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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF DeVERA,

Respondent,

-against-

No. 115

ELIA,

Appellant.

20 Eagle Street
Albany, New York
October 10, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 115, Matter of DeVera v. Elia.

3 Good afternoon, counsel.

4 MS. CHAUDHRY: Good afternoon. May it please the
5 court, Zainab Chaudhry for the Commissioner. Your Honor,
6 if I may please reserve one minute for rebuttal.

7 When charter schools are collaborating with the
8 school district to provide Article 73 Pre-K, they are
9 operating outside of their charters and wholly outside of
10 the charter school statute.

11 JUDGE RIVERA: Counsel, let me ask you, under the
12 statute what is the Commissioner's interpretation of what
13 entity is responsible for oversight and monitoring of the
14 programs, the programs that are part of that consolidated
15 district application that - - - that's approved?

16 MS. CHAUDHRY: Your Honor, the - - - it's a co-
17 extensive authority that is shared among the school
18 district, which is centrally responsible to, you know,
19 operate the streamlined oversight. The Commissioner's also
20 responsible ultimately for ensuring to the legislature that
21 the program is operating as intended and that the program
22 quality is being met, and the charter entities share in
23 that authority as well.

24 JUDGE RIVERA: No, but let's put aside the
25 charter for one moment. I just - - - everybody else but



1 the charter, let me put it that way. Where would I find
2 that in the legislation, what you just described that the -
3 - - the state has particular oversight and the district who
4 puts forward the consolidated application that's then
5 granted or approved, where - - - where can I find that?
6 Where's that language in the statute?

7 MS. CHAUDHRY: Yes, Your Honor, there - - -

8 JUDGE RIVERA: Or is it in the regs? Where - - -
9 where would I find that?

10 MS. CHAUDHRY: It's all over the place, first of
11 all.

12 JUDGE RIVERA: Okay. Fair enough.

13 MS. CHAUDHRY: It's in the very design of the
14 subject to the approval of the scheme contemplates this
15 type of oversight by all three entities. But specifically,
16 expressly in subsection (10) we have the inspection
17 authority which does name the department, the school
18 district with which any entity may be partnering.

19 JUDGE RIVERA: Yes, but that's my problem with
20 your argument. There is a difference between an inspection
21 and ongoing oversight and monitoring and curricular
22 approval.

23 MS. CHAUDHRY: Your Honor, the inspections serve
24 to assist and ensure that the full monitoring review is
25 taking place. They have to under this statutory scheme

1 have a broad meaning. They can't have a narrow meaning
2 given the critical purposes those inspections serve within
3 the statutory scheme and the overall design.

4 JUDGE STEIN: Well, you'll agree that subdivision
5 (10) and subdivision (12) are apparently at odds here. And
6 let - - - let me ask you why the following interpretation
7 doesn't harmonize the two. (10) says three entities have
8 to inspect, right, and it says that it has to be done at
9 least twice a year, right. So that - - - we know it
10 doesn't mean twice a year by each of those entities, right?

11 MS. CHAUDHRY: Right.

12 JUDGE STEIN: Okay. And then it says that one of
13 those two - - - at least one of those two times has to be
14 by the charter entity if that's applicable, right?

15 MS. CHAUDHRY: Right.

16 JUDGE STEIN: So why can't it be that in the - -
17 - in terms of charter schools both of those times have to
18 be by the charter entity? Then that to me would harmonize
19 those two sub-divisions. Why is that not an appropriate
20 interpretation?

21 MS. CHAUDHRY: The reason is, Your Honor, because
22 it would give the charter entities exclusive authority not
23 only in contravention of the language of (10) but the
24 entire statutory scheme. And what's really important is to
25 - - -

1 JUDGE STEIN: Well, but the entire statutory
2 scheme about charter schools is that they get to get this
3 funding, and they're overseen by the charter entity.

4 MS. CHAUDHRY: For purposes of the Charter School
5 Act, Your Honor, I will wholly agree with you.

6 JUDGE STEIN: But why would there be a different
7 policy here? Why is that - - - why is there any reason to
8 think that the legislature didn't intend that very same
9 thing?

10 MS. CHAUDHRY: There's several reasons, Your
11 Honor. First of all, the legislature made a deliberate
12 choice not to put charter school - - - excuse me, not to
13 put Pre-K into Charter - - - the Charter Schools Act - - -

14 JUDGE GARCIA: But they would have had to put a
15 whole other statute in for everybody else anyway. I mean
16 they couldn't have done this whole thing in the Charter
17 School Act. They did it separately, and then they
18 referenced the Charter School Act.

19 MS. CHAUDHRY: Well, but the - - -

20 JUDGE GARCIA: That's a lot easier than putting
21 it in the Charter School Act and referencing everybody
22 else.

23 MS. CHAUDHRY: Well, it's true that the 2014 law
24 would have had to have been implemented regardless. But
25 the - - - they could still have put charter schools into



1 the Charter Schools Act if they wanted that full autonomy.
2 But the reason charter school - - - excuse me, charter
3 entity enforcement and oversight is not enough to protect
4 the state's interest - - - and Ms. Gustafson will speak to
5 the district's - - - but primarily because of the very
6 limited enforcement options that a charter entity would
7 have if one of its schools is not meeting Pre-K quality and
8 other requirements. It doesn't hold any of the purse
9 strings here. It's not a party to any Pre-K contract. The
10 charter that it has with its school only covers K through
11 12. So the only thing it could do is enforcement under
12 Article 56 which only allows for revocation of the entirety
13 of the charter.

14 JUDGE GARCIA: Can I ask a - - - go up a little
15 bit to ask a broader and a very basic question. I
16 apologize, but under this grant system that worked here
17 there was certain money available to the city, and there
18 was a consolidated application. But it's - - - it's
19 unclear to me, and maybe just the way I read it, that
20 application was then made through the school district to
21 the state and approved and the money went back down to the
22 state and then was dispersed according to the application?
23 Or money went down to the state, 300 million from the state
24 to the city - - -

25 MS. CHAUDHRY: The district.



1 JUDGE GARCIA: - - - and then the city decided
2 who was going to get that money? How did it work?

3 MS. CHAUDHRY: The department put out a request
4 for proposals. The city school district put in an
5 application for a consolidated program which they're
6 required to do, and then it had conducted its own requests
7 for proposals project looking for - - -

8 JUDGE GARCIA: So the money it was getting from
9 the state in the - - - in the grant just was going to the
10 district. The state wasn't seeing, okay, there are these
11 other entities that are consolidated in your application?

12 MS. CHAUDHRY: We know there are consolidated
13 entities, but we treat them as the district's
14 subcontractors. There is - - - the - - - the district has
15 the contract with the state for the grant funds, and it has
16 to assure the state that every single provider, charter
17 school or otherwise, is meeting the grant requirements.

18 JUDGE RIVERA: Okay. So it's the Commissioner's
19 - - - let me understand this. So it's the Commissioner's
20 interpretation of the statute that the districts can impose
21 other - - - let's use curricular for one moment, other
22 curricular requirements beyond what it said anywhere in the
23 legislation or anywhere in the Commissioner's regulations?

24 MS. CHAUDHRY: They're not other requirements,
25 Your Honor. What they are is the statute and the



1 regulations that set for the Pre-K requirements, they cover
2 the eight quality criteria in - - - in a generalized
3 manner. But the way they have to be, you know, the
4 district's terms - - - and Ms. Gustafson will speak to that
5 but they are - - - the Commissioner found them to be
6 directly correlated and linking back to each of the
7 statutory factors and that they were a reasonable means to
8 implement the district's obligations to us.

9 JUDGE RIVERA: So - - - so number two, "All
10 universal full-day Pre-K programs shall demonstrate quality
11 on the following elements." Let's just pick the first one,
12 A, curriculum, okay. So that is referring to the partners
13 with the district when it says, "All universal full-day
14 Pre-K programs," right? We're talking about the programs
15 that are actually delivered by the partners, correct?

16 MS. CHAUDHRY: Correct.

17 JUDGE RIVERA: Okay. Where do those partners
18 find the curricula or can they design it themselves or is
19 it the district that designs it and imposes it on them?

20 MS. CHAUDHRY: They do have the ability to be
21 innovative and creative.

22 JUDGE RIVERA: Who's the they? I'm sorry.

23 MS. CHAUDHRY: I'm sorry. The charter schools as
24 a provider - - -

25 JUDGE RIVERA: Well, the provider.



1 MS. CHAUDHRY: - - - or the providers in general.

2 JUDGE RIVERA: Yes, I - - - yeah.

3 MS. CHAUDHRY: Yes, they have the ability to be
4 innovative and creative in developing their programs as to
5 each of these aspects of the quality criteria.

6 JUDGE RIVERA: Yes.

7 MS. CHAUDHRY: But the district is responsible
8 for supervising them, and so it must be able to supervise
9 them in a way that is consistent across the board.

10 JUDGE GARCIA: But does that mean - - - what
11 bothers me with that is you're allowing let's say a
12 subcontractor or a sub-grantee then to kind of backdoor in
13 oversight over a curriculum that they wouldn't normally
14 have, and I think that's what the statute says. So by just
15 block granting out this money to the city, to the district,
16 you're not approving anything other than their application.
17 You're not saying no to the charter school, so they're not
18 saying no to the charter schools. They're consolidating
19 them, and then they're saying, okay, to really get this
20 money now you're going to have to do all these things we
21 want you to do.

22 MS. CHAUDHRY: Well, they have proposed - - -

23 JUDGE GARCIA: And I don't see where they get the
24 authority to do that.

25 MS. CHAUDHRY: Your Honor, the authority is



1 inherent and explicit in the statute, but they have - - -
2 the charter schools have proposed - - -

3 JUDGE GARCIA: Where in the statute is that? I -
4 - - you point to an inspection provision which as Judge
5 Stein was pointing out - - -

6 MS. CHAUDHRY: Even under the reading of Article
7 - - -

8 JUDGE GARCIA: - - - has many different entities
9 that can inspect, and in fact, if the charter school is
10 allowed to make a direct application to the state that
11 school district isn't even involved in the inspection at
12 all. So I have a hard time seeing how critical the school
13 district inspection is when they don't even have to be
14 involved if a charter school makes a direct application.

15 MS. CHAUDHRY: Well - - -

16 JUDGE GARCIA: So if they don't like what the
17 charter school is doing they can say go do your own thing.

18 MS. CHAUDHRY: That's right. They're involved to
19 the extent they have to consider the proposal.

20 JUDGE GARCIA: They can reject it.

21 MS. CHAUDHRY: They can reject it. But here they
22 did not reject it - - -

23 JUDGE GARCIA: In which case they wouldn't get
24 control over the curriculum. So if they reject the charter
25 school - - -



1 MS. CHAUDHRY: Well, in that case, Your Honor,
2 the state would have oversight authority.

3 JUDGE GARCIA: And that would be a very different
4 case.

5 MS. CHAUDHRY: And that's the problem here is
6 that under the Appellate Division's reading and the
7 petitioner's reading they've assigned them an exclusive - -
8 - the charter entities an exclusive authority even to the
9 exclusion of the state. And we have no way to know that
10 millions of dollars annually that go to charter schools for
11 these programs are being used in accordance with the
12 quality requirements.

13 JUDGE STEIN: But you trust them to do that for
14 grades K through 12.

15 MS. CHAUDHRY: They do that pursuant to their
16 charter, Your Honor, and they are subject to a very
17 different oversight system.

18 JUDGE STEIN: But let me ask you this, if the
19 charter entity was the one to - - - to do the inspection or
20 the - - - you know, the supervision, would they not have to
21 follow - - - would that entity not have to follow the
22 education department's protocol - - - inspection protocol?

23 MS. CHAUDHRY: Your Honor, the statute does not
24 require them to follow the protocol exactly as - - - as a
25 guideline, but they are required to make sure their charter



1 schools are meeting the quality elements.

2 JUDGE STEIN: No, no, no. I mean under - - -
3 under this Pre-K program - - - not - - - not the charter
4 schools.

5 MS. CHAUDHRY: Yes.

6 JUDGE STEIN: Okay. So - - -

7 MS. CHAUDHRY: Yes, under the - - - under the
8 Pre-K program the state has developed - - -

9 JUDGE STEIN: So - - - so let's say you agree
10 that at least they can do the inspection at least once,
11 right? That's what the - - - that's what the - - -

12 MS. CHAUDHRY: Well, they can do that, and they
13 have the full amount of oversight authority to look at
14 anything else. It's just not exclusive. And let me just -
15 - -

16 JUDGE STEIN: But, no, my - - - my question is
17 that one time that they do it do they have to follow the
18 state's protocol?

19 MS. CHAUDHRY: They are not required to use the
20 state's protocol in doing that inspection. However, the
21 program itself does meet - - - need to meet the protocol
22 which is typically - - -

23 JUDGE STEIN: Okay.

24 MS. CHAUDHRY: - - - what the district is doing
25 and using.



1 JUDGE STEIN: But why - - - my question is why
2 can't the entity do that very same thing that you're saying
3 that the school district should do?

4 MS. CHAUDHRY: Your Honor, they could do it. We
5 are not saying that an entity like the charter entity would
6 be flouting its obligations. What we do know is in this
7 case it was not done. There is nothing in the record about
8 that. But, you know, even - - -

9 JUDGE GARCIA: But there was no inspection done
10 here, right?

11 MS. CHAUDHRY: - - - there's multiple oversight -
12 - -

13 JUDGE GARCIA: They never got any money, so what
14 - - - what are you saying if there's nothing in the record
15 that they did it? Maybe I'm misunderstanding what you
16 said.

17 MS. CHAUDHRY: Well, they were running the
18 program and they did begin running the program. And so
19 there was no indication or establishment in the record that
20 - - -

21 JUDGE GARCIA: They never got any funding, right?

22 MS. CHAUDHRY: Right.

23 JUDGE GARCIA: So what would you be inspecting
24 since you never gave them any money?

25 MS. CHAUDHRY: I understand your point, Your



1 Honor. They were running the program. However, whether
2 they did it in this case or not beyond that that things can
3 always fall through the cracks. And under petitioner's
4 reading, there is no backup if the inspections are not
5 done.

6 JUDGE RIVERA: Well, let me ask you - - - let me
7 ask you what the Commissioner interprets provision (12) to
8 mean when it says - - - forget the word "all" for one
9 moment, please. I'm focused on something else.

10 MS. CHAUDHRY: Okay.

11 JUDGE RIVERA: It says it has, "The
12 responsibility of monitoring programmatic review and
13 operational requirements." Is that what - - - what is used
14 here, that term "responsibility," is the Commissioner's
15 position that's the same responsibility as the district?
16 It's not a different kind of review or oversight?

17 MS. CHAUDHRY: The Commissioner's position is
18 that it - - - this section that you quoted means that - - -

19 JUDGE RIVERA: Yes.

20 MS. CHAUDHRY: - - - all aspects of review - - -

21 JUDGE RIVERA: Okay.

22 MS. CHAUDHRY: - - - whether it relates to
23 quality, whether it relates to anything else, are available
24 for the charter entity to look at, just not exclusively.
25 But by having them involved - - - and maybe this is - - -



1 JUDGE RIVERA: No, no, no, no.

2 MS. CHAUDHRY: I'm sorry. I think I
3 misunderstood you.

4 JUDGE RIVERA: I'm sorry. I'm not being clear.
5 No, no, I get your - - - where you are. It's the argument
6 you made in the brief, but I'm asking something different.

7 MS. CHAUDHRY: I apologize, Your Honor.

8 JUDGE RIVERA: I - - - no, no, I'm not being
9 clear. I'm trying to understand what the Commissioner's
10 position is - - - and perhaps I'm just misunderstanding
11 this language, so you can help me. What that means to be,
12 "Shall be responsible" - - - "shall be responsible."
13 Responsible in my mind can mean many things. It need not
14 mean that I supervise and oversee everything that you do on
15 a - - - as a daily matter. So I'm trying to understand
16 what the Commissioner views this term "responsibility."
17 Because of course the legislature could have written that
18 the charter school charter entity shall monitor, do
19 programmatic review, and be the sole entity responsible for
20 operational requirements. But it's written differently,
21 and I'm trying to understand why.

22 MS. CHAUDHRY: I think the answer to your
23 question, Your Honor, is the reason that they needed to
24 affirmatively grant a responsibility to the charter entity
25 is that under - - - and this is one of the core purposes of



1 - of section (12) which is not only to - - - to bring
2 charter schools in to be able to participate because
3 they're excluded otherwise but the charter entity is also
4 excluded from any oversight authority or responsibility
5 just by virtue of the Charter Schools Act. Its authority
6 was originally it's created there, the charter entity is
7 limited to - - - to their role there. So in this case the
8 legislature had to put it in, and this was the purpose - -
9 - the main purpose behind subsection (12).

10 And it might help - - - just I understand my time
11 is - - - is expired at the moment, but just to quickly say
12 perhaps it would step - - - help to step back and look at
13 why the legislature would have included charter entities at
14 all if they didn't want them to have all the
15 responsibility. It's common to have shared oversight in -
16 - - in the education context. Even under the Charter
17 Schools Act, the charter entity is not the exclusive
18 oversight authority. It shares that authority
19 coextensively to the same extent as the Board of Regents.
20 So it's never had exclusive authority anywhere. But
21 secondly - - -

22 JUDGE WILSON: May - - - may I ask you - - - I'm
23 sorry.

24 MS. CHAUDHRY: Yes.

25 JUDGE WILSON: Go ahead with the second and then



1 I'll ask you after.

2 MS. CHAUDHRY: Just to quickly say why the
3 legislature gave them a role, they gave them the ability to
4 ensure two things. One, that Pre-K offered by their
5 schools is appropriately integrated with their early
6 elementary education. That is one of the quality
7 requirements in the Pre-K law, and the legislature
8 understood that that could only happen for charter schools
9 if the question of continuity and integration gave - - - if
10 they gave charter entities a role in that process.

11 And the second thing is it makes sure that the
12 provision of Pre-K that the school is offering does not
13 affect the school's ability otherwise under its charter to
14 meet those terms and meet the requirements of the act for
15 their K through 12. So you need the charter entity
16 involved, but the legislature never intended that to be an
17 exclusive authority. I'm sorry, Your Honor.

18 JUDGE WILSON: I just wanted you to correct me
19 about two things if either of them is wrong. One is that
20 the state when it used the RFP advised school districts
21 that providers that were included within a bid would be
22 subject to the jurisdiction of the local school district.
23 Is that correct or not correct?

24 MS. CHAUDHRY: That's correct. And it's required
25 because they consider them subcontractors, and the district



1 has to give the state assurances not just from the
2 statutory terms but from the grant terms - - -

3 CHIEF JUDGE DIFIORE: So, counsel, under - - -

4 MS. CHAUDHRY: - - - about what it will do.

5 CHIEF JUDGE DIFIORE: - - - appropriate
6 circumstances, can the charter make a direct application to
7 the state?

8 MS. CHAUDHRY: The charter school, Your Honor?

9 CHIEF JUDGE DIFIORE: Yes.

10 MS. CHAUDHRY: Only if it's denied inclusion - -
11 -

12 CHIEF JUDGE DIFIORE: Okay.

13 MS. CHAUDHRY: - - - in the district application.

14 CHIEF JUDGE DIFIORE: So the answer's yes,
15 correct? And if they are accepted would the state require
16 that charter to enter into the same kind contract with the
17 same specific programmatic requirements?

18 MS. CHAUDHRY: The programmatic requirements
19 would be the same. We would likely require them to use the
20 statewide protocol. But it's the district in that case
21 that would have no authority to oversee.

22 CHIEF JUDGE DIFIORE: Okay.

23 JUDGE GARCIA: So I'm sorry.

24 JUDGE WILSON: I'm sorry. I - - -

25 JUDGE GARCIA: Would that - - - just to follow up



1 that question, would that be - - - has that happened? Have
2 charter schools gone directly to the state?

3 MS. CHAUDHRY: There are no charter schools
4 currently operating independently, and the only ones that
5 are currently operating at all are under the New York
6 City's consolidated program.

7 JUDGE GARCIA: Apologies, Judge Wilson.

8 JUDGE WILSON: The second thing that I wanted you
9 to correct me about - - -

10 MS. CHAUDHRY: Yes.

11 JUDGE WILSON: - - - if I'm wrong is that when
12 the city responded to the RFP it told the state that it
13 would be responsible for, among other things, the
14 curriculum of the alternative providers included within its
15 bid?

16 MS. CHAUDHRY: Well, it was going to make sure
17 that the curriculum was going to meet the quality standards
18 that the statute and the grant terms required.

19 JUDGE WILSON: Okay. Thank you.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MS. GUSTAFSON: Good afternoon, Your Honors;
22 Ingrid Gustafson appearing on behalf of municipal
23 appellants. I would like to reserve two minutes for
24 rebuttal, please.

25 I'd like to start with the issue of where the



1 school district's authority comes from in the UPK law, and
2 the answer is it comes from multiple sources. Yes, it's
3 explicit in (10) which specifically says that all
4 partnering providers shall be inspected by the school
5 district. But it is also inherent in the statutory scheme
6 set up by subdivisions (2), (3), (7), and (9). So what
7 subdivision (3) does is subdivision (3) favors applications
8 by school districts. It requires all providers to you - -
9 -

10 JUDGE GARCIA: But you can say no. They - - -
11 charter school can come to you and you can say we want you
12 to do these things and you can say no, and they can go
13 their way and deal with the state. But it seems like what
14 happened here was - - - and you have that authority under
15 the - - - under the statute. But you don't say no, you say
16 maybe. So they can't go independently, and then you have
17 the money. And you have - - - you have to sign our
18 contract which is very heavily influencing the curriculum.
19 So I don't see how that type of process is authorized under
20 the statute.

21 MS. GUSTAFSON: If I may start with the process
22 and then move to what exactly happened here. So the
23 process - - - DOA in its RFP made clear that it was going
24 to be requiring its partnering providers to be supervised
25 by the district.



1 JUDGE GARCIA: So - - - okay. Now the charter
2 school doesn't like that. What can they do?

3 MS. GUSTAFSON: I think - - - well, they - - -

4 JUDGE GARCIA: Yeah.

5 MS. GUSTAFSON: They - - - well, the statute
6 requires them to first go through the school district. I
7 mean that is what - - -

8 JUDGE GARCIA: Right, and you're saying maybe if
9 you sign this thing that you're not going to want to sign -
10 - - but we're going to say yes contingent on that. So what
11 can they do at that point?

12 MS. GUSTAFSON: That is - - -

13 JUDGE GARCIA: They can't go independently, and
14 they don't want to agree that you have authority over their
15 curriculum. So they're stuck.

16 MS. GUSTAFSON: That is the nature of the
17 legislative design. It requires all partnering providers
18 to first go through - - - through school districts.

19 JUDGE GARCIA: And you have a yes or no rule.

20 JUDGE RIVERA: I don't understand how they're
21 stuck. You tell them we've got this great program, lots of
22 money, we want to be creative, do you want to be part of
23 it? Do you want to come to the party? Tell them but we're
24 going to have requirements for you to come to the party and
25 they say okay.



1 MS. GUSTAFSON: Exactly.

2 JUDGE RIVERA: They said okay.

3 MS. GUSTAFSON: That's - - - and that is exactly
4 what happened here.

5 JUDGE GARCIA: They reserved their rights when
6 they said okay. But - - -

7 JUDGE RIVERA: But they can't do that.

8 JUDGE GARCIA: So the point is they - - - they
9 get neither a yes nor a no from you, so they can't go
10 separately. And then when you get your block grant, which
11 it seems you already had, you can say we'll give you this
12 money, but you have to sign this contract which is
13 influencing or imposing these requirements on your
14 curriculum which arguably under the statute you can't do.
15 But the problem it seems to me is the charter schools have
16 no way then to go directly to the state and have the state
17 pass on whether or not we want to grant you this money
18 except if they agree to your terms. And if they don't they
19 have no recourse. So you are essentially putting yourself
20 in the position of the grantor with conditions on
21 curriculum which I think is problematic under the language
22 of the statute.

23 MS. GUSTAFSON: I - - - I disagree, and if I may,
24 I - - - I think that's inherent in the design. And if - -
25 - I think the larger issue here is this. This statute



1 doesn't function like the Charter Schools Act for any
2 provider, including charter schools. The Charter Schools
3 Act is based on an accountability and oversight scheme that
4 is very hands-off. The UPK law is not. It is a quality
5 standards-based law - - -

6 JUDGE STEIN: But UPK was enacted before the
7 Charter Schools Act so - - - so they're - - - they're two
8 very different things. And I guess my question is is if
9 the state - - - if the legislature was willing to give
10 charter schools this degree of autonomy in grades K through
11 12, why can't they be trusted to do that - - - or why - - -
12 not why can't they be trusted, why wouldn't the legislature
13 make the same determination when it comes to Pre-K? Yes,
14 somebody obviously has to oversee them, but the charter
15 entity was good enough for K through 12.

16 MS. GUSTAFSON: The answer is that they - - -
17 they didn't. There's nothing weird about that. The UPK
18 law sets up a unique scheme for every provider. It's not
19 integrated with K through 12 for anyone. It's a unique
20 program that functions through ongoing oversight, through
21 specified quality standards and other - - - and other
22 requirements. And there's a very key difference between
23 how the Charter Schools Act works and how the UPK law
24 works. School districts are the ones in subdivision (3)
25 who are made responsible for determining which programs are



1 funded and which programs are renewed. And it can only do
2 this - - -

3 CHIEF JUDGE DIFIORE: Is part of the problem,
4 counsel, that in K through 12 there are objective
5 assessments at the end of the day that you could look at to
6 see if a program is successful and that's very different
7 from a Pre-K program where it's more difficult to assess
8 where children - - - and every child is going to leave the
9 program and go on to kindergarten. Is that part of the
10 issue?

11 MS. GUSTAFSON: I think it - - - I think it very
12 well could be. But I think the key is that the legislature
13 here made a judgment about what this type of program was
14 going - - - was going to be like, and it was going to be
15 based on ongoing supervision and compliance with quality
16 standards. Districts cannot grant or renew funding to
17 providers that don't meet those quality standards. And
18 what the Third Department's decision would - - -

19 JUDGE STEIN: Well, but they don't go in and
20 monitor and do all these things before they grant the
21 application. So isn't the question really whether they're
22 going to renew the application or renew the - - - the
23 grant?

24 MS. GUSTAFSON: I think - - - I think the renewal
25 power is key, but the - - - the Third Department's decision



1 here would - - - would strip that of its - - - of any
2 substance because it - - -

3 JUDGE STEIN: Well, no, it would require them to
4 rely on another agency to implement the review protocols
5 established by the state. That's what it would - - -
6 that's what it would do.

7 MS. GUSTAFSON: Here's - - - I think this will
8 answer your question, Your Honor. Here's our problem, the
9 Charter Schools Act - - - what - - - what petitioners are
10 proposing is not how things work under either the Charter
11 Schools Act or under the UPK law. Under the Charter
12 Schools Act, charter authorizers are the ones who grant
13 charters and the ones that renew them and the ones that are
14 ultimately responsible for oversight. Under the UPK law as
15 it usually works - - - again, petitioners concede that
16 usually under the provisions of this law DOE can - - - can
17 provide the kind of supervision it does here. Usually,
18 under the UPK law DOE has the renewal authority and it also
19 has substantive review authority.

20 What petitioners are proposing is a disconnect.
21 School districts are responsible for making the
22 determination of who gets into the program and who gets
23 renewed, where the money is going. They have no
24 substantive oversight authority. Charter authorizers have
25 all of the oversight authority but no ability to determine



1 who's actually participating. That's not how it works
2 under either statute.

3 JUDGE RIVERA: Let me say at the beginning you -
4 - - you mentioned that the scheme overall supports your
5 position and you got to discuss (3) but you also mentioned
6 (7) and (9). You're running out of time, but can you
7 quickly tell us what (7) and (9) - - -

8 MS. GUSTAFSON: It's (2) - - - it's (2), (7), and
9 (9). Only and all - - - what those provisions provider is
10 that providers can only participate in the program if they
11 meet detailed quality standards and other requirements.
12 Again, and DOE is the one who's making that determination.
13 Without any mechanism for determining whether or not all of
14 its partnering providers - - -

15 JUDGE STEIN: Do you think the mechanism to rely
16 on the charter entity to - - - to do the necessary
17 monitoring and inspection based on their standards that
18 they set and then report back. And maybe they can't - - -
19 the charter entity can't in and of itself deny funding but
20 certainly if it reports to the state that they're not doing
21 what they're supposed to be doing then the state's not
22 going to give them funding.

23 MS. GUSTAFSON: I think this hits on a crucial
24 point, Your Honor. One, just very briefly, I do think it's
25 extraordinary that DOE would require on just the pleasure



1 of another entity provided with that information. But what
2 petitioners are relying on here is that - - - or hoping
3 for, I believe, is that charter authorizers aren't going to
4 do the kind of supervision that is required by the UPK law.
5 Charter authorizers in the usual course are very hands-off.
6 They don't set standards. They do an annual review. They
7 approve - - - they renew charters. But substantive
8 standards are set by the board of the charter school. They
9 don't usually do this kind of supervision.

10 JUDGE STEIN: And here the - - -

11 JUDGE GARCIA: But that's - - - I'm sorry

12 JUDGE STEIN: - - - substantive standards would
13 be set by DOE.

14 MS. GUSTAFSON: The - - - I think what
15 petitioners - - - but that wouldn't flow from the Third
16 Department's interpretation, Your Honor. The Third
17 Department said only charter authorizers have this
18 authority. That would appear to preclude the state, and
19 petitioners have never defended that result. If it's true
20 that only - - -

21 JUDGE STEIN: Well, so - - - as I - - - as I
22 understand it, it would preclude the state from being the
23 one to go in and monitor and inspect and all that stuff,
24 but it wouldn't preclude the state from saying you're not
25 getting our money.



1 MS. GUSTAFSON: The money, yes. Okay. Here - -
2 - I think here is - - - here is another issue. Quality - -
3 - the - - - to determine quality necessarily requires a
4 judgment, necessarily requires standard. How - - - do you
5 show quality? You have to have guideposts, standards to
6 determine how that is shown. What the Third Department's
7 decision does is it says only charter authorizers get - - -
8 at least on its face it appears to say only charter
9 authorizers get to do that. But it's DOE that has the
10 responsibility of making the funding determination here,
11 and it's the state that authorizes the program.

12 JUDGE GARCIA: But you can make that - - - what I
13 come back to is you can make that and say under these
14 circumstances we can do this. I'm sorry you're not part of
15 our consolidated application which takes you out of the
16 inspection protocol. It takes you out of this. If it
17 operates the way Judge Stein says and these charter schools
18 which are speculating are going to do this type of job
19 which you say they're going to do, the state controls the
20 purse at the end of the day, and they can look at what the
21 charter school entities are doing, look at the inspection
22 reports they're getting, and say that's not good enough.
23 We're not giving you any money. So I don't understand this
24 insertion of the school district into this this way.

25 MS. GUSTAFSON: The - - -



1 JUDGE GARCIA: You can deny them part of your
2 consolidated application.

3 MS. GUSTAFSON: Here's the issue with that, Your
4 Honor. The subdivision (3) directly requires school
5 districts to solicit applications with charter schools.

6 JUDGE GARCIA: Right, but you can - - - you can
7 say no. You can say, look, if - - - that your view and
8 some sign this and some don't. If you aren't willing to
9 sign this then you're out.

10 MS. GUSTAFSON: We made - - - that was made very
11 clear, Your Honor.

12 JUDGE GARCIA: So now everyone knows you're out.
13 So now charter school comes, they're not signing something
14 you say no, go your own way, and then they can go to the
15 state and - - - and so I don't understand the crisis that
16 will happen if the statute provides for charter schools
17 being able to go directly if the school district doesn't
18 have this authority.

19 MS. GUSTAFSON: Then I think - - - I think - - -

20 JUDGE GARCIA: Because the statute contemplates
21 that you don't.

22 MS. GUSTAFSON: I think the school district will
23 be in the situation of doing a blanket no. Here's - - -
24 here's the issue with what happened here. What - - - the
25 application Success submitted complied with all of the



1 requirements of the contract. I mean it - - - and I - - -
2 and I think that boil - - - shows why what this lawsuit is
3 all about is it's the debate of philosophy. The
4 petitioners here don't want to be subject to the oversight
5 scheme that is contemplated by the UPK law itself. They
6 want to be subjected to the Charter Schools Act. The
7 contract sets baseline substantive standards. Success'
8 application, which is in the record and I can pull the
9 pages - - -

10 JUDGE GARCIA: Even some of those baseline
11 standards are thrown out by the state, right, three of
12 them?

13 MS. GUSTAFSON: There were - - - there were two,
14 Your Honor. One had to do with audits and it was the role
15 of the state comptroller. The other had to do with the
16 prevailing wage provision, so it was actually sort of - - -
17 it was - - - they were very sort of - - -

18 JUDGE GARCIA: But those were you considered
19 baseline when you put them in the contract.

20 MS. GUSTAFSON: The contract does a lot of
21 things, Your Honor, as does any contract that governs the
22 distribution of funds. It - - - it requires compliance
23 with all sorts of laws, discrimination laws for example.
24 It - - - it includes basic provisions that you would have
25 in any, you know, state contract about insurance,



1 licensing, things like that, and that's what a lot of the
2 contract does. But yes, it - - - what the heart of the
3 contract seeks to do is set - - - set baseline standards to
4 try to implement, you know, what does it mean - - - to - -
5 - to set an understanding, what does it mean to show
6 quality on all of these different statutory elements.

7 And Success' application met all of them. They
8 have never once come forth with an example. They did - - -
9 they - - - and I think this - - - this actually leads me to
10 another crucial point that I think answers one of Your - -
11 - Your Honor's earlier points which is that charter schools
12 - - - Success offered an entire year of UPK paid classes,
13 and they have never once said, you know, yes, and our
14 program would have done this differently. This is what we
15 would have done differently absent your contract.
16 Moreover, DOE actually has sixteen charter schools that are
17 currently partnering with it, and this is another reason
18 why we know, Your Honor, that charter authorizers are not
19 doing this kind of supervision.

20 JUDGE WILSON: I just want to go back to the
21 mechanics for one second to what Judge Garcia was getting
22 at. So we're arguing here for the moment about the 2015-
23 2016 school year, right? That's - - - that's the money
24 that's at issue.

25 MS. GUSTAFSON: That's right.



1 JUDGE WILSON: I don't see the city's application
2 to the state for the school year in the record anywhere.
3 What I do see is the 2014-2015. That application has a
4 really long, hard-to-read chart, covers many, many pages,
5 that lists school by school identifying whether it's a
6 school in the district, whether it's an alternate provider,
7 or whether it's a charter school. I assume that an
8 application like that was submitted for - - - to the state
9 by the city for the 2015-2016 school year; is that right?

10 MS. GUSTAFSON: That is correct. I'm not - - -
11 I'm - - - my understanding and - - - was that this was the
12 application for that first year, the one that is in the
13 record is the relevant one.

14 JUDGE WILSON: Well, if that is the application
15 for this year then Success Academy is not listed in it.

16 MS. GUSTAFSON: That - - - that is correct.

17 JUDGE WILSON: But - - - but let's - - - let me -
18 - - that's not actually where I was going at the moment.
19 So those - - - each of those lines has got an entry for a
20 number of students, et cetera, and that then comes down to
21 eventually a total dollar number of 294 million dollars
22 distributed against everybody who is in the consolidated
23 application. I'm not sure whether I understood your prior
24 answer to Judge Garcia correctly. But if then the city
25 fails to contract with one of the alternative providers



1 listed in this application to the state for which there is
2 at least an imputed amount of money based on the headcount,
3 et cetera, that would come out, do you get to keep that
4 money or do you have to send it back to the state?

5 MS. GUSTAFSON: I think it would have to go to
6 another provider or go back to the state.

7 JUDGE WILSON: Well, which of those? Do you have
8 the authority to give it to another provider, or - - - and
9 that's only if you were then substituting that service with
10 a different provider or - - -

11 MS. GUSTAFSON: Yes, or - - -

12 JUDGE WILSON: - - - otherwise you'd have to
13 return it?

14 MS. GUSTAFSON: - - - or adding on. What
15 happened - - - what happened here, Your Honor, my
16 understanding is - - -you're correct that it's not on the
17 original list - - - is that it was - - - it was applied and
18 added afterward and was then funded under DOE's
19 consolidated application and that wasn't - - - that wasn't
20 an issue because that is - - - that is DOE's role to select
21 its partnering providers. I mean if it's an issue - - - if
22 it were dispositive then I think - - -

23 JUDGE WILSON: I'm sorry. What was added - - -
24 what was added afterwards?

25 MS. GUSTAFSON: I'm sorry?



1 JUDGE WILSON: What - - - you said it was added
2 afterwards?

3 MS. GUSTAFSON: Success is funded under the
4 consolidated application, that is it's funded in accordance
5 - - - in accordance with those terms.

6 JUDGE WILSON: Even though it's not listed - - -

7 MS. GUSTAFSON: In that - - - in that 300
8 million, the application for 300 million.

9 JUDGE WILSON: Even though it's not listed in
10 that list that you've included in the record?

11 MS. GUSTAFSON: That is - - - that is correct.

12 CHIEF JUDGE DIFIORE: Thank you, counsel. Thank
13 you.

14 MS. GUSTAFSON: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel.

16 MR. HOLLEY: Good afternoon, Your Honors. May it
17 please the court, Steven Holley for Success Academy Charter
18 Schools New York City.

19 JUDGE GARCIA: Counsel, before we go off on - - -
20 on anything else can you just follow-up on that point?
21 Because I'm a little confused now. I thought this money
22 essentially came to the city as a block and then the city
23 took applications. But was the process that these
24 providers applied to the city and then were a part of a
25 specific application to the state?



1 MR. HOLLEY: That is not my understanding, Your
2 Honor. I could be wrong about that, but my understanding
3 was - - -

4 JUDGE GARCIA: 300 million is the total amount
5 going to New York City, right?

6 MR. HOLLEY: - - - 300 million came to the New
7 York City Department of Education. They then had an RFP
8 process and decided who was going to get that money. But I
9 don't believe the state education department was making
10 that determination.

11 JUDGE WILSON: Well, but, counsel, what do you
12 make of what is at the record at 2173 which has a whole
13 series of charts behind it and just before that has an
14 affidavit from - - - I've forgotten the woman's name, Ms.
15 Pappas I think, affirming that it is a true and accurate
16 copy of the submission made by the city to the state?
17 There's a whole long list, school location by school
18 location, provider by provider, that spans I don't know 20
19 pages.

20 JUDGE GARCIA: Is that an application or is that
21 what the money then was going to be used for after the city
22 RFP of the 300 million dollars?

23 MR. HOLLEY: And, Your Honor, just to be clear,
24 you're referring to the statement of assurances that starts
25 on page 2173?



1 JUDGE WILSON: On - - - well, the whole thing
2 really starts on 2153, but then the chart that I'm
3 referring to, yes, is the statement of assurances that
4 starts at 2173 and then continues after that. It's all
5 part of what is labeled as Exhibit C.

6 MR. HOLLEY: Right.

7 JUDGE WILSON: Which is on page 2052 as to which
8 the - - - there's an affidavit earlier on explaining what
9 it is. I think that's at 2058.

10 MR. HOLLEY: So I'm looking, Your Honor, at page
11 2156.

12 JUDGE WILSON: Yes.

13 MR. HOLLEY: Which says that the New York City
14 Department of Education is - - - is requesting 300 million
15 dollars from the statewide universal full-day pre-
16 kindergarten program to provide over 50,000 high-quality
17 seats. My understanding is, Your Honor, that - - - that
18 this is not an exhaustive listing of all of those 50,000
19 seats for which the city was requesting 300 million
20 dollars. And - - -

21 JUDGE WILSON: Well, there's a certification on
22 the page you read me, the statement of assurances, that
23 says that it's to the best of my knowledge complete and
24 accurate and what follows that is this long list, and now
25 you're saying it's not complete.



1 MR. HOLLEY: No, I - - - I think it - - - it may
2 well be as Ms. Gustafson said that - - - that this was what
3 existed in the time that this was - - - was made, but, you
4 know, I think other - - -

5 JUDGE WILSON: Well, this is what was - - - this
6 is what was submitted to the state, no?

7 MR. HOLLEY: Yeah, correct, Your Honor.

8 JUDGE WILSON: So is there the possibility after
9 the submission of adding an alternative provider?

10 MR. HOLLEY: Well - - -

11 JUDGE WILSON: Because that seems to me to change
12 the nature of this case if that's right.

13 MR. HOLLEY: Why so, Your Honor?

14 JUDGE WILSON: Well, because then they haven't
15 been shut out.

16 MR. HOLLEY: Well, no, they were shut out in the
17 sense that - - - well, they weren't shut out. They were
18 told that, I think as Judge Garcia said, they were kept in
19 this limbo. They were told, you know, you have approval,
20 preliminary approval, to be part of this program. We're
21 going to approve the addition of physical plan for you to
22 operate these classes. And despite very clear reservation
23 of rights by Success Academy - - -

24 JUDGE RIVERA: Well, I'm not - - - I don't
25 understand that whole argument. I thought - - - please



1 help me on this. I thought the city said, yes, we'll
2 include you in the consolidated application subject to
3 signing off on our contract. So at that point Success
4 knows that there are - - - are terms that's it going to
5 have to comply with.

6 MR. HOLLEY: Well, Your Honor, if - - -

7 JUDGE RIVERA: Just tell me is that correct? I
8 just want to make sure I'm not - - -

9 MR. HOLLEY: I think it is correct to say - - -

10 JUDGE RIVERA: - - - misunderstanding the record.

11 MR. HOLLEY: - - - that Success Academy said to
12 the city we hear what you're saying.

13 JUDGE RIVERA: Right.

14 MR. HOLLEY: But you can't do that under the
15 terms of state law. That is directly contrary to what
16 EE(12) says.

17 JUDGE RIVERA: Yeah, but once they tell you
18 that's not their interpretation, you're saying Success
19 decided at its peril to move forward in case it was
20 incorrect in its own interpretation?

21 MR. HOLLEY: Well, but - - - but our position,
22 Your Honor, is that we were absolutely correct that EE(12)
23 does not permit the Department of Edu - - -

24 JUDGE RIVERA: Did you seek clarification from
25 the Commissioner?



1 MR. HOLLEY: Not until we brought the appeal from
2 the decision by the DOE to say unless you sign this
3 contract we're not going to give you any money.

4 JUDGE RIVERA: Did you ask the department - - -
5 the City Department of Education to then make clear that it
6 was rejecting including you if you didn't abide by the
7 terms since that was the position of Success so that you
8 could seek independently to get a grant from the state?

9 MR. HOLLEY: That did not happen, Your Honor,
10 because we were exhausting administrative remedies to try
11 to get EE(12) enforced by its terms.

12 JUDGE WILSON: Had you received a draft of the
13 contract before you submitted your bid to the city?

14 MR. HOLLEY: I don't believe so, Your Honor. I
15 think those contracts came in several months after that
16 happened.

17 JUDGE FAHEY: Well, can I ask a little more basic
18 question here? Charter schools, they normally apply for
19 grants from all over the place, don't they? And my
20 experience in Buffalo is they'll - - - they'll apply for
21 grants in various local foundations to do various programs.
22 It's common. Would you agree with that?

23 MR. HOLLEY: Well, yes, but their principal
24 source of funding in the K through 12 - - -

25 JUDGE FAHEY: No, that - - - I understand that.



1 But it is common that they apply in the same way that a
2 not-for-profit would apply for various grants from various
3 foundations?

4 MR. HOLLEY: To supplement the money that they
5 get as public schools.

6 JUDGE FAHEY: Right, you don't have to qualify,
7 and I'm not trying - - - trying to trick you.

8 MR. HOLLEY: Yeah.

9 JUDGE FAHEY: I just want to know if it's done.
10 If you would agree that it's done.

11 MR. HOLLEY: It - - - it is done that some
12 charter schools do seek funding in addition to the funding
13 - - -

14 JUDGE FAHEY: So - - - so I say to myself when I
15 look at this if - - - if the school was applying to a grant
16 from the Ford Foundation and the Ford Foundation says yes,
17 you've been accepted for the grant. Here is the contract
18 and these are the terms of the gran - - - now this is
19 outside your statutory freedoms that are outlined for K
20 through 12. So I see those as separate and clearly set
21 out. Why wouldn't this be the same as any other grant that
22 you're applying for for any national foundation or any
23 other one?

24 MR. HOLLEY: Because in those circumstances, Your
25 Honor, there isn't a state law that says in absolutely



1 clear terms - - - I mean I hear all these arguments about
2 how there's some inherent - - - somewhere in the penumbra
3 of this law there is some principle that says that all
4 these other people get to regulate Pre-K classes provided
5 by charter schools, but that's not what the law says. The
6 law says, "All such monitoring programmatic review and
7 operational requirements under this section," i.e.,
8 everything that's coming before except for that little
9 piece in (10) which talks about inspections, "shall be the
10 responsibility of the charter entity."

11 JUDGE RIVERA: See, that's my difficulty and
12 that's what I was asking before to - - - to the
13 Commissioner's representative. The statute is written as
14 the providers don't get to self-monitor. It's the state
15 and the district. They don't get to self-monitor. So now
16 you have a paragraph that's making exceptions for charter
17 schools that could not otherwise participate and saying you
18 get to be eligible to participate - - -

19 MR. HOLLEY: Correct.

20 JUDGE RIVERA: - - - and we're going to let you
21 do monitoring. But that's my point if it really meant the
22 default which is the providers don't monitor it's the state
23 and city that monitor - - - obviously, providers are
24 monitoring. Don't get me wrong. I understand that they
25 are trying to ensure that they comply. But that there is



1 oversight by a governmental entity. But then (12) is
2 saying that monitoring programmatic review and operational
3 requirements are your responsibility because otherwise, you
4 have no responsibility. I don't see how that means that
5 the Commissioner has acted in a way that's contrary to the
6 law or undermines the legislature when it says the way to
7 interpret the entire statute and this entire program is
8 that it's shared monitoring.

9 MR. HOLLEY: Your Honor - - -

10 JUDGE RIVERA: Because you have no - - - the
11 provider has no monitoring otherwise.

12 MR. HOLLEY: No, no. Your Honor, I - - - I just
13 want to make sure that you and I are on the same page when
14 you use the word - - -

15 JUDGE RIVERA: Yes, and I may be misunderstanding
16 it.

17 MR. HOLLEY: No, no, and I - - - because to me -
18 - -

19 JUDGE RIVERA: That's why I'm asking all of you
20 to help me with that.

21 MR. HOLLEY: To me the provider in this case - -
22 -

23 JUDGE RIVERA: Yes.

24 MR. HOLLEY: - - - in your parlance is Success
25 Academy. And - - -



1 JUDGE RIVERA: Yes, sure.

2 MR. HOLLEY: - - - is it - - -

3 JUDGE RIVERA: It's the day-to-day working with
4 the kids.

5 MR. HOLLEY: Right. And it is - - -

6 JUDGE RIVERA: Yes.

7 MR. HOLLEY: - - - not our position that Success
8 Academy is not subject to any oversight by anyone. It is
9 our position that this statute very clearly says that all
10 monitoring programmatic review and operational requirements
11 are the obligation of the State University of New York as
12 the charter entity for Success Academy.

13 JUDGE RIVERA: Right, but my - - - my question
14 was why does that mean that it can't be - - - why is the
15 Commissioner wrong looking at the entire statute and that
16 the default is that the providers are not self-monitoring
17 in the truest sense to say it's - - - it's shared
18 oversight. It's shared.

19 MR. HOLLEY: Well, there is - - - there are cases
20 from this court, you know, and to be blunt that say all
21 means all, and when it - - - when you say - - - when the
22 legislature says "all such" the clear implication is that
23 they don't mean part or you share it with somebody else.
24 And the phrase "shall be the responsibility of the charter
25 entity" seems pretty clear. It doesn't say the charter



1 entity has some role.

2 JUDGE RIVERA: Yeah, I know. My - - - but my - -
3 -

4 MR. HOLLEY: It says shall be - - -

5 JUDGE RIVERA: - - - problem is that it really -
6 - - if it really meant what you say it means it would have
7 been is solely responsible for and then you would have
8 listed these three categories, and that's my problem. I'm
9 not sure that it equates.

10 MR. HOLLEY: Well, Judge - - -

11 JUDGE RIVERA: And that's what I was trying to
12 understand.

13 MR. HOLLEY: Judge Rivera, I think the next few
14 words are also important.

15 JUDGE RIVERA: Okay.

16 MR. HOLLEY: And it says, "and shall be
17 consistent with the requirements under Article 56 of this
18 chapter," which of course is the Charter School Act. And
19 so it's saying that in the same way that K through 12
20 classes offered by charter schools are principally - - -
21 they are, you know, regulated by charter entities, that's
22 also going to be true of Pre-K classes. And I think it may
23 have been Judge Garcia who asked this question, but what is
24 the logic of saying that you can teach five-year-olds
25 through eighteen-year-olds under one statutory scheme that



1 seems to work just fine but for four-year-olds, it's
2 entirely different.

3 JUDGE RIVERA: But that's the pedagogical - - -

4 JUDGE STEIN: Well, they say that's because
5 there's the charter. Yes.

6 JUDGE RIVERA: Yeah, it's the pedagogical choice
7 of the - - - of the - - - it's the pedagogical choice of
8 the legislature. It's not - - -

9 MR. HOLLEY: Well, but - - - well, okay, yes.
10 Except that I think they were absolutely clear here in
11 EE(12) what they were talking about. I mean the - - -

12 JUDGE RIVERA: You said - - - you said Success
13 and other charter schools do have oversight, that that - -
14 - that the representation - - - or if we understood this to
15 mean that there's no one monitoring or has oversight, that
16 that would be wrong. How does it otherwise work?

17 MR. HOLLEY: The - - -

18 JUDGE RIVERA: What's the oversight you were
19 thinking of?

20 MR. HOLLEY: The charter entities - - - the
21 chartering entities exercise oversight. There's nothing -
22 - -

23 JUDGE RIVERA: Oh, so you mean exactly what this
24 says? I'm sorry. I thought you meant that there's
25 something else, another layer.

1 MR. HOLLEY: No, no, I wasn't, Your Honor,
2 suggesting that - - -

3 JUDGE RIVERA: I misunderstood.

4 MR. HOLLEY: - - - there's yet another layer.

5 CHIEF JUDGE DIFIORE: Judge Garcia.

6 JUDGE GARCIA: If I may ask a question, yes. So
7 let's say you get a no from the school district,
8 hypothetical, and you go directly to the state, the state
9 approves you, and they give you money. And now the state
10 comes in and they inspect under that provision. Can they
11 do that?

12 MR. HOLLEY: I think they can, Your Honor.

13 JUDGE GARCIA: Okay. And then the state comes
14 back to you and says we don't think you have appropriate
15 family engagement or staffing patterns or one of these
16 criteria that's under the statute. They can deny you
17 funding the next year, right?

18 MR. HOLLEY: I believe that's their prerogative,
19 yes, Your Honor.

20 JUDGE GARCIA: That's it.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. HOLLEY: Thank you, Your Honor.

23 CHIEF JUDGE DIFIORE: Counsel.

24 MS. GUSTAFSON: Permission of your court I will
25 be going first on rebuttal.



1 CHIEF JUDGE DIFIORE: Certainly.

2 MS. GUSTAFSON: Followed by the state.

3 CHIEF JUDGE DIFIORE: Your choice.

4 MS. GUSTAFSON: Just very briefly to answer an
5 earlier question about is there - - - was there a sample
6 contract that DOE provided to Success and indicated that it
7 would be requiring something like this for providers to
8 sign? Absolutely. It's page 975 of the record. It's not
9 exactly the same as the one that was ultimately adopted.
10 However, it is very, very similar and has many similar
11 provisions. I want to start with (12) - - -

12 JUDGE GARCIA: I want to just go to Judge
13 Wilson's question. I'm really having some trouble
14 understanding how this grant worked. So 300 million is the
15 entire amount that's designated for New York City. Is that
16 - - - is that right?

17 MS. GUSTAFSON: That's correct.

18 JUDGE GARCIA: So if you say to a charter no,
19 we're not consolidating you into our application and the
20 charter goes directly to the state and they get - - - let's
21 just pick a number, a million dollars, right, that comes
22 out of that 300 million, right? Because that's the total
23 amount that's going to New York City, isn't it? So if it's
24 a - - - if it's a New York City charter and they go to you
25 and you say no, go make your own application, which you can



1 do, then they go and they get a million dollars, doesn't
2 that come out of your 300 million?

3 MS. GUSTAFSON: Frankly, Your Honor, I think that
4 that's ambiguous. I mean it's the 300 dollars that's - - -
5 it's an issue that hasn't been determined or presented just
6 because there aren't any such - - - such providers. But
7 the way the grant process worked is as - - - as Judge
8 Wilson was - - - was discussing earlier, it - - - it - - -
9 the school district, DOE, did actually have to still apply
10 for this money. I mean it still has to comply with the
11 requirements of the statute, and it made specific
12 assurances to the state. The state required it to sign
13 that it would monitor every single one of its providers,
14 that it would adopt quality standards and assure - - -

15 JUDGE RIVERA: So an independent provider that's
16 rejected by a district, if they then proceed on their own
17 are they competing across the state or just across - - - or
18 just with the city? Because it's a competitive process,
19 correct?

20 MS. GUSTAFSON: I think they would be competing
21 across the state because they would be applying directly to
22 the state and not to the school district to be a part of
23 its - - - its program.

24 JUDGE STEIN: And if we disagree with you - - -
25 well, wouldn't - - - wouldn't the state then have to remove



1 from its requirements of you, of the school district, that
2 you provide these assurances? In other words, if - - - if
3 you're not entitled to inspect or - - - or monitor
4 obviously you can't provide those assurances unless you're
5 going to take the word of another entity, maybe you can.
6 But that's something that - - - that the state will have to
7 - - -

8 MS. GUSTAFSON: I - - - I think that's right, but
9 it doesn't give DOE - - -

10 JUDGE STEIN: - - - going forward.

11 MS. GUSTAFSON: Oh, I'm sorry, Your Honor. But
12 it doesn't get DOE out of the statute which is that it can
13 only renew or accept providers that comply with statutory
14 quality requirements and other - - -

15 JUDGE WILSON: Back - - - back to Judge Garcia's
16 issue for a second. I noticed in the record the 300
17 million ended up getting reduced to 294 million. I also
18 believe that there's something in the statute that says if
19 the program is oversubscribed, then the state will make
20 proportional reductions in the amount that it gives to
21 everybody throughout the state. You may or may not know
22 the answer to this, but my assumption was that if there
23 were alternative providers that applied, were rejected by
24 the local district, and then made an application to the
25 state and that was approved and the thing was - - - that



1 would - - - that would count towards part of the over-
2 subscription and there would therefore be a proportional
3 reduction in everybody's monies? I don't know if you - - -

4 MS. GUSTAFSON: I have to admit that I don't have
5 that information, Your Honor, about whether that's the way
6 that it works. My understanding is that the - - - the
7 whole program is - - - is fully subscribed at this point.
8 I - - - but I would like to return to your point, Judge
9 Garcia, about the state's ability to require compliance
10 with these detailed quality standards because I was
11 confused by my opponent's answer here. If it is true that
12 the state itself could put these standards on charter
13 schools and then deny them funding if they don't meet - - -

14 JUDGE GARCIA: But that's authorized by - - -

15 MS. GUSTAFSON: - - - that in effect regulation,
16 Your Honor - - -

17 JUDGE GARCIA: - - - the statute. That's
18 authorized to me by the subject to the because this - - -
19 the programs under the statute have to meet these general
20 criteria. Which are listed in section (2). And if the
21 state is the grantor here, right, they're giving funds out
22 and they're doing it pursuant to this statute and they have
23 an inspection, right, it seems a reasonable reading to me
24 to say if you're not complying generally with one of these
25 things they can take that into consideration as the grantor

1 in giving you money the next year. That seems to me a fair
2 reading of this statute.

3 What doesn't seem to me to be a fair reading of
4 the statute, if they can delegate that authority to you and
5 then you could then impose curriculum - - - very specific
6 requirements on a charter school. I think that somehow is
7 back-dooring something that you're not allowed to do given
8 the - - - that seems to me also a fair reading of the
9 statute.

10 MS. GUSTAFSON: I'd like - - - if there are
11 multiple fair readings of the statute, that is there's an
12 ambiguity I think that is at most what Success has
13 highlighted here is an ambiguity in the statute. This
14 court regularly defers - - -

15 JUDGE GARCIA: But the statute refers - - -
16 carves out charter schools. I think there would be an
17 ambiguity if you didn't have that provision there would be
18 a very good argument. But the legislature made a specific
19 determination that they were going to be treated
20 differently and it was with respect to a specific area of
21 their authority. And I have a hard time reading the
22 inspection statute to allow that authority somehow to be
23 delegated down to a school district which has an option of
24 taking a charter school into an application to provide an
25 oversight that seems to me specifically excluded by the



1 statutes.

2 MS. GUSTAFSON: Well, I would love to focus on
3 subdivision (12) then because we all agree this is how it
4 works without (12), and I think for plaintiffs - - - for
5 petitioners to prevail here they need to prove that it is
6 crystal clear and not in conflict with the rest of the
7 statute and subdivision (12) is at best ambiguous. The - -
8 - it doesn't say sole or exclusive. It's not framed as an
9 exemption.

10 The legislature has the tools for framing an
11 exemption and very easily could have said, as Judge Rivera
12 pointed out earlier, sole authority to the charter entities
13 to the exclusion of any other entity. Could have said
14 that, didn't say that. All it said was all such monitoring
15 programmatic review and operational requirements shall be
16 the responsibility of the charter entity. That language by
17 plains - - - its plain terms does not preclude a role for
18 other entities.

19 Now I agree with Your Honor in isolation I think
20 that it's not entirely clear what that means. Is it
21 exclusive, is it concurrent? But in the context of this
22 statute, there is only one interpretation of that language
23 that makes sense, and that is the - - - is the
24 Commissioner's. The word "all" - - - we can agree it means
25 all. Sometimes it also has the additional meaning of



1 exclusive, and the question here is does it also have that
2 additional meaning. The statute doesn't actually say that.
3 That's not consistent with the rest of the - - - of the
4 law. Let me give an example, so let's say that the
5 legislature - - - and they've done this - - - decided the
6 statute - - -

7 JUDGE RIVERA: Well, can I ask you could it - - -
8 could it - - - the charter entity is SUNY, correct, in
9 (12)?

10 MS. GUSTAFSON: That's - - -

11 JUDGE RIVERA: Well, for these schools, I'm
12 sorry. For these schools, I'm sorry.

13 MS. GUSTAFSON: For the - - - yes, for these
14 petitioning charter schools, that's correct.

15 JUDGE RIVERA: So that could be to clarify that
16 it's not the individual charter school, that it's their
17 charter entity, that that would be part of why that
18 language would be there.

19 MS. GUSTAFSON: The all such - - -

20 JUDGE RIVERA: In terms of the monitoring - - -

21 MS. GUSTAFSON: Absolutely - - - absolutely, what
22 that - - -

23 JUDGE RIVERA: In terms of the whole sentence.
24 Everybody wants to look at one word. Let's look at the
25 whole sentence, shall we, for a moment?

1 MS. GUSTAFSON: I am sorry. I am not entirely
2 sure I'm understanding the question.

3 JUDGE RIVERA: No, well, I - - - I just found it
4 interesting that it says the charter entity, right, as
5 opposed to one could have said it's just the provider which
6 was my point before. The default here is the provider
7 doesn't - - - doesn't have these responsibilities. So this
8 provision is making - - -

9 MS. GUSTAFSON: Yes.

10 JUDGE RIVERA: - - - it possible - - -

11 MS. GUSTAFSON: Yes, and in - - -

12 JUDGE RIVERA: - - - for the charter entity as
13 opposed to the provider.

14 MS. GUSTAFSON: Yes, and in the usual course
15 charter entities - - - I mean this - - - this language
16 needs to be there to give the - - - if the legislature is
17 going to put charter entities on the hook, which is what I
18 think the language does, it needs to be there because it
19 otherwise wouldn't be clear because charter authorized
20 otherwise supervised according to a charter which doesn't
21 apply in the Pre-K - - -

22 JUDGE RIVERA: Let me - - - your time is up if I
23 can just ask this one question of you. Is the - - - the
24 contract - - - just to be clear, the contract that the city
25 wanted Success to sign off on, was that shown to the



1 Commissioner as part of its original RFP to the - - - for
2 the Commissioner to say New York State, this is what we're
3 going to do and this is how we're going to do? This is
4 what we're going to require of them?

5 MS. GUSTAFSON: I'm not sure the original
6 contract was attached to the application.

7 JUDGE RIVERA: Or a sample contract?

8 MS. GUSTAFSON: I don't think any contract, but
9 DOE did include very specific details about what it would
10 monitor for quality, and it executed three pages of
11 assurance to the state that it would fulfill its statutory
12 obligation as the grantor. And if I may just finish with
13 Your Honor's permission on one sentence which is - - -

14 CHIEF JUDGE DIFIORE: Thirty seconds, go.

15 MS. GUSTAFSON: - - - to the - - - thank you very
16 much. To the extent that there is any ambiguity in the
17 statute, I would encourage this court as it has often done
18 before to defer to the expert interpretation of the
19 Education Commissioner. She's been administering the UPK
20 program for twenty years. She has expertise in educational
21 policy, and she knows what mechanisms are required to carry
22 out the statutory scheme that was adopted by the
23 legislature here.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MS. GUSTAFSON: Thank you very much.



1 CHIEF JUDGE DIFIORE: Counsel.

2 JUDGE STEIN: Could I - - - could I start where
3 she just left off? What - - - how - - - what is the
4 expertise of the State Department in - - - in applying Pre-
5 K programs to charter schools?

6 MS. CHAUDHRY: The expertise of the Commissioner?

7 JUDGE STEIN: Yes.

8 MS. CHAUDHRY: I'm sorry. Yes. The Commissioner
9 has been operating the universal Pre-K program, the
10 original framework of which goes back twenty years - - -

11 JUDGE STEIN: Yes, but never - - - never in
12 connection with charter schools, right? And charter
13 schools have a different scheme to them.

14 MS. CHAUDHRY: That's correct, Your Honor, but it
15 also can be looked at the other way which is that charter
16 schools have no experience with Pre-K and - - -

17 JUDGE STEIN: Well, but that's not - - -

18 MR. HOLLEY: - - - they have never offered that.

19 JUDGE STEIN: - - - the point. The point is is
20 that aren't we just dealing with a straight interpretation
21 of statutory language and what the legislature intended?
22 And I - - - I just - - - I don't see why deference - - -

23 MS. CHAUDHRY: Well, I understand that. I'm not
24 trying to rely on deference.

25 JUDGE STEIN: Okay.



1 MS. CHAUDHRY: Our position is with or without
2 deference the Commissioner's reading is the most reasonable
3 and Pre-K is different. Judge, as you mentioned, they do
4 not have objective standards. The Commissioner is not
5 allowed to give standardized testing in personal knowledge,
6 and if I could just make two brief points before
7 concluding. One, I just wanted to get back to the
8 enforcement mechanism, if the charter entity is the only
9 supervising authority, the only recourse they have is to
10 what enforcement mechanisms exists in Article 56 which is
11 only revocation and termination of the charter of the
12 entirety of the school, K through 12 included. They cannot
13 just do something about Pre-K, and that is just too severe
14 to be an effective remedy. And it would be implausible
15 that the legislature would have wanted a program - - -

16 JUDGE STEIN: Why can't the remedy be that it's
17 reported to the Commissioner and the Commissioner says
18 you're not getting any more money?

19 MS. CHAUDHRY: Well - - -

20 JUDGE STEIN: Why isn't that an appropriate
21 remedy? It ends the program.

22 MS. CHAUDHRY: Well, the - - - the charter entity
23 is not required under the statute to report to the
24 Commissioner. But under their reading and under the - - -

25 JUDGE GARCIA: But if you had an inspection - - -



1 he just - - - I think your opponent just said the state can
2 come in and do an inspection, and if you feel the program
3 isn't meeting your standards you don't have to renew them.

4 MS. CHAUDHRY: Well, I was surprised to hear
5 that, Your Honor, because it's true they haven't squarely
6 made that argument, but that is the logical consequence of
7 the Appellate Division decision and their reading.

8 JUDGE GARCIA: Okay. But what if that's true?
9 Let's assume that what he says is accurate. So then what
10 is the problem as Judge Stein was asking you? What - - -
11 what is - - - it's that you control the funding, and if you
12 inspect them and you believe they're not doing one of those
13 eight enumerated things in the statute you say, you know,
14 next year, no. What's the harm here?

15 MS. CHAUDHRY: Your Honor, we haven't had that
16 situation where the school district has not been allowed to
17 do the comprehensive oversight that the legislative design
18 was intended for. I - - -

19 JUDGE GARCIA: But there's a design that says the
20 charter can go directly to you if they don't include them,
21 so it's contemplated in the statute. It - - - even in fact
22 in the inspection provision it says the district if
23 applicable contemplating the district won't even be there.
24 So if you are able to do that and we take this scenario as
25 accurate, what's the difference here then?



1 MS. CHAUDHRY: Well, Your Honor, under the way
2 the Commissioner has interpreted the program until now,
3 denial by a school district of a charter school's inclusion
4 in their program for purposes of for this reason that they
5 don't want to sign a contract that they feel is onerous,
6 that that has not been considered a denial.

7 JUDGE GARCIA: But that's a different lawsuit
8 maybe.

9 MS. CHAUDHRY: Yes.

10 JUDGE GARCIA: But - - -

11 MS. CHAUDHRY: The state wants the charter
12 schools to be a part of this program. Everybody does.

13 JUDGE RIVERA: I was going to - - - I was going
14 to ask, I would have thought the Commissioner would not
15 want to invoke a dramatic remedy where they're removing
16 since the whole point of is this is to have innovation - -
17 -

18 MS. CHAUDHRY: They don't. Exactly. We don't
19 want to remove charter schools.

20 JUDGE RIVERA: - - - creativity, you want to work
21 with them.

22 MS. CHAUDHRY: We don't want charters to be shut
23 down. We just want the quality requirements to be - - -

24 JUDGE GARCIA: But that's true for any entity,
25 any provider, and it's - - - that's the drastic remedy if



1 the parade of horribles comes true. But also, you have the
 2 authority to say if you don't fix this we won't renew you,
 3 right? So it's not yes or no. That's obviously your
 4 ultimate leverage over any provider, but you also have all
 5 these intermediary steps you can take because you are the
 6 grantor.

7 MS. CHAUDHRY: That's correct, Your Honor. I - -
 8 - I understand. But the problem is given the scale of
 9 these programs, a single district like the city has Pre-K
 10 happening at over 2,000 sites. It is simply not possible
 11 for the Commissioner to be going into every single provider
 12 and see what's happening. That's why the legislature
 13 designed this streamlined system. The districts take care
 14 of checking their providers, and the Commissioner comes in
 15 and sees what records they've accumulated and what is
 16 happening on a broader level.

17 JUDGE GARCIA: The problem I go back to that
 18 argument is two-fold. One, there is a charter entity
 19 inspection provision that Judge Stein has pointed out, but,
 20 two, the statute itself contemplates that the district
 21 won't be part of the inspection where there isn't a
 22 consolidated application. So for whatever reason, if there
 23 is a direct application made to you, appropriately, then
 24 you are doing that.

25 MS. CHAUDHRY: That's correct. The state would



1 be doing that.

2 JUDGE GARCIA: You won't have a school district
3 so that - - -

4 MS. CHAUDHRY: The state would be doing that.

5 JUDGE GARCIA: - - - would be this case.

6 MS. CHAUDHRY: Yes, except under the way the
7 petitioners have argued it and the way the Appellate
8 Division's decision reads exclusive either means exclusive
9 or it doesn't. And under their decision, the state's
10 authority at - - - to go in is in question.

11 JUDGE RIVERA: May I ask for a provider who has
12 been rejected by a district and is going out on their own,
13 is that one of the factors the Commissioner would consider
14 in deciding whether or not to grant, the fact that they
15 would be working independently as opposed to under the
16 auspices - - - or in a - - - in a partnership with the
17 district, or is that not a factor?

18 MS. CHAUDHRY: It's not a factor in evaluating
19 the appropriateness - - -

20 JUDGE RIVERA: Okay.

21 MS. CHAUDHRY: - - - of the program they've
22 proposed, but it is to - - - you know, the Commissioner
23 needs evidence that they have submitted an application and
24 have been previously denied, as that's the statutory
25 requirement.



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JUDGE RIVERA: Okay.

MS. CHAUDHRY: And, you know, only the Commissioner's instruction ensures the appropriate accountability in the manner designed by the legislature, harmonizes every single provision of the statute, and advances the purpose of the legislature which is not only for innovative Pre-K and high-quality Pre-K, but Pre-K that is connected and coordinated and accountable across the board. We urge the court to reverse.

CHIEF JUDGE DIFIORE: Thank you, Ms. Chaudhry.

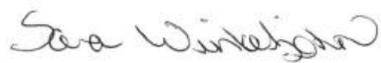
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of DeVera v. Elia, No. 115 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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