STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of

PARENTS FOR EDUCATIONAL AND RELIGIOUS LIBERTY IN SCHOOLS, AGUDATH ISRAEL OF AMERICA, TORAH UMESORAH, MESIVTA YESHIVAH, RABBI CHAIM BERLIN, YESHIVA TORAH VODAATH, MESIVTHA TIRERETH JERUSALEM, RABBIN JACOB JOSEPH SCHOOL, YESHIVA CH'SAN SOFER - THE SOLOMON KRUGER SCHOOL, SARAH ROTTENSREICH, DAVID HAMMER, ABRAHAM KAHAN, RAPHAEL AHRON KNOPFLER, and ISAAC OSTREICHER,

Petitioners,

-against-

BETTY ROSA, as Chancellor of the Board of Regents of the State of New York, and MARYELLEN ELIA, as Commissioner of the New York State Education Department,

Respondents.

DECISION/JUDGMENT

Index No. 901354-19
RJI No. 01-19-ST0207

APPEARANCES:

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RYBA, J.,

Petitioner New York State Council of Catholic School Superintendents (hereinafter

NYSCC)[1] is an association formed for the purpose of supporting Catholic education in the State of New York, and consists of the superintendents of schools for each of the eight Roman Catholic Dioceses of New York and approximately 500 individual schools. Petitioner Parents for Educational and Religious Liberty in Schools (hereinafter PEARLS) is a non-profit organization whose stated mission is to protect a parent's choice to provide his or her child with a yeshiva education. Petitioner New York State Association of Independent Schools (hereinafter NYSAIS) is an association of non-public nursery, elementary and secondary schools established with the purpose of promoting the independence of non-public schools. In March 2019, NYSCC, PEARLS, and NYSAIS, along with selected individuals and schools that form their membership, commenced three separate proceedings pursuant to CPLR Article 78 seeking to set aside certain purported guidelines issued by the New York State Department of Education consisting of the "Substantial Equivalency Review and Determination Process" dated November 20, 2018 (hereinafter the New Guidelines), the "Local School Authority Review Toolkit" dated December 21, 2018 (hereinafter the Toolkit), and the "Frequently Asked Questions on the Substantial Equivalency Guidance" (hereinafter the FAQ). Each of the petitions in these proceedings was accompanied by an Order to Show Cause seeking a preliminary injunction prohibiting respondents from taking any action to implement or enforce the New Guidelines, Toolkit and FAQ pending the outcome of these matters. In addition, the Order to Show Cause submitted by NYSAIS contained a request for a temporary restraining order, which the Court (Mackey, J.) struck in signing the Order to Show Cause. Respondents thereafter served an answer to each of the petitions, moved to dismiss each proceeding on various grounds, and submitted

[1] Three separate petitions were filed related to this matter seeking similar relief. At oral argument on April 15, 2019, the petitioners requested to set forth their positions jointly. Accordingly, to ensure consistency and in the interest of judicial economy, the Court will address the three petitions in each of it's three decisions.

papers in opposition to the respective applications for a preliminary injunction.

In response to the respondents' opposing papers, petitioners in each proceeding filed reply papers that contained additional evidence and/or affidavits. Respondents thereafter moved to strike the reply papers in all three proceedings, but later withdrew the motion to strike with regard to the proceeding commenced by petitioners NYSCCS. With regard to the proceeding commenced by NYSAIS and the proceeding commenced by petitioners PEARLS, the motions to strike remain pending. Respondents have also filed sur-reply papers in the PEARLS and NYSAIS proceedings. Oral argument with regard to the applications for preliminary injunctions in all three proceedings was conducted on April 15, 2019.

Pursuant to Education Law § 12 (2), a Local School Authority ("LSA") is defined as the "trustees, board of education, or corresponding officers, whether one or more, and by whatever name known, of a city school district, or other school district however created." According to Education Law § 3204(2), "instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of the like age and attainments at the public schools of the city district where the minor resides."

The State Constitution, as well as the State Administrative Procedure Act ("the SAPA"), mandates the procedures that must be followed for promulgation of rules and regulations. Excluded from these requirements are "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (See SAPA § 102 [2] [b] [iv]). A rule or regulation, by contrast, is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" (Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]). Both the Board of Regents and the Commissioner may adopt "rules for

carrying into effect the laws and policies of the state relating to education." (See Education Law § 207). However, when adopting a rule, the Board of Regents and the Commissioner must comply with the procedures established by the SAPA and the New York State Constitution. The SAPA sets forth in part that "prior to the adoption of a rule, an agency shall submit a notice of the proposed rule-making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." (See State Administrative Procedure Act § 202 [1]).

Relevant to the issues here, the old guidelines regarding substantial equivalence were enacted in 2001 and are set forth below (emphasis added).

> "Through experience gained over time, local school officials are usually familiar with nonpublic schools which have been in existence for several years. Schools have a known record through children transferring in and out of the school and their subsequent achievements in public schools and colleges. **If, however, a serious concern arises about equivalency of instruction in an established school, the superintendent of schools of the district in which the nonpublic school is located should inform the officials of the nonpublic school that a question has been raised about equivalency of instruction in the school. The superintendent should then discuss the reason for the inquiry informally with the nonpublic school officials.**
>
> If, after this discussion, the superintendent of schools concludes that there is a serious problem, the superintendent should discuss it with the District Superintendent, where appropriate, and with the Nonpublic School Services office. If the problem is not resolved at this point, the superintendent should provide to the nonpublic school officials the basis of the question in writing. In addition, the superintendent of schools should, if necessary, ask to visit the nonpublic school at a mutually convenient time in order to check on the information which led to the assertion of lack of equivalency. The superintendent should review materials and data which respond to the assertion and discuss with the officials of the nonpublic school plans for overcoming any deficiency. If the problem can be remedied within a reasonable amount of time, the superintendent and the administrator should agree on a plan and schedule for arriving at a satisfactory solution.
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> During the period of investigation of equivalency, services to the pupils attending the nonpublic school should continue. Transportation, textbook loans,

> and health services are to be provided unless and until the board of education of the public school district determines that the program is not equivalent.
>
> If a plan of improvement cannot be designed or if the superintendent judges that the program of instruction continues to be inadequate, the superintendent should notify the board that the nonpublic school program is not equivalent. Subsequent actions are identical to those in the section on new schools.

The section regarding subsequent actions referenced above is as follows:

> Once a board of education approves a resolution at a public meeting that a nonpublic school is not equivalent, the administrator of the nonpublic school and the parents of pupils attending that school should be notified in writing that the children will be considered truant if they continue to attend that school. Parents should be given a reasonable time in which to transfer their children to either a public school or another nonpublic school. At the end of that time, all transportation, textbooks, and health services should be withdrawn. If parents continue to enroll their children in a nonpublic school whose program has been determined to be not equivalent, they should then be notified that petitions will be filed in Family Court by the public school authorities to the effect that their children are truant.

The new eleven page guidelines at issue were enacted on November 20, 2018 (see, http://www.nysed.gov/common/nysed/files/programs/nonpublic-schools/substantial-equivalency-guidance.pdf.) In relevant part the new guidelines set forth the following (emphasis added):

> **I. Review Timeline**
>
> **Superintendents or their designees will begin to conduct substantial equivalence reviews on behalf of their school boards using the updated process during the 2018-2019 school year.** LSA and nonpublic school leaders who will be involved in the review and determination process are expected to attend trainings offered by the Department. Most superintendents or designees will be able to conduct reviews for their religious and independent schools during the 2018-2019 and 2019-2020 school years, but districts that have large numbers of religious and independent schools within their boundaries may need a longer period of time to complete reviews. **All religious and independent schools will be visited as part of the process** and initial reviews for all nonpublic schools within a district should be completed by the end of the 2020-2021 school year. Superintendents or designees should plan to re-visit the religious and independent schools in their district on a five-year cycle. Between

> visits, school districts and their local religious and independent schools should keep each other informed of important information, such as changes in leadership, curriculum, school building locations, grade levels served, etc. We encourage school leaders to use other opportunities, such as discussions regarding federal Title services, to build a sustained, collaborative working relationship for the benefit of all students.

The NYSCC petitioners argue that the New Regulatory Mandate constitutes "rules" as defined under the SAPA and case law. Likewise, the NYSAIS petitioners argue that the new guidelines are not an "interpretive statement" of existing law, but rather an entirely new inspection regime. They argue further that the new rule provides LSAs with direct authority to close independent schools. The PEARLS petitioners similarly assert that because the New Guidelines create rigid, statewide procedures and standards, they are a "rule" as that term is defined by the SAPA. They also point out that the same requirements that compelled respondents to comply with the SAPA in 2004 (when addressing substantial equivalence of home school students) pursuant to Education Law § 3204, exists here. Respondents disagree. They claim that SAPA applies only to an agency's adoption of a "rule." They set forth that "the guidance merely interprets the statutory provisions related to substantial equivalency and lists the existing statutory regulatory requirements that apply to nonpublic schools." They state further that the guidance does not "command, order, require or dictate." The Court disagrees. The language set forth above states in relevant part that **"[a]ll** religious and independent schools **will** be visited as part of the process." It also states that the "superintendents or their designees **will** begin to conduct substantial equivalence reviews on behalf of their school boards using the updated process during the 2018-2019 year." The term "will" is mandatory. Notably the new guidelines do not suggest or request that the LSA's assist in conducting the reviews.

Here, the Court finds that the mandatory language dictating when the reviews will begin

coupled with the language that insists that "all" schools will be visited as part of the process constitute clear rules and are not merely "interpretive statements which in themselves have no legal effect but are merely explanatory." Therefore the Court finds that the new guidelines are "rules" that were not implemented in compliance with the SAPA and are hereby nullified (see, Suffolk Reg'l Off-Track Betting Corp. v. New York State Racing & Wagering Bd., 11 NY3d 559, 571–72 [2008] [the Court of Appeals found no rules or regulations existed, but rather an interpretation of the requirements of the statutes at issue]. This case is distinguishable from Suffolk Reg'l Off-Track Betting Corp.v New York State Racing & Wagering Bd. (11 NY3d 559 [2008]), as the statute here has not simply been interpreted, but the powers and duties of the LSAs have been expanded. Education Law § 3204 is specific with regard to setting forth that the *Commissioner* is the "entity that determines whether nonpublic elementary and secondary schools are in compliance with the academic requirements." The statute does not mandate that the LSAs conduct reviews at every school and dictate when they commence. Therefore, the mandates are akin to "sufficiently fixed standards" that required compliance with the SAPA which includes, among other things, a filing with the Secretary of State. (Matter of JD Posillico, Inc. 160 AD2d 1113[1990] citing NY Const, art IV §8; State Administrative Procedure Act § 202). And since the toolkits and FAQ's flow from the new rule that the Court has nullified, the Court need not make a decision regarding the legality or the constitutionality of the contents therein.

In view of the foregoing findings, the Court need not address petitioners' respective requests for a preliminary injunction, nor need the Court consider the constitutional arguments raised by petitioners. Moreover, the Court's decision in this regard requires denial of respondents' motions to dismiss the petitions, as well as their motions to strike petitioners' reply papers.

For the foregoing reasons, it is

ORDERED and ADJUDGED that the petition herein is granted in part insofar as the New Guidelines are struck down pursuant CPLR § 3001 as null and void, without costs, and it is further

ORDERED and ADJUDGED that the motion by respondents to strike petitioners' reply papers are denied, without costs, and it is further

ORDERED that the motions by respondents to dismiss the petitions pursuant to CPLR 3211 (a)(7) are denied, without costs.

This Memorandum constitutes the Decision and Judgment of the Court. This original Decision and Order is being returned to the attorney for petitioners Parents for Educational and Religious Liberty in Schools et al.. The original papers are being transferred to the Albany County Clerk. The signing of this Decision and Judgment shall not constitute entry or filing under CPLR 2220. Counsel is not relieved from the provision of that rule regarding filing, entry, or notice of entry.

ENTER.

Dated: April 17, 2019

HON. CHRISTINA L. RYBA
Supreme Court Justice