SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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PARENTS FOR EDUCATIONAL AND RELIGIOUS LIBERTY IN SCHOOLS; AGUDATH ISRAEL OF AMERICA; TORAH UMESORAH; MESIVTA YESHIVA RABBI CHAIM BERLIN; YESHIVA TORAH VODAATH; MESIVTHA TIFERETH JERUSALEM; RABBI JACOB JOSEPH SCHOOL; YESHIVA CH'SAN SOFER – THE SOLOMON KLUGER SCHOOL,

Petitioners,

Index No. 907655-22

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

-against-

LESTER YOUNG JR., as Chancellor of the Board of Regents of the State of New York; and BETTY A. ROSA, as Commissioner of the New York State Education Department,

Respondents.

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PETITIONERS' COMBINED MEMORANDUM OF LAW IN SUPPORT OF PETITION AND MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

In September, the New York State Education Department's ("NYSED") years-long campaign to regulate yeshiva education culminated in the adoption of a new and invasive regulatory regime ("New Regulations") that implements extensive curricular, oversight, and inspection requirements on yeshivas. These New Regulations were designed so that yeshivas will be subject to their inspection and curricular requirements while almost all non-Jewish private schools in the State will be exempt. The New Regulations go so far as to require local school authorities to assess and approve the teachers at yeshivas, threaten parents who send their children to these schools with draconian penalties, including jail, and threaten yeshivas with closure.

The New Regulations are contrary to law and should be struck down.

First, the New Regulations were enacted in violation of the State Administrative Procedure Act ("SAPA"), because NYSED and Respondents did not properly consider the more than 300,000 negative public comments critical of the New Regulations that were submitted during the sixty-day public comment period. Instead, the public comment process was nothing more than a sham, designed by NYSED to lead to the adoption of the regulations exactly as proposed, without any substantive revisions. NYSED simply rejected every single one of the criticisms, suggestions and proposals submitted by the public, without addressing the many important issues they raised.

Second, the New Regulations are invalid because they contradict and are inconsistent with the Education Law and applicable standards for public schools. In particular, the New Regulations require that instruction be in English for all common branch subjects, even though numerous public schools with designated "Dual Language Programs" are permitted to teach the vast majority of their instruction in a language other than English. Thus, in supposed pursuit of "equivalency" the New Regulations impose more restrictive standards on nonpublic schools than on public schools.

Third, the New Regulations are invalid because they violate the doctrine of religious autonomy that preserves the independence of religious schools by prohibiting government to interfere with a school's selection and supervision of its faculty. The New Regulations undermine that autonomy by arrogating to the State the authority to approve or disapprove of yeshiva teachers.

Fourth, the New Regulations exceed NYSED's statutory authority because they are an unlawful and *ultra vires* licensing system for nonpublic schools, as determined by the Court of Appeals in *Packer Collegiate Institute v. University of the State of New York*. *Id.*, 298 N.Y. 184 (1948). None of the statutes relied upon by NYSED for the authority to enact the New Regulations actually empower NYSED to implement the largescale licensing of nonpublic schools.

Finally, the New Regulations violate Petitioners' constitutional rights in several ways. Most significantly, parents who are members of Petitioners have the fundamental right to control the upbringing and education of their children, yet the New Regulations ignore their constitutionally-protected interest by handing control over curriculum and faculty at yeshivas to local school authorities. Additionally, the New Regulations violate Petitioners' right to the free exercise of religion by targeting religious conduct for harsher treatment than secular programs. And the New Regulations violate Petitioners' free speech rights by imposing strict requirements on the substance of yeshiva curriculum, the language in which it can be taught, and those who can teach it.

The New Regulations require yeshivas to alter their religious instruction and their faculty under threat of closure to the school and threat of imprisonment to the parents who enroll their children. That imposes irreparable injury on yeshivas and their students and parents. For these reasons, Petitioners respectfully request that the Court enjoin the New Regulations.

BACKGROUND

A. The New Regulations Are Contrary To Over A Century Of Precedent

1. Prior Regulatory Framework

The statutory standard for nonpublic school instruction has remained the same since at least 1894: "Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." Educ. Law § 3204(2)(i).

Because the statutes do not define "substantially equivalent," NYSED has long "maintained 'guidelines' [for private schools] which essentially incorporated most of the statutory and regulatory requirements applicable to public schools." *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 221 (E.D.N.Y. 2019). Those published guidelines acknowledged that local school districts have "no direct authority over a nonpublic school," did not provide rigid curricular requirements on those subjects, and did not authorize local school boards to assess the competence of the faculty at nonpublic schools. Exhibit A to Verified Petition ("Petition").

2. NYSED's 2018 Attempt To Regulate Private Schools

On November 20, 2018, NYSED imposed a new, comprehensive regulatory regime to govern all nonpublic elementary and high schools, including private religious schools, in New York. These guidelines ("2018 Guidelines"), amended in part on December 21, 2018, contained an array of rules, checklists, and procedures imposed on every private school in the State. *See Parents for Educ. & Religious Liberty in Sch. v. Elia*, 110 N.Y.S.3d 513, 516–17 (Albany Cnty. Sup. Ct. 2019) ("*PEARLS*"). Like the New Regulations, the 2018 Guidelines also required specific instruction in numerous subjects for all elementary and middle school students, and also mandated inspections of all nonpublic schools on a strict timeline. *See PEARLS*, 110 N.Y.S.3d at 517.

Several schools, organizations, and parents challenged these 2018 Guidelines, arguing, in part, that the Commissioner did not have the authority to uniformly impose those rules. More specifically, the Petitioners in *PEARLS* argued that the 2018 Guidelines amounted to a rule under SAPA because they created a new mandatory "inspection regime" and imposed "rigid, statewide procedures and standards" on nonpublic schools. *Id.* at 516. Supreme Court agreed, concluding that the 2018 Guidelines "constituted clear rules . . . that were not implemented in compliance with the SAPA, and [were] [t]hereby nullified." *Id.* at 517.

3. NYSED's 2019 Proposed Regulations

In July of 2019, NYSED attempted to formally promulgate the rejected 2018 Guidelines as regulations. *See* Exhibit I to Petition. The rulemaking for these proposed guidelines "was published in the State Register on July 3, 2019, and the public comment period ended September 3, 2019." Exhibit A to Affirmation of Avi Schick ("Schick Aff."). NYSED received more than 140,000 comments in opposition to those proposed regulations, and ultimately abandoned them.

4. NYSED's 2022 Adoption Of The New Regulations

On March 3, 2022, NYSED's governing body, the Board of Regents, announced that it would discuss whether to "adopt a new Part 130 of the Regulations of the Commissioner of Education relating to nonpublic schools and substantially equivalent instruction for nonpublic school students." *See* Exhibit K to Petition. Thereafter, on March 30, 2022, the NYSED published the New Regulations, titled "Substantially Equivalent Instruction for Nonpublic School Students," in the New York State Register for public notice and comment, with the comment period running from April 1, 2022 to May 31, 2022. *See* Exhibit J to Petition.

a) NYSED Rejected All Of The More Than 300,000 Public Comments Critical Of The New Regulations And All Of The Alternatives Proposed

After NYSED published the New Regulations, it received nearly 350,000 public comments about them. *See* Exhibit N to Petition. The "overwhelming number . . . blasted the changes," Nancy Cutler, *NY Regents Boost Private School Education Oversight; What Districts Face*, LoHud (Sept. 13, 2022), criticizing numerous aspects of the New Regulations and proposing alternatives.

Despite the volume of objections and the large number of suggestions it received, NYSED made only a few "non-substantial revisions" to the New Regulations, which were merely intended "to provide clarification" of the initially proposed regulations. Exhibit N to Petition at 11. For example, NYSED made minor changes such as "clarify[ing] the definition of Local School Authority for the City School District of the City of New York" and requiring an LSA to "notify the nonpublic school" when it "deems a nonpublic school substantially equivalent pursuant." *Id.*

NYSED rejected out of hand all of the comments and proposed alternatives relating to the instructional and inspection requirements that are at the core of the New Regulations. Indeed, not only was there no discussion of alternatives at the Board of Regents meeting adopting the New Regulations, there was no discussion of the New Regulations at all.[1] Thus, despite parents, schools, students, alumni, interested parties and members of the public expressing their grave concerns, NYSED provided no meaningful response to their criticisms and made no substantive changes to the New Regulations, yet the Board of Regents adopted them. *See* Exhibit B to Schick Aff.

[1] NYSED, *Board of Regents Meeting – September 13, 2022* (Sept. 13, 2022) (available at https://vimeo.com/749981911).

This was by design: Not only was NYSED not interested in the public's comments, it was dead-set against incorporating any substantive revisions, because that would trigger an additional public comment period under SAPA. *See* SAPA § 202(4-a)(a).

b) The New Regulations Direct Public School Authorities To Conduct Highly-Invasive Reviews Of Private Schools

The New Regulations impose onerous requirements on nonpublic schools and subject them to reviews by—and the whims of—the local public school authorities who are responsible for determining whether nonpublic schools in their districts are substantially equivalent.

The New Regulations authorize local school authorities ("LSAs") to assess whether private school faculty are "competent" teachers. A "competent" teacher is defined as one "who demonstrate[s] the appropriate knowledge, skill, and dispositions to provide substantially equivalent instruction." Exhibit N to Petition at 14 (8 N.Y.C.R.R. § 130.1(a)).[2] This, of course, is a tautology: a school is deemed equivalent if its faculty is "competent," yet "competent" is defined as the ability "to provide substantially equivalent instruction." Even more egregiously, it allows the NYSED and local school authorities the final say on whether a teacher can remain a member of a yeshiva's faculty, despite the fact that a yeshiva's selection of its teachers is of deep religious significance: a yeshiva's teachers are meant to guide its students, by word and deed, to live their lives in accordance with their Jewish faith.

"Substantial equivalency of instruction" is defined as "an instructional program which is comparable to that offered in the public schools and is designed to facilitate students' academic progress as they move from grade to grade." 8 N.Y.C.R.R. § 130.1(b).

[2] References to the New Regulations are cited by their position in new Part 130.

Under the New Regulations, nonpublic schools are subject to substantial-equivalency reviews initiated by either the nonpublic school's LSA or directed by the Commissioner of Education. 8 N.Y.C.R.R. §§ 130.2, 130.3.

However, a nonpublic school can avoid the review if they satisfy one of several alternative "pathways. As is relevant here, those pathways are if a school (1) has a registered high school that administers the Regents exams; (2) is accredited by an accrediting body approved by the NYSED for purposes of demonstrating compliance with the requirements of the New Regulations; or (3) uses NYSED-approved assessments to demonstrate compliance with the substantial-equivalency requirements. 8 N.Y.C.R.R. § 130.3.

The New Regulations do not explain what would satisfy the assessment pathway, and it allows subjective judgments by LSAs on whether the assessments "demonstrate student academic progress as they move from grade to grade." 8 N.Y.C.R.R. § 130.3(a)(6). Schools meeting any of these criteria are deemed substantially equivalent without any State review or investigation into their curriculum or faculty. As discussed in greater detail below, the effect of the pathways is to exempt all or just about all of the non-Jewish private schools in New York State, so that substantial equivalency reviews will be conducted exclusively, or virtually exclusively, at yeshivas.

Schools subject to substantial equivalency reviews are required to satisfy an extensive list of numerous mandatory criteria contained in 8 N.Y.C.R.R. § 130.9, including but not limited to:

- Whether instruction is given only by competent teachers;
- Whether English is the language of instruction for all common branch subjects;
- Whether the nonpublic school's instruction is substantially equivalent to that provided in public schools in mathematics, science, English language arts, and social studies; and
- Whether the nonpublic school's curriculum includes instruction in (a) patriotism and citizenship, (b) the history, meaning, significance, and effect of the provisions of the U.S. Constitution and amendments thereto, the Declaration of Independence,

> and the New York Constitution, (c) New York state history and civics, (d) physical education and related subjects, including alcohol, drug, and tobacco abuse, (e) highway safety and traffic regulation, (f) fire drills, fire and arson prevention, injury prevention, and life-safety education, and (g) hands-only CPR and the use of an automated external defibrillator.

If a local school authority or the Commissioner determines that a nonpublic school is not substantially equivalent, the school is given 60 days to develop a timeline and plan for attaining substantial equivalency no later than the end of the following school year. 8 N.Y.C.R.R. §§ 130.6(a)(1), 130.8(d)(2).

A negative equivalency determination results in the nonpublic school "no longer be[ing] deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law;" and a revocation of services to the school after a "reasonable" amount of time to allow the parents of the students to enroll them elsewhere. 8 N.Y.C.R.R. §§ 130.6(c)(2), 130.8(d)(7). In effect, then, an LSAs determination that a yeshiva is not substantially equivalent is tantamount to a government order directing the school to close.

A parent who does not remove their child from the school is subject to monetary penalties and criminal fines, including imprisonment. 8 N.Y.C.R.R. § 130.14(a); Educ. Law § 3233.

B. Petitioners

The Association Petitioners are not-for-profit organizations whose members and missions are deeply affected by the New Regulations. Torah Umesorah: National Society for Hebrew Day Schools has as its mission to ensure that every child in the schools it services receives the highest standards of Torah education, along with the skills to lead a successful life and become a productive member of society. Its membership consists of 800 day-schools and yeshivas with an aggregate enrollment of nearly 300,000 students. Agudath Israel of America is a membership organization at the forefront of advocacy on behalf Orthodox Jewish interests and rights, perhaps most significantly on behalf of the broad Orthodox Jewish school community. Thousands of its

members send their children to yeshivas that are affected by the New Regulations. Parents for Educational and Religious Liberty in Schools ("PEARLS") is a non-profit organization composed of parents, school administrators, and other interested persons whose mission is to protect the fundamental right of parents to choose a yeshiva education for their children.

The New Regulations would have substantial adverse effects on the mission of the Association Petitioners and their members. In particular, many of their members are schools that are neither accredited nor registered, and will therefore have to submit to a local school authority review under the New Regulations.

The five Petitioner Yeshivas are Orthodox Jewish schools founded in New York more than one hundred years ago. *See, e.g.* Affidavit of Rabbi Yisroel Reisman ("Reisman Aff.") at ¶ 1; Affidavit of Israel M. Kirzner ("Kirzner Aff.") at ¶ 1. They have been operating continuously since shortly after the "substantial equivalence" provision first appeared in the Education Law in 1894. *Id.* Since that time, they have collectively produced tens of thousands of graduates who have participated successfully as highly functioning and contributing members of New York and American society. Their graduates have succeeded in every professional field and remain actively involved in their communities. Reisman Aff. ¶¶ 22, 7; Kirzner Aff. ¶¶ 25; Affirmation of Aaron D. Twerski ("Twerski Aff.") at ¶¶ 21-25. They also have contributed to the rejuvenation of Orthodox Jewish life and practice in New York and beyond. Twerski Aff. at ¶¶ 7-11.

Yeshiva curricula, including those provided at Petitioner Yeshivas, offer their students a rigorous course of study that prioritizes critical thinking and a deep understanding of the material being taught, whatever the subject. *See* Affidavit of Moshe Krakowski ("Krakowski Aff.") at ¶¶ 16-29 (discussing lesson plans that promote reading comprehension and "cognitive transfer of structural similarities in different content domains"); Reisman Aff. ¶ 13; Twerski Aff. at ¶ 18.

Beyond the content of any individual class, students of yeshivas are immersed in a religious pedagogy that emphasizes ethics, honesty, responsibility, generosity toward others, and a lifelong commitment to learning, which prepares them to be active and contributing members of their communities. Reisman Aff. ¶ 4. *See also, id.* ¶ 21; Kirzner Aff. ¶¶ 1, 13; Twerski Aff. at ¶ 19.

The role played by yeshivas is essential to the preservation of the Orthodox Jewish community and its culture. *See, e.g.,* Twerski Aff. at ¶ 7 ("It is [] impossible to overstate the centrality of yeshivas and the yeshiva system to the growth and vitality of the Orthodox Jewish and Chasidic community"); Krakowski Aff. at ¶¶ 6-9 (noting "the culture, content, and structure of these schools is central to these religious minority communities' capacity to instill religious commitment and belief in their children and thus to maintain religious continuity"); Kirzner Aff. ¶ 15 (yeshiva education "is absolutely essential for the continuity of Orthodox Jewish life and practice in the United States"). The majority of Orthodox Jewish schools in the United States are located in New York State, and the majority of yeshiva students in the United States attend schools in New York State. Affirmation of Andrew Weinstock ("Weinstock Aff.") at ¶ 4.

Compliance with the New Regulations will require each Petitioner Yeshiva to revise its curriculum significantly and to alter its emphasis on Jewish Studies. See Krakowski Aff. at ¶¶ 14, 30; Reisman Aff. ¶ 14; Kirzner Aff. ¶¶ 17-21; The yeshiva school day is already quite long, and can run from 7:30 in the morning to 5:30 or later in the evening. Reisman Aff. ¶¶ 19-20. The inclusion of additional classes to accommodate all the topics listed in the New Regulations would necessarily mean cutting instruction in existing subjects. *See id.* ¶ 23 ("because there are only so many hours in a school day, [the New Regulations] require [Petitioner Yeshiva] to diminish the religious education and Judaic Studies that are at the core of its existence"); Kirzner Aff. ¶¶ 17-18 ("The [New] Regulations would require [Petitioner Yeshiva] to alter its character and identity, its

emphasis on Talmudic study and its religious mission… by requiring the addition of numerous subjects and topics to the [] curriculum").

The Association Petitioners have as members numerous parents whose children attend yeshivas in New York State. These parents choose yeshiva education for their children to fulfill the Biblical injunction that "You shall place these words of Mine upon your heart and upon your soul . . . and you shall teach them to your children to speak in them." Deuteronomy 11:18-19. *See also* Twerski Aff. at ¶ 4; Weinstock Aff. at ¶ 6. This follows the example of Abraham, about whom it is written, "I have known him because he commands his sons and his household after him, that they should keep the way of the Lord." Genesis 18:19. *See also* Twerski Aff. at ¶ 4; Reisman Aff. ¶ 6 (noting "parents who choose [the yeshiva] for their children do so for the religious education that we offer and the religious values that we instill"); Kirzner Aff. ¶ 24 ("the purpose of the Yeshiva, and the desire of the parents who enroll their children, is for students to understand and appreciate the beauty of their faith").

The New Regulations will have a significant and adverse impact on the religious education that students will receive. Reisman Aff. ¶¶ 14, 19-23; Kirzner Aff. ¶ 9. Not only do the New Regulations crowd out and replace the Jewish studies classes that are the reason parents choose the Petitioner Yeshivas for their children (Kirzner Aff. ¶¶ 26), they restrict the school's ability to select its instructors, undermining the yeshivas' pursuit of their missions. Kirzner Aff. ¶ 19-21 ("the selection … of the teachers … is at the core of our mission, and empowering local school authorities to approve or disapprove of yeshiva faculty undermines that mission."); Reisman Aff. ¶ 18 ("Empowering local school authorities to approve or disapprove of yeshiva faculty [] undermines the independence of [Petitioner Yeshiva] and interferes with our religious mission.").

LEGAL STANDARD

Article 78 authorizes a petitioner to challenge agency action on that grounds that the agency (1) "proceeded, is proceeding or is about to proceed without or in excess of jurisdiction" or (2) made a determination that was "in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR 7803(2), (3).

Article 78 authorizes a court to stay enforcement of New York State agency action. CPLR 7805. In determining whether to issue a stay under CPLR 7805, courts apply the same three-part test used to assess a motion for a preliminary injunction. *Melvin v. Union Coll.*, 195 A.D.2d 447, 448 (2d Dep't 1993). Therefore, the agency action should be enjoined if Petitioners show: (1) they are likely to succeed on the merits of their challenge to the New Regulations; (2) they will suffer irreparable harm if an injunction does not issue; and (3) the balance of the equities favors granting an injunction. *Id.* Even "the existence of a factual dispute will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance." *Melvin*, 195 A.D.2d at 448.

A petition raising "novel issues of first impression" and "substantial principles of constitutional law" constitutes "precisely the situation in which a preliminary injunction should be granted to hold the parties in status quo while the legal issues are determined in a deliberate and judicious manner." *Tucker v. Toia*, 54 A.D.2d 322 (4th Dep't 1976). As shown below, Petitioners raise such a challenge and easily meet the standard for an injunction.

ARGUMENT

I. Petitioners Are Entitled To Injunctive Relief Because They Are Likely To Succeed On The Merits Of Each Of Their Challenges To The New Regulations

To establish a likelihood of success on the merits, Petitioners are required only to "show [their] right to a preliminary injunction is plain on the facts of the case." *Melvin*, 195 A.D.2d at 448. Even "the existence of factual questions for a trial does not prevent a party from establishing a likelihood of success on the merits," because "success need not be a certainty" to get preliminary injunctive relief. *Cooperstown Capital, LLC v. Patton*, 60 A.D.3d 1251, 1252–53 (3d Dep't 2009). Rather, Petitioners need only make a *prima facie* showing of a reasonable probability of success on any of their claims. *See Weissman v. Kubasek*, 112 A.D.2d 1086, 1086 (2d Dep't 1985). Here, Petitioners have a sufficient likelihood of success on the merits of their claim in each of their three independent challenges to the New Regulations.

A. NYSED Failed To Follow The Substantive And Procedural Requirements That Apply To Rulemaking Under The State Administrative Procedure Act

Respondents and the NYSED violated the State Administrative Procedure Act in multiple ways, by failing to address public comments critical of the New Regulations, and by adopting regulations that contradict both New York law and the state and federal constitutions.

Section 202 of the N.Y. State Administrative Procedure Act imposes various requirements, both procedural and substantive, on government agencies before any proposed regulation can take effect. As relevant to the instant Petition, these procedural requirements include mandatory public notice and the opportunity for public comment. *See* SAPA § 202(1). As particularly relevant here, Section 202 provides specific requirements for agencies to follow *after* the public comment period has closed. SAPA § 202(5)(a) ("[A]n agency may not file a rule with, or submit a notice of adoption to, the secretary of state unless the agency has previously submitted a notice of proposed rule making and complied with the provisions of this section.").

Under Section 202(5)(b), agencies are *required* to "publish and make available to the public an assessment of public comment" on proposed rules, which must "be based upon any written comments submitted to the agency and any comments presented at any public hearing held on the proposed rule by the agency." SAPA § 202(5)(b). Such assessments must contain, at minimum, three critical elements: (1) "a summary and an analysis of the issues raised and significant alternatives suggested by any such comments"; (2) "a statement of the reasons why any significant alternatives were not incorporated into the rule"; and (3) "a description of any changes made in the rule as a result of such comments," as well as an "assessment of public comment." SAPA § 202(5)(b)(i)–(iii), (c)(vii).

Interpreting these provisions, courts have established guideposts for an agency's mandatory assessment-of-public-comment duties. For example, when an agency gives "no indication that out of the more than 500 comments received any alternatives were identified, considered, analyzed or found to be viable," and offers only a "bald comment that 'no viable alternatives were considered' [that] does not satisfy the statute" and renders enacted regulations "null and void as contrary to law and lawful procedure." *Med. Soc'y of the State of N.Y. v. Levin*, 712 N.Y.S.2d 745, 752–53 (N.Y. Cnty. Sup. Ct. 2000).

1. NYSED Failed To Respond To Numerous Public Comments Before Adopting The New Regulations

NYSED failed to assess and respond to numerous public comments submitted during the public comment period, repeatedly violating its obligations under SAPA.

First, the entire public-comment process amounted to a sham, in which Respondents and the NYSED had no intention of revising the New Regulations regardless of any public comments submitted. During the public comment period, the Respondents and the NYSED received more than 300,000 public comments critical of the New Regulations. Some comments raised concerns

that the Education Laws foreclosed the assignment of substantial equivalency reviews to local school authorities, thereby precluding the New Regulations' assignment of such reviews to those bodies. *See, e.g.*, Exhibit C to Schick Aff.

Other comments explained the gravely deleterious effects the New Regulations would have on yeshivas, including because they would allow any local school authority "unfettered power . . . to inject its own social perspective in reviewing yeshivas that come under its oversight authority," thereby allowing "checklist bearing government functionaries who have no real understanding of the Jewish faith or of the yeshiva community," to review and "count for nothing" the value of any educational offerings beyond the core topics listed in the New Regulations. *See, e.g.*, Exhibit D to Schick Aff. Yet others went through the New Regulations section by section and explained how problematic they were. *See, e.g.*, Exhibit E to Schick Aff.

Nevertheless, and despite the overwhelming number of negative public comments in response to the New Regulations, the NYSED and Respondents made no substantive changes at all to the original proposed regulations, finding nothing whatsoever in the thousands of submissions that not only criticized the New Regulations but also proposed revisions to them.

This was what NYSED intended all along: to enact the New Regulations as initially proposed, regardless of the public comments received and alternatives proposed. NYSED treated the public comment period not as means to an end – to consider criticisms and alternatives – but as an end in itself. The failure to accept any revision or alternatives from among the thousands that were proposed was NYSED's goal for the public comment period, not the result of its review.

Second, NYSED failed to address the public comments noting that the New Regulations were motivated by a desire to modify and control yeshiva education. Numerous commenters explained that these New Regulations amounted to nothing more than "an assault on the Orthodox

and Chassidic communities" (Exhibit F to Schick Aff.) by NYSED designed to "undermine the independence of [Orthodox] schools and impos[e] rigid requirements" on yeshivas, thereby "attempt[ing] to impose a 'culture' on the Orthodox community" (Exhibit G to Schick Aff.; *see also, e.g.*, Exhibit H to Schick Aff. (noting that the New Regulations are "all about yeshivas")).

That yeshiva education was the target of the New Regulations was not only a criticism raised in public comments. The targeting of yeshiva education was discussed by every newspaper that covered the public debate about the New Regulations. Article after article acknowledged that the goal of NYSED in enacting these regulations was to alter the educational offerings of yeshivas. *See, e.g.*, Cutler, *NY Regents Boost Private School Education Oversight; What Districts Face*, *supra*; Laura Meckler, *New York Set to Force Ultra-Orthodox Schools to Teach Secular Subjects*, WASHINGTON POST (Sept. 9, 2022); Eliza Shapiro et al., *New York Lawmakers Call for More Oversight of Hasidic Schools*, N.Y. TIMES (Sept. 12, 2022); Eliza Shapiro & Brian M. Rosenthal, *N.Y. State Vote Could Raise Pressure on Officials Over Hasidic Schools*, N.Y. TIMES (Sept. 11, 2022); Exhibit M to Petition.

Those journalists were not speculating about the objective of the New Regulations. NYSED had already explained that the motivation for the New Regulations arose in 2015, when a complaint was filed by an advocacy group seeking to transform yeshiva education. (Exhibit K to Petition at 2; *see also* Exhibit I to Schick Aff. (noting that the New Regulations are "rooted in a single complaint in 2015 by former parents and students of yeshiva schools")).

NYSED's specific motivation to impose the New Regulations on yeshivas is also evident from the "pathways" it included to permit a school to avoid a substantial equivalency review. As noted above, a school with a registered high school, or that is accredited by an accrediting agency

approved by NYSED, or that utilizes certain assessments is exempt from the substantial equivalency review requirement. 8 N.Y.C.R.R. § 130.3.

All or nearly all non-Jewish private schools are either registered or accredited. *See* Weinstock Aff. ¶ 13 ("large majority of the non-Jewish nonpublic schools in New York are either registered or accredited"). But since many yeshivas are elementary-only and not connected to a high school, they cannot be registered. *Id.* ¶ 9 ("There are a large number of yeshiva elementary (K-8) schools in New York [and thus] many tens of thousands of yeshiva students …without an affiliated high school."). And because "there are virtually no accrediting agencies that have dealt with the yeshiva community," Exhibit M to Petition, there are almost no accredited yeshivas in New York. Weinstock Aff. ¶ 10. As a result, yeshivas alone will be subject to LSA substantial equivalence reviews. *Id.* ¶ 3 (noting "the deliberate exclusion of yeshivas from the 'pathways' in the New Regulations that allow other nonpublic schools to avoid review by a local school authority") & ¶¶ 7-13. The surgical precision with which the inspection and curricular requirements of the New Regulations apply to yeshivas but not to other nonpublic schools underscores the extent to which they improperly target the yeshiva community.

Not surprisingly, this unfair process of targeting yeshivas leads to inequitable substantive results. Schools that must undergo substantial equivalency reviews – a group that will consist exclusively or virtually exclusively of yeshivas – will be required to demonstrate curricula and instruction not only in the core subjects of English, mathematics, science, and social studies, but also numerous other courses such as patriotism and citizenship, health education and the New York State Constitution, and more. 8 N.Y.C.R.R. § 130.9. *See also* Weinstock Aff. ¶¶ 14-17 (listing various subjects and areas of instruction raised by the New Regulations). These ancillary topics go far beyond what is tested on Regents examinations or reviewed by accreditors. *See* Exhibit J

to Schick Aff. (listing English language arts, mathematics, and science as permissible testing topics); Exhibit K to Schick Aff. (listing English language arts, mathematics, science, social studies, and foreign languages, including Hebrew, as permissible testing topics). As a result, only yeshivas will be inspected for and judged by their instruction in these curricular areas.

NYSED was simply silent on the numerous critiques pointing out that the New Regulations were targeting yeshiva education, stating only that the New Regulations are "applicable to all nonpublic schools, a universe far broader than a single religious tradition." Exhibit O to Petition at 39. But of course, mere reference to the neutral language used in the New Regulations is not sufficient to respond to the comments alleging that they are *motivated* by the NYSED's animus toward yeshiva education, and have the *effect* of singling out yeshiva education. *See* SAPA § 202(5)(b); *Levin*, 712 N.Y.S.2d at 752.

Moreover, because NYSED never adequately responded to these comments or otherwise cured the government targeting, the result is that the New Regulations were enacted with the intent to target and alter yeshiva education. Government is not permitted to enact laws with the intent of harming religious activity, *infra* Part I.E.2; *see also Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–30 (2019), so Respondents' and NYSED's SAPA failure caused real harm to Petitioners' constitutional rights.

Third, the New Regulations failed to address the concerns that they permit any person to file an Education Law Section 310 appeal to the Commissioner challenging a substantial equivalence determination, regardless of their lack of any actual and direct interest in the proceedings. The Jewish Education Project explained in a letter to the NYSED that Section 130.12 of the New Regulations, by its express language, now permits any "[p]ersons considering

themselves aggrieved by an LSA's substantial equivalency determination [to] file an appeal to the Commissioner," even though that such appeals "should only be available to individuals who can document themselves as an aggrieved party." Exhibit E to Schick Aff. Similarly, Councilman Yeger explained that he was concerned that the New Regulations "would provide any self-determined 'aggrieved' party . . . the right to appeal a determination of substantial equivalency by a local school authority, even if they would otherwise have no legal standing." Exhibit H to Schick Aff. *See also* Reisman Aff. ¶ 24; Kirzner Aff. ¶ 28.

NYSED has cited various Commissioner's Decisions holding that standing is a prerequisite for a Section 310 appeal (Exhibit O to Petition at 42), but nowhere explained the contradiction between those prior decisions requiring an injury in fact to establish standing to file a Section 310 appeal and the New Regulations, which permit all "persons considering themselves aggrieved" to file a Section 310 appeal. The logical conclusion is that NYSED recognized its mistake in permitting any aggrieved party to file a Section 310 appeal, but refused to correct its error because that type of substantive revision would have triggered an additional public comment period.

By inviting even those without a cognizable interest in a substantial equivalence determination to file a Section 310 appeal challenging it, NYSED is ensuring that yeshivas will be required to respond to these filings, and then will have to defend against any Article 78 challenges to the agency decision even if the Commissioner determines that the complainant lacks standing. The failure of NYSED to engage with these concerns, and the failure to address these public comments in any meaningful manner violates SAPA. *Levin*, 712 N.Y.S.2d at 752.

2. The New Regulations Violate SAPA By Imposing Stricter Requirements On Nonpublic Schools Than On Public Schools

The New Regulations are also invalid in that they apply standards to nonpublic schools that are inconsistent with the Education Law and applicable standards for public schools. It is

blackletter law that "an agency cannot promulgate rules or regulations that contravene the will of the Legislature," *Weiss v. City of New York*, 95 N.Y.2d 1, 4–5 (2000), and is only permitted to "promulgate rules to further the implementation of the law as it exists," *Finger Lakes Racing Ass'n v. N.Y. State Racing & Wagering Bd.*, 45 N.Y.2d 471, 480 (1978). A regulation is impermissible not only when it is "in direct conflict with the plain language of" the relevant statute, *id.*, but also whenever it "is 'out of harmony' with an applicable statute," *Weiss*, 95 N.Y.2d at 5.

The New Regulations violate this requirement by prohibiting yeshivas from teaching in any language other than English, even though there are dozens of New York public schools that are not only permitted to teach classes in languages other than English but are lauded for it.

The New Regulations provide that a substantial equivalency determination will be based in part on whether "English is the language of instruction for common branch subjects." 8 N.Y.C.R.R. § 130.9(b). Moreover, they provide only a single temporary exception for this requirement—nonpublic schools may offer "students who have limited English proficiency" a special program that "enabl[es] them to make progress toward English language proficiency," 8 N.Y.C.R.R. § 130.9(c), but it does not permit a nonpublic school to maintain split-language programming in which students receive non-English instruction in common branch subjects.

Public schools, on the other hand, are not only permitted to teach extensively in foreign languages, but NYSED encourages it. In particular, NYSED trumpets public schools that offer Dual Language Programs through which students "receive half of their instruction in their primary or home language" – whether Polish, Japanese, Italian, Bengali or Arabic – "and the remainder of their instruction in the target language." Exhibit D to Petition. Some public schools even offer "a 90% to 10% model, [where] a greater percentage of the instruction is in the target language other than English and decrease[s] over time until reaching 50% to 50%." *Id.* These programs – of

which there are more than 200 in New York City public schools alone – are not meant for students who need instruction in English as a Second Language, but rather for students who want "the opportunity to become bilingual, biliterate, and bicultural." *Id*. NYSED touts these programs as beacons of success in education and cultural diversity and sensitivity, while threatening yeshivas trying to do the same for their students in the languages of their culture. *See* Jason Bedrick & Jay P. Greene, *The* New York Times*'s Botched Attack on Jewish Schools*, WASHINGTON EXAMINER (Sept. 15, 2022),

Under the New Regulations, even though public-school students are permitted to half or more of their instruction in common branch topics subjects in languages other than English, yeshiva students are expressly prohibited from doing so. In this manner, the New Regulations plainly violate the "substantial equivalency" standard by imposing more onerous standards on nonpublic schools than on public schools, and so are in "direct conflict" and "out of harmony" with that standard. *Weiss*, 95 N.Y.2d at 5.

NYSED's intention to treat public and nonpublic schools differently in this regard it was confirmed during Board of Regents committee meeting. When Regent Reyes questioned a NYSED official about the English language requirement of the New Regulations given the bilingual programing in public schools, he was told that program "applies in the public school context" and that such offerings were not available to nonpublic schools.[3]

The imposition of the English-only-instruction requirement is no small matter for yeshiva students, where other languages – notably Hebrew and Aramaic – are necessary to engage with "the Talmud, a long and wide-ranging text that forms the backbone of Jewish law and Jewish life." Krakowski Aff. ¶ 18; Reisman Aff. ¶ 13 ("Students are taught to study in the languages of our

[3] NYSED, *Board of Regents Meeting – September 12, 2022* (Sept. 12, 2022) (available at https://www.regents.nysed.gov/video/board-regents-meeting-september-12-2022 or https://vimeo.com/755640585).

faith and texts, Hebrew and Aramaic."). Additionally, many Orthodox Jewish communities in New York take "deep religious meaning" in "the use of Yiddish" in their community members' daily lives. Moshe Krakowski, *The War Against the Haredim*, CITY JOURNAL MAGAZINE (Autumn 2020).

Many yeshiva graduates go on to work within their communities, turning the exceptionally complex and stimulating religious studies courses and languages offered in yeshivas into businesses even in the most insular Orthodox communities, including in professions that require extensive cultural and historical knowledge such as the "meticulous requirements" pertaining to kosher dietary laws, Bill Bradshaw, *Orthodox Hasidic Jews from Brooklyn Find Specialty Wheat in Eastern Oregon Fits Kosher Requirements*, THE OREGONIAN (Oct. 5, 2021).

And these benefits are extensive even ignoring the large numbers of yeshiva graduates who themselves go on to become Rabbis and teachers, educating future generation of yeshiva students, which again requires extensive knowledge of the Talmud, Yiddish, Aramaic, and Hebrew. Indeed, it is impossible to overstate how crucial it is to the Orthodox community that Orthodox "children learn the Torah and Talmudic texts, laws, customs, values and the history of [their] people," Exhibit L to Schick Aff. Instruction in Yiddish at yeshivas is also consistent with NYSED's promotion of "inclusive education for all students" as a point of emphasis in public schools by "support[ing] students' learning within the boundaries of families' and communities' cultural values and beliefs." Exhibit M to Schick Aff.

Public schools are permitted to offer common branch course instruction in foreign languages, yet yeshivas are prohibited from doing so. SAPA does not permit the adoption of such biased regulations, and the New Regulations must therefore be struck down. *Finger Lakes Racing Ass'n*, 45 N.Y.2d at 480; *Weiss*, 95 N.Y.2d at 5.

3. The New Regulations Are Invalid Under SAPA Because They Impermissibly Empower LSAs To Approve or Disapprove of Yeshiva Faculty

The United States Supreme Court has long recognized that the doctrine of religious autonomy prevents the government from interfering with a religious school's teachings and hiring decisions. Here, the New Regulations flout that restriction, by requiring LSAs to decide whether instruction at yeshivas is provided by "competent" teachers, and exposing a yeshiva to draconian penalties if they determine that its teachers are not "competent." 8 N.Y.C.R.R. § 130.9(a).

In *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), the United States Supreme Court held that courts could not adjudicate a claim brought by a Catholic school teacher challenging the termination of her employment. This holding applies even to those who teach secular topics like math and science, because even they are expected "to model, teach and promote behavior in conformity" with religious values.

As the Court explained, teachers are "expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith." *Id.* at 2066. Religious school must maintain their authority to "select, supervise, and if necessary, remove" teachers "without interference by secular authorities," otherwise an individual's "preaching, teaching, and counseling could contradict the [school's] tenets." *Id.* at 2060.

Our Lady of Guadalupe recognized that "religious education and formation of students is the very reason for the existence of most private religious schools" and therefore the "selection and supervision of the teachers" must be free from government interference. *Id.* at 2055.

The protection from government interference afforded the Catholic school in *Our Lady of Guadalupe* surely must be extended to the Petitioner Yeshivas here. There is no doubt that all faculty employed by Petitioner Yeshivas are "expected to guide their students, by word and deed,

toward the goal of living their lives in accordance with the faith." *Id.* at 2066; *see* Kirzner Aff. ¶ 20; Reisman Aff. ¶ 16.

The Second Circuit has recognized the vital importance of yeshivas in providing religious instruction to Jewish children, emphasizing that even the secular studies portion of a yeshiva's dual curriculum is part of a "wholly integrated" approach in which "the curriculum of virtually all secular studies classes is permeated with religious aspects, and the general studies faculty actively collaborates with the Judaic studies faculty in arranging such a Jewish-themed curriculum." *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 345 (2d Cir. 2007).

The New Regulations are far more intrusive than judicial review of the employment-law claim in *Our Lady of Guadalupe*, and pose a far greater threat to the religious autonomy of Petitioner Yeshivas than the employment lawsuit did to Our Lady of Guadalupe School.

The New Regulations require LSAs to assess the competence of every single teacher employed by each and every yeshiva in New York. The New Regulations do not identify what standards the LSAs are supposed to apply in making these judgments, but it is certain that public schools have different standards and goals than yeshivas. Reisman Aff. ¶ 4; Kirzner Aff. ¶ 19. And the penalties that government can impose on a yeshiva dwarf the consequences Our Lady of Guadalupe School faced. *See, e.g.,* Reisman Aff. ¶¶ 17-18 (explaining the interference with teacher selection "undermines the independence of [the yeshiva] and interferes with our religious mission"); Krakowski Aff. at ¶ 13. A yeshiva whose teachers are found to be less than "competent" will be deemed not substantially equivalent, and its parent body will be directed to remove their children from the school. *See supra* p. 8. Our Lady of Guadalupe School would have at most been confronted with a monetary judgment imposed by a court.

If the independent judiciary is constitutionally prohibited from adjudicating an employment claim affirmatively brought by a teacher terminated by a Catholic school for fear of undermining the religious autonomy of religious schools, the State Education Department surely cannot direct LSAs to assess the competence of every yeshiva teacher in New York State.

The New Regulations are inconsistent with the First Amendment and thus are contrary to "the law as it exists," *Finger Lakes Racing Ass'n*, 45 N.Y.2d at 480, rendering them void.

B. NYSED Exceeded Its Lawful Authority By Creating A Licensing System For Private Schools

Further underscoring Petitioners' likelihood of success, the New Regulations amount to an unlawful licensing system for nonpublic schools, in excess of NYSED's statutory authority. The legislative power of the State of New York is vested solely in the Senate and the Assembly. N.Y. Const. art. III, § 1. Such legislative power is "untrammeled and supreme," *Silver v. Pataki*, 96 N.Y.2d 532, 537 (2001), meaning that it is "the prerogative of the Legislature to establish State policy," which is a core "function of the Legislature, not an administrative agency," *Boreali v. Axelrod*, 130 A.D.2d 107, 114 (3d Dep't 1987), *aff'd* 71 N.Y.2d 1 (1987). Thus, agency action, including rulemaking, which "usurp[s] the prerogative of the Legislature to establish State policy in direct contravention of the separation of powers doctrine" are null and void. *Id.* And, pursuant to the doctrine of constitutional avoidance, New York courts interpret statutes whenever reasonably possible in a manner that avoids serious constitutional questions. *Beach v. Shanley*, 64 N.Y.2d 241, 254 (1984); *People v. Grasso*, 54 A.D.3d 180, 183 (1st Dep't 2008).

More specifically in the elementary and secondary-education context, the Court of Appeals has discussed the limits of the Commissioner of Education's authority to regulate nonpublic schools, even in the face of *some* attempted delegation of authority by the Legislature. In *Packer Collegiate Institute v. University of the State of New York*, 298 N.Y. 184 (1948), the Court of

Appeals addressed a statute related to the compulsory education laws that provided, in pertinent part: "'No person or persons, firm or corporation, other than the public school authorities or an established religious group, shall establish or maintain a nursery school and/or kindergarten and/or elementary school giving instruction in the subjects included in section six hundred and twenty, subdivision c, paragraph one-a, of this article, unless the school is registered under regulations prescribed by the board of regents.'" *Id.* at 188 (quoting what was then Educ. Law § 625).

The Court found this statute unconstitutional and "nothing less than an attempt to empower an administrative officer, the State Commissioner of Education, to register and license, or refuse to register and license, private schools, under regulations to be adopted by him, with no standards or limitations of any sort." *Packer Collegiate* , 298 N.Y. at 189. It reasoned that the Legislature failed not only to set out "standards or tests" that apply to such registration, but also failed to specify "what the subject matter of the regulations is to be." *Id.* Because this left the Court "guessing" "what the Legislature had in mind," it made it "impossible" for the Court to "discover what authority was intended to be turned over." *Id.* at 189–90. Nor could the Court discern limits to the discretion given to the Commissioner in other provisions of the Education Law to save the statute. *Id.* 190–91. This, the Court held, constituted an impermissible delegation of the legislative power from the Legislature to the Commissioner of Education, as "it would be intolerable for the Legislature to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to make such regulations as he or they should desire, and to grant or refuse licenses to such schools, depending on their compliance with such regulations." *Id.* at 192.

The Legislature has not provided any sufficient statutory authority for the New Regulations. In the proposed rulemaking, Respondents assert as purported "[s]tatutory authority" for the New Regulations, New York Education Law §§ 207, 215, 305(1), (2), 3204(1), (2), (3),

3205(1), 3210(2), 3233, and 3234, *see* Exhibit J to Petition at 19. None of the cited provisions provide adequate support for the New Regulations consistent with *Packer Collegiate*.

Section 207 merely authorizes the Board of Regents to "exercise legislative functions concerning the educational system of the state," broadly "determine its educational policies," and "establish rules for carrying into effect the laws and policies of the state[ ] relating to education." Educ. Law § 207. Section 215 only permits the Regents, Commissioner, and their representatives to "visit, examine into and inspect . . . any school or institution *under the educational supervision of the state*." *Id.* § 215 (emphasis added). Section 305 notes the Commissioner is the "chief executive officer of the state system of education and of the board of regents" with authority to "enforce all laws" relating to the educational system and to "supervis[e]" all schools. *Id.* § 305. The cited portions of Section 3204, 3205, and 3210 merely note that students must "regularly" "attend upon full time instruction" from ages six to sixteen and may attend "elsewhere" than at a public school; note that instruction must come from competent teachers, in English; note special considerations for certain nonpublic schools that meet certain criteria; and list the courses required in "full time public day schools." *Id*. §§ 3204 (1), (2), (3), 3205(1), 3210(1). And Sections 3233 and 3234 merely provide various penalties and enforcement mechanisms the Commissioner can use to enforce the Education Laws. *Id.* §§ 3233, 3234.

Nothing within these sections specifically authorizes NYSED to create and enforce a largescale licensing program of all nonpublic schools within the State. *See Packer Collegiate*, 298 N.Y. at 188–92. Nevertheless, and despite the lack of any authority, the New Regulations amount to nothing less than the NYSED imposing a comprehensive licensing regime on private schools, exceeding NYSED's authority and affecting a profound change for yeshivas.

The New Regulations require all new nonpublic schools to notify local school authorities when it intends to begin instruction and submit to and complete a substantial-equivalency review within two years. 8 N.Y.C.R.R. § 130.4(a). Existing schools must undergo substantial-equivalency reviews. 8 N.Y.C.R.R. § 130.4(b). A yeshiva will only pass a substantial-equivalency review by proving to a local school authority that competent teachers, in English, provide sufficient instruction in math, science, English language arts, social studies, patriotism and citizenship, U.S. Constitutional history, New York history, physical education, public health (including instruction regarding alcohol, drugs, and tobacco abuse), highway safety, fire safety, and more. 8 N.Y.C.R.R. § 130.9. *See also* Weinstock Aff. ¶¶ 14-17 (listing various subjects and areas of instruction raised by the New Regulations). Any determination by local school authorities or the Commissioner that a nonpublic school falters or fails to provide substantially equivalent education, results in that nonpublic school "no longer be[ing] deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law," 8 N.Y.C.R.R. § 130.6(c)(2, meaning that the nonpublic school would, for all intents and purposes, be shut down.

Thus, the New Regulations clearly create a comprehensive licensing program for nonpublic schools without any grant of authority from the Legislature, and must be struck down. *Packer Collegiate*, 298 N.Y. at 189.

Nor should this Court interpret any of the vague and insufficient statutes NYSED cited in support of their promulgation of the New Regulations as sufficiently authorizing NYSED to create a licensing regime over nonpublic schools. Doing so would present serious constitutional questions that this Court should avoid by reasonably construing the statute as not authorizing NYSED's overreach. *See Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984) ("Courts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground."); *People*

v. Grasso, 54 A.D.3d 180, 183 (1st Dep't 2008) (noting the "obligation to construe a statute whenever reasonably possible so as to avoid serious constitutional questions"). Finding sufficient legislative direction in any of the provisions of the Education Laws discussed above would not only run headlong into the Court of Appeals' separation-of-powers analysis in *Packer Collegiate*, it would also raise serious constitutional questions and impinge upon Petitioners constitutional rights as explained further below.

C. NYSED's New Regulations Violate Petitioners' Rights Under The U.S. And New York Constitutions

Petitioners also maintain a high likelihood of success because the New Regulations violate their constitutional rights in multiple ways.

1. The New Regulations Violate Parent Members' Right To Due Process

The guarantee of substantive due process restricts the government from imposing certain limitations on the rights of parents to choose the education for their children. U.S. CONST. amend. XIV; *see also* N.Y. Const. art. I, § 6. Consistent with that guarantee, the Supreme Court has repeatedly held that due process affords parents a fundamental, protected right to control the upbringing and the education of their children. *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399–403 (1923). In *Troxel v. Granville*, 530 U.S. 57 (2000), the Supreme Court noted that "the interest of parents in the care, custody, and control of their children [ ] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65; *see also Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2261 (2020).

The New Regulations unduly burden parents' constitutionally-protected interest in sending their children to private religious schools that will provide them with instruction consistent with their religious values and beliefs and which are free from secular intrusion. This violates the

"enduring American tradition" allowing parents "to direct the religious upbringing of their children." *Espinoza*, 140 S. Ct. at 2261 (citations omitted). In particular, the New Regulations compel public school authorities to assess the competence of yeshiva faculty and require yeshivas to alter their instructional offerings to satisfy local school authorities. *See* Kirzner Aff. ¶¶ 17-21 Reisman Aff. ¶¶ 18, 23.

Parents who want government to control the curriculum and faculty of their children's school choose the public schools. Parents who choose yeshiva education want school leaders to make those choices. *See* Weinstock Aff. ¶ 5 ("individual schools differ in their precise approach, religious outlook, and teaching philosophy. Parents select for their children the yeshiva whose mission best aligns with their religious values and goals, and that will best serve the needs of their child"). *See also* Kirzner Aff. ¶¶ 19, 26-27; Reisman Aff. ¶¶ 15-17, 23.

2. The New Regulations Unconstitutionally Burden Petitioners' Rights To The Free Exercise of Religion

The First Amendment restricts the government from prohibiting the free exercise of religion. U.S. CONST. amend I; *see also* N.Y. Const. art. I, § 3. As the Supreme Court has held, parents have the constitutionally-protected right to freely exercise their religious beliefs and practices by providing a religious upbringing for their children. *Wisconsin v. Yoder*, 406 U.S. 205, 234–35 (1972). Strict constitutional scrutiny applies to a state law if it targets a religious practice for discriminatory treatment. *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993). A law is not neutral if it imposes disparate treatment on religious conduct. *See, e.g.*, *id.* at 543; *Cent. Rabbinical Cong. of the U.S. v. N.Y.C. Dep't of Health & Mental Hygiene*, 763 F.3d 183, 193–96 (2d Cir. 2014); *Catholic Charities of Diocese of Albany v. Serio*, 28 A.D.3d 115, 122 (3d Dep't 2006). A law is also not neutral if the background surrounding its enactment evidences

the illicit targeting of religion. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2423 (2022); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1729–30 (2019).

Strict scrutiny applies to the New Regulations because they are not neutral towards religious practice. The New Regulations target religious conduct for harsh treatment by requiring substantial equivalency reviews of yeshivas almost exclusively because the regulations exempt most other private schools from their inspection and curricular requirements. And NYSED's motivation in enacting the New Regulations evidence that the regulations were targeted at religious education. *Supra* p. Part I.A.1.

By instituting secular oversight of religious instruction and teachers, as well as mandating substantially equivalent studies in specific courses, the New Regulations require the sacrifice of religious autonomy (*See* Kirzner Aff. ¶¶ 17-26 (quoted *supra*); Reisman Aff. ¶¶ 17-23 (quoted *supra*)) and "substantially interfer[e] with the religious development of the [Jewish] child[ren]" who attend New York yeshivas. *Yoder*, 406 U.S. at 218. *See also* Krakowski Aff. at ¶¶ 13-14 ("these regulations will prevent many Orthodox communities from practicing their faith as they understand it"). Therefore, the New Regulations necessarily do not survive strict scrutiny, because the NYSED does not have a compelling interest in conducting invasive oversight of religious education and the New Regulations are not narrowly tailored to ensure children receive a meaningful education, necessary to overcome this substantial right.

3. The New Regulations Violate Parent Members' Hybrid Rights To Direct The Religious Education Of Their Children

In addition to the above-discussed individual protections, the First and Fourteenth Amendments (and their New York Constitution analogues) provide parents with a hybrid right to control the religious education of their children, and strict scrutiny applies to such a claim. *Emp't Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872 (1990); *Yoder v. Wisconsin*, 406 U.S.

205 (1972). In *Smith*, the Court explained that when cases involve "the Free Exercise Clause in conjunction with other constitutional protections" even a "neutral, generally applicable law" can be barred from applying to "a religiously motivated action." *Id.* at 881. Courts have found similar state laws to violate parents' rights to control the religious education of their children. *See, e.g.*, *People v. DeJonge*, 501 N.W.2d 127, 134–41 (Mich. 1993); *State v. Whisner*, 351 N.E.2d 750, 761, 765–66 (Ohio 1976).

4. The New Regulations Infringe Upon Petitioners' Right To Free Speech

The First Amendment restricts the States from unlawfully compelling speech and from impairing the right to free speech. U.S. CONST. amend I; *see also* N.Y. Const. art. I, § 8. Laws that act as a deterrent to and chill free speech, even where not directly prohibiting the exercise of free speech, are subject to constitutional scrutiny. *Bd of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Both compelled speech and restricted speech are afforded identical constitutional protection, *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796–97 (1988), and content-based regulations of speech are subject to strict scrutiny, *Turner Broad Sys. v. FCC*, 512 U.S. 622, 642 (1994). More specifically, regulations that impose restrictions on materials that private schools can teach their students constitute a violation of the schools' and students' rights to free speech. *Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 12–13, 27–31 (1st Cir. 2007).

The New Regulations are subject to strict scrutiny because they compel certain speech and restrict other speech. The New Regulations' requirements that yeshivas provide substantial equivalent instruction in particular courses necessarily compels certain speech on these topics, which also burdens free speech by effectively restricting the amount of religious instruction that yeshivas can provide and students can receive, *supra* pp. 10-11, thereby violating Petitioner Yeshivas' rights to free speech, *Riley*, 487 U.S. at 796–97; *Garcia-Padilla*, 490 F.3d at 12–13, 27–

31. *See also* Kirzner Aff. ¶ 17-26 (quoted *supra*); Reisman Aff. ¶ 17-23 (quoted *supra*). The same is true for the requirement that yeshivas *not* teach core classes in Yiddish, Hebrew, or Aramaic, 8 N.Y.C.R.R. § 130.9(b), which unconstitutionally infringes on Petitioner Yeshivas' rights to free speech, either by prohibition or compulsion, *Riley*, 487 U.S. at 796–97; *Garcia-Padilla*, 490 F.3d at 12–13, 27–31. As explained above in each of Petitioners' constitutional challenges to the New Regulations, NYSED simply cannot overcome strict scrutiny, as they have no compelling interest in conducting such invasive oversight and regulating yeshivas' classroom speech, and the New Regulations are not narrowly tailored.

The New Regulations fail strict scrutiny and must therefore be enjoined.

II. Petitioners Will Suffer Irreparable Harm Absent Injunctive Relief

Irreparable harm exists whenever the injury "cannot be adequately compensated for in damages." *Samuelsen v. Yassky*, 911 N.Y.S.2d 570, 578 (N.Y. Cnty. Sup. Ct. 2010) (citation omitted). Moreover, where there is a "significant impairment" of constitutional rights, "irreparable harm must be presumed." *Chiasson v. N.Y.C. Dep't of Consumer Affairs*, 505 N.Y.S.2d 499, 504 (N.Y. Cnty. Sup. Ct. 1986) (quoting *N. St. Book Shoppe v. Vill. of Endicott*, 582 F. Supp. 1428 (N.D.N.Y. 1984)); *see also Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (citation omitted)); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (recognizing a "presumption of irreparable injury that flows from a violation of constitutional rights"); 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2948.1 ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary.").

Here, Petitioners will suffer irreparable harm in no less than three ways.

First, the New Regulations mandate that Petitioner Yeshivas alter the nature and content of the instruction they provide, thereby frustrating the religious mission sought by the parents from the yeshivas they chose for their children and harming the schools themselves. *See* Kirzner Aff. ¶ 26; Reisman Aff. ¶ 23, & ¶ 6 ("The parents who choose [Petitioner Yeshiva] for their children do so for the religious education that we offer and the religious values that we instill."); Weinstock Aff. ¶ 6 ("parents choose yeshiva education for their children because of the classes in Jewish texts, history, values, ethics and ideals that they teach offer").

In doing so, the New Regulations impinge upon a yeshivas' ability to provide the religious education they offer, damage their reputations and dissuade Orthodox parents from enrolling their children. Reisman Aff. ¶¶ 11-21. This alone is sufficient to show irreparable harm, both for loss of "customers" like the students Petitioner Yeshivas will lose, *Albany Med. Coll. v. Lobel*, 296 A.D.2d 701, 703 (3d Dep't 2002), and from loss of reputation or goodwill, *Konishi v. Lin*, 88 A.D.2d 905 (2d Dep't 1982); *Wegman v. Altieri*, 57 N.Y.S.3d 677 (Sup. Ct. Monroe Cnty. 2015).

Second, Petitioner Yeshivas that are found by local school authorities to be less than equivalent will be deemed as not providing compulsory education under New York law (*see* Weinstock Aff. ¶ 19), subjecting parents to fines and imprisonment (*id.* ¶ 21), and forcing students to switch schools, all of which would cause irreparable harm. *Cmty. Charter Sch. v. Bd. of Regents of the Univ. of the State of N.Y.*, 2013 WL 10185566, at *17 (Erie Cnty. Sup. Ct. June 1, 2013); *Waldman v. United Talmudical Acad.*, 558 N.Y.S.2d 781, 783 (Orange Cnty. Sup. Ct. 1990).

Indeed, a result of a finding that a yeshiva no longer offers substantially equivalent education would be to preclude students from enrolling in the school. *See* Weinstock Aff. ¶ 19 (such a finding would be "a death sentence for a school, and is the functional equivalent of a government directive shutting down the school"). That is no different than a loss of accreditation,

which courts have recognized constitutes irreparable harm. *See, e.g.*, *Faith Int'l Adoptions v. Pompeo*, 345 F. Supp. 3d 1314, 1334 (W.D. Wash. 2018); *Dillard Univ. v. Lexington Ins. Co.*, 466 F. Supp. 2d 723, 728 (E.D. La. 2006).

Finally, as explained above, *supra* Part I.C., the New Regulations will violate Petitioners' constitutional rights in numerous ways and thus cause irreparable harm. Courts presume irreparable harm where there exists a threatened violation of constitutional rights, which is particularly true in the context of First Amendment rights. *Chiasson*, 505 N.Y.S.2d at 504; *Roman Catholic Diocese*, 141 S. Ct. at 67; *Jolly*, 76 F.3d at 482.

These harms are not remediable via money damages, *Samuelsen*, 911 N.Y.S.2d at 578, and all constitute irreparable injury necessitating preliminary injunctive relief.

III. The Balance Of Equities Weigh In Favor Of An Injunction

Lastly, the balance of equities also clearly favor Petitioners' request for an injunction. In making this determination, courts generally look to the prejudice that would accrue to each party from a grant or denial of the requested relief. *STS Steel, Inc. v. Maxon Alco Holdings*, LLC, 123 A.D.3d 1260, 1262 (3d Dep't 2014).

As discussed immediately above, *supra* Part II, Petitioners will suffer substantial and irreparable harm if the requested injunction is not issued, for multiple reasons. The New Regulations immediately impose upon private schools numerous instructional requirements, *see supra* p. 8. On the other hand, NYSED will suffer little or no harm from a delay in implementation, which would merely maintain the 125-year status quo for religious education.

For all of these reasons, the New Regulations should be enjoined.

CONCLUSION

For the foregoing reasons, the Court should grant Petitioners' Article 78 Petition and Motion for Preliminary Injunction.

Dated: New York, New York
November 21, 2022

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CERTIFICATION

I hereby certify that the foregoing memorandum of law complies with the word count limitations set forth in 22 N.Y.C.R.R. § 202.8-b(a), and Petitioners' letter application for leave to file a memorandum of law which exceeds the word limit, *see* 22 N.Y.C.R.R. § 202.8-b(a), (f). According to the word-processing system used to prepare this memorandum of law, it contains 10,983 words, excluding parts of the document exempted by Rule 202.8-b(b).

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