

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

NEW YORK STATE UNITED TEACHERS, by its President ANDREW PALLOTTA; UNITED FEDERATION OF TEACHERS, LOCAL 2, by its President MICHAEL MULGREW; ANGELA ESPOSITO, individually and on behalf of her minor grandchildren; MONICA TERON, individually and on behalf of her minor child; and ANA S. RIVERA, individually and on behalf of her child,

Index No.

Mot. Seq. No.

Petitioners,

v.

STATE UNIVERSITY OF NEW YORK; DEBORAH F. STANLEY, as Interim Chancellor of the STATE UNIVERSITY OF NEW YORK; DR. MERRYL H. TISCH, as Chairman of the STATE UNIVERSITY OF NEW YORK BOARD OF TRUSTEES; JOSEPH W. BELLUCK, as Chair of the STATE UNIVERSITY OF NEW YORK BOARD OF TRUSTEES' CHARTER SCHOOLS COMMITTEE; STATE UNIVERSITY OF NEW YORK CHARTER SCHOOLS INSTITUTE; STATE UNIVERSITY OF NEW YORK BOARD OF TRUSTEES' CHARTER SCHOOLS COMMITTEE; BRILLA COLLEGE PREPARATORY CHARTER SCHOOLS; and PUBLIC PREP CHARTER SCHOOL ACADEMIES,

Respondents.

**MEMORANDUM OF LAW
IN SUPPORT OF PETITIONERS' VERIFIED PETITION**

STROOCK & STROOCK & LAVAN LLP
180 Maiden Lane
New York, New York 10038
(212) 806-5400

Co-counsel for Petitioners

BETH A. NORTON, ESQ.
52 Broadway, 14th Floor
New York, NY 10004
(212) 701-9420

*Co-counsel for Petitioners
United Federation of Teachers*

ROBERT T. REILLY, ESQ.
52 Broadway, 9th Floor
New York, NY 10004
(518) 213-6000

Co-counsel for Petitioners

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	ii
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS	3
The Charter Schools Act.....	3
Respondents SUNY, Brilla, and Public Prep.....	5
The Creation of Vertex Partnership Academies	6
ARGUMENT	10
THE SUNY CHARTER SCHOOLS COMMITTEE VIOLATED THE CHARTER CAP AND ACTED IN EXCESS OF ITS AUTHORITY, ARBITRARILY AND CAPRICIOUSLY, AND ABUSED ITS DISCRETION WHEN IT APPROVED THE RESUBMISSION OF CHARTER ACTIONS TO CREATE VERTEX PARTNERSHIP ACADEMIES	10
A. The Charter Law Provides An Explicit Numerical Cap For NYC Charters That Has Been Exhausted	10
B. The “Vertex Model” Is Specifically Designed To Evade The Cap And Other Statutory Requirements For New Charter Schools	13
C. SUNY Is Treating Vertex Like A New Charter School	14
D. Allowing Vertex To Open Without A Separate Charter Will Eviscerate The Statutory Cap And Subvert Requirements For New Charter Schools	18
CONCLUSION.....	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Bender v. Jamaica Hosp.</i> , 40 N.Y.2d 560 (1976)	12
<i>Matter of Gruber (New York City Dept. of Personnel-Sweeney)</i> , 89 N.Y.2d 225 (1996)	11
<i>New York State Bd. of Regents v. State Univ. of New York</i> , 178 A.D.3d 11 (3rd Dep't 2019)	3
<i>New York State Psychiatric Ass'n, Inc. v. New York State Dep't of Health</i> , 19 N.Y.3d 17 (2012)	19
<i>Puchalski v. Depew Union Free Sch. Dist.</i> , 119 A.D.3d 1435 (4th Dep't 2014)	19
<i>Matter of Tutunjian v. Conroy</i> , 55 A.D. 3d 1128 (3d Dep't 2008)	11
<i>Weingarten v. Bd. of Trustees of N.Y. City Teachers' Ret. Sys.</i> , 98 N.Y.2d 575 (2002)	11
<i>Welling v. Portfolio</i> , 26 N.Y.S.2d 823 (Sup. Ct. New York Cnty. 1941)	19, 20
<i>Wipfler v. Klebes</i> , 284 N.Y. 248 (1940)	20
Statutes	
N.Y. Educ. Law § 2851	passim
N.Y. Educ. Law § 2852	passim
N.Y. Educ. Law § 2853	3, 4, 16

Petitioners New York State United Teachers (“NYSUT”), by its President, Andrew Pallotta; United Federation of Teachers, Local 2 (“UFT”), by its President, Michael Mulgrew; Angela Esposito, individually and on behalf of her minor grandchildren; Monica Teron, individually and on behalf of her minor child; and Ana S. Rivera, individually and on behalf of her child (hereinafter collectively referred to as “Petitioners”), bring this hybrid Article 78 proceeding seeking an order and judgment nullifying the State University of New York Board of Trustees’ Charter School Committee’s (“SUNY”)¹ approval of the at-issue charter modifications permitting the creation of Vertex Partnership Academies, an entirely new school governed by an entirely new educational corporation. SUNY’s approval of Vertex Partnership Academies represents the creation of a new charter high school in violation of Education Law § 2852(9) which caps the number of allowable charter schools in New York State and New York City, and by which New York City has already exhausted its allotted number of charters, as well as Education Law § 2852 which articulates the application and approval process for creating a new charter.

PRELIMINARY STATEMENT

Government action must be judged by its substance and not its label. Here, attempting to circumvent the legislative cap on the number of allowable charter schools within New York City, SUNY has approved the so-called “revision” of certain existing, unrelated charter schools to add a new joint high school “program,” to be operated by a separate entity under the name “Vertex Partnership Academies.” Neither Vertex Partnership Academies nor its parent network entity have ever applied for or been granted a charter, as is required by the Education Law to operate a

¹ Hereinafter, Respondents SUNY, its Board of Trustees, SUNY Charter Schools Institute, and the Committee will be referred to as “SUNY” or “SUNY Respondents.”

new charter high school. Nor is Vertex an extension of, or a joint venture of, the two charter schools that applied for the “revision” to their own charters. It is a distinct entity which has merely contracted with Brilla College Preparatory Charter School and Public Prep Charter School Academies to allow students from the contracted schools priority placement in the new high school. Vertex is nominally, operationally, effectively, and actually a new charter school. SUNY’s approval of it via the applications of Brilla and Public Prep is *ultra vires* and violates Education Law § 2852(9) which explicitly limits the number of charters available in New York City, a limit that has long since been reached. N.Y. Educ. Law § 2852(9-a).

Every part of the approval process demonstrates that SUNY is attempting to evade the cap by treating this “revision” as a new school with a new charter in every way but name, calling it a charter “revision.” Indeed, as set forth herein, both SUNY and Vertex acknowledge that the convoluted joint program structure is specifically designed as a work-around for the cap. Nonetheless, SUNY has proceeded with its approval in flagrant disregard of the Board of Regents’ express concerns that SUNY’s efforts are in violation of the cap. In short, SUNY is not only well aware of what it is doing, but has admitted throughout the approval process that this new structure is designed to evade the cap.

Since the Charter Schools Act’s enactment in 1998, the New York State Legislature has recognized the need to establish a cap on the number of charter schools both within the state and specifically within New York City. Over the last two decades, the Legislature has continued to demonstrate its authority to limit the number of charter schools in the state by amending the Charter Schools Act to increase the cap of allowable charter schools to balance need and countervailing burden on traditional public schools within the same district. SUNY should not be allowed to violate the law by labeling this new charter high school as a convoluted revision to

expand grades. If allowed to proceed, SUNY's approval of Vertex Partnership Academies would render Education Law § 2852 meaningless and provide Vertex, SUNY, and others the unfettered ability to create unlimited new charters outside of the statutory process. SUNY's actions with regard to Vertex Partnership Academies are in direct conflict both with the statutory purpose and legislative intent of the cap as well as the statutorily prescribed steps required to create a new charter school, which SUNY here has not followed. For the reasons stated herein, the Court should nullify SUNY's approval of the charter revisions designed to authorize Vertex Partnership Academies, and declare that such "expansions" are unlawful.

STATEMENT OF FACTS

The Charter Schools Act

The creation, operation and modification of charter schools in New York State is governed by the New York Charter Schools Act of 1998 (codified in Article 56, Education Law §§ 2850 – 2857) (the "Act").² *New York State Bd. of Regents v. State Univ. of New York*, 178 A.D.3d 11, 18-19 (3rd Dep't 2019). From inception, the State Legislature placed a cap on the number of charter schools New York and, later, New York City can have. N.Y. Educ. Law § 2851; Petition Ex. 1. Over time, the Legislature has increased the cap to carefully calibrate the number of allowable charters and in 2007, provided New York City with its own limit of charters within the overall state cap. N.Y. Educ. Law § 2852(9). New York City reached that limit in 2019. Petition ¶ 6. Thus, no new charters may be issued in the New York City school district absent state legislative action.

² A "charter school" is a school that operates independently of existing schools and school districts, is run by a private board, overseen by its chartering agency, and financed with public funding. N.Y. Educ. Law § 2853(1)(c). When a charter school is permitted to open and enroll students in a school district, the school district is required to pass through its per student funding for each student that ultimately enrolls in the charter school. Accordingly, the creation of charter seats in a school district also creates a drain on public school district resources available to students remaining in traditional schools.

Since the first charters were issued, the operational structure of charter schools has changed with many charter schools – like the Respondent schools in this case – operating under the umbrella of a single education corporation. As such, the Legislature has clarified that existing umbrella organizations seeking to add schools or sites must apply for and obtain *new* additional charters in compliance with the statutory caps:

an education corporation operating a charter school shall be authorized to operate more than one school or house any grade at more than one site, ***provided that a charter must be issued for each such additional school or site in accordance with the requirements for the issuance of a charter pursuant to this article and that each such additional school or site shall count as a charter issued pursuant to [§ 2852(9)].***

N.Y. Educ. Law § 2853(b-1) (emphasis added). In short, new schools and new locations need new charters, and those new charters count against the cap.

In addition to prescribing the number of allowable charter schools in the state, the Act also provides procedures and requirements for both new charter applications and applications by existing schools to renew or modify their existing charters (charters are granted for five-year terms). N.Y. Educ. Law § 2852; § 2851(4). Applications for renewal or modification, as the names indicate, are not “new” charters and therefore do not count against the cap. SUNY Respondents here have attempted to subvert this distinction to authorize what is plainly a new charter high school under the guise of charter modifications. In doing so, they not only violate the cap, but they also violate the statutory requirements for the granting of a new charter, which are more extensive – including more detailed information, materials, a showing of community support and vetting by the agency – than a mere grade expansion. N.Y. Educ. Law § 2852(7)(a). Additionally, as explained below, although charters are – as a technical matter – ultimately issued by the Board of Regents, the application process allows a charter entity – here SUNY – to

push through a charter or a modification in the absence of actual Board of Regents' approval.
N.Y. Educ. Law § 2852.

Respondents SUNY, Brilla, and Public Prep

SUNY's Board of Trustees is one of three agencies authorized, pursuant to Education Law § 2851, to serve as a charter entity for certain charter schools operating in New York. Petition ¶ 27. Currently, SUNY is the charter entity or authorizer for 216 charter schools operating in New York, including Respondents Brilla College Preparatory Charter Schools ("Brilla"), Public Prep Charter School Academies ("Public Prep"), and, if the unlawful charter action is permitted to continue, the newly created Vertex Partnership Academies. *Id.*

Brilla is a SUNY-authorized non-for-profit charter school education corporation operating several Brilla schools. Petition ¶ 39. Brilla's participating schools are located in Bronx, New York. *Id.* For all relevant times, Brilla was authorized to serve grade kindergarten through grade eight. Petition ¶ 40. Brilla operates four elementary schools and one middle school, each of which has its own charter. Petition ¶ 41. Brilla uses Seton Education Partners, Inc., a Wyoming charter management organization, as its charter management organization. Petition ¶ 42. The application for modification for Brilla seeks to expand the grades served by one of its schools to include grades 9-12 and authorize Brilla to contract for that school's students to attend a separate "joint" high school "program" operated by Vertex Partnership Academies. Petition ¶ 43.

Public Prep is a SUNY-authorized non-for-profit charter school education corporation operating several Public Prep schools. Petition ¶ 44. Public Prep's participating schools are located in Bronx and Manhattan, New York. *Id.* For all relevant times, Public Prep was authorized to serve grade kindergarten through grade eight. Petition ¶ 45. Public Prep operates four elementary schools and two middle schools, each of which have their own charters,

although some of its elementary schools serve middle school grades as well. Petition ¶ 46.

Public Prep uses The Public Prep Network Board (“Public Prep Network”), a New York charter management organization, as its charter management organization. Petition ¶ 47. Unlike Brilla, the application for modification for Public Prep seeks to expand the grades served by one of its middle schools to include grades 9-12 and authorize Public Prep to contract for its students at any of its schools to attend a separate “joint” high school “program” operated by Vertex Partnership Academies. Petition ¶ 49. Public Prep has also “lent” Vertex Partnership Academies approximately \$400,000 to assist in its start-up, with “Vertex to repay those funds out of philanthropy Vertex raises for the program.” Petition Ex. 6 at 2.

The Creation of Vertex Partnership Academies

In or about 2020, in an explicit effort to bypass the statutory cap on charter schools, Ventoux Partnership Network, Inc., (“Vertex”), a new entity created by Ian Rowe (“Mr. Rowe.”), partnered with Brilla and Public Prep to create the first of a new network of “joint” high school programs. Petition ¶ 51. Mr. Rowe, formerly CEO of Public Prep, has consistently stated his intent not just to expand existing schools but to create new ones. Petition ¶ 54. Indeed, as one example, his biographical note at the Thomas B. Fordham Institute states that Mr. Rowe is an “Entrepreneur-In-Residence at the Charter School Growth Fund, and is founding Vertex Partnership Academies, *a new network* of character-based, International Baccalaureate public *charter high schools to open in the Bronx in 2022.*” Petition ¶ 53 (emphasis added). This first of these new schools would allow Brilla and Public Prep (and later other contracting charter schools) to funnel their middle school students into guaranteed spots. Petition Ex. 6 at 3. Instead of Vertex applying for a new charter for its high school (which would hamper the ability to funnel students from existing schools to the exclusion of other applicants and violate the statutory cap), both Brilla and Public Prep entered into a series of convoluted agreements with

Vertex and applied to modify their existing charters to allow for an expansion of grades and the creation of Vertex.³ Petition ¶ 59.

According to a SUNY Charter Schools Institute report, dated December 9, 2020, the Vertex co-educational joint high school program was created through a three-step procedure: First, Brilla contracted with Vertex, a new, not-for-profit charter management organization. *Id.* Second, Public Prep contracted with Brilla to permit Public Prep students to participate in the new Vertex high school program. *Id.* Third, revisions were sought to the charters for both Brilla and Public Prep, requiring approval by SUNY and the Board of Regents. *Id.* SUNY stated in its December 2020 Summary of Findings that both Brilla’s management organization, Seton Education Partners, Inc., and Public Prep’s management organization, Public Prep Network “will not be directly involved in the joint high school program.” Petition Ex. 6 at 2. Instead, Vertex Partnership Academies would be managed by the newly formed charter management organization Ventoux Partnership Network, Inc. *Id.* at 2-3. All 8th grade graduates from the participating or sending schools “will have returning students preference at Vertex Academies...” *Id.* at 3. This means that, unlike with the issuance of a new charter, students from Brilla and Public Prep (and any future contracting charter middle school), will have preference over any other students who may wish to apply to the Vertex high school either from other charter schools or from traditional public elementary schools.⁴ Given the ability to determine the

³ Specifically, Brilla sought to revise its charter with respect to one of its middle schools, Brilla College Preparatory Charter School (NYC CSD 7 – The Bronx), currently authorized to serve kindergarten through grade 8, while Public Prep sought to revise the charters of three of its schools: (1) Boys Preparatory Charter School of New York (NYC CSD 7 The Bronx, 192 E. 151st Street); (2) Girls Preparatory Charter School of New York (NYC CSD 1 – Manhattan, 420 E. 12th Street); and (3) Girls Preparatory Charter School of the Bronx (NYC CSD 8 – The Bronx, 890 Cauldwell Avenue), all currently authorized to serve kindergarten through grade 8. Petition ¶¶ 43; 48.

⁴ From SUNY’s December 2020 Summary of Findings: “The enrollment for the joint high school program is set forth below. All 8th grade graduates from the sending schools will have returning student preference at Vertex Academies, which will be open to additional students each year to reach the projected enrollment...” Petition Ex. 6 at 3.

number of seats available, this may well exclude all but students from Brilla and Public Prep.

The new high school is scheduled to open in time for the 2022-2023 school year. Petition ¶ 107.

The high school application/selection period for New York City students who will be attending high school in the 2022-2023 school year is currently ongoing. Petition ¶ 108.

As the application and approval process makes clear, Vertex is not an expansion of either Brilla or Public Prep, nor even some joint venture of the two. It is a separate entity with which Brilla and Public Prep have contracted. Vertex Partnership Academies is not the name of either a Brilla or Public Prep charter; and neither Brilla nor Public Prep is changing its name to Vertex Partnership Academies. Upon information and belief, Mr. Rowe, the Founder and Chief Executive Officer (“CEO”) of this new charter high school is not currently employed by or on the board of Brilla or Public Prep. Petition ¶¶ 57-58; 52.

Despite the applications clearly proposing a new charter, on December 23, 2020, SUNY approved the proposed charter actions to create Vertex Partnership Academies as “modifications.” Exhibit A of the “First Revision to the Second Amended and Restated Original Charter,” signed on May 21, 2021 by SUNY and Brilla, states while the joint high school program (“JHSP”) “is a program within the meaning of the Charter Agreement, as set forth herein, *it is the intent of the Parties and Public Prep to generally subject the JHSP to the same academic, operational, fiscal, and accountability terms and conditions to which a school is subject under each education corporation’s charter.*” Petition Ex. 14 at 2 (emphasis added).

This subterfuge was clear to the Board of Regents when SUNY subsequently submitted the application to it. Petition ¶¶ 82-83. Ahead of the Board of Regents July 12, 2021 meeting to rule on the proposed charter actions to authorize Vertex, Allison Armour-Garb, Special Advisor

to the Executive Deputy Commissioner of the New York State Education Department, submitted a July 1, 2021 memorandum to the P-12 Education Committee stating:

It is the Department's position that these proposed charter actions ***do not meet the required findings enumerated within Article 56*** and, furthermore, ***are not mere revisions*** to allow the operation of a "program" as part of an existing charter school, ***but instead appear to be an attempt to create a new school in potential violation of the NYC charter limits under the Education Law.***

Petition Ex. 3 at 4 (emphasis added). On July 12, 2021, the Board of Regents voted to reject the charter revisions, thus sending the proposal back to SUNY for reconsideration. Petition ¶ 97. In a letter sent the same day by Dr. James N. Baldwin of the Board of Regents to Dr. Merryl H. Tisch, Chairman of the SUNY Board of Trustees, Dr. Baldwin advised Dr. Tisch of the vote and clarified that:

In addition, in accordance with Education Law §2852(9) there are no charters available for issuance in New York City. ***Although the proposed charter actions are identified as revisions, the nature of the proposed charter actions and a review of supporting documentation evidence the creation of a new charter high school, in potential violation of the law.***

Petition Ex. 3 at 6 (emphasis added).

Notwithstanding the State Education Department's findings and recommendation that the proposed charter action was a scheme to avoid the cap and that the proposed actions be abandoned, on or about October 7, 2021, SUNY Respondents approved a resolution to resubmit its proposed revisions to the Board of Regents without modifications. Petition ¶ 98. However, apparently recognizing that it had, at the least, an optics problem, SUNY made cosmetic adjustments to the proposal, and a month later, on November 12, 2021, SUNY approved the resubmission of charter actions to authorize Vertex with modifications. Petition ¶ 101. As changes, SUNY recommended the inclusion of contracts between each education corporation (Brilla and Public Prep) with the same charter management organization (Vertex) to provide "greater oversight of the joint high school program." Petition Ex. 2 at 2. In the initial submission

only Brilla contracted directly with Vertex and then Public Prep contracted with Brilla. The substance of these agreements, however, were only addressed generally, instructing that “[t]he Education Corporations will also amend the memorandum of understanding between them that details roles and responsibilities, employment relationships, liability allocation, and fiscal structures” and justified the endeavor by stating vaguely that “[t]he modifications track a prior structure over a decade old used by charters working with KIPP NYC, LLC and Uncommon Schools, Inc.” Petition Ex. 2 at 3-4.

On December 21, 2021, SUNY resubmitted the charter revisions to the Board of Regents. Petition ¶ 104. Pursuant to the statutory process, upon resubmission, the Board’s only options were to approve the charter revisions or stay silent, which would allow the charter revisions to go into effect by operation of law 30 days from submission. Petition ¶ 105. As such, despite the Board of Regents’ vocal concerns about illegality that have not been addressed, the revised proposed charter actions authorizing Vertex were approved by operation of law, on or about January 20, 2022. Petition ¶ 106.

ARGUMENT

THE SUNY CHARTER SCHOOLS COMMITTEE VIOLATED THE CHARTER CAP AND ACTED IN EXCESS OF ITS AUTHORITY, ARBITRARILY AND CAPRICIOUSLY, AND ABUSED ITS DISCRETION WHEN IT APPROVED THE RESUBMISSION OF CHARTER ACTIONS TO CREATE VERTEX PARTNERSHIP ACADEMIES

A. The Charter Law Provides An Explicit Numerical Cap For NYC Charters That Has Been Exhausted

The resubmission of charter actions adopted by SUNY, under the guise of SUNY’s interpretation of grade level expansions allowed by Education Law § 2852, represents a direct violation of the clear and unambiguous charter cap established by the State Legislature under Education Law § 2852, and the Education Law § 2853 requirement that new schools must apply

for and receive new charters. The Court need only measure Respondents' actions against the statute to find that the charter action is a new charter. While Article 78, in appropriate cases, allows some deference to an agency's interpretation, such deference is not required where, as here, the issue turns solely on statutory interpretation. *See Weingarten v. Bd. of Trustees of N.Y. City Teachers' Ret. Sys.*, 98 N.Y.2d 575, 580 (2002), (declining to defer to a government agency in a declaratory judgment action challenging that agency's interpretation of multiple provisions in the statute); *See also Matter of Gruber (New York City Dept. of Personnel-Sweeney)*, 89 N.Y.2d 225, 231-32 (1996) (internal citations omitted) (holding that in Article 78 proceedings where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency." In such circumstances, the judiciary need not accord any deference to the agency's determination, and is free to ascertain the proper interpretation from the statutory language and legislative intent.) Here, whether SUNY was authorized to approve these so-called expansions is a matter of statutory interpretation.

The "primary consideration...in the construction of statutes is to ascertain and give effect to the intention of the Legislature." *Matter of Tutunjian v. Conroy*, 55 A.D. 3d 1128, 1130 (3d Dep't 2008) (quoting McKinney's Cons. Laws of N.Y. Book 1, Statutes § 92(a)). The courts have noted that "[t]o ascertain that intent, we first read the statute literally and determine whether its language is unambiguous and clearly expresses the Legislature's intent. If we find the language to be ambiguous, then we consult the statute's legislative history for guidance." *Id.* at 1130-31 (internal citations omitted). Indeed, "[w]here the statute is clear and unambiguous on its face, the legislation must be interpreted as it exists. Absent ambiguity the courts may not resort to rules of construction to broaden the scope and application of a statute and must apply the plain

import of the statute.” *Bender v. Jamaica Hosp.*, 40 N.Y.2d 560, 561–562 (1976) (internal citations omitted).

Here, the Legislature has spoken clearly and unambiguously, setting a maximum of 50 additional charters for New York City:

The total number of charters issued pursuant to this article statewide shall not exceed four hundred sixty. (a) All charters issued on or after July first, two thousand fifteen and counted toward the numerical limits established by this subdivision shall be issued by the board of regents upon application directly to the board of regents or on the recommendation of the board of trustees of the state university of New York pursuant to a competitive process in accordance with subdivision nine-a of this section. ***Fifty of such charters*** issued on or after July first, two thousand fifteen, ***and no more***, shall be granted to a charter for a school to be located in a city having a population of one million or more.

N.Y. Educ. Law § 2852(9)(a) (emphasis added). Indeed, the Legislature added language to the statute in 2015 reiterating that the cap was a hard rule; subsection (d) of Education Law § 2852(9) clarified that nothing in the Legislature’s changes was to be construed as altering the cap for New York City:

Notwithstanding any provision of this article to the contrary, any charter authorized to be issued by chapter fifty-seven of the laws of two thousand seven effective July first, two thousand seven, and that remains unissued as of July first, two thousand fifteen, may be issued pursuant to the provisions of law applicable to a charter authorized to be issued by such chapter in effect as of June fifteenth, two thousand fifteen; ***provided however that nothing in this paragraph shall be construed to increase the numerical limit applicable to a city having a population of one million or more as provided in paragraph (a) of this subdivision, as amended by a chapter of the laws of two thousand fifteen which added this paragraph.***

N.Y. Educ. Law § 2852(9)(d) (emphasis added).

The Legislature thus has made crystal clear that New York City was allotted *no more* than 50 additional charters after 2015. There is no dispute that New York City exhausted its 50 additional charters in March 2019. Petition Ex. 1; Petition ¶ 6. As such, the addition of new charter schools cannot occur without subsequent legislative changes. Had the Legislature

intended for SUNY to have the ability to approve unlimited new schools through a charter “modification” – regardless of any numerical limit – it would not have enacted a cap in the first place and expanded the cap with hard-line specifications regarding the total number of allowable charters over the last two decades.

B. The “Vertex Model” Is Specifically Designed To Evade The Cap And Other Statutory Requirements For New Charter Schools

Vertex’s own agreements make clear that it has been designed specifically to evade the exhausted cap. The Academic and Business Services Agreement between Vertex and Brilla describes what it calls “the Vertex Model”:

In New York State, due to a charter “cap,” no new charters are being granted to open new schools. However, charter revisions to expand grades are being granted. In the case of each Vertex Partnership Academy, each partnering K-8 school will request that the SUNY Charter Schools Institute revise its charter to extend to serve Grades 9-12. The schools would then bind its high school grades through a shared services agreement and a common academic program.

Petition Ex. 4, Business Agreement, Ex. A (Vertex Model) at 3. Moreover, the Business Agreement between Brilla and Vertex makes it clear that the intention of Vertex is to continue to undermine and avoid the charter cap by creating more “joint high school programs” in a similar fashion. Petition Ex. 4.

Through this model, Vertex would not only evade the cap, but also avoid the statutory requirements for the creation of new charter schools. The Legislature has specified that to create a new charter school, the parties interested in creating the new charter school must submit a charter application to a charter entity. N.Y. Educ. Law § 2851. The application must include, among other things, the name of the proposed charter school, the governance and organizational structure of the school, the facilities to be used, including the location of the school, the number of students to be served and the ages and grade levels to be served. *Id* at (2)(c), (i), (k), (j) and (l). The application must also include “[a] proposed budget and fiscal plan for the school, including

supporting evidence that the fiscal plan is sound and that sufficient start-up funds will be available to the charter school.” N.Y. Educ. Law § 2851(2)(e). Further, the application must include the procedures to be followed in the case of the charter school’s closure or dissolution. N.Y. Educ. Law § 2851(2)(t). The Legislature has also specified that the application must include “[e]vidence of adequate community support for and interest in the charter school sufficient to allow the school to reach its anticipated enrollment, and *an assessment of the projected programmatic and fiscal impact of the school on other public and nonpublic schools in the area.*” N.Y. Educ. Law § 2851(2)(q) (emphasis added).

As such, to legally become a new school, Vertex would need its own unique charter, one subject to the application and issuance procedures in Article 56 generally and Education Law §§ 2851, 2852 specifically, including an analysis of the projected impact of this new network of charter high schools on the other public and nonpublic schools in the area, as well as evidence of adequate community support for and interest in the school. However, Vertex never made an application pursuant to Education Law § 2851 nor has a proposed charter been submitted for it pursuant to Education Law § 2852. Indeed, Vertex itself has not applied for anything. It is relying on separate applications by separate schools that have no relationship to Vertex besides being contracting parties. It has provided no assessment of the impact of the school on other public and nonprofit schools in the area, and as the affidavits of the individual petitioners demonstrate, it has not gathered evidence of community input. *See* Petition Exs. 8, 9, and 10.

C. SUNY Is Treating Vertex Like A New Charter School

SUNY’s behavior throughout the resubmission process demonstrates that, whatever label it gives the applications, it viewed and treated the Vertex “expansion” as a new school – and not a new Brilla or Public Prep program – by placing statutory requirements on Vertex that are otherwise required for a new school. SUNY was blatant in its disregard of the law, noting in its

December 9, 2020 Summary of Findings that it had sought revisions to the application “to hold the joint high school accountable as *if it was a cohesive school*, and ensure SUNY oversight of the joint high school program.” Petition Ex. 6 at 5 (emphasis added). This glaring admission that, without specific modification, SUNY was not sure of its own oversight authority over Vertex – because, of course, it did not actually charter Vertex – goes to the heart of the attempted subterfuge. Indeed, SUNY noted that due to the “*newness and uniqueness* of the high school program, [SUNY] will place additional language in the charter agreement of each education corporation limiting the authority of the education corporations to add schools or other education corporations to the program without the approval of SUNY.” *Id.* at 1 (emphasis added). Meaning, SUNY attempted to limit Vertex expanding without SUNY approval by altering language in charters between SUNY and Brilla and Public Prep. It is not clear how such changes would be binding on Vertex.

Even within its questionable oversight, SUNY is treating Vertex as a separate school and not an extension of either Brilla or Public Prep. SUNY stated that it would review the high school program separately, independently, and on a different timeline than the renewal processes of either Brilla or Public Prep. *Id.* at 1. SUNY’s review process here not only veers from the statutory renewal process set forth in Education Law § 2851 for both Brilla and Public Prep, but also – as SUNY itself notes – would “put the high school program up for high-stakes review every five years”: the same time frame as a new charter school’s renewal. *Id.*; N.Y. Educ. Law § 2851(4). This could mean that Brilla’s and/or Public Prep’s charters could be up for renewal at a different time than Vertex’s approval and that each would be considered separately. How can Vertex constitute a modification or expansion of existing charters and yet be renewed or revoked separately from those charters? SUNY also explained it was putting in provisions in the

revisions “to allow SUNY to close the program under the same circumstances that permit SUNY to revoke a charter.” Petition Ex. 6 at 1. This is an equivalence to the Education Law § 2851(t) requirement that an applicant convey its closure procedures.

SUNY further stated that it made “extensive requests for amendments” to the proposed high school program in an effort to ensure its fiscal soundness, which is a requirement of new charters under § 2851(e). *Id.* at 2. Notably, the “complexity of the money flows and the various entities with fiscal roles involved in the [high school] program” compelled SUNY to demand an “unprecedented level of fiscal transparency in terms of financial reporting on the joint high school program...” *Id.* at 6. For instance, “the education corporations, through Vertex, will have to report on the high school program *as if it were a chartered school* in terms of quarterly financials and enrollment, annual budgets, budgets to actual, and other reporting *normally done by schools*.” *Id.* (emphasis added). SUNY also noted that it would require “the high school program to undergo the Institute’s Prior Action process *normally reserved for new schools* before the program may commence instruction.” *Id.* at 5 (emphasis added).

However, SUNY has also diverged from statutory requirements in key ways. For instance, SUNY noted that the proposed new high school program would be held accountable for academic performance separately from the existing elementary charter schools (“[t]he K-8 programs of the schools within the education corporations will be unaffected by SUNY’s action associated with any possible poor performance of the high school.”) *Id.* at 2. This is a departure from the statute, which provides that the board of trustees of a charter school is responsible for outcomes of all students enrolled in their charter. N.Y. Educ. Law § 2853(1)(f). SUNY also did not require Vertex to demonstrate community input or involvement, as mandated by Education Law § 2851(2)(q) for new schools.

The Board of Regents in its disapproval highlighted these instances by which SUNY demonstrated this was no mere expansion. The Board of Regents also noted that SUNY had required Brilla to establish a separate dissolution reserve fund for the high school. Petition Ex. 3 at 4. Such funds are generally required for all new schools. *Id.* The Board of Regents also noted that the proposed revisions which provided for Brilla and Public Prep turning over funding (including students with disabilities funds and other federal funds) received for students who attend the joint high school program to Vertex “support[s] the inference that Vertex and the ‘program’ it operates will constitute a separate, new school” and may violate certain grant requirements set by the United States Department of Education. *Id.* at 5.

Put simply, if it looks like a new charter, is held accountable like a new charter, and is structured like a separate and new charter, then it is indeed a new charter and not an expansion. SUNY has made clear by its own words, actions, and revisions that it is treating Vertex like a new school despite not requiring Vertex to go through the statutory process for receiving a new charter which would exceed the statutory cap. SUNY’s vague suggestion that the creation of Vertex somehow parallels its approval of the structures used by KIPP NYC, Inc. and Uncommon Schools, Inc. cannot transform the illegal permission for Vertex to operate as a charter school without a separate charter. Even by Respondents’ own description, KIPP NYC College Prep High School provided an example of a merger of individual charter schools in a charter network (i.e., the four individual charters that already authorized services to high school students were effectively merged into a single school). Petition Ex. 4 at 3. KIPP NYC College Prep High School was pooling resources and physical space by a single, previously approved network that already held the necessary charters. Thus, as a practical matter, the number of charters remained the same, but the number of charter schools was merged into one.

In that instance, KIPP, the approved charter holder, continued to be solely responsible for the management of the school and the education of the students from each of its separately chartered schools. KIPP had gone through a full charter approval process. There was no increase in the number of charter schools, nor was there a new entity, not previously approved through a charter-granting process overseeing the education of the charter students. It is one thing to say that high school students from several KIPP schools would all be attending high school in a single KIPP high school facility and quite another to seek an expansion of grades for one Brilla school with the intention to funnel all Brilla middle school students into a separate school with students from another network run independently by a newly created and unvetted or approved education corporation. That amounts to a new school requiring a new charter.

Here, there is no merger: Vertex would be creating an entirely new entity, managed and operated by Vertex, serving new grade levels that neither Brilla nor Public Prep previously served at a site to be determined by Vertex. Each of the existing Brilla and Public Prep schools holding charters would continue to exist and serve the same grades as before. In short, Vertex would be a brand new school.

D. Allowing Vertex To Open Without A Separate Charter Will Eviscerate The Statutory Cap And Subvert Requirements For New Charter Schools

If SUNY is allowed to bypass the law in this manner, it will create no distinction between an expansion and a new charter and it will render the statutory cap meaningless. Indeed, in approving the creation of Vertex Partnership Academies, the Committee is creating a precedent that the statutory cap is mere semantics, and that the parameters provided by the Legislature in Education Law § 2852 can be evaded by private contract. This is exactly what Vertex wants. As explained above, the express intention of Vertex's founder is to create an entire network of new charter high schools through this same sham "modification" process where willing middle

schools simply contract with Vertex for guaranteed spots in one of these new schools. This gambit violates the clear and unambiguous meaning of Education Law § 2852 and is an abuse of authority.

The courts have consistently recognized the importance of reading a provision in the context of the statutory scheme in which it arises, rather than in isolation:

It is well settled that “[a] statute or legislative act is to be construed as a whole, and all parts of an act are to be read and construed together to determine the legislative intent.” Furthermore, “[e]ach section of a legislative act must be considered and applied in connection with every other section of the act, so that all will have their due, and conjoint effect.”

New York State Psychiatric Ass’n, Inc. v. New York State Dep’t of Health, 19 N.Y.3d 17, 23-24 (2012) (internal citations omitted) (reading subsequent amendment relating to the payment of coinsurance to psychiatrists in a manner consistent with prior amendment applying to physicians). *See also Puchalski v. Depew Union Free Sch. Dist.*, 119 A.D.3d 1435 (4th Dep’t 2014) (applying the contextual rule of construction in determining proper calculation of period for appeal under Education Law § 3020-a). As such, it is important that the Court view the amended statutory caps in concert with the application procedures set forth in the law for new charter schools.

As has been held in other contexts, the label given by the government to its actions cannot mask the substance of those actions. *Welling v. Portfolio*, 26 N.Y.S.2d 823 (Sup. Ct. New York Cnty. 1941), is instructive. There, the New York City Board of Estimate sought to avoid an order to replace long-term provisional employees with properly appointed employees by suddenly reclassifying the positions, abolishing the existing 115 positions and simultaneously creating 115 new positions with the same duties but different names – and empowering the agency to fill those new vacancies with the incumbents. *Id.* at 826. In annulling this action, the court held that “[t]he Civil Service law may not be circumvented by the employment of a device

that changes the title of the position while the character of the employment remains the same.”

Id. at 827. Quoting the Court of Appeals in *Wipfler v. Klebes*, 284 N.Y. 248, 255 (1940), the

Welling court reiterated the principle that courts are authorized to

look[] behind the form of the ordinance to determine its intended purpose or effect, and where an ordinance in legal form cloaks an illegal purpose and produces an illegal result the courts have said that the ordinance is not adopted in “good faith” and has no effect.

Welling, 26 N.Y.S.2d at 828. The same is equally true here. SUNY is attempting to cloak the illegal purpose of creating new charters by naming these acts “expansions.” Just as the courts struck down the actions in *Welling*, so should they here.

Further, if SUNY’s actions here are not struck down, the courts will be paving the way for an educational landscape in which schools can be created regardless of community input, need, or funding. Such a scheme, if allowed to replicate, will create pay-to-play admissions rules where schools are being created and siphoning resources from the rest of the system solely to service existing charter school students and not any other students in the community. By allowing existing charters to be revised to create brand new schools, SUNY is disregarding the structure and requirements of the Charter Schools Act and ignoring legislative intent.

CONCLUSION

For the reasons set forth above, the relief requested in the Verified Petition should be granted and SUNY's approval of the at-issue modifications and authorization of Vertex should be declared null and void.

Dated: February 28, 2022
New York, New York

/s/ Dina Kolker

STROOCK & STROOCK & LAVAN LLP

Dina Kolker, Esq.

Alan M. Klinger, Esq.

180 Maiden Lane

New York, New York 10038

(212) 806-5400

dkolker@stroock.com

aklinger@stroock.com

and

ROBERT T. REILLY

52 Broadway, 9th Floor

New York, NY 10004

(518) 213-6000

Robert.Reilly@nysut.org

Co-counsel for Petitioners

and

BETH A. NORTON, ESQ.

52 Broadway, 14th Floor

New York, NY 10004

(212) 701-9420

bnorton@uft.org

Co-counsel for Petitioners

United Federation of Teachers

WORD COUNT CERTIFICATION

I hereby certify that this memorandum complies with Rule 202.8-b of the Uniform Civil Rules for the Supreme Court and the County Court. This certificate certifies that the document complies with the word count limit. Compliance relied on the word count of the word-processing system used to prepare the document. The total number of the words in this brief, exclusive of the caption, table of contents, table of authorities and signature block is 6,800 words.

Date: February 28, 2022
New York, New York

/s/ Dina Kolker

Dina Kolker, Esq.