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# Why Matter of Devera Matters: Universal Pre-K, Quality, Oversight, and the Need to Restore Public Values in New York Statutory Interpretation

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Natalie Gomez-Velez is a Professor of Law at the City University of New York (CUNY) School of Law. She is a graduate of New York University School of Law where she was an Arthur Garfield Hays Civil Rights/ Civil Liberties Fellow. Her recent work, "Universal Pre-Kindergarten: Supporting High Quality and Broad Access at a Time of Federal Disengagement and 'School Choice'" appears in the Oxford Handbook of U.S. Education Law and examines the growing popularity of universal pre-kindergarten as a public policy initiative despite challenges to its implementation in the face of government constraints. Professor Gomez-Velez is grateful to CUNY Law Review editors and staff, including Andreas Argeros, Audrey Juarez, Mira DeJong, Max Behrman, Natalie Baker, Victoria Pilger, Jennifer I. Lopez, for their helpful edits, suggestions, and hard work on this article. The author is also deeply grateful to Roberto Velez for his review of early drafts and his steadfast support during the writing process. Any errors or omissions are the author's own. Professor Gomez-Velez dedicates this article posthumously to Maria D. Gomez, a phenomenal woman and pre-k and kindergarten teacher and to former Chief Judge Judith S. Kaye, a phenomenal woman and jurist.

# WHY MATTER OF DEVERA MATTERS: UNIVERSAL PRE-K, QUALITY, OVERSIGHT, AND THE NEED TO RESTORE PUBLIC VALUES IN NEW YORK STATUTORY INTERPRETATION

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## INTRODUCTION

Publicly supported universal pre-kindergarten ("UPK") is an important current education policy initiative, promising to improve equitable access to high-quality early education. New York State has long supported early education. In 1997, the New York State Legislature passed a UPK law designed to help bring pre-kindergarten ("pre-K") education to all four-year-olds in the state.[1] A lack of adequate funding, however, stymied the ability to serve even half of eligible four-year-olds, particularly those in lower income groups and in New York City.[2] In 2013, New York City mayoral candidate Bill de Blasio made UPK an education priority, announcing a plan to make high-quality UPK available to all four-year-olds and then implementing that plan as mayor.[3] This commitment to high-quality UPK was bolstered by a 2014 amendment to New York State's UPK law, providing more funding and requiring research-based quality standards and robust oversight.[4] For UPK to fulfill its promise to improve educational attainment and close opportunity gaps, extensive research shows that high-quality, meaningful oversight is essential.[5] Achieving such quality goals is challenging when multiple providers are needed to bring programs to scale, and it has proven particularly challenging in an education policy environment favoring privatization, de-regulation, and school choice.[6] New York's Charter Schools Act, passed in

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[1] N.Y. EDUC. LAW § 3602-e (McKinney 2019).

[2] *See* N.Y. STATE SENATE MAJORITY COAL. FIN. COMM., FINANCE COMMITTEE / COUNSEL STAFF ANALYSIS OF FY 2015 EXECUTIVE BUDGET 169-70 (2015), https://perma.cc/9A7K-QMRK; Press Release, Former N.Y. State Senator Jeffrey D. Klein, Senate Co-Leader Jeff Klein and Senator Diane Savino Urge State to Approve Mayor de Blasio's Universal Pre-K Plan (Jan. 5, 2014), https://perma.cc/J7W4-9DF2.

[3] Rebecca Mead, *The Lessons of Mayor Bill de Blasio's Universal Pre-K Initiative*, NEW YORKER (Sept. 7, 2017), https://perma.cc/TX6S-RMMQ.

[4] *See* N.Y. EDUC. LAW § 3602-ee (McKinney 2019).

[5] Natalie Gomez-Velez, *Can Universal Pre-K Overcome Extreme Race and Income Segregation to Reach New York's Neediest Children? The Importance of Legal Infrastructure and the Limits of the Law*, 63 CLEV. ST. L. REV. 319 (2015).

[6] Mike Stivers, *The Promise of Universal Pre-K*, JACOBIN (Sept. 8, 2016), https://perma.cc/SR3S-FMBV.

1998, permits approved charter schools to provide kindergarten through grade 12 instruction under the terms of their charters with very little regulation.[7] The 2014 UPK law authorizes school districts to obtain state grants to provide pre-K programming, working with both public schools and a variety of partners including non-profit organizations, community-based organizations, private schools, and charter schools.[8] Assuring high-quality and broad access to UPK in New York—as the 2014 legislation intended by engaging a range of providers, including charter schools—is difficult as a policy and practical matter.

In *Matter of DeVera v. Elia*, a majority of the New York State Court of Appeals compounded the policy and practical difficulties. Rejecting the state and city education departments' interpretations harmonizing New York State's UPK and Charter School Laws, it decided that charter schools are exempt from the New York UPK law's robust quality and oversight standards.[9] The decision is based on an oversimplified and blinkered reading of a single provision of the UPK law, privileging charter school autonomy over UPK quality measures. But *DeVera* is troubling not only because of its UPK policy implications. It may also represent an ill-advised departure from settled doctrines of statutory interpretation that call for interpreting statutory schemes as a whole, and for harmonizing apparently inconsistent provisions to most closely effectuate legislative intent. It also eschews the education agencies' experience and expertise in interpreting and implementing a complex statutory scheme that they are charged with administering, failing to give them due weight under New York canons of statutory interpretation. This, too, is misguided.

This Article will examine *DeVera* from key legal and policy perspectives. It will provide a brief description of UPK efforts in New York State and place them in a broader education policy landscape. That landscape includes recent UPK legal and policy developments, and the impact of privatization and school choice efforts on education quality and equity goals. It will then describe the events leading to Success Academy's challenge of UPK quality and oversight standards in *DeVera*, including the background, the case's development, and the Court of Appeals' determination and rationales. This Article will explore the legal bases for the decision, with a focus on the degree to which they depart from key canons of statutory interpretation, including the weight that should be accorded agency interpretations of complex statutory schemes within their areas of expertise. Finally, it will consider *DeVera*'s law and policy implications

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[7] N.Y. EDUC. LAW §§ 2850-2857 (McKinney 2019).

[8] *See* EDUC. § 3602-ee.

[9] Matter of DeVera v. Elia, 32 N.Y.3d 423, 431 (2018).

for efforts to impose standards and oversight on all UPK providers, standards that are designed to ensure equitable access to quality UPK education. This Article ultimately contends that the New York Court of Appeals in *DeVera* should have accepted the New York City and State education departments' interpretation harmonizing the UPK laws and the Charter Schools Act to conclude that *all* UPK providers, including charter schools, must meet the standards set forth in the 2014 UPK law. That interpretation most closely accords with legislative intent and with longstanding principles of statutory interpretation in New York. Thus, even without granting deference, the Court of Appeals should have held that UPK quality standards apply to all providers, including charter schools. Given the language of the UPK law, the manner in which it is distinct from the Charter Schools Act, the legislature's intent with respect to UPK, and the City and State education departments' experience and expertise in managing education programs including UPK, deference to the agencies' interpretation that would apply UPK standards to all schools, including charters, is most sound based on law and policy.

## I. NEW YORK STATE AND NEW YORK CITY'S UPK PROGRAM

New York City has received accolades for its implementation of UPK as a public policy priority.[10] New York City Mayor Bill de Blasio identified UPK as a key policy priority in his 2013 mayoral campaign.[11] In 2014, he implemented the first phase of the UPK program, adding 4,200 pre-kindergarten seats across the City.[12] The UPK program steadily expanded access to pre-kindergarten, enrolling approximately 70,000 students in 2019, up from 19,000 in 2013, with 94% of programs meeting quality standards.[13]

As observers have noted:

> The significance of New York's large-scale investment in pre-K for all can hardly be overstated. Studies have shown that children who have been enrolled in high-quality pre-K programs—in classrooms led by skilled and knowledgeable teachers who engage children in imaginative play and block building, and read to

[10] *See* Stivers, *supra* note 6.

[11] HALLEY POTTER, CENTURY FOUND., LESSONS FROM NEW YORK CITY'S UNIVERSAL PRE-K EXPANSION 1 (2015), https://perma.cc/7XKT-AG6E.

[12] Press Release, NYC Mayor Bill de Blasio, In First Wave of UPK Implementation, Mayor de Blasio Announces More than 4,200 New Full-Day Pre-K Seats Added to Public Schools (Apr. 2, 2014), https://perma.cc/RJT8-LY5D.

[13] Eliza Shapiro, *Bright Spot for N.Y.'s Struggling Schools: Pre-K*, N.Y. TIMES (Jan. 1, 2019), https://perma.cc/KBC5-SVP5.

> them and teach them songs—have long-term positive outcomes on their future academic and even post-academic lives.[14]

High-quality standards and robust oversight have been central to New York's UPK initiative, as was clearly articulated in New York State's 2014 UPK legislation.[15] Indeed, broad access to high-quality early education has long been a national education policy goal. Education research strongly establishes the importance of high-quality programming to achieve the important cognitive gains that are central to UPK's purpose.[16] This is why New York's quality standards are crucial to achieving the policy goals of improving educational attainment and leveling the playing field for all students.

### *A. New York's Universal Pre-Kindergarten Policy Initiatives in a Broader Education Policy Landscape*

New York's UPK initiatives are part of a decades-long effort by the federal government (and many state governments) to support early education as an anti-poverty strategy, and as a means to address significant educational and social inequities.[17] Publicly funded early education programs date back to the Great Society programs of the 1960s and the dawn of the federal Head Start program.[18] Over time, the anti-poverty rationales supporting Head Start and other early education initiatives gave way to rationales focused on the country's economic competitiveness, concerns about equitable opportunity, and, most recently, a focus on the cognitive benefits of early education.[19]

Broader education policy initiatives have also evolved over time. The notion of public education as a common good has been challenged as part of a broader assault on public institutions, regulation, and the administrative state that began in the 1980s under the Reagan administration and has continued to gain steam, threatening public education and other

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[14] Mead, *supra* note 3.

[15] *See* EDUC. § 3602-ee.

[16] *See* ALLISON H. FRIEDMAN-KRAUSS ET AL., NAT'L INST. FOR EARLY EDUC. RESEARCH, THE STATE OF PRESCHOOL 2018 (2019), https://perma.cc/KCP4-Y3GD.

[17] *See* Natalie Gomez-Velez, *Universal Pre-Kindergarten: Supporting High Quality and Broad Access at a Time of Federal Disengagement and "School Choice," in* THE OXFORD HANDBOOK OF U.S. EDUCATION LAW (Kristine L. Bowman ed., 2019), https://perma.cc/9Y8L-3AZY.

[18] *See* Maurice R. Dyson, *Promise Zones, Poverty, and the Future of Public Schools: Confronting the Challenges of Socioeconomic Integration & School Culture in High-Poverty Schools*, 2014 MICH. ST. L. REV. 711, 715 (2014).

[19] *See* ELIZABETH ROSE, THE PROMISE OF PRESCHOOL: FROM HEAD START TO UNIVERSAL PRE-KINDERGARTEN 16-17, 101-05, 131-35 (2010).

public institutions.[20] The 1983 report *A Nation at Risk* highlighted shortcomings in public education, declaring that "the educational foundations of our society are presently being eroded by a rising tide of mediocrity that threatens our very future as a Nation and a people."[21]

The report is widely credited with (and criticized for) sparking decades of education "reform."[22] Much of that reform focused on the establishment of rigorous standards and accountability measures.[23] Despite its laudable goals, the report yielded mixed outcomes: it negatively impacted the public's view of public education, eventually drew criticism for having "manufactured a crisis," and was pointed to as an "example of the ways political leaders at the time were misleading the nation about the quality of public schools."[24] For example, even though *A Nation at Risk* was couched in the language of excellence, equity, and civil rights, it was actually used to support misguided privatization and deregulatory efforts (including school vouchers, tuition tax credits, and school prayer).[25]

Based on a continuing narrative of failing public schools, the 1990s saw a ramp-up of test-driven standards and accountability reforms. The federal No Child Left Behind Act imposed a testing and accountability regime in what some characterized as an "effort to weaponize testing in an assault on public schools."[26] Despite well-intentioned statements about the goals of No Child Left Behind, which included closing achievement gaps, the law contributed to a disparaging narrative about public

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[20] *See generally*, Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 Harv. L. Rev. 1, 3 (2017) ("[R]esistance to administrative government reflects antigovernment themes that have been a consistent presence in national politics since President Reagan's election in 1980.").

[21] NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983), https://perma.cc/C4EP-X2TT.

[22] *See* Rosemary C. Salomone, *The Common School Before and After Brown: Democracy, Equality, and the Productivity Agenda*, 120 YALE L.J. 1454, 1477 (2011) ("Beyond the Reagan years of federal retreat, and through successive presidential administrations, *A Nation at Risk* continued to inspire a push for national standards and increased federalization of education policy.").

[23] *See* Natalie Gomez-Velez, *Public School Governance and Democracy: Does Public Participation Matter*, 53 VILL. L. REV. 297, 306 (2008).

[24] *See* Jennifer Park, *A Nation at Risk*, EDUC. WK. (Sep. 10, 2004), https://perma.cc/SBK6-YJQC (citing DAVID C. BERLINER & BRUCE J. BIDDLE, THE MANUFACTURED CRISIS: MYTHS, FRAUD, AND THE ATTACK ON AMERICA'S PUBLIC SCHOOLS (1995)).

[25] *See* Valerie Strauss, '*A Nation at Risk' Demanded Education Reform 35 Years Ago. Here's How It's Been Bungled Ever Since*, WASH. POST (Apr. 26, 2018, 6:00 AM), https://perma.cc/66Y5-GLPZ.

[26] *Id*.; *see also* Anya Kamenetz, *What 'A Nation at Risk' Got Wrong, and Right, About U.S. Schools*, NPR (Apr. 29, 2018, 6:00 AM), https://perma.cc/T5FH-ZXB8.

schools.[27] As with earlier attacks on public education, this rhetoric of "reform" was used by some to push an educational "choice" agenda favoring deregulated charter schools and voucher programs, shifting public dollars into the hands of private actors.[28] That agenda would gain further traction during the early 2000s under both the Bush II and Obama administrations.[29]

The Obama administration's education policy included an emphasis on common core standards; and as part of its stimulus package in response to the 2008 Great Recession, this policy offered federal "Race to the Top" dollars to catalyze state adoption of common core standards and to foster federal initiatives like support for early education (including pre-kindergarten).[30] This helped several states expand pre-kindergarten and other early education programs.[31] At the same time, continued negative rhetoric about public schools catalyzed the expansion of charter schools. Charter schools began as an idea grounded in the development of "laboratories of innovation"[32] that would provide creative approaches to public education.[33] The charter school movement has devolved, however, into a movement primarily aimed at deregulating schools funded with public dollars and having them "compete" with public schools for funding and for students.[34]

The combined impact on state education policy-making of the No Child Left Behind Act's punitive accountability measures and the Race to the Top program's significant monetary incentives was met with backlash.[35] Claims of "federal overreach" generated support for legislation

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[27] *See generally* Cassandra Jones Havard, *Funny Money: How Federal Education Funding Hurts Poor and Minority Students*, 19 TEMP. POL. & CIV. RTS. L. REV. 123, 136 (2009) ("Criticisms [of No Child Left Behind] have come from every affected constituency—state legislators, local and state school administrators, teachers and parents. The criticisms have concerned unilateralism, funding, accountability and pedagogy.").

[28] *See* Kevin S. Huffman, *Charter Schools, Equal Protection Litigation, and the New School Reform Movement*, 73 N.Y.U. L. REV. 1290, 1290-91 (1998).

[29] *See* Diane Ravitch, *The Education Reform Movement Has Failed America. We Need Common Sense Solutions That Work.*, TIME (Feb. 1, 2020), https://perma.cc/8TSB-HYE6.

[30] Claudio Sanchez & Cory Turner, *Obama's Impact on America's Schools*, NPR (Jan. 13, 2017, 6:38 AM), https://perma.cc/RYP5-QLYN; Gomez-Velez, *supra* note 5, at 327.

[31] *See* Sanchez & Turner, *supra* note 30.

[32] *See* Greg Richmond, *Collaborating, not Competing: Charter Schools as "Laboratories of Innovation,"* EDUC. POST (Sep. 17, 2014), https://perma.cc/4QJF-DLFE.

[33] *See* Richard D. Kahlenberg & Halley Potter, *Restoring Shanker's Vision for Charter Schools*, AM. EDUCATOR, Winter 2014-2015, at 4, 5-9, https://perma.cc/4V6X-NNZ4.

[34] *See* Samuel E. Abrams*, Exit, Voice, and Charter Schools,* 88 REV. JUR. U. P.R. 894*,* 908 (2019) ("Much as Desiderius Erasmus laid the egg Martin Luther hatched, Ray Budde, Albert Shanker, and like-minded advocates of reforming public education unwittingly established the foundation for a charter movement they would not recognize.").

[35] *See* Kimberly Jenkins Robinson, *Restructuring the Elementary and Secondary Education Act's Approach to Equity*, 103 MINN. L. REV. 915, 976, 986 (2018).

limiting the federal government's role in education policy-making.[36] In 2015, Congress passed, and President Obama signed, the Every Student Succeeds Act ("ESSA"),[37] limiting federal involvement and oversight of education policy-making.[38] This included limiting federal programs encouraging early education like pre-kindergarten.[39] Pre-kindergarten initiatives, therefore, came to depend more heavily on state structuring and support.

Several states have struggled to implement high quality UPK, and pre-kindergarten and early education programs and policies vary widely across U.S. states and localities. The National Institute for Early Education Research ("NIEER") at Rutgers University publishes an annual report entitled *State Preschool Yearbook* that details statistics and information about preschool enrollment, funding, quality, and access in all 50 states and the District of Columbia.[40] It is an excellent resource regarding the status of pre-kindergarten in the United States. According to the NIEER 2019 report, 44 states and the District of Columbia offered preschool during the 2018-2019 school year, enrolling almost 1.63 million children—approximately 1.38 million four-year-olds and 239,000 three-year-olds.[41] The report notes that while preschool enrollment continues to climb across the country, both enrollment and overall expenditures have slowed and in some cases regressed.[42] The report also documents wide variations in enrollment levels and per-pupil expenditures among states. For example, the District of Columbia provides pre-kindergarten access to 87% of four-year-olds and 71% of three-year-olds.[43] Florida, Vermont, and Oklahoma serve more than 70% of four-year-olds.[44] By contrast, 11 states enroll fewer than 10% of four-year-olds, and six states have no program.[45] Thus, pre-kindergarten access is far from universal across the states. Program quality also varies widely among the states. States like

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[36] *See* Brendan Pelsue, *When it Comes to Education, the Federal Government Is in Charge of . . . Um, What?*, HARV. ED. MAG., Fall 2017, https://perma.cc/G3DK-MVV7.

[37] Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

[38] Robinson, *supra* note 35*,* at 933-38.

[39] *See* Gomez-Velez, *supra* note 17.

[40] *See, e.g.*, ALLISON H. FRIEDMAN-KRAUSS ET AL., NAT'L INST. FOR EARLY EDUC. RESEARCH, THE STATE OF PRESCHOOL 2019: STATE PRESCHOOL YEARBOOK (2019), https://perma.cc/93ZH-K6B8.

[41] *Id*. at 10. The NIEER report includes state- and federally-funded pre-kindergarten, Head Start, and special education preschool programs. It also tracks both targeted and universal pre-kindergarten programs.

[42] *Id.* The report notes that from 2018-2019, 12 states decreased enrollment of three- and four-year-olds in state-funded preschool programs.

[43] *Id*. at 8.

[44] *Id.*

[45] *Id.* at 14.

Florida that provide broad access often struggle to provide high-quality programming.[46]

The 2019 NIEER report emphasizes the critical importance of program quality:

> A primary goal of state-funded preschool education is to support the learning and development of young children as a means of improving the quality of their lives now and in the future. Research finds that preschool programs can accomplish this goal, but that doing so at scale has proven difficult. Only high-quality preschool programs can be expected to produce large and lasting gains in outcomes such as achievement, educational attainment, personal and social behavior (e.g., reductions in crime), and adult health and economic productivity.[47]

This means that state and local quality standards and adequate resources are centrally important to the ability of pre-kindergarten programs to improve children's development.

Like many other states and localities, New York State and New York City have experienced a challenging tension between providing broad access to pre-kindergarten while ensuring consistently high-quality programs.[48] To accomplish these important dual goals, the City and State have, like many states and localities, engaged with a range of early childhood education providers including charter schools.

### 1. Interplay of UPK with Charter Schools and Recent Educational Policy Initiatives

The ascendance of the charter school movement across the country has created both opportunities and significant challenges with respect to achieving UPK goals of broad access and high-quality programming. While it is difficult to provide publicly funded pre-K programs that ensure high quality, equity, and universal access regardless of the provider, doing so in a deregulated, "school choice" environment has only amplified the challenge. Tensions among goals of equity, access, and quality have become sharper with the growth of various school choice and privatization initiatives, which tend to eschew public oversight and can exacerbate inequity. The picture is complicated and hotly contested.[49] While some

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[46] *See id.* at 73-74.

[47] *Id.* at 18.

[48] *See* Gomez-Velez, *supra* note 5, at 327-336.

[49] *See* Mandy McLaren, *New Charter Schools Debate: Are They Widening Racial Divides in Public Education?*, WASH. POST (May 16, 2017), https://perma.cc/E2C8-VWWW; Claudio Sanchez, *The Charter School vs. Public School Debate Continues*, NPR (July 16, 2013, 5:02 PM), https://perma.cc/8WNF-RUS7; Rachel Slade, *The Great Charter Schools Debat*e, BOS.

view "school choice" efforts as primarily allied with privatization and deregulation—and in conflict with the notion of public schools as serving the common good[50]—others view "choice" and public/private partnerships as offering opportunities for innovation, expansion, and quality improvement.[51] In the context of UPK expansion, tensions between these views tend to be heightened, as states and localities seeking to expand UPK access often must rely on a range of providers (including charter schools) to meet program needs.[52]

The standards used to measure quality, as well as the quality of education offered by charter schools, vary across the country. Some offer high-quality programs, as judged by test scores and disciplinary measures.[53] At the same time, "choice" models, including charter schools, tend to "exacerbate the segregation of students by race/ethnicity and the stratification of students by socioeconomic status."[54] Indeed, some scholars studying charter schools locally have found that "charters can currently choose their students, rather than families choosing their schools—in essence, school choice has evolved to mean that charter schools, and not families, choose."[55] In addition, several studies have found that, when controlling for factors such as student need and school size, traditional public schools outperform charter schools.[56] Nonetheless, in the K-12 context, many charter supporters argue that charter schools perform at

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NEWS (Aug. 28, 2016, 5:45 AM), https://perma.cc/FJT2-3QWJ; Valerie Strauss, *A Dozen Problems with Charter Schools*, WASH. POST (May 20, 2014, 2:30 PM) https://perma.cc/H3ZP-RLVV.

[50] *See, e.g.*, Bush v. Holmes, 919 So. 2d 392, 412-13 (Fla. 2006) (holding that a voucher program violated the Florida Constitution's requirement that education be provided through a "uniform" system of public schools, and noting that the Florida Constitution "does not allow the use of state monies to fund a private school education"); Ian Farrell & Chelsea Marx, *The Fallacy of Choice: The Destructive Effect of School Vouchers on Children with Disabilities*, 67 AM. U. L. REV. 1797 (2018) (arguing that school voucher programs may violate the Equal Protection Clause of the U.S. Constitution by requiring students with disabilities to waive the federal rights and protections they would be entitled to receive in the public school system).

[51] *See, e.g.*, Martha Minow, *Confronting the Seduction of Choice: Law, Education, and American Pluralism*, 120 YALE L.J. 814, 843-848 (2011).

[52] *See* POTTER, CENTURY FOUND., *supra* note 11, at 7-8.

[53] *See, e.g.*, Anya Kamenetz, *High Test Scores at a Nationally Lauded Charter, but at What Cost?*, NPR (June 24, 2016, 7:00 AM), https://perma.cc/54RW-N7AG.

[54] DAVID R. GARCIA, SCHOOL CHOICE 160 (2018).

[55] Julian Vasquez Heilig et al., *Separate and Unequal? The Problematic Segregation of Special Populations in Charter Schools Relative to Traditional Public Schools*, 27 STAN. L. & POL'Y REV. 251, 285 (2016).

[56] Myron Orfield & Thomas Luce, *Charters, Choice, and the Constitution*, 2014 U. CHI. LEGAL F. 377, 398 (2014) ("The Institute on Metropolitan Opportunity (IMO) authored 2008, 2012, and 2013 reports providing clear evidence that traditional public schools outperformed charter schools after controlling for student poverty, race, special education needs, limited language abilities, student mobility rates, and school size.").

least as well as—and in some cases better than—traditional public schools, particularly with respect to test scores.[57] Success Academy is among the charter providers touted as high-performing based on state test scores.[58] Yet the overall picture is "modest at best and inconsistent across subjects and years."[59] Several studies of K-12 charter school performance yield quite a mixed record, including several troubling failures.[60] Oversight mechanisms have been shown to be just as important for charter school performance as they are for other key governmental functions.[61] Overall, the performance of the K-12 charter sector varies almost as widely as the public school sector.[62]

Moreover, pre-kindergarten is different. Education scholar Diane Ravitch notes:

> Children need prekindergarten classes that teach them how to socialize with others, how to listen and learn, how to communicate well, and how to care for themselves, while engaging in the joyful pursuit of play and learning that is appropriate to their age and

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[57] *See, e.g.*, Grace Chen*, Charter Schools vs. Traditional Public Schools: Which One Is Under-Performing?,* PUB. SCH. REV. (Nov. 12, 2018), https://perma.cc/GRS3-RRZ6.

[58] *See, e.g.*, ROBERT PONDISCIO, HOW THE OTHER HALF LEARNS: EQUALITY, EXCELLENCE, AND THE BATTLE OVER SCHOOL CHOICE 16 (2020) ("At Success, 82 percent of black and Hispanic students passed [the New York State English Language Arts exam] in 2016—a rate that easily outpaces even the 59 percent rate for Asian and White students citywide. In math, 93 percent of Success Academy's black students and 95 percent of its Hispanic students passed their math tests, with 73 percent scoring at Level 4, the very highest level.").

[59] GARCIA, *supra* note 54, at 161.

[60] *See generally* Preston C. Green III et al., *Are We Heading Toward a Charter School Bubble?: Lessons from the Subprime Mortgage Crisis,* 50 U. RICH. L. REV. 783, 793-794 (2016).

[61] *See* Susan L. DeJarnatt, *Oversight, Charter Schools, and a Thorough and Efficient System of Public Education*, 70 S.C. L. REV. 435, 477 (2018) ("Government functions need oversight even when the government contracts them out to private entities. No one argues that it is 'overreach' to have oversight of a contract to build a bridge or road. Police and fire departments comply with regulations and are subject to review. Public education should be no different. Just as roads are not merely for the benefit of the people who use them today, schools benefit entire communities and future members of those communities. Stewardship of our collective resources is critical.").

[62] Robert A. Garda, Jr., *The Mississippi Charter School Act: Will it Produce Effective and Equitable Charter Schools?*, 36 MISS. C. L. REV. 265, 268 (2018) ("In 2009, [the Stanford University Center for Research on Education Outcomes] conducted a comprehensive study regarding educational outcomes of students in charter schools and concluded that 'in the aggregate charter schools are not advancing the learning gains of their students as much as traditional schools.' It also found a wide variation in performance between states. The study concluded that 'state laws governing charter school operation have an important impact on student academic growth,' but could only identify correlations rather than causative effects.") (quoting CTR. FOR RESEARCH ON EDUC. OUTCOMES, MULTIPLE CHOICE: CHARTER SCHOOL PERFORMANCE IN 16 STATES 9, 45 (2009)).

development and that builds their background knowledge and vocabulary.[63]

The pedagogical approaches deemed appropriate for pre-K appear at odds with the approaches that many charter schools tout as the basis for their success. These include regimented study focused on test preparation, top-down models of instruction, and requiring student (and parent) adherence to strict codes of conduct and discipline.[64] Like the broader charter school debate, the wisdom of using deregulatory charter schools for UPK is contested. Because UPK engages a broad mix of public and private providers (including non-profit and community-based organizations, day care centers, and private schools), questions of quality, oversight, and competition are sharpened.[65]

Indeed, some charter school supporters lament: "Charters must compete with long-standing community-based and district providers for scarce pre-K resources. Inadequate funding for public pre-K programs makes it challenging for charters to offer high-quality pre-K programming. Public programs must also adhere to "quality" standards that impose cumbersome input or process requirements that infringe on charter autonomy."[66]As a broader policy matter, significant concerns have arisen with respect to "school choice" and competition operating as mechanisms that extract public funds, disinvest from common public schools, and exacerbate race and class inequity.[67] More fundamentally, many choice and privatization models frame education as a private commodity rather than a public good.[68] This does great damage to a vision of public education as

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[63] DIANE RAVITCH, REIGN OF ERROR: THE HOAX OF THE PRIVATIZATION MOVEMENT AND THE DANGER TO AMERICA'S PUBLIC SCHOOLS 7 (2013).

[64] *See, e.g.*, Sarah Carr, *How Strict Is Too Strict? The Backlash Against No-Excuses Discipline in High School,* ATLANTIC, Dec. 2014, https://perma.cc/63W5-76ZD.

[65] *See, e.g.*, Eliza Shapiro, *13 Charter Schools Approved to Offer Pre-K This Fall*, POLITICO (Mar. 17, 2015, 5:41 AM), https://perma.cc/P7UT-SEDW; Linda Jacobson, *New Twist in Charter Schools: Preschool Programs*, EDUCATION WEEK (Mar. 20, 2002), https://perma.cc/ZN79-NX45.

[66] Ashley LiBetti & Sara Mead, *The Charter Model Goes to Preschool*, Winter 2017, EDUCATION NEXT at 36, 38.

[67] *See* Osamudia R. James, *Opt-Out Education: School Choice as Racial Subordination*, 99 IOWA L. REV. 1083, 1086 (2014) ("Choice rhetoric problematically idealizes competition, privacy, independence, and individualism, while overshadowing interdependence and vulnerability in public education, and outsources conversations that belong in the public sphere to families and individuals. Yet choice rhetoric has endured, due to its sanitizing effect on inequality and vulnerability."); Erika K. Wilson, *The New White Flight*, 14 DUKE J. CONST. L. & PUB. POL'Y 233, 238 (2019) ("[I]n some parts of the country that are embracing school choice, white charter school enclaves are forming.").

[68] *See* Derek W. Black, *Charter Schools, Vouchers, and the Public Good*, 48 WAKE FOREST L. REV. 445, 447 (2013) ("[T]he purpose of receiving an education, at least a public education, goes far beyond the teaching of information and skills and the interests of individual

essential to human development, prosperity, and robust engagement in democracy and society.[69] Promoters of this vision of public education as a crucially important common good are particularly suspicious of the expansion of charter schools and other "choice" models into early education.[70]

### 2. Success Academy's Background and Its Place in the New York Charter School Movement

The Success Academy Charter Schools network's challenge to New York's UPK implementation provides an example of the dissonance between some charter schools' stated support for educational quality and equity, and their fierce opposition to the public oversight needed to ensure those values. Of several charter schools that applied for New York City UPK grants, Success Academy was the only provider that refused to agree to the quality-focused contractual requirements that were announced as a condition of a UPK grant.[71] One would assume that a charter network that claims to support quality education would agree with the need for UPK quality standards and would have little problem ensuring those standards are met; however, that is not the position that Success Academy has taken. Experiences in California and beyond have demonstrated that meaningful oversight is important to charter school effectiveness and to protecting the public interest.[72]

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students. Public education includes the transmission of social values that lead to social cohesion and the overall betterment of society.") (citing Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

[69] *See* Michael J. Haslip & Dominic F. Gullo, *The Changing Landscape of Early Childhood Education: Implications for Policy and Practice*, 46 EARLY CHILDHOOD EDUC. J. 249, 253 (2018) ("A moral vision is needed to guide education to focus on both individual and community well-being and preparation for citizenship in a democracy that upholds social justice and protects the common good. Loss of the moral vision that has long supported the values of citizenship and democracy as a primary purpose of education appears to be an ongoing trend influencing curriculum and instruction across the educational spectrum.").

[70] *See, e.g.*, RAVITCH, *supra* note 63, at 34-35 (describing how corporate education reformers "view students as 'human capital' or 'assets.' One seldom sees any reference in their literature or public declarations to the importance of developing full persons to assume the responsibilities of citizenship.").

[71] Appeal of De Vera, 55 Ed. Dep't. Rep., Decision No. 16,882.

[72] *See, e.g.*, Anna M. Phillips & Howard Blume, *Inglewood Charter School with History of Alleged Wrongdoing Denied Renewal by County*, L.A. TIMES (Jan. 8, 2020), https://perma.cc/2BEQ-6TXJ ("In California and across much of the country, a growing backlash against charters has pushed left-leaning state legislatures to place stricter regulations on how the schools are opened and overseen."); Greg Richmond, *Op-Ed: If California Wants Better Compliance from Charter Schools, It Must Fix Its Oversight System,* L.A. TIMES (Aug. 18, 2016, 5:00 AM), https://perma.cc/QNX2-2NSA (noting that although "a majority of California's charter schools meet their obligation to all the children in their communities, too often, no one is paying attention when an individual charter school does something wrong").

But Success Academy's litigious approach is less surprising when considered within the broader context of public education privatization and deregulation.[73] Charter schools hold a contentious place in New York City and State education policy and politics. Some of that contention stems from opposing views of the purposes and appropriate methods of public education, and from concerns about the impact of charter schools and other "school choice" efforts on quality and equity goals.[74] Indeed, proponents and opponents of charter schools are not easy to categorize. Some contention, however, including concerns about Success Academy Charter Schools, is based on troubling experiences such as charter schools' exclusion of certain targeted students,[75] inappropriate student discipline,[76] and the punishment of parents[77] as means of eliminating "difficult" students and families to help bolster school outcomes.

The goals of the charter school sector, while ostensibly (and in some cases actually) aimed at improving education quality, have been revealed to be more squarely focused on a broader project of privatization and deregulation.[78] This is one reason why the Success Academy challenge and the Court of Appeals' decision are particularly troubling. Success Academy's determination to flout New York's UPK standards, contracts, and

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[73] *See* NOLIWE ROOKS, CUTTING SCHOOL: THE SEGRENOMICS OF AMERICAN EDUCATION 30-31, 178-79 (2020) (noting that education privatization and deregulation are part of a long-term strategy that includes charter operators' profit motive).

[74] *See* sources cited *supra* note 50.

[75] *See, e.g.*, Kate Taylor, *At a Success Academy Charter School, Singling Out Pupils Who Have 'Got to Go,'* N.Y. TIMES (Oct. 29, 2015), https://perma.cc/G726-TXEG (describing a "Got to Go" list of students that the principal thought should be removed from the school).

[76] *See, e.g.*, Johanna F. Roberts, *No Excuses for Charter Schools: How Disproportionate Discipline of Students with Disabilities Violates Federal Law*, 70 OKLA. L. REV. 729, 738 (2018) ("Despite the stated purpose of [No-Excuses discipline] policies, there is no evidence to suggest that zero-tolerance discipline practices have increased the consistency of school discipline. Likewise, findings suggest that zero-tolerance schools have higher rates of suspension and expulsion, and have been found to 'have less satisfactory ratings of school climate, to have less satisfactory school governance structures, and to spend a disproportionate amount of time on disciplinary matters.'"); *see also* S.G. v. Success Acad. Charter Sch., Inc., No. 18 Civ. 2484 (KPF), 2019 WL 1284280, at *14 (S.D.N.Y. 2019) ("Plaintiffs argue, and the Court agrees, that the [complaint] sufficiently alleges 'ADA and Rehabilitation Act liability based on both bad faith and gross misjudgment and under both the disparate impact and failure to reasonably accommodate theories of liability.'").

[77] Andrew Gerst, *Limited Access Letters: How New York City Schools Illegally Ban "Unruly" Parents of Color and Parents of Students with Disabilities*, 22 CUNY L. REV. 334, 335-336 (2019) ("The word 'damn' caused problems. A few hours later, Success Academy's principal, Brittany Davis-Roberti, banned Battle from the school grounds. The ban came in the form of a letter from Principal Davis-Roberti. In order to ever set foot on the campus again, the principal required Battle to 'schedule an appointment . . . to apologize for [her] behavior.' Principal Davis-Roberti also required Battle to 'pledge that it [would] never happen again.'").

[78] *See generally* ROOKS, *supra* note 73; RAYNARD SANDERS ET AL., TWENTY-FIRST-CENTURY JIM CROW SCHOOLS: THE IMPACT OF CHARTERS ON PUBLIC EDUCATION (2018).

oversight requirements, regardless of the impact on the broader UPK project, make clear that Success Academy's primary objective is deregulation.[79]

Success Academy describes itself as "a not-for-profit education corporation that is the governing legal entity for 24 high-performing public charter elementary schools, nine public charter middle schools, and one public charter high school, for a total of 34 schools across New York City, in Brooklyn, the Bronx, Queens, Harlem, and other parts of Manhattan."[80] The Success Academy Charter Schools Network is a well-funded and politically powerful network of charter schools. Established as Harlem Success Academy in 2006 by Eva Moskowitz, a former member of the New York City Council,[81] Success Academy's stated mission is to "[b]uild exceptional, world-class public schools that prove children from all backgrounds can succeed in college and life; and advocate across the country to change public policies that prevent so many children from having access to opportunity."[82] This is an admirable goal, and many observers tout Success Academy's strong showing with respect to test scores and graduation rates as evidence that it is a better option than most public schools (and most charter schools) in New York City.[83]

When considering those metrics, however, it is important to note that Success Academy benefits from supports that are not available to most other schools.[84] Success Academy is politically powerful and has connections to enormous wealth.[85] Its wealth and political access have rendered

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[79] *See* Diane Ravitch, *The* New York Times *Is Spreading Charter School Lies*, JACOBIN (Nov. 30, 2019), https://perma.cc/8ZFK-TM56 ("Why has the charter movement lost its luster? . . .[M]aybe it was the almost daily revelations of waste, fraud, and abuse that occurs when public money is handed to entrepreneurs without any accountability or oversight."); Jack Schneider, *School's Out: Charters Were Supposed to Save Public Education. Why Are Americans Turning Against Them?* WASH. POST. (May 30, 2019), https://perma.cc/MRV5-MW6W. *But see* Karen DeWitt, *NY Charter School Expansion Unlikely in 2019*, WAMC (May 4, 2019), https://perma.cc/Q522-6BK4; Erica L. Green & Eliza Shapiro, *Minority Voters Chafe as Democratic Candidates Abandon Charter Schools,* N.Y. TIMES (Nov. 27, 2019), https://perma.cc/E3EM-QDZ4.

[80] Verified Article 78 Petition at ¶ 17, *In re* Vera v. Elia, No. 1014-16, 2016 WL 4580093 (N.Y. Sup. Ct. June 8, 2016).

[81] *See* Kate Taylor, *At Success Academy Charter Schools, High Scores and Polarizing Tactics*, N.Y TIMES (Apr. 6, 2015), https://perma.cc/BXX5-3R3K.

[82] *About*, SUCCESS ACADEMY NYC, https://perma.cc/HV4S-6CC2 (last visited May 9, 2020).

[83] *See, e.g.*, Ian Livingston, *Examining the Success of Success Academy Charter Schools*, BROOKINGS (Sept. 10, 2015), https://perma.cc/9G3V-TTWN.

[84] *See, e.g.*, Kate Taylor, *Success Academy Charter School Network Receives $25 Million Gift*, N.Y. TIMES (Apr. 12, 2016), https://perma.cc/9TLX-U2V5.

[85] For example, as noted by Valerie Strauss in the context of Success Academy's recent effort to impose its own teacher certification requirements: "The corporation with the largest

Success Academy a powerful force in establishing and expanding its charter network,[86] demanding access to public funds and public space,[87] and operating with minimal oversight.[88] Success Academy also benefits from private funding in addition to the public dollars it receives from New York City and State.[89] Success Academy's CEO Eva Moskowitz has taken full advantage of her access to wealth and political connections to advocate for increased public support for charter-friendly policies and laws.[90] She also organizes charter school parents and students to lobby as part of her political efforts.[91]

Moskowitz has pushed hard against government efforts at regulatory oversight, be it in the area of labor, fiscal control, curriculum, or student retention. Success Academy has developed a reputation for limiting access to its schools to only the most motivated and compliant parents and

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number of charter schools under the control of the SUNY Charter School Institute is the Success Academy charter chain, run by Eva Moskowitz. Her political action committee, the Great Public Schools PAC, contributed $65,000 to Cuomo in 2011-2012 and another $50,000 to date in 2017. Success Academy Chairman Daniel Loeb, founder and chief executive of Third Rock Capital, and his wife, have directly contributed over $133,000 to Cuomo. Since 2015, Loeb has added $300,000 to Moskowitz's PAC, and another $270,000 to other PACs that support Cuomo. That's more than $700,000." Valerie Strauss, *What's the Link Between Charter Schools, Political Donations and Teacher Certification in New York?*, WASH. POST (Aug. 2, 2017, 4:47 PM), https://perma.cc/W9ZT-JCKW.

[86] *See, e.g.*, Judith Messina, *Crain's 2019 Most Powerful Women in New York*, CRAIN'S N.Y. BUS. (June 17, 2019), https://perma.cc/SXT3-25QC ("Eva Moskowitz, 55, may have her differences with Mayor Bill de Blasio, but Washington, it seems, has her back. In April the U.S. Department of Education handed her nearly $10 million to open six charter schools and expand four middle schools and six pre-K programs—which would bring the total number of Success Academy schools to 52.").

[87] *See, e.g.*, Michael Elsen-Rooney, *Shuttered Catholic School Could Be the Site of New Success Academy Middle School in Queens*, N.Y. DAILY NEWS (Nov. 13, 2019, 1:35 PM), https://perma.cc/G6X4-Q5KC.

[88] *See, e.g.*, Alan Singer, *How Charter Schools Buy Political Support*, HUFFPOST (Aug. 10, 2017, 6:25 AM), https://perma.cc/MN6F-VU4U (discussing how individuals associated with Success Academy donated close to $2 million to Governor Andrew Cuomo, who then supported a move to exempt charter schools from standard public-school teacher certification requirements).

[89] *See, e.g.*, Ben Chapman, *Success Academy Charter Schools' Revenue Doubles in a Year; CEO Eva Moskowitz's Pay Jumps to $567K*, N.Y. DAILY NEWS (Dec. 19, 2014, 2:30 AM), https://perma.cc/R4XR-2SGX.

[90] *See, e.g.*, Andrew Ujifusa, *Michael Bloomberg Brings Controversial N.Y.C. Schools Record to 2020 Race*, EDUC. WEEK (Nov. 24, 2019, 10:49 AM) (noting that under Mayor Bloomberg, the number of charter schools in New York City grew from 22 in 2003 to 159 in the 2012-13 school year, and that Bloomberg was an "ally" of Eva Moskowitz), https://perma.cc/WRG2-PUN8.

[91] *See, e.g.*, Bernadette Hogan & Carl Campanile, *Charter School Parents Worried that Gov. Cuomo Is Abandoning Them*, N.Y. POST (Jan. 15, 2020, 2:42 PM), https://perma.cc/3SZQ-2E8B.

students, while avoiding accountability for its actions.[92] This penchant for fending off all efforts at public oversight (including oversight of Success Academy's voluntary participation in New York City's UPK program) runs contrary to quality education goals, while permitting charter schools like Success Academy to claim "better" outcomes than schools subject to greater oversight and accountability.[93]

### *B. New York's Universal Pre-Kindergarten Law and Its Implementation*

#### 1. New York Pre-Kindergarten Background

New York State has a long record of support for early education, establishing targeted pre-kindergarten programs starting in the 1960s.[94] Building on that history, New York State passed legislation supporting UPK in 1997 and again in 2014.[95] The 2014 UPK law contains specific provisions designed to ensure high-quality programming. These include provisions addressing curriculum; learning environment; materials; family engagement; staffing; teacher education and experience; facilities; physical well-being, health, and nutrition; and partnerships with nonprofit, community, and educational institutions.[96] The 2014 Law exemplifies the legislature's strong commitment to ensuring high quality in its pre-kindergarten programs. The legislation's emphasis on high-quality programs and broad access cannot be overstated.

Notwithstanding its longstanding commitments to both targeted and universal pre-kindergarten, New York State has taken a variety of approaches, used multiple funding sources, and has had mixed success in

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[92] *See, e.g.*, Susan Edelman, *New Book Tells Secrets and Surprises of Success Academy's Winning Academics*, N.Y. POST (Sept. 7, 2019), https://perma.cc/G479-D9XX (asserting that Success Academy "gets rid of kids it finds too difficult").

[93] *See, e.g.*, Chester E. Finn, Jr., *Success Story: Founder and CEO of Success Academy Recounts Her Journey*, EDUCATION NEXT, Spring 2018, at 75, 75-76 (reviewing EVA MOSKOWITZ, THE EDUCATION OF EVA MOSKOWITZ: A MEMOIR (2017)) ("[I]t helped a lot that Mayor Michael Bloomberg and schools chief Joel Klein were in charge of the school system during most of the time Moskowitz was struggling to get traction, and that Success Academy benefited from umpteen favorable rulings from the city's education department. In most places, charter folks must contend with superintendents and locally elected school boards that are far more beholden to the teachers' union and other adult interests than were Messrs. Bloomberg and Klein.").

[94] James D. Folts, *History of the University of the State of New York and the State Education Department 1784 – 1996*, N.Y. ST. LIBR., https://perma.cc/PU6J-S7CD (last updated Oct. 22, 2018).

[95] CTR. FOR CHILDREN'S INITIATIVES & CTR. FOR EDUC. EQUITY, ESTABLISHING UNIVERSAL ACCESS TO PREKINDERGARTEN AS A CONSTITUTIONAL RIGHT 8 (2017), https://perma.cc/YK5W-XYZQ.

[96] *See* EDUC. § 3602-ee.

implementing pre-kindergarten programs that are broadly accessible, equitable, and of high quality. For example:

> NYS has several separate pre-K funding streams, five of which are competitive awards. UPK is administered by school districts via an allocation grant award that is non-competitive. However, the funds and awardees for this program have been frozen for nearly a decade. For the last four years, school districts have been able to compete for additional funding for five-year grant awards. In 2016-2017, state pre-K spending served 122,871 children, 51.6% of the state's 4-year-olds and 1.5% of 3-year-olds. New York was also awarded a federal Preschool Development Grant (PDG). In 2016-2017, $25 million was used to support the enrollment of 2,350 low-income 4-year-olds in five school districts in both new slots and in enhancing existing slots.[97]

New York Governor Andrew Cuomo has supported efforts to establish high-quality and broadly accessible UPK. For example, in late 2018 he announced a $15 million award to establish pre-kindergarten programs for the first time in several high-need school districts in New York State.[98] Governor Cuomo also claims to have "more than doubled the state's commitment to early childhood education."[99] He created the state's first full-day pre-kindergarten seats in 2013, and in 2015 expanded pre-kindergarten to serve three-year-olds.[100]

But New York State's most significant strides in providing broad pre-kindergarten access are in New York City, where Mayor Bill de Blasio made UPK a top priority starting with the 2015-2016 school year. Building on the 2014 UPK law's specific quality standards and grant requirements, the Mayor and Schools Chancellor sought to expand capacity for high-quality UPK by tapping into New York City's existing early education infrastructure and contracting with a combination of public schools, city and state agencies, community-based organizations, nonprofits, and private providers.[101] As noted more fully below, New York City's UPK program is largely supported by a New York State Education

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[97] NAT'L INST. FOR EARLY EDUC. RESEARCH, IMPLEMENTING 15 ESSENTIAL ELEMENTS FOR HIGH-QUALITY PRE-K: NEW YORK, https://perma.cc/8HFX-XV52 (last visited May 18, 2020).

[98] Press Release, Governor Andrew M. Cuomo, Governor Cuomo Announces $15 Million to Support Pre-Kindergarten Programs Statewide (Dec. 5, 2018), https://perma.cc/A2VP-YKU9.

[99] *Id.*

[100] *Id.*

[101] *See* OFFICE OF THE MAYOR, READY TO LAUNCH: NEW YORK CITY'S IMPLEMENTATION PLAN FOR FREE, HIGH-QUALITY, FULL-DAY UNIVERSAL PRE-KINDERGARTEN 3, 11 (2014), https://perma.cc/NQW8-3WRH.

Department ("SED") grant under the 2014 UPK law, in addition to contributions from New York City's own education funds.[102] New York City then issues grants to UPK providers through a process that is focused on ensuring that the high-quality standards set forth in the legislation and required by the SED are carried through.[103]

New York City is currently at the forefront in implementing universal UPK programs. Since its announcement in 2014 and launch in 2015, New York City's UPK program has expanded from enrolling 19,163 four-year-olds in pre-kindergarten in FY 2014, to 53,120 in FY 2015, 68,547 in FY 2016,[104] and up to 71,481 full-day and 2,101 half-day students by FY 2018.[105] Importantly, in addition to increased access through broad enrollment, New York City's UPK program has placed a central focus on ensuring high-quality programs.[106]

In April 2017, Mayor de Blasio announced an expansion of universal pre-kindergarten to include three-year-olds, dubbing the program "3K for All."[107] The announcement touted the success of New York City's "historic effort to make high quality, early childhood education available to every four-year-old in New York City," claiming that it "is one of the most successful expansions of any municipal pre-kindergarten program in the country" and that "we are already witnessing it's [sic] tremendous impacts."[108] New York State and New York City's recent UPK efforts have thus focused on ensuring high-quality programming as well as broad and equitable access. The central importance of UPK quality standards makes Success Academy's rejection of UPK oversight and the Court of Appeals decision in *DeVera* all the more troubling.

### 2. Implementing New York City's UPK

New York City's implementation of UPK is based on a state appropriation of funds pursuant to New York State's 2014 UPK law, which

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[102] For the 2015-2016 term, roughly 78% of funding for NYC DOE's program came from the State, while approximately 21% was provided by the City and 1% through federal grants. Matter of DeVera v. Elia, 32 N.Y.3d 423, 445-46 (2018) (Rivera, J., dissenting).

[103] *See* OFFICE OF THE MAYOR, *supra* note 101, at 7, 11.

[104] Press Release, NYC Mayor Bill de Blasio, Mayor de Blasio Announces over 68,500 Students Enrolled in Pre-K for All (Dec. 18, 2015), https://perma.cc/NE9D-H9KV.

[105] N.Y. STATE EDUC. DEP'T, *NYC Public Schools Enrollment (2018 - 19)*, https://data.nysed.gov/enrollment.php?year=2019&instid=7889678368.

[106] *See* NYC Mayor Bill de Blasio, *supra* note 104 ("If New York City continues to focus on improving its program quality and using data to inform its planning, it is on track to a very strong universal pre-K program that truly makes an impact on inequality and improves the lives of millions of young people.").

[107] Press Release, NYC Mayor Bill de Blasio, Mayor de Blasio Announces 3-K for All (Apr. 24, 2017), https://perma.cc/L4H9-2YNA.

[108] *Id.*

amended the earlier 1997 UPK law to provide full-day pre-kindergarten and included specific quality standards for all providers operating through a grant process.[109] In May 2014, the SED released an Announcement of Funding Opportunity for Statewide Universal Full-Day Pre-K ("SUFDPK") programs.[110] The announcement included a Request for Proposals ("RFP") setting forth the requirements for school district UPK proposals.[111] The SED's RFP required that proposals demonstrate innovation and high quality.[112] Applicants also were asked to address student and community need.

The SED RFP indicated that the SUFDPK program would "ensure high-quality early care and education by requiring all grantees to demonstrate quality program standards."[113] It set forth the program requirements that school districts and eligible providers, including charter schools, were required to meet or assure to be eligible for the grant.[114] It required that, except as otherwise provided, all programs comply with the same rules and requirements as UPK programs funded pursuant to Education Law § 3602-e, including Commissioner's regulations § 151-1, and incorporate these requirements in their program design.[115] The RFP required that programs operate under the jurisdiction of the local board of education, which would be responsible for the proper disbursement of and accounting for project funds.[116] The RFP also required applicants to certify that the program would be conducted in accordance with all applicable federal and state laws and regulations, and applicants were required to sign a Statement of Assurances.[117]

In response to the RFP, the New York City Department of Education ("DOE") submitted a consolidated application.[118] The DOE requested $300 million to provide over 50,000 high-quality full-day seats in the 2014-2015 school year, and an additional 20,000 seats in the 2015-2016 school year, bringing the total seats to over 70,000.[119] The DOE stated that the expansion would ensure that every four-year-old in New York City has access to a pre-K seat, and would enable the DOE to build a

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109 *See* CTR. FOR CHILDREN'S INITIATIVES & CTR. FOR EDUC. EQUITY, *supra* note 95, at 3.
110 Matter of DeVera v. Elia, 152 A.D.3d 13, 15-16 (N.Y. App. Div. 2017).
111 *Id.* at 16.
112 Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882.
113 *Id.*
114 *Id.*
115 *Id.*
116 *Id.*
117 *Id.*
118 *Id.*
119 Matter of DeVera v. Elia, 32 N.Y.3d 423, 447 (2018) (Rivera, J., dissenting).

single system of high-quality, full-day pre-kindergarten for the city's families.[120] The SED approved the DOE's request in the amount of $295 million.[121]

In December 2014, the DOE released an RFP directed to charter schools interested in providing UPK programs for the 2015-2016 school year.[122] Pursuant to the 2014 UPK law, compliance with statutory and regulatory standards, program quality standards, and oversight and supervision by the New York City school district were RFP grant requirements.[123] The RFP noted that charter schools included in a school district's state grant application were prohibited from applying separately for additional funds because the pre-kindergarten funds were being provided to the school district, not to the charter schools; it also stated that charter schools were prohibited from commingling pre-kindergarten funds with their other funds.[124] The DOE's RFP sought to identify eligible high-quality early childhood providers to collaborate with the DOE's Division of Early Childhood Education ("DECE").[125] The RFP "was open to charter schools serving any of DOE'S 32 community school districts that could provide a consistent weekly schedule for a full-day program between 8:00 am and 4:30 pm, 5 days per week for 180 days of the school year."[126] The RFP described the basis for contract awards and payment structure, attached a sample contract, and stated that contract awards were subject to timely completion of contract negotiations between DOE and the "selected proposer."[127] The sample contract included the following language: "NO PAYMENTS WILL BE MADE BY THE DOE UNTIL THE CONTRACT IS REGISTERED WITH THE NYC COMPTROLLER'S OFFICE."[128] This is standard procurement procedure in New York City.[129]

In response to the RFP, Success Academy NYC submitted UPK applications on behalf of three of its charter schools: Harlem I, Cobble Hill,

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120 *Id.* at 446-47.

121 *Id.* at 432 n.4.

122 *See* Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882.

123 *Id.*

124 Matter of DeVera, 32 N.Y.3d at 446 (Rivera, J., dissenting).

125 *See* Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882.

126 *Id.*

127 *Id.*

128 *Id.*

129 *See* N.Y.C. Comptroller, *Contract Registration*, https://comptroller.nyc.gov/services/for-city-agencies/contract-registration/ ("To ensure that the City has adequate funding to cover the cost of its contracts and to prevent corruption in City procurement, the City Charter requires that contracts and agreements entered into by City agencies be registered by the Comptroller prior to implementation.").

and Williamsburg.[130] In March 2015, the DOE advised Success Academy NYC that it found the proposed programs to be "conditionally eligible for award," "subject to timely completion of contract negotiation and timely submission of contract documents."[131] In April 2015, three Success Academy schools held admission lotteries to fill pre-kindergarten seats.[132] On either July 23 or August 4, 2015, the DOE sent proposed UPK contracts to the three conditionally eligible Success Academy schools.[133] Although the proposed contracts included a provision stating that issues regarding the lawfulness of any contract terms could be brought to the DOE Chancellor's designee for resolution, Success Academy did not make any inquiries about the contract, nor did it execute the contracts.[134] Success Academy began pre-kindergarten programs at the three schools on August 24, 2015.[135] On August 27, 2015, the DOE sent an email congratulating Success Academy on starting its pre-kindergarten classes but also advising that, until Success Academy executed the contract, "[Y]ou are operating your Pre-K classrooms at your own risk."[136]

By letter dated October 2, 2015, Success Academy objected to the proposed contract, to which the DOE replied on October 15, 2015 by stating that it could not begin payments without signed contracts.[137] Success Academy then appealed the payment denial to SED Commissioner MaryEllen Elia on October 30, 2015.[138]

## II. THE SUCCESS ACADEMY CHALLENGE

### *A. The Administrative Challenge*

Commissioner Elia reviewed Success Academy's appeal of the DOE's denial of funds and issued a decision on February 26, 2016.[139] Commissioner Elia considered the merits of Success Academy's claim that the DOE's refusal to pay for its three schools' UPK programs without an executed contract violated Education Law § 3602-ee(12).[140] Success

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130 *In re* Vera v. Elia, No. 1014-16, 2016 WL 4580093, at *2 (N.Y. Sup. Ct. June 8, 2016).

131 *Id.* at *1.

132 The New York Supreme Court opinion noted that the two parties disagreed about the date the proposed contracts were sent. *Id.* at *2 n.1.

133 *Id.*

134 *See* Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882.

135 *Id.*

136 *Id.*

137 *Id.*

138 *Id.*

139 *See* Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882.

140 *Id.* "Notwithstanding paragraph (a) of subdivision one of section [2854] of this chapter and paragraph (c) of subdivision two of section [2854] of this chapter, charter schools shall be

Academy took the position that neither the state nor city education departments could conduct monitoring or oversight of pre-kindergarten programs funded through the UPK law's grant and procurement process.[141] Success Academy's position was that its charter entity had *exclusive* oversight authority over its state-funded pre-kindergarten programs.[142] Thus, Success Academy's challenge struck at the heart of the quality standards that were central to the 2014 UPK law.

Commissioner Elia's administrative decision found the DOE's contractual requirements for pre-kindergarten programs under its SED grant to be rational and reasonable.[143] The Commissioner noted the following statutory requirement under Education Law 3602-ee(2): "[a]ll SUFDPK programs must demonstrate quality on eight elements: curriculum; learning environment, materials and supplies; family engagement; staffing patterns; teacher education and experience; facility quality; physical well-being, health and nutrition; and partnerships with non-profit, community and educational institutions."[144] She determined that this statutory requirement contradicted Success Academy's argument that, to be paid under the DOE grant, Success Academy need only show (1) approval to provide pre-kindergarten instruction and (2) documentation of expenditures.[145] Commissioner Elia pointed out that "[t]here must be mechanisms in place to ensure that such programs continue to provide quality services throughout the grant term."[146]

Acknowledging the voluntary nature of the UPK grant program, Commissioner Elia observed that Success Academy chose to respond to the DOE's RFP, sought to participate in the program, and was made aware

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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 [56] of this chapter. The provisions of paragraph (b) of subdivision two of section [2854] of this chapter shall apply to the admission of pre-kindergarten students, except parents of pre-kindergarten children may submit applications for the [2014-2015] school year by a date to be determined by the charter school upon selection to participate in the universal full-day pre-kindergarten program. The limitations on the employment of uncertified teachers under paragraph (a-1) of subdivision three of section [2854] of this chapter shall apply to all teachers from pre-kindergarten through grade twelve." N.Y. EDUC. LAW § 3602-ee(12) (McKinney 2019).

[141] *See* Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882..

[142] *Id.*

[143] *Id.* ("Just as the State routinely requires grant recipients to execute contracts as part of the State procurement process . . . it is not unreasonable for a school district to require a contract as part of its procurement process.").

[144] *Id.*

[145] *Id.*

[146] *Id.*

of the requirements associated with the grant.[147] The Commissioner found that the DOE properly required Success Academy NYC to execute the contract as a condition of payment under its SUFDPK program.[148]

Turning to whether the DOE contract terms were consistent with Education Law Article 56 and § 3602-ee, Commissioner Elia acknowledged that Education Law § 3602-ee(12) "states that the monitoring, programmatic review and operational requirements for SUFDPK programs shall be the responsibility of the charter entity, in this case the SUNY trustees."[149] However, she disagreed with Success Academy's interpretation that the intent and effect of Education Law § 3602-ee(12) is to prohibit school districts that operate SUFDPK programs under the consolidated SED application from regulating pre-kindergarten programs funded through the application.[150] To take such an interpretation to its logical conclusion would mean that the DOE would be required to provide UPK funding to charter schools without any mechanism to ensure that the statutorily required eight quality elements are being met, and without any mechanism to ensure that public UPK funds are being spent in accordance with the requirements of Education Law § 3602-ee, the SED's RFP, and the DOE'S RFP.[151]

Commissioner Elia's decision noted that the DOE's contract requirements were consistent with DOE and SED obligations under Education Law § 3602-ee(2) to ensure that providers demonstrate quality in eight specific categories.[152] The Commissioner rejected Success Academy's objection to various DOE contract provisions (including those that required discipline be age- and developmentally-appropriate, placed limits on computer time and field trips, imposed curriculum and evaluation requirements, and maintained DOE's rights to inspect, review, and audit providers' sites and to observe and evaluate providers' programs), instead finding that the DOE's requirements and rationales were all based in sound educational policy and were consistent with Education Law § 3602-ee.[153]

Commissioner Elia also found that the Success Academy failed to articulate any rationale as to how the RFP or DOE contracting requirements violated either Article 56 or Education Law § 3602-ee.[154] Harmo-

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147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 *Id.*
154 *Id.*

nizing the DOE's mandatory provisions for quality standards and oversight of UPK programs with Education Law § 3602-ee(12)'s placement of charter school monitoring and oversight with the charter entity, the Commissioner observed that § 12 does not give charter entities "sole" or "exclusive" authority for monitoring and oversight.[155]

Commissioner Elia explained:

> To harmonize these seemingly conflicting statutory provisions (McKinney's Statutes § 98), I interpret the language of Education Law § 3602-ee(12) as having two effects. First, it clarifies that in the case of a charter school, the charter entity is also responsible for ensuring that the charter school complies with the requirements of the grant, and can invoke the enforcement mechanisms under Article 56. Second, it further clarifies that the charter entity is the "oversight agency" responsible for conducting at least one inspection under Education Law § 3602-ee(10) in order to monitor, engage in programmatic review and enforce the operational requirements of the program.[156]

Commissioner Elia's decision also rejected Success Academy's arguments that the DOE's contract is illegal, noting that its argument that a charter school could voluntarily apply for a grant of state funds, assert a blanket exemption from grant requirements, and still be entitled to the funds, is irrational, contrary to legislative intent, and contrary to public policy.[157]

In response to Commissioner Elia's determination, Success Academy filed suit.[158]

### *B. The Court Challenges*

Success Academy sued under C.P.L.R. Article 78 to annul the Commissioner's decision; order the Commissioner to require the DOE to pay Success Academy for its UPK classes; and order the Commissioner to invalidate the DOE UPK contract.[159]

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[155] *Id.* "To interpret that language to divest DOE of its role in inspecting the charter school program as the school district's partner under Education Law § 3602-ee(10), or to so limit the scope of its inspection to make it superficial and meaningless, would conflict with the provision of Article 56 that gives the school district of location the authority to 'visit, examine into and inspect' the charter school for the 'purpose of ensuring that the school is in compliance with all applicable laws, . . .' namely Education Law § 2853(2-a), or in the case of charter schools formed by respondent's Chancellor as charter entity, Education Law § 2853(2) . . . ."

[156] *Id.*

[157] *Id.*

[158] *In re* Vera v. Elia, No. 1014-16, 2016 WL 4580093 (N.Y. Sup. Ct. June 8, 2016).

[159] *Id.* at *1.

After conducting a thorough review of the facts alleged on both sides and considering all of the relevant provisions of the UPK laws, the Charter School Act, and other relevant laws and regulations, Judge Raymond Elliot of the Albany County Supreme Court determined that the Commissioner's decision was rational, and not arbitrary and capricious.[160] The Court agreed with the Commissioner that the legislature opted to distinguish between pre-kindergarten and grades K-12 for purposes of the charter school law, treating UPK as a "program" rather than a "grade."[161] Therefore, Education Law § 3602-ee(12)'s proviso "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" did not operate to eviscerate the remaining requirements of the UPK law.[162] The trial Court also found that the 2014 UPK law's detailed quality standards, grant process, and inspection requirements all evidenced a "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."[163] The Court also found that it was reasonable for the DOE to require that Success Academy execute a contract ensuring that the UPK public funds granted to it by the State were appropriately used.[164] Reading all of the provisions of the relevant statutes with an eye toward harmonizing them, the court determined that § 3602-ee(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."[165]

Success Academy then appealed to the Appellate Division Third Department, which overturned the lower court's decision.[166] The Third Department first determined that no deference need be accorded to the Commissioner's interpretation of Education Law § 3602-ee because the question presented was one of "pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent" and there was "little basis to rely on any special competence or expertise of the administrative agency."[167] The Third Department then focused almost exclusively on § 3603-ee(12), determining that it "unambiguously provides

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[160] *Id.* at *10.
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.* at *11.
[166] DeVera v. Elia, 152 A.D.3d 13, 22 (N.Y. App. Div. 2017).
[167] *Id.* at 19 (quoting Matter of Gruber, 89 N.Y.2d 225, 231 (1996)).

charter entities with authority in regard to the programing [sic] and operations of prekindergarten programs funded pursuant to the statute."[168] Focusing on that provision and its use of the word "all," the Third Department determined that "use of the term 'all' tasked the charter entity with full responsibility for the relevant 'monitoring, programmatic review and operational requirements' for the relevant prekindergarten programs."[169] Determining that consideration of the remaining provisions of the UPK law had no effect on its reading of subsection 12, the Third Department reversed the lower court decision.[170]

The SED and the DOE then appealed to New York's highest court.[171] Refusing to give weight to SED and DOE interpretations of UPK and charter school laws, a majority of the Court of Appeals determined that Education Law § 3602-ee(12)[172] prohibited the DOE from imposing standards consistent with the UPK law on charter schools as a condition of funding.[173] In an opinion by Judge Garcia, a majority of the Court of Appeals agreed with the Third Department that deference to Commissioner Elia's interpretation of the relevant statutes was unwarranted.[174] Characterizing the question as "one of pure statutory interpretation," the Court said that it "need not accord any deference to the agency's determination and can undertake its function of statutory construction."[175] The majority went on to say that the case "turns on subdivision (12) of the Universal Pre-K Law which provides that, for charter school prekindergarten programs, 'all . . . monitoring, programmatic review and operational requirements . . . shall be the responsibility of the charter entity and

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[168] *Id*.

[169] *Id.* at 20.

[170] *Id.*

[171] Matter of DeVera v. Elia, 32 N.Y.3d 423, 431 (2018).

[172] The provision states that "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. The provisions of paragraph (b) of subdivision two of [§ 2854] of this chapter shall apply to the admission of pre-kindergarten students, except parents of pre-kindergarten children may submit applications for the [2014-2015] school year by a date to be determined by the charter school upon selection to participate in the universal full-day pre-kindergarten program. The limitations on the employment of uncertified teachers under paragraph (a-1) of subdivision three of [§ 2854] of this chapter shall apply to all teachers from pre-kindergarten through grade twelve." N.Y. EDUC. LAW § 3602-ee(12) (McKinney 2019).

[173] *Matter of DeVera*, 32 N.Y.3d at 438 ("Nothing in the Universal Pre-K Law or Legacy Pre-K Law . . . gives school districts unilateral authority to impose curricular and programmatic requirements on charter schools—by contract or otherwise.").

[174] *Id.* at 434.

[175] *Id*. (quoting Albano v. Bd. of Trustees of N.Y.C. Fire Dep't, 98 N.Y.2d 548, 553 (2002)).

shall be consistent with the requirements under article [56] of this chapter.'"[176]

The majority focused on a very narrow, textual interpretation of one section of the UPK law, ignoring the overall purpose of the UPK law and rejecting interpretive approaches that harmonized all provisions of that law to support the clear legislative goal of ensuring high-quality UPK. The majority instead read subsection 12 as overriding all other provisions of the UPK law. By mechanically focusing on one provision of the UPK law, this approach refused to consider the law's overall legislative purpose and how it might harmonize competing goals of including charter schools while maintaining quality standards across all providers. In doing so, the majority privileged charter school autonomy over all other public values expressed in the UPK statutes.

In a thoughtful and well-reasoned dissent, Judge Jenny Rivera noted that the majority had read the provision relating to charter eligibility without considering adequately the context of the 2014 and 1997 UPK laws and the charter school law.[177] In Judge Rivera's view, the full statutory framework should be considered when discerning the legislature's intent with respect to oversight of pre-kindergarten providers.[178] Lacking such context, the majority failed to recognize that the SED and the DOE were not seeking to "impose requirements on charter schools that contradict [§ ] 3602-ee(12) . . . but rather to exercise their coextensive authority within that framework" as a means of harmonizing relevant statutes.[179] Judge Rivera observed that the majority's interpretation could be read to lead "to the absurd result of stripping charter school oversight from the SED—the sole entity legislatively charged with approving grants for pre-k programs in accordance with its own scoring system and developing statewide inspection and quality assurance protocols mandated for provider annual inspections."[180] Judge Rivera's dissent suggested that the appropriate focus for the relevant statutory question was to read the statute as a whole and in context, work to harmonize provisions that are in tension, and give weight to the SED and DOE interpretation where there is ambiguity.[181] In addition to these legal principles, Judge Rivera recognized the troubling policy implications of exempting charter schools from

[176] *Id.*
[177] *Id.* at 457 (Rivera, J., dissenting).
[178] *Id.* at 439-40.
[179] *Id.* at 457 (Rivera, J., dissenting).
[180] *Id.* at 457-58.
[181] *Id.* at 452-53, 456-57, 459-60.

key quality standards and monitoring requirements expressed in the 2014 UPK law.[182]

## III. MATTER OF DEVERA'S LEGAL AND POLICY IMPLICATIONS

A central issue in *Matter of DeVera* was whether, as Success Academy claimed, charter schools are exempt by law from the quality standards and oversight requirements set forth in New York's UPK law. Despite clear evidence of the legislature's focus on assuring quality standards in the implementation of the UPK grant process,[183] Judge Garcia's majority opinion focused almost exclusively on a single provision of the 2014 UPK law designed to include charter schools in that grant process.[184] Read in isolation, that provision appears to limit program oversight to the designated charter entity.[185] Yet read in the context of the statute as a whole, which includes provisions that set forth robust quality standards and vest oversight in the SED and the DOE, the import of the charter school provision is far from clear.[186] Also at issue is the appropriate interplay of the 2014 UPK law with the New York State Charter Schools Act, which by its terms applies only to grades K-12.[187]

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[182] "[T]his level of independence would undermine the 2014 Pre-K Law's centralized quality control apparatus by which consolidated applications are preferred and district programming prioritized for funding, as well as the obligation of school districts to evaluate and inspect its providers for compliance with the quality elements set forth in [§ ] 3602-ee (2) and the SED's quality assurance and inspection protocols designed in satisfaction of the mandates of [§ ] 3602-ee(6)." *Id.* at 456-57.

[183] *See id.* at 440 (citing Memorandum of State Educ. Dep't, Bill Jacket, L. 1997, Ch. 436; N.Y. STATE COMPTROLLER, THE 1997-98 BUDGET: FISCAL REVIEW AND ANALYSIS (1997); Gomez-Velez, *supra* note 5, at 330-331 (2015)).

[184] *Matter of DeVera*, 32 N.Y.3d at 434.

[185] *See* N.Y. EDUC. LAW § 3602-ee(12) (McKinney 2019) ( "[C]harter 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 . . . .").

[186] For example, subdivision two provides that "[a]ll universal full-day pre-kindergarten programs shall demonstrate quality on the following elements: (a) curriculum; (b) learning environment, materials and supplies; (c) family engagement; (d) staffing patterns; (e) teacher education and experience; (f) facility quality; (g) physical well-being, health and nutrition; and (h) partnerships with non-profit, community and educational institutions." EDUC. LAW § 3602-ee(2). Subdivision three refers to consolidated applications by school districts that include charter schools among a range of providers. *Id.* § 3602-ee(3). These provisions are at odds with a reading of subdivision 12 that provides for exclusive charter entity oversight of charter-operated UPK programs. *Id.* § 3602-ee(12).

[187] N.Y. EDUC. LAW § 2854(2)(c) (McKinney 2019) ("A charter school shall serve one or more of the grades one through twelve, and shall limit admission to pupils within the grade levels served. Nothing herein shall prohibit a charter school from establishing a kindergarten program.").

As noted above, the standards and oversight provisions included in the 2014 UPK law are detailed and robust, and were based on research demonstrating that high-quality programs are essential to meeting UPK goals of making young students school-ready and helping to close educational opportunity gaps.[188] Judge Garcia's majority opinion in *DeVera* thus raises significant legal and policy issues that are not limited to the interpretation and implementation of the UPK law. First, the opinion raises questions about the appropriate approach to statutory interpretation in New York State (including textualist, purposivist, and mixed approaches),[189] the weight given to agency expertise, and how long-standing principles of statutory interpretation are applied. The majority opinion also raises serious concerns about the ability of New York's UPK programs to ensure quality standards for charter schools; the disparate treatment of charter schools and other UPK providers; and the Court's view of the relationship between legal interpretation, policy interpretation, and public law effects. These legal and policy implications will be considered in turn.

### *A. New York Statutory Interpretation – Textual and Contextual Legislative Intent*

As a legal matter, a key question in *Matter of DeVera* is ascertaining legislative intent. Specifically, whether it is appropriate to read a single provision like § 3602-ee(12) in isolation, or whether that provision must be read within the broader context of the statutory scheme. This would include the legislature's overarching intent to ensure high-quality pre-kindergarten programs while also including charter school providers,and the apparent tension this creates.

Significant scholarly attention has been paid to methods and tools of statutory construction and interpretation.[190] Much of that attention focuses

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[188] *See* POTTER, CENTURY FOUND., *supra* note 11, at 3-4.

[189] *See, e.g.*, VALERIE C. BRANNON, CONG. RESEARCH SERV., R45153, STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS (2018), https://perma.cc/ATU9-CW2W. "The two theories of statutory interpretation that predominate today are purposivism and textualism. Proponents of both theories generally share the goal of adhering to Congress's intended meaning, but disagree about how best to achieve that goal. Judges subscribing to these theories may employ different interpretive tools to discover Congress's meaning, looking to the ordinary meaning of the disputed statutory text, its statutory context, any applicable interpretive canons, the legislative history of the provision, and evidence about how the statute has been or may be implemented." *Id.* at 2-3 (citations omitted).

[190] *See, e.g.*, Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027 (2002); Abbe R. Gluck, T*he States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010); Abbe R. Gluck & Robert A. Posner, *Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals*, 131 HARV. L. REV. 1298 (2018); Adam M.

on whether judges are to serve as "faithful agents" of legislatures[191] and what that means.[192] That query relates to broader institutional questions about the relative roles of the legislature, executive, and judiciary in statutory construction and interpretation, including whether "judges should exercise a kind of expansive judgment that sustains values of the legal system as a whole and operates as a check on misguided or out-of-date statutory provisions."[193] Courts often are faced with interpretive choices, including whether the "clear text" or "plain language" in a statute is at odds with the legislative purpose.[194] Yet, as several scholars have noted, "[a]fter centuries of judicial and scholarly effort, 'the hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation.'"[195]

This has led some scholars and jurists to advance textualist or formalist theories of statutory construction and interpretation. Proposals to simplify and make more uniform the process of statutory interpretation include a "Federal Rules of Statutory Interpretation,"[196] a "Restatement of Statutory Interpretation,"[197] and the application of stare decisis principles to interpretations of specific statutes.[198]

Others view trends in statutory interpretation, such as the current emphasis on textualism, as driven by an overarching desire to limit judicial

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Samaha, *If the Text Is Clear – Lexical Ordering in Statutory Interpretation*, 94 NOTRE DAME L. REV. 155 (2018); Glen Staszewski, *The Dumbing Down of Statutory Interpretation*, 95 B.U. L. REV. 209 (2015).

[191] "A central ambition of most theories of statutory interpretation is to ensure that judges act as faithful agents of the legislature—a role that requires courts to subordinate their own values to those of their principals. 'Purposivist' theories demand that judges do so by deciding statutory cases in accordance with the purpose or intent of the legislature." Richard H. Fallon, Jr., *Three Symmetries Between Textualist and Purposivist Theories of Statutory Interpretation—and the Irreducible Roles of Values and Judgment Within Both*, 99 CORNELL L. REV. 685, 686 (2014).

[192] *See, e.g.*, KENT GREENAWALT, STATUTORY AND COMMON LAW INTERPRETATION 21 (2013) ("The most common assumption about the judiciary's role in dealing with statutes is that judges should be 'faithful agents' of legislatures.").

[193] *Id.*; *see also* Robert A. Katzmann, *Madison Lecture: Statutes*, 87 N.Y.U. L. REV. 637, 661-82 (2012).

[194] Carlos E. Gonzalez, *Turning Unambiguous Statutory Materials into Ambiguous Statutes: Ordering Principles, Avoidance, and Transparent Justification in Cases of Interpretive Choice,* 61 DUKE L.J. 583 *passim* (2011).

[195] Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2086 (2002) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 1169 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994)).

[196] *Id.* at 2089.

[197] Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333, 334 (2004).

[198] Randy J. Kozel, *Statutory Interpretation, Administrative Deference, and the Law of Stare Decisis*, 97 TEX. L. REV. 1125, 1146 (2019).

discretion, and as contrary to important jurisprudential goals. Glen Staszewski posits:

> While the meaning of a statute is important and should generally be followed, a host of other factors will ordinarily be relevant when agencies and judges make their interpretive decisions, including the legislative history of the statute, its underlying purposes, applicable legal precedent, canons of construction, constitutional norms, related statutory provisions and common law principles, a potentially broad range of policy considerations, and how things have changed since a statute was enacted. From this perspective, neither agencies nor courts are "ascertaining the meaning of the law" when they interpret statutes in the modern regulatory state. Rather, agencies are carrying out their delegated authority to implement statutory programs, while courts are generally reviewing the legality of an agency's decisions. Agencies are making policy decisions within the constraints provided by Congress, and the judiciary is providing the people with opportunities to contest the validity of those exercises of governmental authority.[199]

Other critiques of proposals to restrict statutory interpretation to a textualist exercise in discerning plain meaning, or the application of static rules, argue that such proposals fail to acknowledge that interpretation to discern intent occurs in *all* language and communication.[200] Such proposals also fail to note that there may be a difference between what a statute says and what the legislature meant, based on either mistake or a failure to foresee certain consequences; this can create a gap between text and intent even when it may be argued that the statutory text is clear.[201] Staszewski proposes that judicial discretion in statutory interpretation

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[199] Staszewski, *supra* note 190, at 262.

[200] *See, e.g.*, Lawrence M. Solan, P*rivate Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation*, 93 GEO. L.J. 427, 484 (2005) (arguing that "the distinction between the language of a statute and the intent of the legislature is largely a false one. All we can do when we interpret language is hope that we have absorbed whatever a speaker or writer has intended to convey. If intent is basically all that interpretation is about, then there is no point in positing rules pretending to avoid it.").

[201] "We all have experiences like, 'Did I say Tuesday? I meant Thursday.' Alternatively, we sometimes believe that we were mistaken when, in retrospect, we failed to think through the consequences of our statements in unforeseen circumstances. The two types of mistake are quite different, and textualists draw a distinction between them. In the first instance, the person says, 'I didn't mean to say what I said.' In the second, the person says, 'I meant to say what I said, but now I see that it was a very bad idea.' Sometimes, in the statutory context, it is not easy to tell which one occurred. One may come to different conclusions about which if either of these types of error should be corrected judicially. But it is difficult to avoid the conclusion that intent is relevant to the analysis." *Id.* at 461.

should not be seen as a problem, but rather as a means to prevent the possibility of domination by the state and to promote democracy by encouraging practical reasoning and a diversity of views.[202] He notes that "to perform this function, statutory interpretation must take place in an information-rich environment in which decision-makers consider a wide range of interests and perspectives."[203] While there is a rich and varied scholarly discussion of federal statutory interpretation and the federal structure,[204] relatively less scholarship examines statutory interpretation under state law,[205] including whether its principles and canons should align with or diverge from those under federal law.[206] Former New York State Chief Judge Judith S. Kaye observed that there are issues "distinctly germane to the interpretation of state statutes."[207] Judge Kaye noted that there are far more state statutory interpretation cases than there are federal for the simple reason that there are far more state cases in general.[208] She also pointed to the relative sparseness of legislative history in New York as compared to the federal system.[209] Judge Kaye identified the "state courts' unique role in shaping the common law" as "inevitably linked to their function of interpreting statutes" in a "complex fabric defining a wide

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[202] Staszewski, *supra* note 190, at 242-249.

[203] *Id.* at 261.

[204] *See*, *e.g.*, Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 19-20 (1995) ("[Scholarly statutory interpretation] analysis has focused almost entirely on how federal courts read federal statutes. Few, if any, of the recent commentators have considered whether the subject of statutory interpretation presents a different set of issues for state judges reading state statutes.").

[205] *See* Judith S. Kaye, *Things Judges Do: State Statutory Interpretation*, 13 TOURO L. REV. 595, 598-99 (1997) (noting the dearth of scholarship on state statutory interpretation and the differences between federal and state statutory interpretation, in spite of the fact that "there are far more state statutory interpretation cases than federal"). *But see* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 *passim* (2010) (examining some state high court statutory interpretation approaches, including examples of the use of stare decisis and rules of construction); Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the* Chevron *Doctrine*, 39 MCGEORGE L. REV. 977 *passim* (2008) (discussing state courts' doctrines of judicial review of agency interpretation and comparing them to the federal *Chevron* doctrine).

[206] *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 YALE L.J. 1898 *passim* (2011) (noting that federal courts routinely overlook state interpretive principles when they are tasked with interpreting state law, and that even the U.S. Supreme Court does not treat its own statements regarding federal statutory interpretation principles as precedential).

[207] Kaye, *supra* note 205, at 599.

[208] *Id.*

[209] *Id.* at 600.

range of rights and duties."[210] Finally, Judge Kaye noted as a significant difference between the state and federal systems that there is usually "a closer relationship between the distinctly separate branches of state government than at the federal level," describing a dynamic dialogue that sometimes takes place between state legislatures and courts.[211]

While Chief Judge Kaye adhered to the well-settled notion that the "oath and obligation of every judge" is to "bend to the legislative command,"[212] she nevertheless emphasized:

> My concern, however, is with the next sentiment: that judges—proper, well-behaved judges—are obliged simply to apply the words of statutes as they are written; that they must ask only what statutes say and not what the drafters meant; that anything beyond the technical exercise of applying sections of a code to facts of a case smacks of activism and overreaching—in other words, that judges are on the prowl for opportunities to wrest ambiguity from the jaws of clarity. Based on my own experience, I simply cannot agree that statutory interpretation is such a mechanical exercise, or that the proper path of an honorable judge is so confined.[213]

Judge Kaye considered carefully the judge's role in discerning legislative intent under New York law, including the application of common law principles to address ambiguity and give attention to the key purposes of the relevant law:

> When the meaning of a statute is in dispute, there remains at the core the same common-law process of discerning and applying the purpose of the law. As one commentator noted, "courts have not only a law-finding function . . . but [also] . . . a law-making function that engrafts on the statute meaning appropriate to resolving the controversy." Indeed, "there is no sharp break of method in passing from 'common law,' old style, to the combinations of decisional and statutory law now familiar. Statutes, after all, need to be interpreted, filled in, related to the rest of the corpus."[214]

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[210] *Id.* at 601 (quoting DAVID L. SHAPIRO, CONTINUITY AND CHANGE IN STATUTORY INTERPRETATION 937 (1992)).

[211] *Id.* at 601-02.

[212] Kaye, *supra* note 205, at 604.

[213] *Id.* at 605.

[214] Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 25 (1995) (citing Reed Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 HOFSTRA L. REV. 1125, 1127-28 (1983) and Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1845 (1983)).

Judge Kaye notes the judiciary's obligation to follow statutory meaning and legislative intent particularly when the "plain meaning" of a statute dictates a particular result, but she cautions that this is not a "mechanical exercise," and "[a]t times the common-law method compels courts even to read a statute in a way that appears contrary to its 'plain meaning.'"[215] This is often the case in a state's highest court, where "[t]he very fact that a controversy over statutory interpretation has found its way to a state's high court—quite possibly after several other trial and appellate judges have divided on the question—signals that discerning the statutory meaning may not be quite so simple."[216]

New York State's canons of statutory interpretation generally express a similar path. They provide that it is "fundamental that a court, in interpreting a statute, should attempt to effectuate the intent of the Legislature."[217] This first principle of statutory interpretation explains that the court's role is to discern and effectuate the legislature's intent, not to apply its own policy in a given situation. In ascertaining legislative intent, the court must start with the text of the statute itself. When the statute is clear, or when legislative intent is clearly ascertainable, the legislature's intent must be followed. Thus, the crux of many statutory interpretation questions lies in determining whether the statute clearly addresses the issue at hand, and if not, determining what the legislature intended.

Statutory text is not to be read piecemeal or in isolation. Rather, under well-settled principles of statutory interpretation, a statute is to be viewed as a whole, and "its various sections must be considered together and with reference to each other."[218] A court must consider a statute as a whole, reading and construing all parts of an act together to determine legislative intent,[219] and should attempt to "harmonize[ ] [all parts of a statute] with each other . . . and [give] effect and meaning . . . to the entire statute and every part and word thereof."[220]

Where a potential conflict exists, all parts of the statute must be given meaning and effect and, if possible, must be "harmonized to achieve the

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[215] *Id.* at 26.

[216] *Id.* at 27.

[217] Patrolmen's Benevolent Ass'n of City of N.Y. v. City of New York, 41 N.Y.2d 205, 207 (1976); *see also* N.Y. STAT. LAW § 92(a) (McKinney 2019).

[218] People v. Mobil Oil Corp., 48 N.Y.2d 192, 199 (1979); *see also* STAT. LAW §§ 92, 97, 98.

[219] STAT. LAW § 97.

[220] Friedman v. Conn. Gen. Life Ins. Co., 9 N.Y.3d 105, 115 (2007) (quoting STAT. LAW § 98).

legislative purpose."[221] Similarly, when a statute is part of a broader legislative scheme, its language must be construed "in context and in a manner that harmonizes the related provisions and renders them compatible."[222] Unlike a small number of state courts that impose a strict textualist approach to statutory interpretation, New York courts practice both textual and contextual methods of statutory interpretation.[223]

Applying these principles to Education Law § 3602-ee, it becomes apparent that to realize the UPK law's broader legislative purpose, subsection 12's provision making charter schools eligible to participate in UPK programs (with charter entity oversight) must be harmonized with other programmatic provisions of the UPK law. Those provisions include the 2014 UPK law's requirements that "[a]ll universal full-day pre-kindergarten programs shall demonstrate quality" on curriculum; learning environment, materials and supplies; family engagement; staffing patterns; teacher education and experience; facility quality; physical well-being, health and nutrition; and partnerships with non-profit, community and educational institutions.[224] They also include provisions for grant awards,[225] a statewide inspection protocol for annual inspections of all universal full-day pre-kindergarten providers,[226] and an inspection provision that says:

> Notwithstanding any provision of law to the contrary, a universal full-day pre-kindergarten provider shall be inspected by the department, the school district with which it partners, if any, and its respective licensing, permitting, regulatory, oversight, registration or enrolling agency or entity no fewer than two times per school year, at least one inspection of which shall be performed by the eligible agency's respective licensing, permitting, regulatory, oversight, registration or enrolling agency, as applicable.[227]

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[221] Sanders v. Winship, 57 N.Y.2d 391, 395-96; *see also In re* M.B., 6 N.Y.3d 437, 447 (2006); Kosmider v. Whitney, 34 N.Y.3d 48, 54-55 (2019) (analyzing a broader statutory scheme to determine whether there was a clear legislative intent to establish a FOIL exception through the enactment of Election Law § 3-222).

[222] Mestecky v. City of New York, 30 N.Y.3d 239, 243 (2017) (quoting *In re* M.B., 6 N.Y.3d at 447); *see also* Heard v. Cuomo, 80 N.Y.2d 684, 689 (1993); Sanders v. Winship, 57 N.Y.2d 391, 395-96 (1982); Till v. APEX Rehab., 144 A.D.3d 1231, 1232-33 (N.Y. App. Div. 2016).

[223] *See* Gluck, *supra* note 190, at 1860 n.403 (describing New York as one of several "states that appear resistant to a text-based approach" to statutory interpretation).

[224] N.Y. EDUC. LAW § 3602-ee(2) (McKinney 2019).

[225] *Id.* § 3602-ee(3).

[226] *Id.* § 3602-ee(6).

[227] *Id.* § 3602-ee(10).

In reviewing Success Academy's Challenge to DOE oversight, both the Commissioner of Education and the trial court applied a contextual view of statutory interpretation that sought to harmonize related provisions and allow for the inclusion of the UPK law's broader goals.[228] The Commissioner and the trial court also balanced the UPK law's inclusion of charter schools as grant-eligible with the statute's articulation of broader quality and oversight goals.[229]

By contrast, the Appellate Division and the Court of Appeals majority elected to focus on *one* provision of the UPK law without closely considering that provision's interaction with other sections of the UPK law, or with the Charter Schools Act.[230] By focusing on a single provision in the UPK law and ignoring the broader context of both laws and the ambiguity created by tensions between them, the Court of Appeals failed to give sufficient effect to legislative intent. In doing so, the majority opinion creates confusion. Worse yet, it may signal a retreat from a more robust, contextual approach to statutory interpretation that considers legislative intent in a manner that is cognizant of the actual goals of the statutory scheme, rather than merely engaging in a mechanical exercise.

### *B. Judicial Review of Agency Interpretations of Statutes They Implement*

Another question raised by *Matter of DeVera* is whether, and to what degree, the Court should have deferred to the SED and DOE interpretations of the UPK statutes as they relate to oversight of charter schools.

New York's formulation of the standard of deference given to agency interpretations of statutes they are charged with administering bears some similarities to, and some key differences from, the federal standard known as *Chevron* deference.[231] *Chevron* deference is a canon of statutory interpretation that is applied when Congress delegates power to an agency to carry out a regulatory scheme, with the understanding that the agency will apply its experience and expertise in implementing and interpreting its governing statute.[232] When an agency's interpretation of

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[228] Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882; *In re* Vera v. Elia, No. 1014-16, 2016 WL 4580093, at *10-*12 (N.Y. Sup. Ct. June 08, 2016).

[229] Appeal of De Vera, 55 Ed Dept Rep, Decision No. 16,882; *In re* Vera, 2016 WL 4580093 at *11.

[230] DeVera v. Elia, 152 A.D.3d 13, 19-21 (N.Y. App. Div. 2017); Matter of DeVera v. Elia, 32 N.Y.3d 423, 434-36 (2018).

[231] *See generally* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[232] *See, e.g.*, LARRY M. EIG, CONG. RESEARCH SERV., R97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 27-31 (2014), https://perma.cc/K82W-6E8T.

ambiguity in its governing statute is expressed in a manner carrying the force of law (through rulemaking or adjudication), a reviewing court will defer to the agency's interpretation as long as it is permissible or reasonable.[233]

Under *Chevron*, a court reviewing an agency interpretation of a statute it implements is faced with the following questions. First, at what has become known as "*Chevron* step zero," has Congress delegated to the agency authority to interpret the statute in a manner carrying the force of law, and has the agency exercised that authority in the interpretation at issue?[234] If so, the court then asks, at *Chevron* step one, has Congress has spoken to the precise question at issue?[235] If Congress has clearly addressed the statutory question presented, that interpretation must stand; both the agency and the court must abide by Congress' clear statutory direction.[236] If, on the other hand, Congress has not spoken to the precise question at issue, a reviewing court is to defer to the agency's interpretation of the statute so long as it is reasonable.[237] This is known as *Chevron* "strong deference."[238]

The theory behind such deference is that where Congress has charged an agency with implementing a statutory scheme that contains ambiguities, Congress has implicitly delegated authority to the agency to fill any "gap left by Congress" such that the agency's reasonable interpretation should be upheld.[239] Much of *Chevron*'s rationale is based on the notion that an agency's experience and expertise in a particular area of law places it in a better position to discern and carry out Congress' intent.[240]

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[233] *Id.* at 27-28.

[234] *See* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 195 (2006) ("*Chevron* applies to agency decisions having the force of law or backed by relatively formal procedures, while requiring a case-by-case inquiry into whether *Chevron* applies to less formal agency action.").

[235] *Chevron*, 467 U.S. at 842-43.

[236] *Id.*

[237] *Id.* at 843.

[238] *See, e.g.*, Cetto v. LaSalle Bank Nat'l Ass'n, 518 F.3d 263, 274 (4th Cir. 2008) (stating that "under specifically applicable statutory provisions and Supreme Court holdings . . . strong deference" must be accorded to the challenged agency interpretation).

[239] *Chevron*, 467 U.S. at 866.

[240] *Id.* at 865. It is worth noting that *Chevron* deference currently stands on somewhat shaky ground. Several Supreme Court justices have expressed skepticism of, if not outright disdain for, the doctrine, and some have explicitly advocated for its demise. *See, e.g.*, Baldwin v. United States, 140 S. Ct. 690 (2020) (Thomas, J. dissenting from denial of certiorari) (arguing that the Supreme Court's decisions in both *National Cable & Telecommunications Assn. v. Brand X Internet Servs.*, 545 U.S. 967 (2005)—a decision Justice Thomas authored—and *Chevron* should be overruled as unconstitutional on separation-of-powers grounds and on the grounds that they are inconsistent with the federal Administrative Procedure Act.).

New York's approach to judicial deference to agency interpretations of statutes they administer bears some similarities to *Chevron* deference, deferring in cases involving questions within the agency's special competence, while leaving pure statutory questions to courts. For example, the Court of Appeals has said that "'an agency's interpretation of the statutes it administers must be upheld absent demonstrated irrationality or unreasonableness,' but where 'the question is one of pure statutory reading and analysis . . . there is little basis to rely on any special competence or expertise of the administrative agency.'"[241] New York courts state the deference test differently and call for a distinct (but in some ways *Chevron*-related) analysis.

In New York, the rule relating to judicial review of agency interpretations of statutes they are charged with implementing has been stated as follows:

> Although the proper interpretation of a statute ordinarily presents an issue of law reserved for the courts, this Court has recognized that "[a]n administrative agency's interpretation of the statute it is charged with implementing is entitled to varying degrees of judicial deference depending upon the extent to which the interpretation relies upon the special competence the agency is presumed to have developed in its administration of the statute."[242]

Thus, the basis for judicial deference to agency statutory interpretations in New York centers largely on the degree to which a correct statutory interpretation would benefit from the agency's experience and competence in administering the statute.[243] This includes the agency's operational implementation of the statute: "[W]here the interpretation of a statute or its application involves knowledge and understanding of underlying operational practices or entails an evaluation of factual data and

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[241] Lorillard Tobacco Co. v. Roth, 99 N.Y.2d 316, 321 (2003) (quoting Seittelman v. Sabol, 91 N.Y.2d 618, 625 (1998)).

[242] Claim of Gruber, 89 N.Y.2d 225, 231 (1996) (quoting Rosen v. Pub. Empl. Relations Bd., 72 N.Y.2d 42, 46 (1988)).

[243] This standard reads much like the "sliding scale" of deference applied under federal law to informal (or "non-force of law") agency interpretations of statutes they implement, known as *Mead/Skidmore* deference (based on the Supreme Court's resurrection in *U.S. v. Mead Corp*., 533 U.S 218 (2001), of the pre-*Chevron* deference standard applied in *Skidmore v. Swift & Co*., 323 U.S. 134 (1944)). However, unlike federal *Mead/Skidmore* deference, New York courts do not explicitly cite a difference in the degree of deference afforded based on whether the agency interpretation carries the force of law, nor do they cite the same factors articulated in *Mead* (as based on *Skidmore*): "The weight [accorded to an administrative judgment] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it the power to persuade, if lacking power to control." *Mead*, 533 U.S. at 228 (quoting *Skidmore*, 323 U.S. at 140).

inferences to be drawn therefrom[,] the courts regularly defer to the governmental agency charged with the responsibility for administration of the statute."[244] Under the New York standard, "[w]hen such deference is appropriate," the courts will uphold an agency's interpretation of a provision so long as the interpretation "is supported by a rational basis."[245]

While providing for deference to agency experience and expertise when deemed relevant to the interpretation, New York courts will not defer to agency statutory interpretations where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent."[246] The theory is that in such circumstances, "there is little basis to rely on any special competence or expertise of the administrative agency," and the court may instead rely on its own interpretation of the statutory language and legislative intent.[247]

While similar to the question posed under *Chevron* step one, New York's formulation of the deference question differs. . Rather than posing the question as one of statutory ambiguity that presumably leaves gaps for the agency to fill, the focus is on whether the question is one of "pure statutory reading and analysis." This gives reviewing courts a great deal of leeway in deciding whether to consider agency expertise. This framework also permits courts to ignore the value that agency experience may add to questions of legislative intent simply by characterizing a matter as one involving questions of pure statutory reading and analysis. For example, Judge Garcia's majority opinion in *Matter of DeVera* ignores very useful insight into how New York's UPK program is implemented and how the various relevant laws interact in practice. The majority opinion characterizes the question as one of pure statutory interpretation, declining to defer to or even closely consider the fact- and policy-based interpretive approach taken by the New York State Commissioner of Education. Instead, it mechanically relies on an isolated statutory provision deemed to be "clear."[248]

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[244] Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459 (1980); *see also* Indus. Liaison Comm. v. Williams, 72 N.Y.2d 137, 144 (1988) ("Our reasoning does not mean that an agency's special expertise will never be relevant or specially respected as to a question arising under the State Administrative Procedure Act . . . but that the principle of deference should be applied only where such expertise is relevant. It is not in this case.").

[245] Claim of Gruber, 89 N.Y.2d at 231 (citing Fisher v. Levine, 36 N.Y.2d, 146, 150 (1975); Matter of Van Teslaar (Levine), 35 N.Y.2d 311, 318 (1974)).

[246] Kurcsics, 49 N.Y.2d at 459.

[247] Claim of Gruber, 89 N.Y.2d at 231-32 (1996) (quoting Kurcsics, 49 N.Y.2d at 459); *see also* Van Teslaar, 35 N.Y.2d at 318; Matter of Ferrara, 10 N.Y.2d 1, 7 (1961).

[248] Matter of DeVera, 32 N.Y.3d, 423, 434 (2018).

### *C. Legal Implications of Matter of DeVera*

*Matter of DeVera* calls for the Court to re-examine and clarify its approach to statutory interpretation, including how it considers the entire statutory scheme and the weight it gives to how agencies interpret statutory schemes they implement. A defining feature of the *DeVera* majority's opinion is its conclusion that the legislature had spoken clearly on the question of charter schools' exemption from UPK oversight requirements.[249] This narrow, mechanical approach to statutory interpretation strays from the richer, more nuanced approach to ascertaining legislative intent described by former Chief Judge Judith Kaye.[250] The *DeVera* majority's approach fails to consider the full scope of legislative intent in the UPK law, which emphasizes quality standards while including multiple providers to broaden UPK access. In doing so, the majority ignores the public law norms and values implicated and the priority among them.[251]

In the broader context of privatization in public education, "public law norms include constitutional principles, statutory requirements, public oversight, and democratic accountability."[252] The language of "public law values" is used here to refer to basic values of fairness, equality, expertise, competence, and adherence to the rule of law, all of which hold government agencies accountable and work in favor of the greatest common good. Scholars have noted the significant stress that privatization places on public law norms and values.[253] The tensions created by the privatization of public functions are particularly concerning in the context of public education, which is central to the development of informed citizens in a democracy.[254]

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[249] *Id.* at 438.

[250] *See* Kaye, *supra* note 214, *passim.*

[251] The public law values expressed in the UPK law are focused on effective, high-quality pre-kindergarten education. To the extent that charter school freedom from oversight might also be considered a value to be addressed by the legislature, it must be considered secondary under the UPK law.

[252] Natalie Gomez-Velez, *Common Core State Standards and Philanthrocapitalism: Can Public Law Norms Manage Private Wealth's Influence on Public Education Policymaking?*, 2016 MICH. ST. L. REV. 161, 195 (2016).

[253] *See, e.g.*, Kenneth J. Saltman, *Putting the Public Back in Public Schooling: Public Schools*
*Beyond the Corporate Model*, 3 DEPAUL J. SOC. JUST., Fall 2009, at 9, 12-13; Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 402 (2006); Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1301-10 (2003); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369-70 (2003).

[254] *See* Gomez-Velez, *supra* note 252, at 173 ("Defenders of public education as a common good that is central to a healthy, equitable, and inclusive democracy tend to oppose the market-based version of public education and its associated reforms. At the same time, these public education advocates seek to improve the quality of the public education system as a

This calls to mind arguments favoring public values analysis in statutory interpretation, based on "the public values ideal that fundamental principles and norms developed through adjudication can contribute to the common good of our polity and to the rationality and coherence of its law."[255] Such an approach to statutory interpretation would emphasize "expanded context, the evolution of statutory principles, and the importance of background understandings."[256] As legal scholar William N. Eskridge, Jr. explains:

> First, the interpreter should explicitly consider not just the text and legislative history of a statute, but also its entire public law context and current concepts of reasonableness and justice . . . . Second, the interpreter should view statutes as dynamic rather than static . . . .Third, the interpreter should explicitly acknowledge the importance of rational background understandings—public values—when she interprets statutes . . . . Public values have a gravitational force that varies according to their source (the Constitution, statutes, the common law) and the degree of our historical and contemporary commitment to these values.[257]

Considering *Matter of DeVera* from a public values perspective, the holistic, contextual approach taken by Commissioner Elia, the trial judge, and Judge Rivera is preferable to that taken by the Court of Appeals majority. This is particularly so given evidence that the legislature prioritized the importance of implementing UPK in a manner that supports high-quality programming over charter school autonomy.[258] It is also the better approach from the perspective of public law, reasonableness, and justice.

The procedural approach taken by the SED and the DOE in implementing New York City's UPK program merits judicial deference. When the legislature has delegated authority to an agency to implement a statutory scheme involving coordinated, shared public/private regulatory space, and the agency implements the statutory scheme using procedures

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whole, a goal in tension with reforms based on competition and consumer choice. This includes applying resources equitably and ensuring quality education with standards that will support the growth and development of young people.").

[255] William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1017 (1989).

[256] *Id.*

[257] *Id.* at 1017-18.

[258] *See, e.g.*, Report of Senate Majority Leader Klein on New York City's Proposed Universal Pre-K Plan (Jan. 5, 2014) (noting that quality UPK program participation was linked to high economic returns to society and to the public); Memorandum of State Educ. Dep't, Bill Jacket, L. 1997, Ch. 436; N.Y. STATE COMPTROLLER, THE 1997-98 BUDGET: FISCAL REVIEW AND ANALYSIS (1997).

that are formalized and transparent, the agency's determinations should receive deference. As Jody Freeman notes: "to the extent that agency coordination takes the form of . . . decisionmaking modes characterized by relative transparency and formality, it will merit Chevron deference more often."[259] Applied here, the state legislature clearly delegated authority to the SED and the DOE to carry out the UPK programs. The SED established a fairly formalized and transparent procurement and oversight process for implementing the UPK programs.[260] The DOE similarly established a procurement process that was designed to ensure the quality standards set forth in the 2014 UPK law and to apply those standards consistently across all UPK providers.[261]

Such a deferential approach would not only hew more closely to the legislature's intent under the UPK law, but would also restore an approach to statutory interpretation that better embodies the New York Court of Appeals' role as a guardian of law and public values.

### *D. Policy Implications of Matter of DeVera*

In addition to its legal implications, *Matter of DeVera* complicates UPK policy and practice in New York. Success Academy's challenge was rooted in resistance to complying with the quality standards and public oversight required of all early childhood education providers. From a policy perspective, the importance of quality standards to an effective early education cannot be gainsaid. A core question in *DeVera* was whether the New York State Legislature intended that provisions of the New York City Charter Schools Act limiting oversight of charter schools to charter entities would apply to UPK programs under the 1997 and 2014 UPK laws. This question strikes at the heart of public education policy battles over quality, equity, and the degree to which privatization and deregulation should take precedence over public oversight and accountability.

Needless to say, the decision in *DeVera* is a setback for New York State's pre-kindergarten quality and oversight structure as it applies to charter schools. The Success Academy challenge also raises questions about the charter school network's reasons for objecting to compliance requirements that mark baseline standards for high-quality pre-kindergarten programs. Success Academy's complaint alleges that the SED and DOE requirements are too onerous for its high-quality program:

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[259] Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1206 (2012).

[260] *See* discussion *supra* Section I.B.

[261] *Id.*

> Success Academy, a high-quality public charter school operator, cannot continue the successful curriculum of its Pre-K classes if it is forced to accept the onerous provisions of the DOE's contract. If Success Academy is forced to stop providing Pre-K classes, that will impose irreparable harm on families that plan to send their children to pre-K classes provided by Success Academy.[262]

With regard to specific pre-kindergarten program issues, Success Academy's Article 78 Petition touts its curriculum, instruction, teacher professional development, and overall strength of its programs.[263] The Petition then complains about the length and detail of the DOE's "Full-Day Universal Pre-Kindergarten (UPK) Contract for Charters 2015-2018," including the teacher training requirements, limits on the use of technology tools, and attendance and "short breaks" requirements.[264] Success Academy's Petition seems to quibble over baseline requirements that it claims its programs either meet, exceed, or approach more effectively.

Why, then, did Success Academy decide to challenge the DOE's standards, ultimately undermining UPK quality standards that would apply to all charters, instead of negotiate on the basis that its programs offer greater enrichment and more effective programming, and reach a compromise on monitoring and oversight? If Success Academy really was concerned with quality pre-kindergarten writ large, logic dictates that it would seek to collaborate with the education department, support quality standards, and offer assistance in the project to "lift all boats" in the pre-kindergarten-for-all initiative. Instead, Success Academy chose litigation.

This highlights a key problem with the "choice and competition" model of education. Rather than focusing on the public project of improving equitable access to high-quality UPK, the choice model seems to emphasize competition and deregulation. Because quality standards and oversight are so important to the success of pre-kindergarten, states and

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[262] Verified Article 78 Petition at ¶ 7, *In re* Vera v. Elia, No. 1014-16, 2016 WL 4580093 (N.Y. Sup. Ct. June 8, 2016).

[263] For example, in its verified complaint, Success Academy alleges, inter alia: "Success Academy schools prepare low-income and minority children for college readiness and career success . . . . Success Academy enrolls nearly 11,000 students, primarily low-income children of color in disadvantaged neighborhoods: 95% are children of color, and 75% of students receive free or reduced-price lunch . . . .These students (and their schools) have reversed racial and socio-economic achievement gaps in New York City: on the 2015 New York State assessments, 93% of Success Academy students who reached testing grades (grades three and up) were proficient in math (as compared to 35% of students city-wide), and 68% of Success Academy students met reading standards (as compared to 30% of students city-wide). These results place Success Academy schools with testing grades in the top 1% in Math and the top 3% in English Language Arts ("ELA"), among approximately 3,550 public schools in New York State." *Id.* ¶ 20.

[264] *Id.* ¶¶ 40-41.

localities should be encouraged and supported in efforts to incorporate the recommended, research- and evidence-based quality standards and appropriate public monitoring mechanisms. In short, even considering and supporting the establishment and goals of charter schools, the paramount interests should be equity and broad access to high-quality pre-kindergarten. Yet neither Success Academy nor the appellate level courts focused on these public policy goals. Instead, the focus was on the deregulatory goals of charter schools, even in the context of UPK, where ensuring quality standards is crucial to achieving the program's laudable and urgently needed aims.

## CONCLUSION

The outcome in *Matter of DeVera* calls for a clarification of the court's statutory interpretation canons and a recommitment to applying what Judge Kaye described as concepts of "common-sense and substantial justice"[265] and to achieving the legislative purpose consistent with public values.[266] It also calls for a commitment to public law norms and values, particularly as they relate to accountability for quality standards in public education in an environment that includes a range of public and private actors. This is particularly important in cases where statutes include various approaches to achieving quality education that require harmonization to achieve complex legislative and public policy goals.

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[265] *See* Kaye, *supra* note 204, at 26.

[266] See Eskridge, *supra* notes 255-57, and accompanying text.