

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

KIPP ACADEMY CHARTER SCHOOL,

Plaintiff,

-against-

UNITED FEDERATION OF TEACHERS,  
AFT NYSUT, AFL-CIO,

Defendant.

Case No.

**COMPLAINT**

Plaintiff KIPP Academy Charter School, by and through its counsel, Bond, Schoeneck & King, PLLC, as and for its Complaint against Defendant United Federation of Teachers, AFT NYSUT, AFL-CIO, alleges as follows:

1. The United Federation of Teachers, AFT NYSUT, AFL-CIO (the “UFT”) is unlawfully attempting to force KIPP Academy Charter School (“KIPP” or “KIPP Academy”) to arbitrate alleged disputes under a classroom teacher collective bargaining agreement (“CBA”) that is not applicable to KIPP, and under circumstances in which the UFT does not represent KIPP teachers. The terms of the CBA the UFT seeks to impose have never been and may not lawfully be applied to KIPP Academy. Further, KIPP teachers have never assented to representation by the UFT, and have objected to application of the UFT CBA to them.

**JURISDICTION**

2. This action arises under Section 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(c) and 28 U.S.C. § 2201. Jurisdiction is conferred upon the Court by the provisions of 29 U.S.C. § 185(c) and 28 U.S.C. § 1331.

### VENUE

3. Venue is proper in this district pursuant to 29 U.S.C. § 185(a) because this is a suit concerning an alleged contract between an employer and a labor organization which labor organization alleges that it represents employees of that employer, in an industry affecting commerce. Venue is also proper in this district pursuant to 28 U.S.C. § 1391(b)(2) because the labor organization resides in this judicial district and the events giving rise to the claims occurred here.

### PARTIES

4. KIPP Academy Charter School was first granted a charter by the State of New York in 2000. Approximately 80 education professionals are employed at KIPP Academy and 800 children attend kindergarten through eighth grade there.

5. KIPP is informed and believes that the UFT is a New York corporation. It is the collective bargaining representative for persons employed by New York City Department of Education (“DOE”) in its public schools. The UFT is, with the NYC DOE, party to a CBA covering the approximately 75,000 NYC public school teachers employed at approximately 2000 public schools. The most recent UFT classroom teacher CBA was entered in 2014 and is in effect through 2018. KIPP is informed and believes that since 2000 at least 2 other successive UFT classroom teacher CBAs were entered. KIPP Academy is informed and believes that in addition to the classroom teacher CBA, the UFT and the DOE are parties to 12 other CBAs establishing the terms and conditions of other categories of school employees, including but not limited to bilingual teachers, guidance counselors, school secretaries, psychologists and social workers, nurses, and physical and occupational therapists. KIPP is informed and believes that like the classroom teacher CBA, these other UFT – DOE CBAs have gone through successive renewals since 2000.

### FACTUAL ALLEGATIONS

6. KIPP Academy originated out of the Knowledge is Power Program educational program which was originally created to provide educationally underserved children with a more dynamic and ultimately successful educational experience. The Knowledge is Power Program was embraced by teachers, staff, students and families as it provided transformative educational experiences for many inner city children. One of the principal drivers of the success of the Knowledge is Power Program was the extremely dedicated and motivated teachers who participated in it.

7. P.S. 156 in the Bronx was the first public school in which the Knowledge is Power Program was established. Teacher David Levin was responsible for introduction and implementation of the program at P.S. 156 in 1995. Although teachers at P.S. 156 were covered by the UFT – DOE classroom teacher CBA, the Knowledge is Power Program immediately departed at its inception and at all times thereafter from terms of the UFT classroom teacher CBA. The Knowledge is Power Program teachers and administrators ignored CBA provisions including but not limited to terms regarding teacher schedules during the day, classroom and outside of classroom duties, availability to parents and students, expectations for work beyond the school day including during Saturdays and school breaks, and teacher and administrator accountability. The UFT never objected to the departure by the Knowledge is Power Program from the provisions of the UFT classroom teacher CBA.

8. The New York Charter Schools Act (“CSA”) was enacted in 1998. It permitted private individuals to establish a public charter school as an alternative to a traditional public school. Public funds finance the operation of charter schools, but the establishment, operation and governance are carried out by private individuals. The CSA permits the chartering of new “start up” charter schools, and conversion of existing public schools to charter schools. The

latter are referred to as “conversion schools.” Both start up and conversion charter schools follow the same application and approval process. That process involves making an application to the Chancellor of the New York City Department of Education, which was responsible for investigating and making a determination on the application.

9. Under the CSA, teachers in a start up charter school were not deemed to be members of a bargaining unit or represented by a union, unless the school had more than 250 students when it began. Teachers in a “conversion” charter school were deemed to be represented by the existing union and were members of the collective bargaining unit in the district in which the charter school was located, and they were deemed to be covered by the same CBA as applied at other schools in the district. However the CSA provided that “a majority of the members of a negotiating unit within a conversion charter school may modify, in writing, a collective bargaining agreement...with the approval of the board of trustees of the charter school.” Neither union involvement nor approval was required to modify the CBA in a conversion school. The New York State “Taylor Law” which governed the labor relations of public employees was deemed to apply to school employees whether the charter school was a start up or conversion.

10. David Levin applied in 1999 to establish the KIPP Academy Charter School under the CSA. His was one of the first charter applications in the state. His objective was to expand the Knowledge is Power Program to become the foundation for operation of an entire new school. Levin was granted a charter and KIPP Academy opened in 2000 with approximately 220 students. Although Levin’s application sought to establish a separate charter school, and P.S. 156 continued to operate and was thus not converted to a charter school, the

charter granted to Levin established KIPP Academy as a “conversion” school. The KIPP Academy charter has been renewed 3 times since the establishment of the school in 2000.

11. KIPP Academy has graduated more than 1,000 children in the South Bronx since 2000. Eighty-seven percent of them matriculated to college within 5 years of graduating from 8<sup>th</sup> grade and over 50% of that number graduated from college-- more than five times the national average for students from low-income communities. KIPP Academy students have outperformed the district, NYC and New York State in almost every grade level in every year of its existence on New York State 3<sup>rd</sup> -8<sup>th</sup> grade English Language Arts and Math tests.

12. Because KIPP’s charter identified it as a “conversion” school, the provisions of the CSA imposing automatic union representation applied. At no time did the KIPP Academy classroom teachers ever vote to have the UFT represent them. They were subject to automatic, nonconsensual representation by the UFT and ostensible coverage by the UFT CBA, under the CSA and the Taylor Law. .

13. Although it had putative representative status based on the characterization of KIPP Academy as a conversion school, other than collecting union dues from KIPP teachers and staff, the UFT never carried out any representative functions in relation to them. The UFT never negotiated on their behalf, it never chose union stewards, and it never objected to any of the myriad actions taken by KIPP Academy over the more than 20 years since establishment of the Knowledge is Power Program that were inconsistent with the provisions of the UFT CBAs.

14. KIPP’s foundational principle was and is that an innovative, holistic approach to education provided by a deeply committed faculty are necessary to provide children growing up in low income neighborhoods the opportunity to achieve their full potential and close the opportunity gap between children in underserved communities and children growing up in more

affluent communities. An essential element of KIPP's mission has been to create and foster a rewarding and supportive work place for teachers, in which they are not bound by restrictive practices that frustrate the innovative educational process sought to be nurtured at KIPP.

15. For their part, KIPP and its teachers exercised their right under the CSA as a putative conversion school not to have the UFT classroom teacher CBA applied to them. Since 2000, the wages, hours, and other terms and conditions of employment for KIPP Academy charter school teachers were never those set by the UFT CBA. From the beginning, in consultation with its teachers, KIPP Academy established its own compensation and working conditions for the school, different from the UFT classroom teacher CBA.

16. The terms and working conditions of KIPP classroom teachers' employment and that of other KIPP staff are embodied in the KIPP Employee Handbook, and related policies and practices which were developed through a process involving the KIPP faculty and administration over 16 years involving ongoing feedback and discussions among teachers, school leadership, parents, and task forces and committees that have been charged to address specific educational and professional issues. These policies and procedures have been approved by the KIPP Academy board of trustees and by teachers. The focus of the original and ongoing efforts to create and implement employment terms and conditions particular to KIPP Academy has been to make the role of the teachers and staff fully consistent with and advancing of the foundational principles on which the school was established.

17. To promote that objective, KIPP Academy teachers and other staff receive higher pay than is set in the UFT CBA. KIPP Academy teachers and staff have in some years been paid bonuses not provided for in the UFT CBA. KIPP Academy has always maintained a work schedule and school year different than that of traditional public schools as provided in the UFT

CBA. KIPP teachers carry out duties that are not provided for in the UFT CBA. For example, KIPP teachers may work on Saturdays, afterschool, during school breaks and during the summer with individual students, and maintain a high level of contact with parents and guardians.

18. Among its other features, the KIPP Academy Handbook provides a multi-step dispute resolution procedure for teachers and staff to present complaints that arise regarding any policy, procedure, practice or disciplinary action. The dispute resolution policy provides for multiple levels of consultation and review which anticipate resolution of conflict within the KIPP Academy system. The policy does not provide for arbitration, and no dispute with a teacher or matter concerning teacher working conditions has ever been arbitrated. Such matters have been handled exclusively under the provisions of the KIPP Academy Handbook.

19. In contrast, among its many other provisions, the 2014 UFT classroom teachers CBA sets forth a detailed, complex 40 pages or more of text concerning teacher discipline and a grievance and arbitration process. The grievance and arbitration provisions of the UFT CBA define permissible subjects for grievances and arbitration, and formal processes and time limitations applicable to those proceedings. The predecessor UFT classroom teacher CBAs had grievance and arbitration provisions substantially identical to that contained in the 2014 CBA. At no time has a grievance and arbitration provision in a UFT CBA ever been applied at KIPP Academy.

20. For 16 years after KIPP Academy was chartered, and dating back five more years to the establishment of the Knowledge is Power Program, the UFT played no role in negotiating or setting the wages, hours or working conditions of KIPP Academy teachers and staff. Prior to the 2016 arbitration demand which led to this suit, the UFT never objected to KIPP Academy terms and conditions of employment for teachers and staff and it has never challenged the KIPP

Academy dispute resolution procedure. It did not engage with KIPP on any issue related to the wages, hours or work conditions of KIPP teachers or staff when it was chartered in 2000, after any of the successive UFT classroom teacher CBAs since 2000 were implemented, or in connection with any renewal or amendment of the KIPP Academy charter. For 16 years, from 2000 until 2016, the UFT never brought a grievance or sought arbitration under the UFT classroom teacher CBA or any other UFT CBA.

21. In 2009, KIPP Academy teachers filed a petition for decertification with the New York Public Employment Relations Board (“PERB”) pursuant to the Taylor Law in which they sought a secret ballot election to formally establish that the UFT did not represent them, and that the UFT CBA did not apply to them.

22. In support of their petition, KIPP teachers unanimously stated in writing that they endorsed the practices developed with KIPP including the KIPP Employee Handbook as their terms of employment – expressly rejecting the UFT collective bargaining agreement:

We, the undersigned employees of KIPP Academy, do not want to work under the provisions of the existing union contract that governs public school teachers in New York City. We want to exercise our rights under the law to modify that agreement so that we are able to work exclusively with the practices that have worked over the years at KIPP Academy and reflect the way we’ve been working with management and the KIPP Academy board for the past fourteen years.

23. The UFT objected to the KIPP teachers’ decertification petition and sought to block their vote. The UFT argued in effect that under the CSA and the Taylor Law the KIPP teachers were automatically and without their consent represented by the UFT. It claimed that they could not alone vote to decertify the UFT as representative; only a vote by a majority of the 75,000 teachers in the entire NYC public school system could effect decertification of the UFT at KIPP Academy.

24. PERB accepted the UFT argument and dismissed the KIPP teachers' petition; the teachers were not permitted to vote on whether they wanted UFT representation. Although PERB sustained automatic, non-consensual representative status to the UFT in relation to KIPP teachers under New York law, it noted in its decision on the teachers' petition that the UFT had never sought voluntary recognition as their bargaining representative, had never been recognized by KIPP as bargaining representative, and there was no evidence that KIPP Academy staff had asked the UFT to negotiate for it.

25. Following the KIPP Academy teachers' 2009 decertification effort the UFT did not take any action to represent KIPP teachers or other KIPP staff. Nor did it object to the continued open fact that KIPP Academy and its teachers were not following the UFT classroom teacher CBA or the CBA pertaining to any other class of employees.

26. After 16 years of non-involvement in representation of KIPP Academy teachers, in June 2016, the UFT wrote to KIPP alleging violations of a number of provisions of the UFT classroom teacher CBA including:

- a. KIPP paid teachers higher salaries than the UFT CBA and did not follow other compensation-related provisions of the UFT classroom teacher CBA;
- b. KIPP paid teachers performance bonuses not provided for in the UFT CBA;
- c. KIPP teacher work schedules differed from the work schedules provided for in the UFT CBA; and
- d. KIPP's sick day policy differed from the UFT CBA.

27. On August 28, 2016, the National Labor Relation Board rendered the decision in *Hyde Leadership Charter School – Brooklyn*, 364 NLRB No. 88 (Aug. 28, 2016) in which it held that New York State law regarding charter school labor relations – the CSA and the Taylor Law – are preempted by the National Labor Relations Act (“NLRA”). When KIPP Academy was chartered, the CSA provided that employees of charter schools were deemed to be public employees and their labor relations were governed by the CSA and the Taylor Law. Under *Hyde*, neither law could be applied and matters concerning whether the UFT could be deemed to represent KIPP teachers and staff could only be determined under federal law by the NLRB or a federal court, applying the NLRA.

28. Soon after *Hyde* was decided, KIPP responded to the UFT June 2016 letter asserting that under *Hyde* “we believe a serious question exists as to the validity of a claim on the part of the UFT to represent employees of KIPP Academy Charter School. While KIPP Academy Charter School analyzes the situation and seeks guidance from the relevant agencies we do not believe it would be appropriate to respond to your recent requests and assertions of grievances.”

29. On November 7, 2016, notwithstanding *Hyde*, the UFT served a demand for arbitration concerning 18 different alleged violations of 10 provisions of the UFT classroom teacher CBA. The claimed violations were based on the KIPP Academy terms and conditions of employment including, paying teachers more money and setting different work schedules than was provided in the UFT CBA.

30. KIPP is informed and believes that in or around December 2016 or January 2017, the UFT learned that KIPP Academy teachers were organizing a petition to seek an NLRB election to establish that the UFT was not their bargaining representative. As it had done in

connection with the 2009 KIPP teachers' PERB decertification effort, the UFT again sought to block an election that would permit the KIPP teachers to vote on whether they wanted to be represented by the UFT or not. Before the KIPP teachers had even filed their election petition with the NLRB, on January 17, 2017, the UFT filed a preemptive NLRB unfair labor practice charge alleging that KIPP had "interfered with, restrained and coerced its employees in the exercise of rights protected by Section 7 of the Act by threatening to retaliate against employees if they joined or supported a union."

31. On January 25, 2017, KIPP Academy Teachers filed a petition with the NLRB seeking a secret ballot election to establish that the UFT is not their collective bargaining representative.

32. KIPP is informed and believes that the NLRB may block an election proceeding notwithstanding KIPP's denial of the allegations by the UFT, until the unfair labor practice charge is litigated.

33. On January 30, 2017, KIPP filed an unfair labor practice charge against the UFT alleging that the UFT's imposition of the UFT classroom teacher CBA on KIPP Academy teachers violated Section 8(b)(1) of the National Labor Relations Act by imposing the UFT CBA on KIPP teachers where the UFT CBA was not applicable to them, and where the UFT was not their representative. The KIPP charge also asserts that the UFT violated Section 8(b)(1)(b) of the NLRA by coercing KIPP in the selection of its bargaining representative by attempting to enforce a CBA between the Union and a separate employer --NYC DOE.

#### **COUNT ONE – DECLARATORY JUDGMENT**

34. KIPP Academy realleges Paragraphs 1-33 as though fully set forth herein.

35. An actual controversy exists over whether an agreement to arbitrate exists between KIPP Academy and the UFT.

36. KIPP Academy is entitled to a declaratory judgment that it has no obligation to participate in any of the grievance and arbitration procedures set forth in the UFT CBA, for the following reasons:

- a. The UFT CBA does not govern the terms and condition of employment for teachers employed at KIPP Academy.
- b. The UFT has no standing to grieve any of the employment conditions of KIPP Academy's teachers because it does not represent any of KIPP Academy's teachers.

**COUNT TWO – PERMANENT INJUNCTION**

37. KIPP Academy realleges Paragraphs 1-36 as though fully set forth herein.

38. KIPP Academy is entitled to a permanent injunction enjoining the UFT and its agents from submitting any alleged dispute to arbitration and from threatening to submit any employment contract dispute concerning KIPP Academy teachers to arbitration for the following reasons:

- a. KIPP Academy has no obligation to arbitrate any employment contract dispute with the UFT.
- b. KIPP Academy has no adequate remedy at law if an arbitration sought by the UFT concerning KIPP Academy teachers is permitted to occur.
- c. Forcing KIPP Academy to arbitrate over its teachers' terms and conditions of employment would subject it to irreparable harm.
- d. The injunctive relief herein prayed for will not deprive the UFT of any legal right and will in no way cause the UFT any improper loss, injury or damage.



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