents has the authority to remove a trustee of a charter school for malfeasance (an authority it has for trustees of all educational institutions in New York) this was equivalent to the trustees having direct personal responsibility to public officials. Because the NLRB found that a New York charter school is not a political subdivision of the state, its conduct with respect to labor matters is under the jurisdiction of the federal NLRA statute and not the state's Taylor Law. *See Hyde* at p.5-7.

Despite the finding that the Hyde Charter School was an employer covered under the federal NLRA, the NLRB could still have discretionarily declined to assert jurisdiction over the matter if it determined that "the effect of the dispute on commerce [was] not sufficiently substantial to warrant the exercise of its jurisdiction." 29 U.S.C. §164 (c)(1). Despite arguments from the United Federation of Teachers

WHAT DOES THIS MEAN FOR OTHER CHARTER SCHOOLS?

While the case was specific to *Hyde*, it is very likely that other New York State charter schools similarly created and situated (that is, a new charter and not a charter converted from a district school) would also be subject to NLRB jurisdiction. In fact, in October 2016, the NLRB affirmed a decision of one of its regional directors (who first decide cases brought before the NRLB) that allowed a charter school teacher's decertification petition to go through under NLRA procedures even though the school had been unionized under PERB. See Riverhead Charter School, 29-RD-132061 (2016). It is less clear what *Hyde* might mean for charter schools that currently have or are negotiating bargaining agreements under PERB. For instance, it has not yet been decided whether a charter school itself (as opposed to its teachers) could move to decertify a union because that union had been created by card check and the employer had no chance to require a secret ballot election. There also are questions about whether a conversion charter school would be considered a political subdivision under the Hawkins analysis given that it used to be a district school or whether the NLRB would, in fact, use its discretion to decline jurisdiction over this subset of charters effectively having them governed by the state's Taylor Law. There are many unanswered questions for schools that have existing unions and collective bargaining units and these schools should seek guidance from lawyers who specialize in the practice of labor law to get their questions answered.

(UFT), which was the defendant in this case, that the NLRB should decline jurisdiction because of the state's regulation and oversight of charter schools and language in the Charter Schools Act defining teachers as public school teachers, the NLRB did not use its discretion to decline. Instead, it maintained jurisdiction over the charter school stating that it routinely asserts jurisdiction over private entities that provide services, under contract, to governmental bodies. *See Hyde* at p. 7-9.

WHAT'S NEXT?

All charter schools need to become familiar with the National Labor Relations Act and what these new labor laws now mean for their school. As mentioned there are significant differences between the NLRA and Taylor Law including the ways in which employees can certify a union ("card check" versus secret ballot election), the role of supervisors in the bargaining unit, how collective bargaining agreements are implemented if there is no agreement, and whether are not workers are allowed to strike. In particular, the NLRB has been active in the last few years in defining the appropriate language that employers must include in employee handbooks, such as what constitutes protected speech and activity around employees discussing/joining together to improve their wages and working conditions. The Charter Center has already offered one session to charter schools and will offer future programming to assist schools in learning about this new (to NYC charters) law.

It is also important to understand that the NLRB's decision in the Hyde case may not be the last word on this issue. Hyde is not the only charter school case in which the NLRB has found jurisdiction; there are other cases from Illinois and Pennsylvania where the NLRB asserted jurisdiction over charter schools. Also, now that charters will be regulated by the NLRB it is possible that this issue eventually will make its way through the federal courts (employers and employees can appeal NLRB decisions on unfair labor practices to the federal courts). While federal courts generally give deference to NLRB decisions on jurisdiction, there has not been a charter school jurisdiction case heard at the federal level. Moreover, to put it politely, the decisions that the NLRB reaches can change based on which political party makes appointments to the NLRB, i.e., who is the president of the United States (NLRB members are appointed by the President and confirmed by the Senate for five-year terms, with one member's term expiring each year). It is certainly not without precedent that a decision by one group of NRLB members is overturned by another, e.g., very recently the NLRB decided that graduate students were employees (and not simply students as universities have asserted) and therefore entitled to unionize, a decision that overturned a previous decision by the NLRB finding precisely the opposite.

THE ISSUE:

School Closure at Renewal

Background: Under the New York State Charter Schools Act (CSA), successful applicants for a charter school are granted provisional charters that can last only a maximum of five years. This means that schools must apply for renewal at least once every five years (sometimes less, if they receive a short-term renewal). Authorizers are not required to renew a school's charter and have the power to deny the application for renewal and close the school. See Education Law Section 2851(4). Additionally, authorizers have always viewed their decision to not renew a charter as similar to their decision to initially authorize a school in that such decision is "final and shall not be reviewable in any court by any administrative body." Education Law Section 2852(6). Despite this statutory framework, several charter schools that have received non-renewal decisions by their authorizer have sought judicial review of this decision and, in 2016, the Second Department of the Appellate Division (the appeals court for Brooklyn, Queens and Staten Island) came down with a decision on the issue. Prior to the Second Department's decision, the Fourth Department of the Appellate Division had already determined that an upstate charter school's non-renewal decision was not subject to judicial review, but there had not been any de-

cisions by courts in New York City. *See Pinnacle Charter Sch. v. Board of Regents of the Univ. of the State of N.Y.*, 969 N.Y.S.2d 318 (4th Dept 2013).[1]

The Case: In the *Matter of Fahari Academy Charter School v. Bd. of Educ. of City School Dist. of City of New York*, the Chancellor of the NYC Department of Education, the school's authorizer, denied the renewal application of the Fahari Charter School ("Fahari"). 27 N.Y.S.3d 688 (2d Dept 2016). The Chancellor denied the charter renewal application after determining that the school had failed to meet the academic benchmarks set forth in its charter. This decision for non-renewal came after the school was given a short-term renewal the previous year with specific academic benchmarks it was required to meet. When the school failed to meet these benchmarks, the Chancellor allowed the school an opportunity to present oral and written submissions to address these deficiencies, and then ultimately decided the school must be closed. The school then appealed to the Supreme Court in Brooklyn.

The Supreme Court ruled that it lacked the jurisdiction to review the Chancellor's non-renewal decision based on the language in the Charter Schools Act. *Fahari Academy Charter School v. Board of Educ. Of City School Dist. Of City of New York*, No. 8109/15 (N.Y. Sup. Ct., 2015). The Court found, relying on the Pinnacle case, that "the plain wording of the statute in question deprive[d] this Court of subject matter jurisdiction" as schools do not have a constitutional right to an administrative review of their non-renewal decision. *Id.* at 11. The Court did note that while schools are not entitled to judicial review of a non-renewal decision this would not preclude review if the Chancellor had acted "illegally, unconstitutionally or in excess of her jurisdiction." *Id.* at 10. In *Fahari*, the Court did not find the Chancellor's conduct to be "conscience shocking or oppressive in a constitutional sense" as the Chancellor had notified the school in writing about the decision to not renew and provided the school with an opportunity to present to a panel. Fahari appealed the lower court's decision to the Appellate Division, where the Court affirmed the Supreme Court's decision finding that non-renewal was not subject to judicial review as the Charter Schools Act expressly acknowledges that charters may be renewed and notes that the denial of an application for a charter school is final and shall not be reviewable in any court. *See Fahari, 27 N.Y.S.3d at 690, citing Matter of New Covenant Charter School Educ. v. Board of Trustees of the State Univ. of N.Y.*, 2010 WL 5468692 at *2 (Albany Sup. Ct., 2010). The Appellate Division affirmed state law, citing both New Covenant and Pinnacle, by holding that Fahari Academy Charter School did not have a right to judicial or administrative review of its non-renewal decision. Fahari appealed to the Court of Appeals (highest court in the state), but similar to Pinnacle, the school was denied leave to appeal, meaning that the decision of the Appellate decision was final. *See Fahari Academy Charter School v. Board of Educ. Of City School Dist. Of City of New York*, 27 N.Y.3d 1120 (2016), and *Pinnacle Charter School v. Board of Regents of University of State of New York*, 22 N.Y.3d 951 (2013).[2]

WHAT DOES THIS MEAN FOR OTHER CHARTER SCHOOLS?

With the *Fahari* decision, it is increasingly clear that charter schools, whether in New York City or upstate, seeking judicial review of non-renewal decisions will generally not be granted such review; nor will they generally be granted more than very short temporary injunctive relief. The statute is clear and several courts across the state have been unanimous in upholding that non-renewal decisions - absent some illegal or conscience-shocking conduct by the authorizer - are not subject to judicial or administrative review. In fact since *Fahari*, another charter school filed for judicial review of its non-renewal decision and the Supreme Court, relying on *Fahari*, also dismissed the matter and the school closed at the end of the school year. *See The Beginning with Children Charter School v. New York City Dept. of Educ.*, 52 Misc.3d 1216(A) (N.Y. Sup. Ct., 2016). Charter schools that receive non-renewal decisions and that do not have clear evidence of misconduct or bias should focus on creating transition plans for students and families.

[1] *New York State is divided into four judicial departments in which there are trial courts (known as supreme courts) and then appellate courts (known as appellate division courts). A decision by a trial or appellate division court in one department is relevant to a court in another department but the precedent is not controlling.*

[2] *Like the United State Supreme Court, New York State's highest court, the Court of Appeals, has, in certain circumstances, the choice of which cases it wishes to hear and review.*

WHAT'S NEXT?

While charter schools in the First Department (Manhattan, the Bronx) have yet to bring a similar case, there is no reason to believe the outcome would be different than that in *Fahari* and Pinnacle. A charter school that receives a final non-renewal decision from its authorizer should expend its time and energy finishing out the school year in good form and working with the New York City Department of Education to ensure that students are transferred to the best possible schools available.

THE ISSUE:

Equitable Funding for Charter Schools

Background: In 2014, the New York State legislature passed the Facilities Access Law that provides rental assistance to new and expanding New York City charter schools. See Education Law Section 2853(3)(e). However, this legislation did not provide facilities funding for any charter school outside of New York City and many New York City charter schools received only partial or no funding. Funding between charter schools and their district counterparts remains highly inequitable with the Independent Budget Office estimating that disparity at close to $3,000 for such schools in New York City.[3] If anything, these disparities are even greater upstate. Unequal funding of charter schools exists against a backdrop of successful litigation against the State for failure to adequately and equitably fund district schools, including, most importantly, the landmark Campaign for Fiscal Equity cases. *See Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307 (1995) ("CFE 1995"), *Campaign for Fiscal Equity, Inc. v. State*, 100 N.Y.2d 893 (2003) ("CFE 2003"). In response, the State adopted the Foundation Aid formula and committed to adding billions in additional state aid to school districts. Using these successful cases as precedent, the Northeast Charter Schools Network (NECSN) along with five families in Buffalo and Rochester filed a lawsuit in 2014 challenging the funding system for New York's charter schools as inequitable, inadequate, and, therefore, unconstitutional.

The Case: In *Brown v. New York*, NECSN, as a representative for its New York state charter school members, and five charter school families residing in Buffalo and Rochester ("Plaintiffs") brought a case in Buffalo challenging the funding disparity caused by the current charter funding formula and the lack of capital funding for charter schools. Plaintiffs' suit included three legal claims regarding constitutional adequacy, equal protection, and disparate impact discrimination. Plaintiffs alleged that because the state's funding formula results in charter students receiving no facilities funding, charter students have been denied access to a sound basic education (adequacy claim) and this creates gross disparities between charter schools and district schools (equal protection claim). In addition, the suit alleges that the funding scheme has a disproportionate and discriminatory impact on minority students (disparate impact claim). The suit was filed against State of New York, the Governor, State Assembly, State Senate, State Budget Director, Division

WHAT DOES THIS MEAN FOR OTHER CHARTER SCHOOLS?

While there may be other legal theories that have yet to be explored and tried, it is likely that the courts will not provide the avenue for achieving parity in funding between charter schools and their traditional district counterparts. However, the case, while pending, highlighted publicly the large disparity in funding that successful charter schools experience. Both NECSN and the New York City Charter School Center will seek to leverage this understanding to obtain additional funding through the budget process.

[3] *New York City Independent Budget Office, Charter Schools Versus Traditional Public Schools: Comparing the Level of Public Support in School Year 2014-15 (July 2015), available at http://www.ibo.nyc.ny.us/iboreports/charter_schools_versus_traditional_public_schools_comparing_the_level_of_public_support_in_school_year_2014_2015_july_23_2015.pdf.*

of Budget, Board of Regents, and Commissioner of Education (Defendants). The Defendants filed a motion to dismiss, arguing that the Plaintiffs failed to state a cause of action, NECSN lacked capacity to bring the action, and the other Plaintiffs lacked standing under the Education Law. The Supreme Court dismissed Defendants' motion (but allowed the case to be dismissed against all parties but the State of New York), and the State of New York appealed to the Appellate Division. *See Brown v. New York*, No. I2014-810534 (Erie Sup. Ct. 2015). In October, the Appellate Division agreed with the State of New York (Defendant) that Plaintiffs failed to state a cause of action and dismissed all claims. *See Brown v. New York*, 2016 N.Y. Slip Op. 06566 (4th Dept, 2016). The claims and the Courts' reasoning for dismissal are discussed in detail below.

Plaintiffs' first claim was brought under the "adequacy" clause of New York State's Constitution. This clause requires that the State "provide for the maintenance and support of a system of free common schools, wherein all the children of the state may be educated." (N.Y. Const., Art. XI, §1). New York case law has interpreted this mandate to mean that each public school student is entitled to a "sound basic education," which includes not only the "basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury," but also "minimally adequate physical facilities." CFE 1995 at 316, 317. The crux of Plaintiffs' argument was that because of the state's failure to provide facilities funding charter schools have (1) inadequate teaching because they can't hire sufficient staff; (2) inadequate facilities such as insufficient classroom space, place for physical exercise and inadequate cafeterias; and (3) inadequate instrumentalities of learning such as lack of libraries, computer labs, and quality curriculum programs to meet Common Core standards. The Appellate Division found that because "a system of charter schools" was created to operate independently of the existing schools and school districts and are in fact, governed by an independent self-selecting board, charter schools are not mandated by the Constitution and therefore the Education Article cannot serve as the "legal basis for challenging the constitutionality of charter school funding legislation." *See Brown* (4th Dept) at 4-5. In addition, the Court concluded that a successful education article claim requires that plaintiff pleads deficient inputs such as inadequate teaching, facilities, or instrumentalities (which Plaintiffs did), but this must be plead as a "district-wide" failure. *Id.*

The Appellate Division also dismissed the second claim, which alleged that because the state's funding system results in students in Rochester and Buffalo receiving only 60 to 68 percent of funding as compared to district students, New York's funding scheme violates the constitutional rights of Plaintiffs to equal educational opportunities. New York State Constitution's equal protection clause provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." (N.Y. Const., Art. I § 11). Because New York holds education as a civil right under N.Y. Exec. Law § 291(2), Plaintiffs alleged that the State cannot create a system of public education that treats charter school students differently than district schools when there is no rational basis to do so. The Appellate Division found that to the extent there is disparity between charter and district funding for facilities, there is a rational basis for this disparity, which includes that charters are "exempt from costly regulations that apply only to traditional public schools, have the discretion to limit their enrollment, are nonunion… have access to sources of funding that public schools do not…[and] charter schools are experimental and more likely to be transitory." *Brown* (4th Dept) at 6.

Lastly, the Appellate Division dismissed Plaintiffs' claim that the funding disparity between district and charter students has a disparate impact on racial and ethnic minority students, which would violate New York's civil rights law. *See N.Y. Exec. Law* § 291(2). Plaintiffs claimed that there is a disparate impact because over 90% of the students attending charter schools in the State of New York are minorities, compared to 40.74% of students attending all public schools being minorities. As a result, Plaintiff's claim that the inequitable charter school funding has a disproportionate impact on the education of minority students. The Appellate Division dismissed this claim because Plaintiffs were unable to plead that the State had discriminatory intent when creating the funding system.

WHAT'S NEXT?

Plaintiffs are not appealing the case to the Court of Appeals, ending the case.