To be Argued by:
Wendy Lecker
(Time Requested: 15 Minutes)

Appeal No. 527579

NEW YORK STATE SUPREME COURT
APPELLATE DIVISION – THIRD DEPARTMENT

In the Matter of the Application of

Rubnelia Agostini, Deborah Alexander, Reeshema Brightley, Laura Cavalleri, Johanna Garcia, Aurora Ronda, Naila Rosario, JoAnn Schneider, Litza Stark, on Behalf of Themselves and their Children, Class Size Matters, and Alliance for Quality Education,

Petitioners-Appellants,

-against-

MARYELLEN ELIA, New York State Commissioner of Education Carmen Farina, Chancellor, New York City Department of Education and the New York City Department of Education, New York City Board of Education,

Respondents-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

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QUESTIONS PRESENTED

1. Is the New York State Commissioner of Education's interpretation of the statutory provision requiring class size reduction in New York City Schools in the Contract for Excellence Law, N.Y. Education Law §211- d(2)(b)(ii), entitled to judicial deference?

   The Supreme Court answered this question "yes."

2. Are Respondents New York City Chancellor and the Department and Board of Education under a continuing obligation to reduce class size in New York City schools through a five-year plan approved by the Commissioner of Education pursuant to the Contract for Excellence Law, N.Y. Education Law §211- d(2)(b)(ii)?

   The Supreme Court answered this question "no."

3. Should the decision by the Court below to uphold the New York State Commissioner of Education's dismissal of the Petition be reversed and the matter remanded to the Commissioner to direct the New York City Chancellor and Department and Board of Education to reduce class size pursuant to N.Y. Education Law §211- d(2)(b)(ii)?

   The Supreme Court answered this question "no."

NATURE OF THE CASE

In this Article 78 proceeding, nine public school parents, from all five boroughs of New York City, and two advocacy groups, Class Size Matters and the Alliance for Quality Education ("Petitioners-Appellants"), brought a petition challenging the decision of the New York State Commissioner of Education ("Commissioner") dismissing their appeal to enforce a provision in the Contract for

Excellence Law, N.Y. Education Law §211- d(2)(b)(ii), requiring the reduction of class size in New York City public schools. R154. Petitioners-Appellants properly exhausted administrative remedies by filing a petition with the Commissioner and then, when the Commissioner dismissed the petition, by filing an Article 78 petition in the Supreme Court. The Court below upheld the Commissioner's dismissal and Petitioners-Appellants filed the within appeal before this Court.

In 2007, the Legislature enacted the Contract for Excellence Law ("C4E"), including a provision mandating the reduction of excessive class size in the New York City public schools. This provision of the C4E law directs the New York City Chancellor and Department of Education and Board of Education ("City Respondents") to develop and submit to the Commissioner for approval a plan to reduce class size to target levels in specific grade spans in all City public schools "within five years." N.Y. Education Law §211- d(2)(b)(ii); see also 8 NYCRR § 100.13(b)(1)(vi). The C4E statute, including the provision for the City Respondents to reduce class size under a five-year plan approved by the Commissioner, has been reauthorized by the Legislature every year except one and remains in full force and effect. See L. 2019 Ch. 59.[1]

[1] The Legislature did not reauthorize the C4E law for the 2010-11 school year. L. 2011 Ch. 58 Pt. A §2(B).

After the C4E law was first enacted in 2007, the City Respondents prepared and submitted the required class size reduction plan, which was then approved by the Commissioner. ("2007 Plan"). However, the City Respondents did not fulfill that plan, nor any other plan that conformed to the class size provision of the C4E statute and implementing regulations. Consequently, the City Respondents have not actually reduced excessive class size in City schools. As the undisputed record on this appeal demonstrates, tens of thousands of students in City schools continue to be educated in classes of thirty or more students — the very overcrowded conditions the C4E law was intended to remedy and a condition the Court of Appeals in 2003 found to be among the essential proofs in the systemic deprivation of City students' constitutional right to a sound basic education. Campaign for Fiscal Equity v. State, 100 N.Y.2d 893, 914-15 (2003) ("CFE II").

In their administrative petition to the Commissioner, Petitioners-Appellants asserted that the City's failure to fulfill the requirements of the 2007 Plan -- the only five-year plan to reduce class size approved by the Commissioner -- violated the mandate to reduce class size in the C4E law, N.Y. Education Law §211- d(2)(b)(ii), and implementing regulations. 8 NYCRR § 100.13(b)(1)(vi). R5-25. In dismissing the petition, the Commissioner determined Petitioners-Appellants' claim was rendered moot "by the fact that such [the 2007 Plan] concluded at the end of the 2011-2012 school year." R150. The Commissioner interpreted the C4E statute as

relieving the City Respondents of their obligation to reduce class size in 2012 because the fifth year of the 2007 Plan had "concluded," even though the Plan had not been implemented and class size not actually reduced. The Commissioner also found Petitioners-Appellants' claims untimely. R150-51.

As Petitioners-Appellants demonstrate in this brief, the Commissioner's dismissal of the Petition was based on an erroneous interpretation of the plain language and legislative intent of the requirement to reduce class size in the C4E statute. Further, the Court below improperly accorded deference to the Commissioner's interpretation of that statute. The C4E law imposes upon the City Respondents a continuing obligation to reduce excessive class size and maintain class size at the reduced levels through implementation of a five-year plan approved by the Commissioner. Accordingly, the decision below upholding the Commissioner's dismissal should be reversed and the Petition remanded to the Commissioner with instructions to enforce the City Respondents' class size reduction obligations under the C4E law.

STATEMENT OF FACTS

In CFE II, 100 N.Y.2d at 911, the Court of Appeals found that, based on the evidentiary record developed at trial, New York City schools "have excessive class size and that class size affects learning." The Court also found that "over half" of City students "in the earliest grades" are "in classes of 26 or more" and "tens of

thousands are in classes over 30." Id. at 911-12. Based on these findings, the Court concluded that the education of large numbers of City students "in overcrowded classrooms" and "inadequate facilities" contribute to a "systemic failure" that deprives those students of their right to a sound basic education under the New York Constitution. Id. at 914.

Following the final ruling of the Court of Appeals in the Campaign for Fiscal Equity v. State, 8 N.Y.3d 14 (2006) ("CFE III"), the Legislature enacted the C4E law, N.Y. Education Law §211-d, to establish a mechanism by which certain districts designated as "low performing" must utilize new funds received by the district on certain "allowable" programs and activities to raise student achievement.[2] The allowable programs and activities identified in the C4E statute include, *inter alia:* class size reduction, after-school programs, and full-day kindergarten and preschool. N.Y. Education Law §211-d(3). Each year, districts are required to submit to the Commissioner a Contract for Excellence ("Contract") detailing which of the identified programs will be implemented in the coming school year. N.Y. Education Law §211-d(1).

[2] Low performing school districts in the C4E law are defined as districts with "at least one school identified as in corrective action or restructuring status or as a school requiring academic progress: year two or above or as a school in need of improvement." N.Y. Education Law §211-d(1).

The Legislature also included in the C4E law a separate class size reduction provision applicable only to New York City schools. That provision requires the City Respondents to include in their Contract a plan to reduce class size in City schools, as follows:

> …. such contract shall also include a plan to reduce average class sizes, as defined by the commissioner, within five years for the following grade ranges: (A) pre-kindergarten-third grade; (B) fourth-eighth grade; and (C) high school. Such plan shall include class size reduction for low performing and overcrowded schools and also include the methods to be used to achieve such class sizes, such as the creation or construction of more classrooms and school buildings, the placement of more than one teacher in a classroom or methods to otherwise reduce the student to teacher ratio….

N.Y. Education Law §211- d(2)(b)(ii). The Commissioner also adopted regulations to implement the C4E statutory requirement for class size reduction in the City schools. The regulations reiterate the requirement to reduce average class size in the three specified grade spans, within five years, pursuant to a plan approved by the Commissioner. 8 NYCRR §100.13 (b)(1)(vi). The regulations also require "continuous class size reduction" by City Respondents pursuant to the approved plan and that City Respondents "align" the plan for class size reduction with the overall capital plan for City's school building improvements. 8 NYCRR§ 100.13 (b)(1)(vi). The regulations further direct that, by the end of the five-year period – or by 2012 -- class size "will not exceed the prekindergarten through grade 12 class size targets." 8 NYCRR §100.13 (b)(1)(vi).

In 2007, the Contract submitted by the City Respondents to the Commissioner contained the requisite class size reduction plan in conformance with the C4E statute and implementing regulations. R.195. The Commissioner approved the 2007 Plan. R.163. The approved 2007 Plan established class size "targets" -- or averages -- to be achieved in five years -- or by 2011-12 -- in all City schools. The specified targets are no more than 20 students per class in Kindergarten to grade 3; no more than 23 students per class in grades 4 to 8; and no more than 23 students in high school. In the 2007 Plan, the City Respondents also committed to "incorporate class size reduction in all grades among the priorities" in the City's capital plan for school facilities improvements and construction. R.73.

In November 2008, the Commissioner approved an amendment to the 2007 Plan to increase average class size for core academic classes in the City's high schools from 23 to 25 students per class. R.163. In February 2010, the Commissioner authorized the City Respondents to temporarily suspend implementation of the 2007 Plan in the 2010-11 year "because of the current economic climate." R.164.

There is no dispute in the record on this appeal that City Respondents have failed to comply with the C4E law's class size reduction requirements. First, the City Respondents failed to achieve the class size average targets in the approved 2007 Plan, as amended in 2008, within five years, or by 2011-12. Second, the City Respondents failed to take steps to reduce class size pursuant to the 2007 Plan in

2012-13 or at any time thereafter. Third, the Commissioner never required, nor did the City Respondents ever submit, an alternative class size reduction plan to replace the 2007 Plan that conformed to the requirements of the class size provision of the C4E statute and implementing regulations. Finally, the City Respondents never "aligned" the City school district's capital plan for school building improvements and construction with the 2007 Plan or to any other class size reduction plan that conformed to the class size provision of the C4E statute and implementing regulations.

The record is also undisputed that the City Respondents' failure to reduce class size as required by the C4E law has resulted in the continuing education of "tens of thousands" City students in excessive class sizes and overcrowded classrooms. CFE II, 100 N.Y.2d at 911-14. For example, the City's own data show that, in 2016, over 40,000 students in grades 1-3 were in classes of thirty or more students. R.20. Between 2007 and November 2016, the number of students in grades 1 through 3 in classes of 30 or more increased approximately 4,000%. R.20. In 2007, 11,174 kindergarten students were in classes of 25 or more and by 2016 the number almost doubled to 21,519 kindergarten students in classes of 25 or more. R.21. Thus, the very same "systemic failure" found by the Court of Appeals in the 2003 CFE II ruling, id. at 914, and that the Legislature expressly intended to remedy through the

class size reduction provision in the C4E statute, continues to persist to this day in City schools.

STANDARD OF REVIEW

On this appeal, the Commissioner's dismissal of the Petition, and the decision by the Court below to uphold the dismissal, must be reviewed to ascertain whether the Commissioner acted in excess of the statutory authority delegated by the Legislature in the C4E statute or in contravention of the New York Constitution. Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of N.Y., 88 A.D.3d 72, 78 fn. 1 (1st Dept. 2011) (class size provision subject to judicial review). It is well established that courts "have the power and the duty to make certain that [an] administrative official has not acted in excess of the grant of authority given ... by statute or in disregard of the standard prescribed by the legislature." De Guzman v. State of N.Y. Civil Service Com'n, 129 A.D.3d 1189, 1191 (3d Dep't 2015) (citations omitted)(emphasis added); see also Ross v. Wilson, 308 N.Y. 605, 617 (1955) (Commissioner of Education's decision affirming school district contract was illegal because school district had no authority to enter into contract); Marine Midland Bank, N.A. v. N.Y. State Div. of Human Rights, 75 N.Y.2d 240, 246 (1989) (agency's erroneous interpretation of statute reviewable by court); Matter of Bd. of Educ. of City of N.Y. v Nyquist, 31 N.Y.2d 468, 473 (1973) (judicial review warranted because Commissioner of Education acted in violation of constitution);

Lipani v. N. Y. State Div. of Human Rights, 56 A.D.3d 560, 561 (2d Dep't 2008) (judicial review warranted because agency acted in violation of statute).

ARGUMENT

I. The Court Below Erred in Deferring to the Commissioner's Interpretation of the Class Size Reduction Provision in the C4E Law

In dismissing Appellants' petition as moot, the Commissioner ruled that the City Respondent's obligation to reduce class size as required by the C4E law "concluded" in 2012, five years after the Commissioner approved the 2007 Plan. The Commissioner reached this determination in the face of an undisputed record that the 2007 Plan had not been implemented and, as a result, classes in City schools remain overcrowded and at the very same excessive levels that the Legislature intended to ameliorate through the C4E law. R.150. The Commissioner also based the decision on her interpretation of that statute, N.Y. Education Law §211-d(2)(b)(ii), specifically the requirement that the City reduce class size under an approved plan "within five years." The Court below affirmed the Commissioner's dismissal, holding that the Commissioner's interpretation of the class size reduction provision in the C4E statute was entitled to judicial deference. R.1101.

As a threshold matter, the Court below clearly erred in according deference to the Commissioner's interpretation of the C4E statute. It is well established that "where the question is one of pure statutory interpretation," courts "need not accord

any deference to an agency's determination." Matter of Albano v. Bd. of Trustees of N.Y. City Fire Dept., Art II Pension Fund, 98 N.Y.2d 548, 553 (2002); see also Claim of Gruber, 89 N.Y.2d 225, 231-32 (1996); Matter of Webster Cent. Sch. Dist. V. Public Employee Relations Bd. of the State of N.Y., 75 N.Y.2d 619, 626 (1990); Kent v. Cuomo, 124 A.D.3d 1185, 1186 (2015); Putnam N. Westchester Bd. Of Coop. Educ. Servs. v. Mills, 46 A.D.3d 1062, 1063 (3d Dep't 2007); Matter of N.Y. Constr. Materials Assn., Inc. v N. Y. State Dep't of Envtl. Prot., 83 A.D.3d 1323, 1326 (3d Dep't 2011).

Further, the principle of non-deference to an agency's statutory interpretation "applies equally in the realm of education law." Matter of DeVera, 32 N.Y.3d 423 (2018). In DeVera, the Court of Appeals reviewed the Commissioner's interpretation of whether a statute establishing universal pre-kindergarten programs authorized school districts to regulate charter schools participating in the program. In finding that the issue before the Court was "one of pure statutory interpretation," the Court ruled "agency deference is unwarranted." Id. at 434; see also Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v. Mills, 4 N.Y.3d 51, 59 (2004).

The issue in this appeal is "one of pure statutory interpretation," DeVera, 32 N.Y.3d at 434, namely, the meaning of the language in the C4E statute directing City Respondents to reduce class size through a Commissioner-approved plan "within five years." It is clear, therefore, that the Court below erred in deferring to the

Commissioner's interpretation of this statutory provision. Under this Court's controlling precedent, the Commissioner's interpretation of the class size reduction provision in the C4E statute is not entitled to judicial deference.

II. The City Respondents Remain Obligated under C4E Law to Reduce Class Size Through a Commissioner-Approved Plan Within Five Years

There is no dispute that in 2007, pursuant to the C4E law, N.Y. Education Law §211- d(2)(b)(ii), the City Respondents secured the Commissioner's approval of a plan to reduce class size in City schools within five years, or by 2012. It is also undisputed that the City Respondents failed to implement the 2007 Plan within the statutorily-prescribed timeframe and that, as a result, class size in the City schools remains at excessive levels for tens of thousands of students. Yet, in the face of City Respondents' failure, the Commissioner ruled that, under the C4E statute, the City's obligation to reduce class size "concluded" in 2012, the fifth year of the unfulfilled 2007 Plan, an interpretation of the C4E statute accorded deference by the Court below. As explained below, it is clear from the plain meaning of the language and legislative history of the C4E law that the City Respondents remain obligated to reduce class size through a five-year, Commissioner-approved plan. Accordingly, this Court should reverse the decision of the Court below upholding the Commissioner's dismissal of Petitioners-Appellants' Petition.

A. The Plain Meaning of the C4E Class Size Reduction Provision

The bedrock principle of statutory construction is that "the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." Majewski v. Broadalbin-Perth Cent. Sch. Dist., 91 N.Y.2d 577, 583 (1998); see also Yatauro v Mangano, 17 N.Y.3d 420, 426 (2011); Patrolmen's Benevolent Assn. of City of N. Y. v. City of N.Y., 41 N.Y.2d 205, 208 (1976). Clear and unambiguous statutory language must be construed to give effect to the plain meaning of the words. Majewski, 91 N.Y.2d at 583; Patrolmen's Benevolent Assn. of City of N.Y, 41 N.Y.2d at 208; Samiento v. World Yacht Inc., 10 N.Y.3d 70, 78 (2008).

The Court of Appeals recently applied these same principles in an analogous education law context in interpreting the universal prekindergarten statute at issue in DeVera, 32 N.Y.3rd at 435. The Court of Appeals also made clear that every provision of a statute must be given effect and any construction rendering part of a statute superfluous must be avoided. Id. at 436; see also Rocovich v. Consolidated Edison Co., 78 N.Y.2d 509, 515 (1991); Albano v. Kirby, 36 N.Y.2d 526, 530 (1975); Madison County Industrial Dev. Agency v. State of N.Y. Authorities Budget Office, 151 A.D.3d 1532, 1536 (3d Dept. 2017); Avella v. City of N.Y., 131 A.D.3d 77, 84 (1st Dept. 2015).

The language of the class size reduction provision of the C4E statute is clear and straightforward. That statutory provision, in pertinent part, provides that the City Respondents' contract for excellence must "include a plan to reduce average class sizes, as defined by the commissioner, within five years for the following grade ranges: (A) pre-kindergarten-third grade; (B) fourth-eighth grade; and (C) high school." N.Y. Education Law §211-d(2)(b)(ii) (emphasis added). There can be no doubt about the meaning of this language. It means what it says: City Respondents are obligated to reduce class size in the specified grade ranges in City schools "within five years" pursuant to a plan approved by the Commissioner. Simply put, in the C4E statute, the Legislature codified in no uncertain terms an express mandate that City Respondents lower class size through implementation of a Commissioner-approved, five- year plan. As the terms of this statutory requirement are plain, "there is nothing left for interpretation.'" DeVera, 32 N.Y.3d at 435 (citations omitted).

Further, in reauthorizing this statutory provision, the Legislature has used the very same language -- year-in, year-out -- as contained in the C4E statute when initially enacted in 2007. And the Legislature has again reauthorized this provision – with the same precise language -- for the current school year. L. 2019 Ch. 59. Thus, the C4E statutory mandate to reduce class size under the same express terms enacted in 2007 has neither expired nor somehow concluded, but rather remains in full force and effect. N.Y.S. Education Law §211-d(2)(b)(ii).

The Commissioner, in dismissing the Petition, interpreted the C4E statute to absolve the City Respondents of their obligation to reduce class size because the 2007 Plan "concluded" in 2012, or the fifth year after Plan approval. This interpretation flies in the face of the statute's plain language. As is evident, C4E's statutory provision for class size reduction does not designate 2012, or any year thereafter, as the point at which City Respondents are no longer obligated to reduce class size. Moreover, the term "within five years" in the statute unquestionably refers to the timeframe – not any specific year – by which City Respondents must reduce class size in City schools under a Commissioner-approved plan. And importantly, nothing in this provision suggests that the City Respondents' obligation to reduce class size would "conclude" in 2012 when the City failed to actually reduce class size under the 2007 Plan approved by the Commissioner. The Commissioner interpreted the term "within five years" to equate the fifth year of the unimplemented 2007 Plan with the termination of City Respondent's mandate to reduce class size altogether, a construction that fails to give "effect to each component" of the C4E statute and "treats" the designated timeframe for class size reduction as "superfluous." DeVera, 32 N.Y.3d at 436 (citing Matter of Lemma v. Nassau County Police Officer Indem. Bd., 31 N.Y.3d 523, 528 (2018)). To the contrary, giving effect to each statutory provision requires the recognition that C4E's mandate for the

development, submission and fulfillment of a five-year plan has been continually reauthorized and remains in effect today.

Finally, the Commissioner's interpretation of the C4E statute is flatly inconsistent with the Commissioner's own implementing regulations. In those rules, the Commissioner unequivocally requires City Respondents to begin in the 2008-2009 school year and, by the 2011-2012 school year, to reduce class size to the specific grade range targets through an approved five-year plan. The rules also make clear that City Respondents must not only reduce class size on a "continuous" basis until the target levels in the plan are reached, but also maintain those targets when achieved by "the end of the 2011-2012 school year." As the Commissioner's regulations make abundantly clear, the City Respondents' obligation to reduce class size did not "conclude" in 2012 or any year thereafter. Rather, the statutory obligation is a continuing one that required City Respondents to reach the class size reduction targets in the 2007 Plan by 2012 and then to maintain class size at those target levels thereafter, both of which the City has indisputably failed to do. Moreover, each year the statute was reauthorized, the Legislature renewed the City Respondents' obligation to have in place a five-year, Commissioner- approved plan to reduce class size, and to fulfill that plan, which the City has indisputably failed to do.

Thus, the Commissioner's interpretation of the C4E statute absolving the City Respondents of their obligation to reduce class size because the 2007 Plan "concluded" in 2012 is completely at odds with the statute's plain language. The statute does not designate 2012 or any specific year as the termination point to the City's obligation. Nor is there any language that terminates that obligation when the 2007 Plan reached its fifth year where, as here, the City failed to reduce class size as required by that Plan. The Commissioner has constructed out of whole cloth an end date to the City's C4E statutory obligation, an interpretation that would, if not reversed, render meaningless the statute's explicit directives to reduce and maintain class size at reduced levels in City schools. DeVera, 32 N.Y.3d. at 436.

B. The Legislative History of the Class Size Reduction Provision

Although the language of the C4E statute is unambiguous – and, as a result, no further examination is necessary – the Legislature in enacting the statute clearly intended to impose upon City Respondents a continuing obligation to reduce class size averages and to maintain class size at the reduced levels. Courts must interpret the plain language of a statute to effectuate legislative intent. Yatauro, 17 N.Y.3d at 426; Majewski, 91 N.Y.2d at 583. The statute's legislative history is a crucial aid in discerning the Legislature's intent in choosing the specific words or phrases comprising the statutory enactment. See Consedine v. Portville Cent. Sch. Dist., 12 N.Y.3d 286, 290 (2009); Brothers v. Florence, 95 N.Y.2d 290, 299 (2000).

The genesis of the C4E statute underscores the Legislature's intention to reduce excessive class sizes in City schools and to maintain class size at the reduced levels on a continuing basis. In proposing the C4E law, the Governor's Memorandum to the Legislature states that the statute is intended to "implement[ ] the Campaign for Fiscal Equity decision." Memorandum in Support of 2007-2008 New York State Executive Budget, Education, Labor and Family Assistance, Article VII Legislation, p. 6-A. The Governor's Memorandum further states that the statute is intended to "implement or expand programs demonstrated to improve student achievement, including class size reduction ... " R.593.

As discussed supra at pp.4-5, the education of City students in excessive class size was among the key findings by the Court of Appeals in CFE II's determination of a systemic violation of the students' constitutional right to a sound basic education. By "implementing the Campaign for Fiscal Equity decision" through enactment of the C4E statute, the Legislature expressly intended City Respondents to remedy this core constitutional deficiency by significantly lowering class size from the excessive levels demonstrated in the CFE court record. Further, through the year-to-year reauthorization of that statute, the Legislature has consistently shown its intention to ensure City students are educated in class sizes at the reduced levels on a continuing basis.

Furthermore, by retaining the class size provision -- word-for-word – almost every year 2007 through 2020, the Legislature has expressed its unequivocal intent that the City Respondents remain obligated to reduce and maintain lower class size through a five-year plan approved by the Commissioner. Had the Legislature intended for the City Respondent's obligations to cease, it could have removed the class size reduction requirement from the C4E statute entirely. Alternatively, the Legislature could have amended the provision. However, the Legislature has chosen neither to repeal nor amend the statute's clear language. Oneida County v. Berle, 49 N.Y.2d. 515, 523 (1980) (holding that once a statute is enacted, "[i]t remains fixed until repealed or amended by the Legislature). The Legislature's express inclusion, consistently each year, of the mandate to reduce class size under the exact same terms overwhelming demonstrates legislative intent to impose upon City Respondents a continuing obligation to ensure City students are not educated in excessively large classes.

But most importantly for the City's school children, the historical record on the enactment and subsequent reauthorization of the C4E law evinces clear legislative intent to achieve a concrete and lasting remedy to the widespread and excessive classroom overcrowding endured by generations of City school children as found in the CFE decision. By mandating class size reduction, the Legislature directed City Respondents to remediate a crucial deficit impacting the constitutional

right of City school children to a sound basic education. There is simply no support in the historical record for the Commissioner's construction of the statute, namely, that the Legislature merely intended for the City to adopt a plan to reduce class size and then, by letting the five-year timeframe expire without implementing that plan, to turn a blind eye to this glaring constitutional deficiency.

Thus, the Commissioner's interpretation that the City Respondents' obligations under the C4E statute somehow "concluded" in 2012 with no remedy for the excessive class sizes in City schools flatly conflicts with legislative intent. There is nothing in the history of the statute to support what the Commissioner's interpretation has condoned: allowing City Respondents to sit on their hands during the five-year timeframe for the 2007 Plan and then be wholly absolved of any obligation to actually reduce class size. Such an absurd result would allow the City Respondents, through their inaction, to jettison a firm and explicit legislative mandate, one grounded in the Legislature's intent to remedy a key resource deficit in the CFE decision's determination of unconstitutional education of City students. The Commissioner's patently erroneous interpretation of the C4E statute, accorded deference by the Court below, must be rejected.

C. The Statutory Timeframe for Class Size Reduction

Courts have made clear that an administrative agency cannot ignore the Legislature's statutory directives, Weiss v. City of N.Y., 95 N.Y.2d 1, 4-5 (2000);

Mayfield v. Evans, 93 A.D.3d 98, 103 (1st Dept. 2012), and that an agency usurps legislative authority when it acts in contravention of an express statutory provision. Matter of Gross v. N.Y. City Alcoholic Beverage Control Bd., 7 N.Y.2d 531, 540 (1960). Nor is it permissible for an agency to graft onto a statute an intent not supported by the statute's express provisions. DeVera, 32 N.Y.3d at 438 (refusing to "infer" a "substantial shift" in the Legislature's charter school regime where the "legislative history of the Universal Pre-K law does not mention charter school oversight"). Where the Legislature fixes an explicit timeframe for compliance with statutory mandates, the agency charged with compliance cannot unilaterally alter that timeframe. N.Y. Const. Materials Ass'n, Inc. v. N.Y. State Dep't of Envtl. Conservation, 83 A.D.3d 1323, 1329 (3d Dept. 2011); see also, Vestal Employees Ass'n, NEA/NY, NEA v. Public Employment Relations Bd. of the State of N.Y., 94 N.Y.2d 409 (2000) (legislative intent to establish specific timetable evident from language itself). Moreover, when an agency fails to comply with a statutory timetable, the obligation to comply does not end, but continues. Trump v. N.Y. State Joint Com'n on Public Ethics, 47 Misc.3d 993, 997 (Supreme Court, Albany Co., 2015) (agency obligated to comply with statutorily-imposed deadline to decide complaint).

As discussed supra at p.7, as mandated by the C4E law, City Respondents in 2007 secured the Commissioner's approval of a five-year plan to reduce class size

by 2012. Yet, in the absence of any explicit or implicit statutory basis, the Commissioner determined the City Respondents' obligation under the 2007 Plan "concluded" in 2012, even though the Plan had not been implemented and class size in City schools remain overcrowded and at the excessive levels the C4E statute is intended to remedy.

The Commissioner's decision to end the City Respondents' obligation to reduce class size under the 2007 Plan, or under another approved five-year plan, represents a patent alteration of the five-year timeframe established by the Legislature in the C4E statute. The Legislature has reauthorized the class size reduction provision in the C4E statute consistently since its enactment in 2007 and, most recently, through 2020. Had the Legislature sought to remove the five-year timeframe for reducing class size, it could have amended the timeframe, or repealed the class size reduction mandate altogether. Instead, the Legislature chose to maintain the class size provision and the statutory timeframe for City Respondents to lower class size from excessive levels.

By unilaterally deciding that the mandate to reduce class size in the C4E statute ended in 2012 and is no longer in force, the Commissioner impermissibly adopted a scheme of her own "as a substitute for that provided by the Legislature." Matter of Gross v New York City Alcoholic Beverage Control Bd., 7 N.Y.2d at 540. In so doing, the Commissioner improperly encroached upon power reserved to the

Legislature. The Court below, therefore, erred by according deference to the Commissioner's blatant usurpation of the Legislature's powers through her erroneous interpretation of the C4E statute. R.1101.

In sum, the plain language of the C4E statute, as construed to effectuate legislative history and intent, imposes upon City Respondents a continuing obligation to reduce class size in City schools through a Commissioner-approved five-year plan. The Commissioner's interpretation, given deference by the Court below, that the City's obligation to reduce class size under the statute ceased in 2012 -- the final year of the unfulfilled 2007 Plan-- conflicts with the statute's express language and intent. Even more egregious, the Commissioner's statutory interpretation, if allowed to stand, would continue to relegate generations of City school children to an education in excessively large and overcrowded classrooms, the very constitutional deficiency found in the CFE decision and which the C4E statute was enacted – and repeatedly reauthorized – to remedy. This Court must reverse the patently erroneous interpretation upheld by the Court below, affirm the City Respondents' continuing statutory mandate to reduce – and maintain – class size at reduced levels, and remand to the Commissioner to direct City Respondents to reduce class size pursuant to a five-year plan that conforms to the C4E statute and is approved by the Commissioner.

III. The Petition was Not Untimely.

The Court below also affirmed the Commissioner's decision that Petitioners'-Appellants' petition was untimely. R.1101. A fundamental principle of New York law is that the statute of limitations does not apply when an agency is under a continuing statutory obligation. See, e.g., N.Y. State Psychiatric Ass'n v. N.Y. State Dept. of Health, 71 A.D.3d 852, 856 (2d Dept. 2010), rev'd on other grounds, 19 N.Y.3d 17, 23 (2012); DeCintio v. Cohalan, 18 A.D.3d 872, 873 (2d Dept. 2005). As discussed supra at Point II A-B, the City Respondents' legal obligation under the C4E statute has not expired. Consequently, the City is under a continuing legal obligation to reduce class size and Petitioners can seek redress through the administrative process available before the Commissioner. Mulgrew, 88 Ad3d at 80. Petitioners-Appellants' claim, therefore, is not untimely.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the decision below affirming the Commissioner's dismissal of the petition and remand this case to the Commissioner with instructions to render a decision effectuating the City Respondents continuing obligation under the C4E statute to reduce class size within five years pursuant to a plan that conforms to the class size provision of the C4E law and is approved by the Commissioner.

Dated: May 21, 2019

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Statement Pursuant to Statewide Practice Rule 1250.8(j)

This brief was prepared on a computer, in Times New Roman, 14 point, double-spaced. The word count is 5,669.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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RUBNELIA AGOSTINI, DEBORAH ALEXANDER, REESHEMA BRIGHTLEY, LAURA CAVALLERI, JOHANNA GARCIA, AURORA RONDA, NAILA ROSARIO, JOANN SCHNEIDER, LITZA STARK, on Behalf of Themselves and their Children, CLASS SIZE MATTERS, and ALLIANCE FOR QUALITY EDUCATION,

Petitioners,

-against-

MARYELLEN ELIA, New York State Commissioner of Education, CARMEN FARINA, Chancellor, New York City Department of Education, THE NEW YORK CITY DEPARTMENT OF EDUCATION, and THE NEW YORK CITY BOARD OF EDUCATION,

Respondents.

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NOTICE OF ENTRY

Index No. 2351-18

PLEASE TAKE NOTICE that the attached document is a true copy of the decision/order which was entered in the Albany

County Clerk's Office on September 4, 2018.

Dated: Albany, New York
September 5, 2018

Yours, etc.,

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Education
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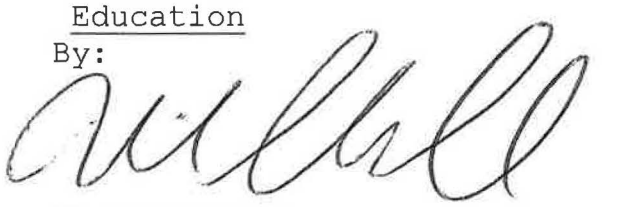

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STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of
RUBNELIA AGOSTINI, DEBORAH ALEXANDER, REESHEMA BRIGHTLEY, LAURA CAVALLERI, JOHANNA GARCIA, AURORA RONDA, NAILA ROSARIO, JOANN SCHNEIDER, LITZA STARK, on Behalf of themselves and their Children, CLASS SIZE MATTER and ALLIANCE FOR QUALITY EDUCATION,

Petitioners,

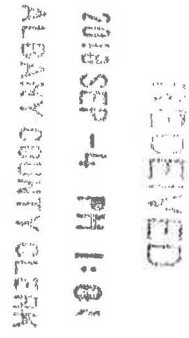
For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules

-against-

MARYELLEN ELIA, New York State Commissioner of Education, CARMEN FARINA, Chancellor, New York City Department of Education and the New York City Department of Education, New York City Board of Education,

Respondents.

Special Purpose Term
Hon. Henry F. Zwack, Acting Supreme Court Justice Presiding
RJI: 01-18-ST9513 Index No. 2351-18



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DECISION/ORDER

Zwack, J.:

Petitioners commenced this CPLR Article 78 proceeding by mandamus and challenge a determination of the New York State Commissioner of Education that dismissed their petition which alleged violations of Education Law § 211-d(2)(b)(ii) in regard to class size in New York City public schools. The petition was dismissed as moot, untimely and on the merits. The petitioners allege the denial of the application is arbitrary and capricious and without a rational basis. The respondents oppose, assert a general denial and seek dismissal of the petition.

In 2003, the Court of Appeals determined the New York City public schools deprived students of a sound basic education (*Campaign for Fiscal Equity v State*, 100 NY2d 893 [2003]). In 2007, the New York State Legislature enacted Education Law § 211-d, the "Contract for Excellence" ("C4E") which sought to fund struggling schools to improve the quality of education especially for low achieving high needs students. One of the aims of the C4E was to reduce class size and overcrowding in New York City public schools. Education Law § 211-d(2)(b)(ii) required the City of New York School District ("District) to devise a plan to reduce class size by the end of the 2011-12 school year (*see*, 8 NYCRR § 100.13(b)(1)). The City submitted

a class size plan, known as the "2007 Plan" which was approved by the NYS Commissioner of Education ("Commissioner"). The District was required to submit an annual proposal detailing how it intends to spend the C4E funds on allowable programs including reducing class size (*see*, Education Law § 211-d(3)(4)).

When the Legislature enacted C4E, it chose to rely on the Commissioner's specialized expertise in educational policy. The legislation empowered the Commissioner to implement the C4E's goals and to oversee the C4E program. The Commissioner was able to enact rules and regulations as necessary in the oversight of the program. The sole and exclusive remedy for a violation of this legislation "shall be pursuant to a petition to the commissioner " (*see*, Education Law § 310(7)). Education Law § 211-d(2)(b)(ii) provided that any decision of the Commissioner "shall be final and unreviewable."

On July 6, 2017, the petitioners filed an appeal to the Commissioner challenging the District's class size plan pursuant to Education Law § 211-d. The petitioners maintain the District failed to implement the 2007 Plan that was approved by the Commissioner in order to reduce class size. As a result, the petitioners contend New York City students attend schools which are overcrowded. Petitioners claim from school year 2008-09 to

school year 2016-17, the District failed to implement the 2007 class size reduction Plan as required by the C4E program. The petitioners contend the District failed to reduce class size as established by the 2007 Plan for low performing and overcrowded schools in the District. The petitioners claim that over the years, class size has increased. The petitioners allege the District failed to achieve the five year deadline as required by the 2007 Plan in reducing class size. The petitioners take exception to the Commissioner's finding that the 2007 Plan "expired" in 2012. The petitioners maintain their claims are not moot or time-barred as the statue of limitations does not apply as the failure to comply with the requirements of Education Law § 211-d(2)(b)(ii) and 8 NYCRR § 100.13(b) constitutes a continuing violation of the C4E program. The petitioners also claim the Commissioner exceeded her statutory authority. The petitioners maintain the decision of the Commissioner is arbitrary and capricious and should be reversed.

The respondents maintain the 2007 Plan was approved by the Commissioner on November 19, 2007. During the 2009-10 school year, federal and state governments faced an economic recession resulting in a shortfall of state funding. In November 2010, the Commissioner authorized the District to suspend class size targets outlined in the 2008-09 Plan and maintain funding at the level of prior years. The respondents contend with

the loss of funding, it became increasingly difficult for schools to maintain or further reduce class size. Thereafter, the Commissioner authorized the District to amend the 2008-09 class size reduction plan to focus on 75 low performing schools that had large class sizes. This amended plan was known as "Target 75 Plan" and was approved by the Commissioner. The Target 75 Plan and was in effect from school year 2009-10 to school year 2014-15. For school year 2015-16 the class size reduction plan concentrated on Renewal Schools which serve students with the greatest educational needs, including students in poverty, students with disabilities and students with limited English proficiency. The respondents claim the Renewal Schools have historically been low performing with high class sizes. The C4E Plan for school year 2016-17 was approved by the Commissioner. Thereafter, the District submitted data demonstrating that the Contract for Excellence funds predominantly benefitted students with the greatest educational needs and as a result, class sizes were reduced. The respondents claim since the Commissioner approved the C4E each year, the District was in compliance with the controlling statutes and regulations.

An Article 78 proceeding which seeks to compel a government official to undertake a particular act is in the nature of a Writ of Mandamus (*see*, CPLR § 7801; *Klostermann v Cuomo*, 61 NY 2d 525 [1984]). Mandamus is

available to compel the performance of a non-discretionary duty only where there has been a showing of a clear, legal right to the relief sought (*Matter of Burch v Harper*, 54 AD3d 854 [2nd Dept. 2008]). Where a party seeks to compel a public official to undertake a purely discretionary act, a writ of mandamus is not available (*Matter of Yager v Massena Cent. Sch. Dist.*, 119 AD3d 1066 [3d Dept. 2014]).

Initially, the Court finds the actions the petitioners seek to compel the respondents to perform are discretionary and not ministerial and as a result, are not entitled to a writ of mandamus (*Maron v Silver*, 14 NY3d 230 [2010]).

The judicial standard of review of administrative determinations pursuant to CPLR Article 78 is whether the determination is arbitrary and capricious, and a reviewing court is therefore restricted to an assessment of whether the action in question was taken "without sound basis in reason and . . . without regard to the facts" (see, CPLR 7803; *In the Matter of Murphy v New York State Division of Housing and Community Renewal*, 21 NY3d 649 [2013]; *Matter of Pell v Board of Education*, 34 NY 2d 222 [1974]). The test usually applied in deciding whether a determination is arbitrary and capricious or an abuse of discretion is whether the determination has a rational or adequate basis (*Matter of Peckham v Calogero*, 12 NY3d 424

[2009]). The reviewing court in a proceeding pursuant to CPLR Article 78 will not substitute its judgment for that of the agency unless it clearly appears to be arbitrary, capricious or contrary to the law (*Paramount Communities, Inc. v. Gibraltar Cas. Co*, 90 NY2d 507 [1997])

"When the judgment of the agency involves factual evaluations in the area of the agency's expertise and is supported by the record, such judgment must be accorded great weight and judicial deference" (*Matter of Flacke v Onondaga Landfill System*, 69 NY2d 335 [1987]). Moreover, in order to maintain limited review, it is incumbent upon the court to defer to the agency's construction of statutes and regulations that it administers as long as that construction is not irrational or unreasonable (*Matter of 427 W. 51 St. Owners Corp. v Division of Hous. and Community Renewal*, 3 NY3d 337 [2004]; *Lorillard Tobacco Co., v Roth*, 99 NY2d 316 [2003]).

Education Law § 211-d(2)(b)(ii) provides that any challenges to the C4E legislation requires that "the sole and exclusive remedy. . .shall be pursuant to a petition to the commissioner. . . and the decision of the commissioner on such petition shall be final and unreviewable."

Although the statutory language does not preclude judicial review in its entirety, it limits the reviewing court to "an extremely narrow standard of review" (*N.Y.C. Dep't of Envtl. Prot. v N.Y.C. Civil Serv. Comm'n*, 78 NY2d

318 [1991]). The Legislature's intent to grant the State Educational Department original jurisdiction over claimed failures to comply with the Contract for Excellence requirements "is bolstered by the fact that all of the relevant and pertinent information to such . . .determinations is readily available to him and he possesses the requisite competence and expertise necessary for such . . . determinations" (*Mulgrew v Board of Educ. of the City School Dist. of the City of New York*, 88 AD3d 72 [1st Dept. 2011]).

The State Legislature authorized the Commissioner to create rules and policies in order to implement the C4E funding program and to monitor its compliance including a class size reduction plan. The Legislature assigned the Commissioner the responsibility of establishing this program and allowed the Commissioner to implement necessary rules and regulations in order to oversee the C4E program. The Legislature granted the Commissioner the authority to determine the most effective way of reducing class sizes and to oversee the implementation of the policies by the District. (*see*, Education Law § 211-d(2)(b)(ii),(iii)). The plan to reduce class sizes had to be accomplished "by the end of the 2011-2012 school year. . ." (*see*, Education Law § 211-d(2)(b)(ii)).

The financial recession of 2008-09, affected the availability of funds to maintain the class size reduction program. The District and the

Commissioner continued the class size reduction program with the suspension of the 2007 Plan and the implementation of the Target 75 Plan. Petitioner's allegation that the respondents failed to abide by the requirements of the 2007 Plan was arbitrary and capricious is without merit. The Commissioner has continuously approved the Target 75 Plan for the reduction of class size for low performing, high needs schools since the 2009-10 school year. The Commissioner correctly determined that petitioners' appeal was moot, untimely and without merit.

After a review of the record, the court finds the determination of the Commissioner was rational and not arbitrary or capricious. The standard of review of administrative decisions of the Commissioner of Education is limited (*Matter of Kelly v Ambach*, 83 AD2d 733 [3d Dept. 1981]). The Commissioner of Educations's decision involving her interpretations of the relevant statutes and regulations she administers are entitled to great weight (*Matter of Lezette v Board of Ed., Hudson City School District*, 35 NY2d 272 [1974]). As a result, the Court must give deference to and not substitute its judgment for factual evaluations within an agency's area of expertise (*Abramoski v New York State Education Department*, 134 AD3d 1183 [3d Dept. 2015]); *Madison-Oneida Bd. of Co-op. Educational Services v Mills*, 4 NY3d 51 [2004]). On this record, the Court finds the

Commissioner did not exceed her statutory authority.

The Court has reviewed the petitioners remaining contentions and concludes they either lack merit of are unpersuasive given the Court's determination. (*Hubbard v County of Madison*, 71 AD3d 1313 [3d Dept. 2010]).

Accordingly, it is

ORDERED, that the CPLR Article 78 petition is denied.

This constitutes the Decision and Order of the Court. This Decision and Order is returned to the attorneys for the respondent, NYS Commissioner of Education. All other papers are delivered to the Supreme Court Clerk for transmission to the County Clerk. The signing of this Decision and Order shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the applicable provisions of this rule with regard to filing, entry and Notice of Entry.

Dated: August 27, 2018
Troy, New York

Henry F. Zwack
Acting Supreme Court Justice

Papers Considered:

1. Notice of Petition dated April 12, 2018;
2. Verified Petition dated April 12, 2018 with Exhibits "A" through "X";
3. Verified Answer dated June 11, 2018 with Exhibits "A" through "K";
4. Memorandum of Law dated June 11, 2018;
5. Verified Answer dated June11, 2018;
6. Memorandum of Law dated June 11, 2018;
7. Reply Memorandum of Law dated June 26, 2018.