Matter of De Vera v Elia
2016 NY Slip Op 31638(U)
June 8, 2016
Supreme Court, Albany County
Docket Number: 1014-16
Judge: Raymond J. Elliott

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At a Special Term of the Albany County Supreme Court, held in and for the County of Albany, in the City of Albany, New York, on the 8th day of June, 2016.

PRESENT: HON. RAYMOND J. ELLIOTT, III
JUSTICE

#1014-16

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

ELAINE DE VERA, individually and on behalf of her son, M.F., Susana Taveras, individually and on behalf of her son, K.R.R., Jesus Hernandez, individually and on behalf of his daughter, L.N.H., Tsuri Benhorin, individually and on behalf of his son, L.B., Slawomir Brzozowski, individually and on behalf of his son G.B., Pierre Delsoin, individually and on behalf of his daughter, E.C.D. P., Said Dib, individually and on behalf of his son, S.R.D., Fatoumata Haidara, individually and on behalf of her daughter, A.H., Alimatou Kaba, individually and on behalf of her daughter T.C., Ebony Langhorne, individually and on behalf of her son, M.C., Joseph Luders, individually and on behalf of his daughter, R.L., Jackie Martineau-Ngoyi, individually and on behalf of her daughter, L.A.T., Ana Minaya, individually and on behalf of her daughter, A.W., Beverly Persad, individually and on behalf of her daughter, R.P., Lovely Pierce, individually and on behalf of her son, N.P.,

Nicholson Pierre, individually and on behalf of his son, N.P., Sarah Polanco, individually and on behalf of her daughter, A.C., Milagros Rodriguez, individually and on behalf of her daughter, S.R., Nerita Sewell, individually and on behalf of her son, S.S., Michael Toney, individually and on behalf of his daughter, A.T., Richard Vargas, individually and on behalf of his son, D.B.V., Jamie Viera, individually and on behalf of her daughter, R.V., Nicole Wilson, individually and on behalf of her daughter, A.D., Rhodesha Wise, individually and on behalf of her son, A.C., and Success Academy Charter Schools-NYC on behalf of Success Academy Charter School-Harlem 1, Success Academy Charter School-Cobble Hill, and Success Academy Charter School-Williamsburg,

Petitioners,

DECISION AND ORDER
INDEX NO. 1014-16

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

-against-

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

Respondents.

APPEARANCES: STEVEN L. HOLLEY, ESQ.
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RAYMOND J. ELLIOTT, III J.S.C.

In this CPLR Article 78 proceeding, the Petitioners seek a judgment: annulling the Commissioner's decision dated February 26, 2016; ordering the Commissioner to immediately require the New York City Department of Education (hereinafter "DOE") and the Board of Education of the School District of the City of New York (hereinafter "BOE") to remit payment to Success Academy for its Pre-K classes, as required by New York Education Law §3602-ee; ordering the Commissioner to invalidate the contract that Respondents BOE and DOE are seeking to impose on Success Academy in violation of New York Education Law §3602-ee.

Respondents have all filed verified answers and oppose the Petition.

In 2014, the New York State Legislature enacted Education Law §3602-ee entitled Statewide Universal full-day Pre-Kindergarten Program. Education Law §3602-ee(1) states "The purpose of the universal full-day pre-kindergarten program is to incentivize and fund state-of-the-art innovative pre-kindergarten programs and to encourage program creativity through competition."

The Legislature appropriated $340 million dollars for the universal pre-k programs, with $300 million allocated to the New York City region and $40 million to the rest of the State.

Education Law §3602-ee(12) indicates that "Notwithstanding paragraph (a) of subdivision one of section twenty-eight hundred fifty-four of this chapter and paragraph (c) of

subdivision two of section twenty-eight hundred fifty-four of this chapter, charter schools shall be eligible to participate in universal full-day pre-kindergarten programs under this section, provided that all such monitoring, programmatic review and operational requirements under this section shall be the responsibility of the charter entity and shall be consistent with the requirements under article fifty-six of this chapter."

On May 31, 2014, the New York State Department of Education released an Announcement of Funding Opportunity for the universal Pre-K programs and included its own Request for Proposals setting forth the requirements that the proposals demonstrate.

On December 3, 2014, the DOE released its own Request for Proposals directed to charter schools interested in providing universal Pre-K programs for the 2015-2016 school year. The DOE's Request for Proposals indicated that program awards were subject to timely completion of contract negotiations between the DOE and the eligible provider. The Request for Proposals also included language that stated that "no payments will be made by the DOE until the contract is registered with the NYC Comptroller's Office and provided a sample contract for review.

On January 12, 2015, Success Academy submitted its application to the DOE to provide two Pre-K classes at SA Harlem 1, and one Pre-K class at both SA Cobble Hill and SA Williamsburg. On March 10, 2015, Success Academy received a letter from the DOE that Success Academy had been "determined to be conditionally eligible for award" and "subject to timely completion of contract negotiation and timely submission of contract documents". In late April, 2015, the DOE approved Success Academy's final budget for providing Pre-K classes, and Success Academy held admission lotteries to fill their Pre-K classes.

On either July 23, 2015, or August 4, 2015[1], the DOE sent Success Academy three versions of its "Full-Day Universal Pre-Kindergarten (UPK) Contract for Charters 2015-2016", one each for SA Harlem 1, SA Cobble Hill and SA Williamsburg.

On August 24, 2015, Success Academy began their Pre-K classes.

On August 27, 2015, DOE emailed Success Academy congratulating them on their Pre-K class openings and indicated that until the contracts were executed, Success Academy was operating the Pre-K programs at their own risk.

On October 2, 2015, Success Academy notified the DOE that it would not sign the Pre-K Contracts and inquired whether the DOE was willing to amend the Pre-K contracts to remove certain provisions Success Academy believed exceeded the DOE's authority under the law.

On October 7, 2015, SA Harlem 1, SA Cobble Hill and SA Williamsburg each submitted invoices to DOE for their Pre-K classes, detailing the number of students enrolled and the amount of funding due from DOE. The invoices had a due date of October 21, 2015.

By letter dated October 15, 2015, DOE informed Success Academy that it would receive no funding for its Pre-K classes unless and until it signed the Pre-K contracts and the contracts were registered with the New York City Comptroller's office. The letter further notes that Success Academy was the only charter school Pre-K provider who had not yet signed a contract.

To date, Success Academy has received no funding from DOE for the Pre-K classes it is providing.

Success Academy and 25 parent petitioners instituted a proceeding appealing to the

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[1]Counsel for the parties differ on which date the proposed contracts were provided.

Commissioner pursuant to Education Law §310 challenging DOE's determination requiring execution of a contract as a condition of funding for Pre-K programs and to direct the DOE to fund Success Academy's Pre-K classes.

On February 26, 2016, the Commissioner issued Decision No. 16882 sustaining DOE's action, in part, and held that it was appropriate for the DOE to condition funding for Pre-K programs on Success Academy's execution and acceptance of the DOE's contract.

The Commissioner did find two provisions in the contract illegal. Those provisions in conflict with Education Law §2854(1)(c) regarding the authority of the State Comptroller to conduct fiscal audits of charter schools located in New York City and Article 38 of the proposed contract regarding the prevailing wage provision. These two provisions are not at issue in this proceeding.

Petitioners argue that the February 26, 2016, decision of the Commissioner was erroneous as a matter of law and is arbitrary, capricious and/or an abuse of discretion. Petitioners cite four basic reasons as to why the Commissioner's decision cannot stand.

Petitioners asserts that the decision ignores Education Law §3602-ee(12) which reserved to a charter school's "charter entity" all "monitoring, programmatic review and operational requirements" of Pre-K classes operated by the charter school. Petitioners state that Success Academy's charter entity is the board of trustees of the state university of New York (hereinafter "SUNY"), not the DOE, and that the decision disregards subsection 12 and renders it meaningless. Petitioners assert that the decision provides for co-extensive regulation of charter schools by both SUNY and the DOE and makes them subject to duplicative and potentially inconsistent regulations inconsistent with subsection 12.

Petitioners state that the Commissioner's decision was based on the idea that if the Statewide Universal Pre-K Law does not authorize DOE to regulate Pre-K classes provided by charter schools then the classes would be unregulated. Petitioners argue this is incorrect as subsection 12 provides for oversight by the charter school's charter entity.

Petitioners assert that the Commissioner's interpretation of the term "inspect" in Education Law §3602-ee(10) is overly broad and inconsistent with the other provision in the Education Law §3602-ee, and does not mean that the local school district should impose regulations on the charter schools.

Petitioners argue that the Commissioner improperly concluded that Education Law §3602-e(5)(d) which permits school districts to enter contracts or other arrangements with providers of Pre-K classes, authorized the DOE to condition funding to Success Academy on a lengthy contract that imposes pervasive regulations on it's Pre-K classes. Petitioner argues that subsection 5(d) does not say what such a contract should contain, and it cannot trump subsection 12, which gives oversight to the charter school's charter entity. Petitioners state that reliance on Section 328 of the New York City Charter is misplaced, as it does not authorize DOE to use such contracts, and the New York City Charter does not trump New York State Law.

Petitioners argue in support of their Petition that the Commissioner's finding that the DOE can pervasively regulate Success Academy's Pre-K classes is inconsistent with the basic concepts underlying the Charter Schools Act found in Article 56 of the Education Law. Petitioners state that the purpose of charter schools is to provide education to students independent of oversight by local school districts. Petitioners assert that to ensure charter schools maintained their autonomy, the Legislature mandated that charter entities, rather than the

local school district, oversee charter schools. Petitioners state that forcing Success Academy to accede to pervasive regulation of its Pre-K classes by the DOE would undermine the purpose of the Charter Schools Act.

Petitioners state that the Commissioner's ruling that there is no limit on the DOE's ability to regulate Pre-K classes provided by charter schools ignores the plain language in Education Law §3602-ee(12) and renders the express carve out for charter schools meaningless. Petitioners assert that subsection 12 provides that oversight shall be the responsibility of the charter entity, not coextensive regulation by both the local school district and charter entity. Petitioners state that the Commissioner's interpretation of subsection 12 is not entitled to judicial deference as questions of statutory interpretation are the court's responsibility. Petitioners assert that subsection 12 is consistent with all other sections of the Education Law §3602-ee, and that charter entities will oversee charter school Pre-K classes just as they do for K-12 under the Charter Schools Act.

Petitioners argue that the Commissioner's broad reading of the term "inspect" in Education Law §3602-ee(10) is unsupportable. Petitioners refer to the phase "notwithstanding any provision of law to the contrary" and that it makes clear that the requirements of this provision trump any other provision in §3602-ee. Petitioners further state that the right of a local school district to conduct an inspection cannot be transformed into a right to impose regulations on a charter school providing Pre-K classes. Petitioners assert that the Commissioner's overbroad reading of "inspect" in subsection (10) contradicts the plain English meaning of the word, which the dictionary defines as "to examine officially". Petitioners cite *New York Charter School Ass'n v. DiNapoli*, 13 N.Y.3d 120 (2009), to demonstrate that the Court of Appeals has

held that terms cannot be read expansively to interfere with the ability of charter entities to oversee charter schools. Petitioners state that contrary to the Commissioner's position, subsection 10 and subsection 12 do not conflict with one another, as charter entities oversee charter schools with the exception of periodic inspections authorized by subsection 10.

Petitioners assert that the DOE cannot condition funding of Pre-K classes provided by Charter Schools on acceptance of a contract that imposes pervasive regulations on those charter schools. Petitioners argue that the fact that subsection 5(d) authorizes local school districts to enter into contracts with providers of Pre-K classes does not permit the use of such contracts to override subsection 12. Petitioners state that the DOE's Request for Proposals cannot countermand the plain language of subsection 12, which the Request for Proposals sought to do, by informing prospective Pre-K providers that they would be required to enter into a contract to receive payment for Pre-K classes. Petitioners argue that subsection 12 states that the charter entities oversee charter schools and that the DOE's Request for Proposals cannot change that fact or the terms of Education Law §3602-ee. Petitioners state that the Commissioner improperly found that section 328 of the New York City Charter justified the DOE's refusal to pay Success Academy for its Pre-K classes based on its refusal to sign the DOE's contract. Petitioners argue that Section 328 does not mandate an executed contract for all DOE funding or say anything about the terms of the contract, and a regulation promulgated by an administrative agency overriding a state statute. Petitioners further assert that it is irrelevant that Pre-K classes provided by charter schools are funded under Article 73 and not Article 56 of the Education Law. Petitioners state that the Commissioner's finding that the Legislature did not amend Article 56 to authorize charter schools to provide Pre-K classes and for funding for such programs is

irrelevant. Petitioners assert that the Commissioner failed to explain why the different funding mechanism for Pre-K classes in charter schools resulted in regulations of these classes by the DOE.

In support of the Petition, an Affidavit from Kris Cheung, Chief Operations Office of Success Academy Charter Schools has been provided. COO Cheung describes Success Academy's Pre-K program, admissions policy and lottery. COO Cheung explains the deadlines for placing orders with vendors for classrooms, renovations and hiring decisions that are all affected by this proceeding.

Additional Affidavits were provided by 21 parents of students who are currently Pre-Kindergarten students at Success Academy.

Respondent Commissioner Elia, (hereinafter "Commissioner") asserts that her February 26, 2016, decision was not arbitrary, capricious or affected by error of law. In that decision, the Commissioner determined that the DOE has the general right under Education Law §3602-e, §3602-ee and various other laws to require Success Academy to execute a contract as precondition to receipt of Pre-K funding. The Commissioner further decided that the specific terms of the proposed contract are consistent with Education Law §3602-ee.

The Commissioner asserts that the decision regarding the specific terms of the DOE's contract was proper. The Commissioner states that Petitioners' narrow construction creates irreconcilable ambiguities and absurdities within Education Law §3602-ee while the Commissioner's interpretation harmonizes the whole statute for a rational reading. The Commissioner asserts that lost in Petitioners' analysis of subdivision 12 is any consideration of how their self-serving construction harmonizes with the remaining portions of the statute. The

Commissioner states that Petitioners interpretation renders subdivisions 2, 3, 5, 6, 7 and 10 virtually meaningless and conflicts with Education Law §2853(2) and creates a statutory construction where charter schools voluntarily apply for Pre-K grants and enjoy grant funding without having to comply with any grant requirements. The Commissioner notes that Petitioners seek to read subdivision 12 as a mandate that charter schools are entirely free from codified programmatic oversight by the local school districts, as their sole oversight is done by their charter entity. The Commissioner asserts that the decision held that both the charter entity and the local school district are jointly responsible to ensure a charter school's compliance with the programmatic requirements.

The Commissioner argues that Petitioners' interpretation of subdivision 12 nullifies subdivisions 2, 3, 5 and 7. The Commissioner states that under subdivision 2, providers are required to demonstrate eight quality standards for their programs, subdivision 5 has the Education Department developing a scoring system to evaluate applications and subdivision 3 has annual renewals of Pre-K award slots by local school districts based on a program's ability to meet the quality standards and all applicable requirements. The Commissioner states that these subdivisions create a duty for the local school districts to the Education Department to ensure program compliance and to ensure the quality elements for renewal are met. The Commissioner states that without any ability to oversee the Pre-K providers, the annual renewals determinations would be meaningless.

The Commissioner asserts that a proper statutory construction must harmonize subdivision 12 with subdivisions 6 and 10 and Education Law §2853(2-a). The Commissioner argues that Petitioners interpretation creates stark inconsistencies within subdivisions 6 and 10

and Education Law §2853(2-a). The Commissioner notes that each of these three separate provisions expressly provide for programmatic oversight of Pre-K provider entities by the local school district. The Commissioner states subdivision 10 vests broad inspection power to the DOE over Success Academy's Pre-K programs and subdivision 6 provides for the Department's development of a quality assurance protocol for annual inspections of all Pre-K programs. Education Law §2853(2-a) provides that local school districts where the charter school is located have the right to visit, examine into and inspect the charter school to ensure that the school is compliant with all applicable laws, regulations and charter provisions.

The Commissioner argues that these separate provisions demonstrate clear legislative intent towards inclusive oversight of charter school Pre-K providers by the Education Department and the local school districts. The Commissioner asserts that the decision which gives meaning and effect to all provisions of the statute presents as the more reasonable construction. The Commissioner argues that Petitioners isolated construction of subdivision 12 constitutes a non-contextual reading of the law, fails to harmonize the internal ambiguity within the act's sub-parts and creates an absurd reading of the law. The Commissioner asserts that the decision harmonizes all ambiguities between the sub-parts and Article 56 and construes the parts of the Act together in order to invoke the legislative intent. The Commissioner argues that Petitioners have failed to demonstrate that this was unreasonable or inconsistent with law.

The Commissioner states that the decision rejecting Petitioners' Article 56 exemption argument was rational. The Commissioner states that Petitioners contend that Education Law §2854(1)(b) exempts charter schools from all other state and local laws, rules, regulations or policies governing public and private schools, including Education Law §3602-ee, which must be

interpreted in this same manner to preserve charter school autonomy in the Pre-K context. In the decision, the Commissioner rejected Petitioners arguments on four grounds: that Petitioners' interpretation would create an absurd reading of Education Law §3602-ee that is contrary to public policy; Petitioners own acceptance of the Pre-K participation requirements and the Legislature's silence on charter school exemption from the requirements undercuts Petitioners' contention; the Pre-K program is not a grade but a program and is outside the ambit of Article 56's provisions and Education Law §3602-ee(12)'s inclusion of certain specific provisions of Article 56 and not others belies inclusion of the Article in its entirety.

The Commissioner argues that each of these four grounds provided a rational basis for denying Petitioner's Education Law §2854(1)(b) argument and was founded on well-established cannons of statutory construction and precedent.

The Commissioner further asserts that the Decision to permit the DOE to require Success Academy to execute a contract as a condition of payment was proper and based on a rigorous analysis of both law and the facts underpinning the contract requirement. The Commissioner cited State Finance Law §112 noting that the State routinely requires grant recipients to execute contracts as part of the State procurement process. The Commissioner also noted that Education Law §3602-ee(7) expressly contemplates that an eligible provider must comply with the terms of Education Law §3602-e, specifically §3602-e(5)(6) which authorizes school districts to enter into any contract necessary to implement the district's pre-kindergarten plan. The Commissioner further found that Education Law §3602-ee(2)'s requirements of eight quality standards for initial program grant and annual renewal support the necessity of a contract.

The Commissioner asserts that in the decision she further conducted a factual review to determine the validity of DOE's contract. The Commissioner noted that the DOE's Request for Proposals contained a section describing that program awards were subject to timely completion of contract negotiations, provided a sample contract and stated that no payments would be made until the contract is registered with the NYC Comptroller's office. The Commissioner recognized that 277 other providers signed the DOE contract and that Success Academy was the only participating charter school provider that has not signed the contract.

Respondents DOE and BOE (hereinafter collectively "City Respondents") assert that the February 26, 2016, decision of the Commissioner which upheld the DOE's proposed contract is thorough, well reasoned and rational. City Respondents state the decision was based on both applicable statutory and regulatory schemes and the record before the Commissioner. City Respondents assert that Petitioners have not and cannot meet their burden to demonstrate that the decision was arbitrary, capricious or affected by error of law.

City Respondents state that the Commissioner's decision is entitled to substantial deference as she is the head of the state agency charged with administrating the statutory scheme at issue. City Respondents assert that the Commissioner's decision interpreted the statutory provisions at issue and utilized and correctly applied the relevant principles of statutory construction. City Respondents state that the Court should defer to the Commissioner's decision and her interpretation of the statutes she is entrusted to administer.

City Respondents argue that the Commissioner correctly held that the DOE is required to inspect all Pre-K programs that have applied for inclusion in the DOE's state-approved

consolidated Universal Pre-K application and that authority is not abrogated merely because Success Academy is a charter school. City Respondents state that the Commissioner correctly held that Education Law §3602-ee(10) requires the DOE to inspect Success Academy's Pre-K programs and that the DOE's inspection authority is not abrogated by subdivision 12. City Respondents argue that Petitioners attempts to attack the Commissioner's interpretation of subdivisions 10 and 12 are without merit. City Respondents assert that the Commissioner recognized the distinction between the term inspect in subdivision 10 and the terms monitoring, programmatic review and operational requirements in subdivision 12 and acknowledged the roles of the charter entity and the DOE under the statute.

City Respondents argue that Petitioners attempts to narrowly circumscribe the DOE's inspection authority is without merit. City Respondent state that the *DiNapoli* case cited by Petitioners does not support their argument, as the New York State Constitution does not prohibit the DOE from inspecting Success Academy's Pre-K programs or impose other restrictions on what the DOE's inspection can include.

City Respondents argue that existing laws and regulations contradict Petitioners' positions with regard to Education Law §3602-ee. City Respondents state that the Commissioner's decision recognized Education Law §3602-e and subpart 151-1 of the Commissioner's Regulations and how they govern DOE's role in the provision of a Pre-K program and that charter schools have now merely been incorporated into and allowed to participate in an already existing framework of laws.

City Respondents assert that the provision of Article 56 do not support Petitioners'

position as Article 56 governs the operations of charter schools in authorized grades. City Respondents argue that if the Legislature intended to authorize charter schools to operate Pre-K programs wholly in the manner described in Article 56, it could have easily just amended Education Law §2854(2)(c), but the Legislature did not do so. City Respondents state the Legislature enacted Education Law §3602-ee separate and apart from the Charter Schools Act, which was recognized by the Commissioner, and reflects a clear distinction between grades charter school serve and Pre-K programs.

City Respondents argue that the State Education Department's grant application supports the Commissioner's decision and contradicts Petitioners' as the grant application demonstrates that the DOE has both authority and responsibility to inspect Pre-K programs operated by charter schools in order to ensure educational quality. City Respondents state that the Commissioner correctly determined that the DOE needs a mechanism to ensure educational quality in the programs included within its consolidated application. City Respondents argue that if DOE had no method to ensure Pre-K programs are meeting the requirements and providing quality education, it would simply be required to turn over public funding with no oversight.

City Respondents assert that the Commissioner correctly determined that the DOE has broad authority to inspect all Pre-K programs that have sought to be included in the DOE's state approved consolidated Universal Pre-K application, and the terms of the DOE's proposed Contract with Success Academy fall well within that authority and are reasonable. City Respondents argue that Petitioners have not and cannot demonstrate that the decision was irrational. City Respondents state that the Commissioner recognized under subdivisions 10 and 6 that the DOE's inspection authority is broad and that the inclusion of provisions related to the

detailed standards and requirements that the DOE is responsible for evaluating and inspecting in the DOE contract were appropriate. City Respondents provide a detailed analysis into how the individual provisions in the contract regarding: curriculum, playtime, activities, exercise, meals, specific time periods for play and screen time, teacher training, restrictions on ability to expel students and field trips, attendance and short breaks are all appropriate, as recognized by the Commissioner's decision. City Respondents explain how these provisions are all within the DOE's authority under the statute.

City Respondent further state that if the Court concludes that any provision of the DOE's proposed contract exceeds its authority, such a finding does not invalidate the entire proposed contract or any other contracts that the DOE has already entered into with other Pre-K providers.

In reply, Petitioners insist that the Commissioner's interpretation of subsection 12 is not entitled to judicial deference as this is a question of pure statutory interpretation and is for the Court to decide. Petitioners assert that Respondents argument that the only way to "harmonize" all the provisions of Education Law §3602-ee is to treat subsection12 as surplusage is without merit. Petitioners state that subsection 12 uses plain language and contains an explicit carve out for Pre-K classes provided by charter schools from oversight by local school districts. Petitioners state that based on the language in the statute, subsection 10 provides for coextensive oversight in contrast to subsection 12 which does not. Petitioners state that the Legislature preserved the autonomy of charter schools providing Pre-K classes through subsection 12. Petitioners further argue that neither subsection 10 or subsection 5(d) render subsection 12 a nullity.

Achievement First, Brooklyn Charter School, Coney Island Preparatory Public Charter School, New York City Charter School Center and TFOA Professional Preparatory Charter

School (hereinafter "Amici") were granted permission to file an *amicus curiae* brief in this proceeding.

Amici are New York City charter schools and charter school advocates who state that they stand with Petitioners in opposing the Commissioner's erroneous decision which, they argue, will infringe upon charter school autonomy.

Amici explain in their *amicus curiae* brief the importance of autonomy to New York public charter schools and that it is autonomy that allows these charter schools to thrive. Amici state the reasons why New York charter schools value the autonomy is that it allows them to develop innovative educational approaches that could be used by public schools to serve a wide variety of students, including high need and underserved students. Amici assert that the autonomy of charter schools is especially essential to Pre-K classes and programs and that the law was changed to allow charter schools to provide Pre-K classes. Amici assert that this proceeding will have a significant affect on the future of New York charter schools' Pre-K and autonomy.

The Respondents each filed responses in opposition to the amicus brief filed by Amici. Respondents collectively assert that the premise of the amicus brief is off base as the autonomy provisions in Article 56 of the Education Law, the Charter Schools Act, are irrelevant as it does not govern the Pre-K programs.

Respondent Commissioner points out that when the Legislature enacted Education Law §3602-ee, it created the Universal Pre-K program and chose not to amend §2854(2)(c) to include Pre-K under Article 56 of the Charter Schools Act. Respondent Commissioner states that by

excluding Pre-K from Article 56, the Legislature made clear its intent to distinguish Pre-K operations from the autonomy provisions of Article 56. Respondent Commissioner asserts that the decision is in line with the charter school autonomy provisions in Article 56 as charter schools are not completely autonomous because they are still subject to oversight by their charter entity and the school district where they are located.

City Respondents argue that the Amici's rely entirely on Article 56 and ignore the provisions in Education Law §3602-ee regarding the governing of the Universal Pre-K program. City Respondents assert that the Amici object to the DOE's proposed contract and how it seeks to regulate every facet of charter school Pre-K, but only offer general conclusory arguments. City Respondents further state that the Amici's beliefs as how they would prefer charter school Pre-K programs to function is irrelevant to the matter currently pending before the Court. City Respondents offer a supplemental Affidavit from Sophia Pappas, The Chief Executive Officer of the New York City Department of Education Division of Early Childhood Education. Ms. Pappas indicated the other than Success Academy, there are 277 privately operated Pre-K programs included in the DOE's consolidated universal Pre-K program for the 2015-2016 school year. Ms. Pappas states that all 277 Pre-K providers voluntarily signed a contract with DOE, and of the 277, 13 are operated by charter schools and all signed a contract.

CPLR §7803(3) allows for judicial review of administrative agency actions as to "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." The judicial standard of review of administrative determinations pursuant to CPLR Article 78 is whether the determination is

arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken "without sound basis in reason and . . . without regard to the facts." (*Matter of Pell v. Board of Education*, 34 NY 2d 222 [1974]). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis. (*Matter of Peckham v. Calogero,* 12 NY3d 424 [2009]). The reviewing court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law. (*Matter of Flacke v. Onondaga Landfill System*, 69 NY2d 355 [1987]; *Akpan v. Koch*, 75 NY2d 561 [1990]).

"When the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference." (*Matter of Flacke v. Onondaga Landfill System*, 69 NY2d at 363). Moreover, in order to maintain the limited nature of review, it is incumbent upon the court to defer to the agency's construction of statutes and regulations that it administers as long as that construction is not irrational or unreasonable. (*Albano v. Kirby,* 36 NY 2d 526 [1975]). The reviewing Court in a CPLR Article 78 proceeding will not substitute its judgment for factual evaluations within the agency's area of expertise unless it appears to be arbitrary, capricious or contrary to law. (*Matter of Catlin v. Sobol*, 77 NY2d 552 [1991]; *Matter of Gundrum v. Ambach*, 55 NY2d 872 [1982]).

The interpretation given to a regulation by the agency which promulgated it and is responsible for its administration is entitled to deference if that interpretation is not irrational or unreasonable. (*Matter of 427 W. 51 St. Owners Corp. v. Division of Hous. & Community Renewal*, 3 NY3d 337 [2004]). However, an agency's interpretation of a regulation is "not

entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court." (*Matter of Baker v. Town of Islip Zoning Bd. of Appeals*, 20 AD3d 522 [2nd Dept. 2005], *lv denied* 6 N.Y.3d 701 [2005]).

"Where the interpretation of a statute involves specialized 'knowledge and understanding of underlying operational practices or entails an evaluation of factual data and inferences to be drawn therefrom,' the courts should defer to the administrative agency's interpretation unless irrational or unreasonable" (*KSLM-Columbus Apts., Inc. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 5 N.Y.3d 303, 312 [2005] *quoting Kurcsics v. Merchants Mut. Inc. Co.*, 49 N.Y.2d 451, 459 [1980]). "By contrast, where the question is one of pure statutory interpretation 'dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency and its interpretive regulations are therefore to be accorded much less weight'" (*Id. quoting Kurcsics v. Merchants Mut. Inc. Co.*, at 459).

"Courts are constitutionally bound to give effect to the expressed will of the legislature and the plain and obvious meaning of a statute is always preferred to any curious, narrow or hidden sense that nothing but a strained interpretation of legislative intent would discern. It is an elementary principle of statutory construction that courts may only look behind the words of a statute when the law itself is doubtful or ambiguous. If the terms of a statute are plain and within the scope of legislative power, it declares itself and there is nothing left for interpretation. The remedy for a harsh law is not in strained interpretation by the judiciary, but rather its amendment or repeal by the legislature" (*Finger Lakes Racing Asso. v. New York State Racing & Wagering Board,* 45 N.Y.2d 471, 479-480 [1978]).

The Court has throughly reviewed the entire record before it including: the petition, exhibits, numerous affidavits, the Commissioner's decision dated February 26, 2016, affirmations, memorandums of law and heard oral argument from counsel[2].

The Court recognizes that this is a case of first impression regarding Education Law §3602-ee. The Court finds that the wording of the law is not ambiguous. The terms are plain and within the scope of legislative power, and there is nothing left for judicial interpretation. Based on this, the Court has no reason to look behind the words to the legislative intent.

After a review of the complete record, the Court finds that the February 26, 2016, decision of the Commissioner is rational and not arbitrary and capricious. The Commissioner's February 26, 2016, decision was clearly made after a thorough consideration of the facts and applicable statutes and resulted in the Commissioner reaching a well reasoned and logical conclusion. The decision was a complete analysis and application of the law and not irrational as it touched on and considered ever aspect and facet of Education Law §3602-ee.

Based on its reading of Education Law §3602-ee, it is obvious to this Court that Pre-K is being treated as a program and not a grade. The Legislature opted to distinguish between Pre-K and kindergarten through grade 12 for purposes of Article 56, and continues with that distinction in Education Law §3602-ee. Education Law §2854(2)(c) states "A charter school shall serve one or more of the grades one through twelve, and shall limit admission to pupils within the grade

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The Court notes that at oral argument Petitioners' counsel indicated that there was a pending motion to intervene before this Court. The Court has throughly reviewed the entire record and has no paperwork on a motion to intervene. Accordingly, the Court will not address this motion.

levels served. Nothing herein shall prohibit a charter school from establishing a kindergarten program." Education Law §2854(1)(a) provides "Notwithstanding any provision of law to the contrary, to the extent that any provision of this article is inconsistent with any other state or local law, rule or regulation, the provisions of this article shall govern and be controlling."

It is apparent that the Legislature realizes the important role charter schools play in the education system in the State of New York because of their autonomy and philosophies. The Legislature specifically chose to include subsection 12 to permit charter schools to operate Pre-K programs. The fact that the Legislature included subsection 12 rather than simply amend the Charter Schools Act found at Education Law Article 56, is a telling decision. Subsection 12 specifically states that charter schools can participate in Pre-K programs, allocates some limited authority to the charter entity and recognizes Article 56. However, subsection 12 does not invalidate or unauthorize the other provisions of Education Law §3602-ee.

The distinction in how the Pre-K program is funded under Article 73 through the apportionment of public moneys is also important. Pursuant to Education Law §2856, for kindergarten through 12 grade, charter schools are paid a basic tuition by the school district of residence for each student enrolled in the charter school who resides in the district.

The Legislature appropriated $340 million dollars for the universal Pre-K programs and, in order to ensure that this money was well-spent on quality programs, included specific requirements in Education Law §3602-ee to oversee the program. As the Pre-K programs are funded with public moneys, the Legislature set forth distinct provisions for: quality standards, developing a scoring system to evaluate applications, annual renewals of Pre-K award slots by local school districts based on a programs ability to meet the quality standards and all applicable

requirements, inspection protocols and inspections. These separate provisions demonstrate clear legislative intent towards inclusive oversight of charter school Pre-K providers by the Education Department and the local school districts, as well as the charter entity, pursuant to subsection 12. The DOE's requirement that Petitioners execute a contract is reasonable given that DOE is responsible to ensure that the public funds granted to it by the State for the Pre-K program are appropriately used.

As indicated by the City Respondents, Petitioners are the only charter school provider participating in the Pre-K program that has not signed the contract. The City Respondents state that of 277 providers, 13 are charter schools and all except for Petitioners, have executed the contract. The Court recognizes again that this is a voluntary program and that the RFP clearly spelled out that no payment would be made until an executed contract was registered with the New York City Comptroller's office and provided a copy of the proposed contract. Petitioners clearly knew the parameters of the program they were applying to participate in, yet once accepted, challenged those terms.

The Court finds that the Commissioner's decision was rational in concluding that the DOE's contract requirement as a precondition for funding was lawful.

The Court further finds that the terms of the contract are consistent with the language of Education Law §3602-ee and Article 56. Petitioners state that the purpose of charter schools is to provide education to students independent of oversight by local school districts. To ensure charter schools maintained their autonomy, the Legislature mandated that charter entities, rather than the local school district, oversee charter schools. Petitioners argue that the terms of the contract that seek to regulate every aspect of a charter school Pre-K program violate Education

Law §3602-ee(12) and Education Law §2854(1)(b). Subsection 12 specifically states that charter schools can participate in Pre-K programs, allocates some limited authority to the charter entity, and recognizes Article 56. Education Law §2854(1)(b) states "A charter school shall meet the same health and safety, civil rights, and student assessment requirements applicable to other public schools, except as otherwise specifically provided in this article. A charter school shall be exempt from all other state and local laws, rules, regulations or policies governing public or private schools, boards of education, school districts and political subdivisions, including those relating to school personnel and students, except as specifically provided in the school's charter or in this article. Nothing in this subdivision shall affect the requirements of compulsory education of minors established by part one of article sixty-five of this chapter."

The Court notes that Education Law §3602-ee(12) does not specifically state that Education Law §2854(1)(b) applies to that section. Subsection 12 states that two specific subsections of Education Law §2854 apply: (2)(b) and (3)(a-1), regarding admissions and limitations of employment of uncertified teachers. In addition, Article 56 only applies to students in kindergarten through grade 12, and Pre-K has been made a program not a grade by the Legislature, under Education Law §3602-ee. The Court finds that if the Legislature intended for Article 56 to apply in its entirety to Pre-K, it would have clearly stated this in Education Law §3602-ee or amended Education Law §2854.

Subsection 12 does not void or invalidate the other provisions of Education Law §3602-ee relating to oversight of the Pre-K programs. Subsection 12 does not state that the charter entity has exclusive oversight over charter school Pre-K programs. As previously indicated, since the Pre-K programs are funded with public moneys, the Legislature set forth distinct provisions in

the other subsection of Education Law §3602-ee for: quality standards, developing a scoring system to evaluate applications, annual renewals of Pre-K award slots by local school districts based on a programs ability to meet the quality standards and all applicable requirements, inspection protocols and inspections. These separate provisions demonstrate clear legislative intent towards joint inclusive oversight of charter school Pre-K providers by the Education Department and the local school districts, as well as the charter entity.

The Court appreciates Petitioners concerns that charter schools will lose the autonomy and the basic concepts that set them part as outlined in the Charter Schools Act found in Article 56 of the Education Law. However, Petitioners must recognize that under Education Law §3602-ee, Pre-K is an optional program that they have opted to participate in subject to the requirements outlined in the law. Petitioners further need to acknowledge that the Pre-K program, which is funded by public moneys, falls under a different statute with specific oversight requirements that differ from those found under Education Law §2854.

The Petitioners and City Respondents discussed at length specific terms of the contract and provided detailed analysis of individual provisions of the contract. The Court recognizes that the contract is a 38 page document with 54 Articles that cover a vast amount of issues. The Court further notes that Petitioners seek reimbursement from the DOE, from public funding, in the amount of at least $720,000.00. The Court has determined that according to Education Law §3602-ee, the DOE's inspection authority and regulation of Pre-K programs is broad. The inclusion of provisions related to the detailed standards and requirements that the DOE is responsible for evaluating and inspecting found in the DOE contract are appropriate

The Court finds that the Commissioner's decision regarding the specific terms of the

DOE contract was rational and not arbitrary or capricious.

Petitioners' remaining contentions, if any, have been considered and found to be without merit.

Accordingly, the Verified Petition is hereby dismissed.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment is being returned to the attorneys for the Respondent MaryEllen Elia, Commissioner of Education. All original supporting documentation is being filed with the Albany County Clerk's Office. The signing of this Decision, Order and Judgment shall not constitute entry or filing under CPLR 2220. Counsel are not relieved from the applicable provisions of that rule relating to filing, entry, and notice of entry.

SO ORDERED AND ADJUDGED.
ENTER.

Dated: June 8, 2016
Albany, New York

RAYMOND J. ELLIOTT, III
Supreme Court Justice

6-17-16 SB