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Court of Appeals

STATE OF NEW YORK

In the Matter of

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

Petitioners-Appellants,

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-Respondents.

BRIEF FOR PETITIONERS-APPELLANTS

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PRELIMINARY STATEMENT

New York's Education Law has always recognized the fundamental right of parents to direct the education of their children. Since the 1890s, it has explicitly provided that parents can choose nonpublic schools for their children, as long as they receive instruction that is "substantially equivalent" to that in the public schools.

For more than 120 years, the substantial equivalence mandate was uncontroversial. Local School Authorities (LSA) would follow up on any complaints, even as it was acknowledged that they "had no direct authority over private schools." There was little friction, and even fewer controversies.

All that changed in September 2022, when the State Education Department (SED) adopted the New Regulations. These regulations require private schools to earn a "substantially equivalent" designation. If a school fails to achieve that status, LSAs must direct parents of the students educated there to enroll them elsewhere. Without any students to instruct, the private school must close.

These regulations are contrary to the Education Law and exceed the authority of SED. The Education Law does not limit the flexibility of parents to direct the education of their children, including the right to satisfy the compulsory education obligation through a combination of sources such as homeschooling, a tutor or an after-school program to supplement the school-based instruction. In fact, the Education Law expressly permits instruction from a combination of sources.

There is also no legal or statutory basis for SED or LSAs to unilaterally decide that parents have not met their compulsory education obligations or to direct them to unenroll their children from the nonpublic school they have chosen. That type of determination and directive can only be issued in a Family Court proceeding.

For these reasons, Supreme Court correctly held that because "no provision" of the Education Law "requires parents to completely unenroll their children from nonpublic schools that do not fulfill all of the substantial equivalency" requirements, "parents should be permitted to supplement the education that their children receive at a nonpublic school" to address "any identified deficiencies in that education."

The New Regulations also improperly exceed SED's authority by effecting the closure of private schools by requiring all of their students to unenroll from the school chosen by their parents. Supreme Court agreed, finding that there is no "provision of the Compulsory Education Law that requires a nonpublic school to close its doors if it does not meet each and every criteria for substantial equivalency."

Because the New Regulations far exceed the authority of SED, Supreme Court properly invalidated the provision of the New Regulations directing that a nonpublic school that fails to earn a substantially equivalent designation from SED "shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law," and properly construed another provision requiring parents to "enroll their children in a different, appropriate

educational setting," to permit parents to keep their children in the private or parochial school they had chosen and to supplement any deficient instruction.

The Appellate Division agreed that the Compulsory Education Law is directed at parents and not schools. But it nevertheless held that because some private schools are defined statutorily by their long school day, it is impractical for parents to supplement the instruction received there. Putting aside the irony of finding parents in violation of the Compulsory Education Law because their children are in school for *too many* hours, the decision is fundamentally flawed because it prohibits *all* parents from utilizing a combination of sources to satisfy their compulsory education obligation, even if the school they have chosen does not have those long hours.

The Appellate Division also agreed that SED does not have the authority to close parochial and other private schools. Yet it allowed SED to direct *all* students at a private school to unenroll on the basis that the school can remain open to offer extra-curricular programs or after-school activities. Of course, that is not a school.

Justice Egan dissented, explaining that the majority's construction was "at variance with the statutory scheme" and "may well raise constitutional concerns given the 'liberty of parents and guardians to direct the upbringing and education of children under their control.'"

For all of these reasons, the decision of the Appellate Division should be reversed, and Supreme Court's careful and considered ruling should be reinstated.

QUESTIONS PRESENTED

1. Whether parents have the right to fulfill their compulsory education obligation by arranging for their child to receive instruction from a combination of sources. Supreme Court held that parents do have that right.

2. Whether the State Education Department exceeded its authority by promulgating regulations that require parents to unenroll their children from the school chosen for them and instead enroll them elsewhere. Supreme Court held that it did.

3. Whether the State Education Department exceeded its authority by requiring private schools to obtain a "substantially equivalent" designation in order to provide instruction to students and by requiring all students of private schools not granted "substantially equivalent" status to unenroll, thereby effecting the school's closure? Supreme Court held that it did.

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over orders that finally determine an action. N.Y. C.P.L.R. § 5602(a)(1)(i). The Appellate Division's June 27, 2024 decision and order, which reversed Supreme Court's grant of the Article 78 Petition, constituted a final determination. This Court has jurisdiction to review the questions of law presented under N.Y. C.P.L.R. § 5501(b). (R.6-26; R.3235-3246).

BACKGROUND

I. New York's Education Law Is Directed At Parents, And Is Flexible About How They Can Fulfill Their Compulsory Education Obligations.

The central requirement of New York's Compulsory Education Law is that "each minor from six to sixteen years of age shall attend upon full time instruction." Education Law § 3205(1)(a). The law affords parents flexibility in meeting that requirement. Their children "may attend [instruction] at a public school" or they may attend "elsewhere." *Id.* § 3204(1). The law recognizes parents' fundamental right to educate their children outside of public schools by sending them to private school, by homeschooling them, or through a combination of instructional sources.

No matter where parents educate their children, the compulsory education obligation is directed at parents, not schools. *E.g.*, Education Law §§ 3212, 3233. The Education Law makes it among the "[d]uties of persons in parental relation" to "cause [a child] to attend upon instruction as hereinbefore required," Education Law § 3212, as it has for 150 years, L. 1874, ch. 421, § 1 ("All parents and those who have the care of children shall instruct them, or cause them to be instructed, in spelling, reading, writing, English grammar, geography and arithmetic."). When parents breach their duty, the Education Law authorizes penalties, including fines and imprisonment, to be imposed on them. Education Law § 3233. But the Education Law does not impose any penalties on private schools or private instructors. *See id.* §§ 3233, 3234.

A. Instruction "elsewhere" than at a public school must be "substantially equivalent" to that offered in public schools.

"Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given . . . at the public schools." Education Law § 3204(2)(i). "Instead of mandating adherence to a detailed and uniform curriculum, the state has opted to set out general educational goals for students." *Blackwelder v. Safnauer*, 689 F. Supp. 106, 123 (N.D.N.Y. 1988). That way, local public schools are "afforded wide leeway" in "determining the scope and depth of instruction in a particular discipline." *Id.*

When parents arrange for their children to be instructed at a parochial or other private school, they do not lose that curricular flexibility. To the contrary, "the 'substantially equivalent' standard is flexible enough to allow local school officials sufficient leeway to accommodate the special requirements of diverse religious groups." *Id.* at 135.

As SED itself has acknowledged, "religious and independent schools often have different settings, calendars, assessments, and instructional methods from public schools" and those "traditions and beliefs—religious or otherwise—will drive the curriculum and will be integrated into the delivery of the learning standards." R.191.

B. Parents can utilize a combination of sources to provide their children with substantially equivalent instruction.

Nothing in the Education Law prohibits parents from combining multiple sources of instruction to satisfy their compulsory education obligation to arrange for their children to receive instruction that is substantially equivalent. This flexibility is consistent not only with the fundamental right of parents to control the education and upbringing of their children, but also with the Education Law and other provisions governing education that acknowledge that children will sometimes receive instruction from a combination of sources.

For example, New York Department of Labor regulations provide that a child actor can have a teacher who educates the child on set to supplement the education of "the minor's regular school." 12 N.Y.C.R.R. § 186-5.1(4), (6). In other words, parents of child performers can satisfy their compulsory education requirement by combining sources—traditional school and private tutoring—without running afoul of the Education Law. *Id.*

Similarly, SED guidance allows homeschooling parents to "engage the services of a tutor to provide instruction for all or a portion of the home instruction program," and they may even "arrange to have their children instructed in a group (rather than individual) setting for particular subjects but not for a majority of the home instruction program." SED, *Home Instruction Questions and Answers*,

https://www.nysed.gov/nonpublic-schools/home-instruction-questions-and-answers.

Education Law Section 3602-c itself provides statutory precedent for multi-source education. That Section not only allows but requires school districts to permit students enrolled at a non-public school to simultaneously enroll in public schools for certain classes, including occupational training, gifted and talented programs, and disability services. Education Law § 3602-c (2) ("Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent or person in parental relation of any such student."); *id.* § 3602-c (1)(a) (defining "services" to include "instruction in the areas of gifted pupils, career education and education for students with disabilities, and counseling, psychological and social work services related to such instruction provided during the regular school year for pupils enrolled in a nonpublic school.").

C. Only Family Court can direct parents to unenroll their children from the private school they chose for them.

When parents are in violation of their compulsory education obligation, the law deems their children "truant." State or local officials who suspect a child is truant may bring an individual proceeding against the parents. A truancy enforcement action is not brought by SED and LSAs—under established law, they lack the authority to unilaterally determine that a parent has failed to fulfill his

compulsory education obligation. Instead, they must make a referral to a social service or other agency, which can then bring a proceeding accusing that parent of violating the Compulsory Education Law. Education Law §§ 3232, 3233, 3234.

Truancy enforcement cases are incredibly fact- and child-specific. They are typically brought by petition in Family Court. 12 Law and the Family New York § 89:80 (2023 ed.). When the parent has arranged for the child to receive instruction elsewhere than at a public school, the parent is given the opportunity to demonstrate that the child's instruction is substantially equivalent to that offered in the local public schools. *Id.*; *see Matter of Christa H.*, 513 N.Y.S.2d 65, 65 (4th Dep't 1987). A judge then must weigh the evidence presented by all parties to the case and determine whether the child has received instruction that is substantially equivalent to that in the public schools. *See, e.g., Matter of Blackwelder*, 528 N.Y.S.2d 759, 761 (Sup. Ct. 1988) (hearing testimony "concerning the curriculum, procedures, activities and test results of the educational process utilized" as well as expert testimony). The finding that a child has not received sufficient instruction, and thus has been educationally neglected, must be supported by a preponderance of the evidence. *In re Fatima A.*, 715 N.Y.S.2d 250, 251 (2d Dep't 2000); *see* N.Y. Fam. Ct. Act § 1046 (McKinney) ("[A]ny determination that the child is an abused or neglected child must be based on a preponderance of evidence.").

Truancy cases involve an individualized proceeding and determination, and courts regularly assess substantial equivalence by considering the combination of multiple sources of instruction arranged by the parent. *See, e.g.*, *In re Myers*, 119 N.Y.S.2d 98 (Dom. Rel. Ct. 1953); *see also In re Lash*, 401 N.Y.S.2d 124 (Fam. Ct. 1977). For example, *In re Myers* held that "evidence establishe[d] that the child [wa]s receiving instruction at least substantially equivalent to instruction given to minors of like age in attendance at the public school" where the "child ha[d] been receiving instruction in arithmetic, spelling, history, geography, current events, reading, writing, and the classics," and "[i]n addition she has been attending the Metropolitan Opera Ballet School twice a week, art classes at the Educational Alliance and music classes at the Henry Street Music School." 119 N.Y.S.2d at 101. Similarly, *In re Lash* held that parents fulfilled their Compulsory Education Law obligations by hiring two teachers, working together and separately, to provide instruction. 401 N.Y.S.2d 124 at 126.

SED itself has long understood that only the Family Court can override the private school educational choices parents make for their children. Until recently, its written guidance expressly provided that "[i]f 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." R.77.

II. The New York and United States Constitutions Protect the Right of Parents to Direct the Education of Their Children.

The New York and United States constitutions recognize the fundamental right of parents "to direct the rearing and education of their children, free from any general power of the State to standardize children by forcing them to accept instruction from public school teachers only." *Zorach v. Clauson*, 303 N.Y. 161, 173 (1951), *aff'd*, 343 U.S. 306 (1952) (citing *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)).

Sitting on this Court, Judge Desmond described the rights of parents to control the education of their children and to instruct their children in a religious setting as "true and absolute rights under natural law, antedating, and superior to, any human constitution or statute." *Zorach*, 303 N.Y. at 178 (Desmond, J., concurring). And the United States Supreme Court described parents' rights "to direct the upbringing and education of children under their control" as a "fundamental theory of liberty upon which all governments in this Union repose." *Pierce*, 268 U.S. at 534-35.

That is why the Supreme Court held that Oregon's Compulsory Education Act prohibiting parents from sending their children to parochial schools violated the Constitution. And when Wisconsin's compulsory attendance law required Amish parents to educate their children in a specific, formalized manner that conflicted with their faith, the Supreme Court likewise held that Wisconsin's law violated the Constitution. Both cases rejected "any general power of the state to standardize its

children by forcing them to accept instruction from public teachers only." *Pierce*, 268 U.S. at 535.

New York has long recognized the same parental rights. As this Court has noted, "[t]he Legislature recognizes the right of parents to send their children for instruction to schools other than public schools," and "[i]t could not do otherwise consistently with the Fourteenth Amendment to the United States Constitution." *Judd v. Board of Education of Union Free School District No. 2*, 278 N.Y. 200 (1938), *overruled in part on other grounds by Board of Educ. v. Allen*, 20 N.Y.2d 109, 115 (N.Y. 1967). The right is so apparent that this Court has axiomatically declared that "[p]rivate schools have a constitutional right to exist, and parents have a constitutional right to send their children to such schools." *Packer Collegiate Inst. v. Univ. of State of New York*, 298 N.Y. 184, 191–92 (1948) (describing this crisp declaration as "the fundamental law of the subject").

Because children are "not the mere creature of the state," parents have "the right" and "duty" to direct the manner of their education. *Pierce*, 268 U.S. at 535. That right is especially pronounced when it comes to religious instruction. *Yoder*, 406 U.S. at 233. A state has no legitimate interest in barring parents from providing for the private or religious instruction of their children.

III. New York Parents Have a Long and Extensive History of Choosing Parochial and Other Private Schools for Their Children.

A. Parents choose alternatives to public schools for their children.

The current and historical practice of New York parents reflects the value they place on the right to direct the education of their children. In total, parents of more than 400,000 children in New York choose nonpublic school for them. *NYS Private School Enrollment*, Empire Center (August 19, 2022), https://www.empirecenter.org/publications/nys-private-school-enrollment/. A majority of these children attend parochial schools, including schools in the Jewish, Catholic, Amish, Protestant and Islamic traditions. *Best New York Religiously Affiliated Private Schools (2024-25)*, Private School Review, https://www.privateschoolreview.com/new-york/religiously-affiliated-schools.

New York parents also choose homeschooling for more than 50,000 of their children, a number that is rising rapidly. *NY 2nd in the Nation for Homeschooling Growth*, Empire Center (Nov. 28, 2023) https://www.empirecenter.org/-publications/ny-2nd-in-the-nation-for-homeschooling-growth/. In fact, no State has seen a larger increase in the rate of homeschooled children in recent years. *Home-School Nation*, https://www.washingtonpost.com/education/interactive/2023/-homeschooling-growth-data-by-district/.

B. Yeshiva education in New York.

There are more than 500 Jewish elementary and high schools in New York, enrolling approximately 180,000 students. *2023-2024 Nonpublic Enrollment by Race and Ethnicity*, Information and Reporting Services, https://www.p12.nysed.gov/irs/statistics/nonpublic/; *see also* R.38; R.848. These Jewish schools are colloquially referred to as yeshivas. While there is no central authority and schools are operated independently, there are several common features of yeshiva education.

Most prominent among them is that they offer a dual curriculum, with Jewish studies classes taught in the morning and secular studies in the afternoon. *See Westchester Day School v. Village of Mamaroneck*, 504 F.3d 338, 344-45 (2d Cir. 2007). No matter what the subject, "classes are taught so that religious and Judaic concepts are reinforced." *Id.*

Parents choose yeshiva education for their children to fulfill the Biblical command that "You shall place these words of Mine upon your heart and your soul . . . and you shall teach them to your children to speak in them." Deuteronomy 11:18; *see Westchester Day School*, 504 F.3d at 345 ("Orthodox Jews believe it is the parents' duty to teach the Torah to their children. Since most Orthodox parents lack the time to fulfill this obligation fully, they seek out a [Jewish] school.").

Even with this emphasis on Jewish studies, yeshivas are among the top performing schools on the New York State Regents examinations. *See* Regents Data: Public Schools Lag Behind Yeshivas, Jewish Press (December 12, 2018).

This is no surprise, since the Jewish studies curriculum taught in Yeshivas is a highly rigorous academic program. R.907 (Affidavit of Professor Aaron D. Twerski, explaining that students' "success stems from the rigor of the education they receive"); R.3168 (Affidavit of Professor Adina Schick, explaining that "the Jewish Studies curriculum provided by yeshivas is real academic learning, which does align with the Next Generation Learning Standards").

New York Yeshiva Graduates Impact Jewish Communities Worldwide

After the Holocaust, the American Jewish community set out to rebuild that which had been destroyed in Europe. R.904 (Affidavit of Professor Twerski). That effort placed a primary focus on the creation of a network of Jewish schools:

> toward the end of World War II . . . there were roughly 30 day schools with an enrollment of between 6,000 and 7,000 students in the entire country and only six were outside of New York City.

Id. (quoting "Spotlight on Jewish Day School Education," Jewish Education Service of North America, Summer 2003). The dramatic increase in the number of Jewish schools and students in New York since then is not a result of the growth of New York's Orthodox community but rather the catalyst for that growth.

Numerous studies have confirmed that the single most determinative factor of involvement in Jewish life and observing Jewish tradition among adult members of the Jewish community is whether they attended a Jewish day school as a child. *See, e.g.*, R.904-905 (citing Sylvia Barack Fishman, "Jewish Education and Jewish Identity Among Contemporary American Jews: Suggestions from Current Research," Bureau of Jewish Education, Center For Educational Research And Evaluation, Boston, 1995, and Schiff and Schneider, "Far Reaching Effects of Extensive Jewish Day School Education," Yeshiva University, July 1994).

For this reason, yeshivas are the central and irreplaceable pillar of Orthodox Jewish life in New York. R.903. Parents choose yeshiva education for their children, because they want their children to have an education that is rooted in Jewish texts and informed by Jewish morality, history, culture, values, ideals, and hopes.

As former U.K. Chief Rabbi Lord Rabbi Jonathan Sacks explained:

> "For Jews, education is not just what we know. It's who we are. No people ever cared for education more.
>
> The Egyptians build pyramids, the Greeks built temples, the Romans built amphitheaters. Jews built schools. They knew that to defend a country, you need an army, but to defend a civilization, you need education."

R.902-903.

Yeshivas have operated in New York since the end of the 19th century. The five Petitioner-Yeshivas are all well over 100 years old. R.35. And New York yeshivas are important not only to the New York Jewish community but to Jewish communities around the world. That is because more than half of all students in Jewish schools across the United States are educated in New York yeshivas. *See* "A Census of Jewish Day Schools in the United States," Avi Chai Foundation (2020), Table 8, page 22, available at https://avichai.org/knowledge_base/a-census-of-jewish-day-schools-2018-2019-2020/.

While many graduates of New York yeshivas go on to professional and business careers, a very large number go on to found and lead Jewish educational, social service, and religious institutions in New York and across the United States. The Orthodox Jewish community's Rabbis, teachers, scholars, spiritual authorities, and social workers are educated and trained in New York yeshivas. These graduates, with the knowledge, skills and commitment to Jewish life they received while attending New York yeshivas, are responsible for the growth and vibrancy of Orthodox Jewish life across New York and the United States. R.30.

IV. The New Regulations Depart From These Principles and Restrict Parents' Right To Direct the Education of Their Children.

A. The State Education Department adopts the New Regulations.

Over the past several years, SED has repeatedly attempted to assert greater control over parochial and private schools, with guidance and regulations, that is

inconsistent with New York's protection of parents' right to direct the education of their children. The New Regulations shift the focus from the instruction a child receives to the instruction a nonpublic school provides. They require a nonpublic school to be designated substantially equivalent in order to keep its students.

In November 2018, SED issued a comprehensive set of rules governing all nonpublic schools in New York (the "2018 Guidelines"). Among other things, the 2018 Guidelines imposed rigid instruction mandates on nonpublic schools and required public officials to inspect all nonpublic schools to determine whether they provide instruction substantially equivalent to that offered in public schools. Parochial and private schools and related organizations challenged the 2018 Guidelines, which were struck down as "null and void" on April 17, 2019, by the Supreme Court. *See N.Y. State Ass'n of Indep. Schs. v. Elia*, 110 N.Y.S.3d 513 (Albany Cnty. Sup. Ct. 2019). The court held that their "mandates are akin to 'sufficiently fixed standards' that required compliance with the [State Administrative Procedure Act]"—requirements SED had ignored. *Id.* at 517. SED did not appeal the judgment and instead began the process of promulgating the 2018 Guidelines as regulations. But it later abandoned that effort. R.45.

In early 2022, SED promulgated the regulations that are at issue in this case (the "New Regulations"), which create a new inspection process for all nonpublic schools that is not provided for or contemplated by the Education Law. The New

Regulations require local school authorities to "make substantial equivalency determinations for all nonpublic schools within their geographical boundaries" other than for schools exempted based on enumerated criteria. 8 N.Y.C.R.R. § 130.2. Upon a determination that a nonpublic school does not provide substantially equivalent instruction, "the nonpublic school shall no longer be deemed a school which provides compulsory education." *Id.* § 130.6(c)(2)(i). Parents must unenroll their children from the nonpublic school and enroll them in "a different appropriate educational setting, consistent with Education Law § 3204." *Id.* § 130.6(c)(2)(ii).

SED adopted the New Regulations even though the Legislature has rejected numerous proposed amendments to the Education Law over the past several years that would impose substantial equivalency oversight and penalties—including up to school closure—on nonpublic schools. *See infra* pp.50-51. SED received more than 300,000 comments in opposition to the proposed regulations but made no substantive revisions to them before they were adopted. R.31.

B. The New Regulations establish a regular inspection process.

Instead of examining whether parents are securing for their children a substantially equivalent education, the New Regulations create a regime akin to a licensing process whereby all private schools must obtain a "substantially equivalent" designation to continue to operate. This is accomplished via a regular inspection process that results in either a positive or negative equivalency

determination. For most schools, the regulations call for the LSA to make the determination. 8 N.Y.C.R.R. § 130.2. For schools that are non-profits with bilingual education programs and a specifically described lengthy school day, the regulations call for the Commissioner to make the determination based on the recommendation of an LSA. *Id.*

The New Regulations establish that in addition to the core subjects of Math, Science, English, and Social Studies, the LSA must review and evaluate the nonpublic schools' instruction in "patriotism and citizenship," New York history, "highway safety and traffic regulation," and (among other topics) the use of a defibrillator. *Id.* § 130.9(f), (e).

The New Regulations also require LSAs to assess the faculty of private schools. *Id.* § 130.9(a). SED's "Substantial Equivalency Implementation Guidance" ("2023 Guidance") directs how LSAs should review "school recruitment, hiring policies," to determine whether the nonpublic school employs competent teachers. *Id.* at 20-21.[1]

The New Regulations also require that the core subjects be taught in English. *Id.* § 130.9(b). This is a departure from what is practiced in the public schools, which

[1]As Petitioners-Appellants explained below, this process raises serious questions concerning religious schools' First Amendment rights to select and retain their teachers. R.3194-95; *Our Lady of Guadalupe School v. Morrissey-Berm*, 140 S. Ct. 2049, 2060-62 (2020) (discussing the "so-called ministerial exception").

operate more than 200 dual-language programs and allow students to learn a target language by receiving up to ninety percent of their instruction in that language. Professor Aaron Twerski, *An Education in Double Standards*, City Journal (Dec. 4, 2023), https://www.city-journal.org/article/newyorks-double-standards-on-yeshivas. As SED explains, "Dual Language (DL) programs seek to offer students the opportunity to become bilingual, biliterate, and bicultural while improving their academic ability." R.157 (https://www.nysed.gov/bilingual-ed/program-options-english-language-learnersmultilingual-learners). "Students learn to speak, read, and write in two languages, and also learn about other cultures while developing strong self-esteem and diverse language skills." R.158. SED "touts these programs as beacons of success in educational and cultural diversity and sensitivity." Twerski, *Double Standards*. "Yet it threatens" nonpublic schools "trying to do the same for their students." *Id.*

C. Parents are required to unenroll their children from a parochial school the LSA says is not substantially equivalent.

If an LSA review results in a negative equivalency determination, parents of children enrolled in that school must "enroll their children in a different, appropriate educational setting." 8 N.Y.C.R.R. §§ 130.6(c)(2)(ii), 130.8(d)(7)(ii). Rather than permitting the parent to supplement any deficiencies identified by the LSA—as the Education Law does—the New Regulations instead assess substantial equivalence

through the narrow lens of the instruction a particular school provides rather than through the totality of the instruction the child receives.

Under the Appellate Division majority's reading of the New Regulations, a parent cannot satisfy substantial equivalence by combining instruction at a nonpublic school with instruction at home, through a tutor or via an after-school program. No matter what additional instruction the child receives elsewhere, she cannot remain in the private school chosen by her parents. Instead, the New Regulations require all parents of the students in a school that fails to achieve a "substantially equivalent" designation to unenroll their children and enroll them in a different school. All at once, SED deprives parochial schools of their "constitutional right to exist" and parents' right "to send their children to such schools."

V. Procedural History.

A. Petitioners-Appellants file this Article 78 challenge.

On October 9, 2022, Petitioners-Appellants filed an Article 78 Petition in Albany County challenging the New Regulations. R.29–72.

Petitioners-Appellants include three organizations whose memberships encompass the majority of all the Jewish schools in New York and a very significant portion of parents in New York who choose yeshiva education for their children—Parents for Educational and Religious Liberty in Schools ("PEARLS"), Agudath Israel of America, and Torah Umesorah: National Society for Hebrew Day

Schools—and five yeshivas, each of which has operated in New York for more than one hundred years. R.34–36.

The Petitioners-Appellants and their members are directly subject to the requirements of the New Regulations. *Id.* Indeed, yeshivas—including Petitioners-Appellants and members of organizational Petitioners-Appellants—had by that time already received negative substantial equivalency determinations and letters seeking to conduct substantial equivalency reviews that could subject them to penalties and consequences. R.3059, 3064–67, 3087–91.

Petitioners-Appellants moved for a preliminary injunction on November 21, 2022. R.811–962. Petitioners-Appellants requested relief from the New Regulations on several grounds including, among other reasons, that they "contradict and are inconsistent with the Education Law and applicable standards for public schools" and "violate Petitioners' constitutional rights in several ways." R.926–27. In particular, Petitioners-Appellants detailed how the "New Regulations impose onerous requirements on nonpublic schools" with the result that a local school authority's ("LSA") "determination that a yeshiva is not substantially equivalent is tantamount to a government order directing the school to close." R.931, 933. In so doing, the New Regulations contradicted the "substantial equivalency standard [that] has been part of the Education Laws for more than 125 years," which "is directed at parents, not schools." R.3186. Petitioners-Appellants' argument, put simply, was

that "[w]hile the compulsory education law has long required *parents* to ensure that children received instruction that is substantially equivalent to the local public schools, the New Regulations plainly impose significant new requirements on *nonpublic schools*." R.3188 (emphasis in original).

Respondents moved to dismiss the Petition, arguing that Petitioners-Appellants lacked standing to challenge the New Regulations and that the New Regulations are consistent with the Education Law in all respects and do not violate Petitioner-Appellants' rights. R.1008.

B. Supreme Court rules in favor of Petitioners-Appellants.

On March 23, 2023, Supreme Court issued a decision and judgment, granting in part and denying in part the Petition. R.6–26. As relevant here, the Court held that SED exceeded its authority in promulgating the New Regulations, which were inconsistent with the Education Law in prohibiting parents from utilizing a combination of sources to satisfy their compulsory education obligation. R.24.

The court emphasized that "there is no provision of the Compulsory Education Law that requires parents to completely unenroll their children from nonpublic schools that do not fulfill all of the substantial equivalency requirements" or "requires a nonpublic school to close its doors if it does not meet each and every criteria for substantial equivalency," because "there is nothing in the Compulsory

Education Law that limits a child to procuring a substantially equivalent education through merely one source of instruction provided at a single location." R.23.

The court explained that the Education Law "places the burden for ensuring a child's education squarely on the *parent*, not the school." R.22 (emphasis in original). "The only penalties for noncompliance authorized by the Compulsory Education Law are the imposition of fines and/or penalties upon a *parent* and the withholding of public moneys from *a city or public school district* that fails to enforce the law." *Id.* (emphases in original, internal citations omitted).

The court concluded that "[s]o long as the child receives a substantially equivalent education, through some source or combination of sources, the Legislative purpose of compulsory education is satisfied." R.23. Because the New Regulations "force parents to completely unenroll their children from a nonpublic school that does not meet all of the criteria for substantial equivalency, thereby forcing the school to close its doors," the court found that the New Regulations are "inconsistent with the Legislative goal of the Compulsory Education Law and exceed[ ] the rule-making authority conferred upon [SED]." R.22-23.

SED therefore "exceeded [its] authority by promulgating rules that require parents to automatically unenroll their children from nonpublic schools that have been found to not provide substantially equivalent instruction, without allowing them the opportunity to prove that satisfactory supplemental instruction is being

provided." R.24. It likewise had no authority to "direct the closure" of nonpublic schools. R.23. The Supreme Court accordingly struck some provisions of the New Regulations and construed others in a manner consistent with the Education Law. The court held:

> 1. "8 NYCRR § 130.6(c)(2)(i) and 8 NYCRR § 130.8(d)(7)(i)—stating that 'the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law'—must be stricken" because it leads to compelling parents to automatically unenroll their children from those nonpublic schools. R.24.
>
> 2. Sections 8 N.Y.C.R.R. § 130.6(c)(2)(iii) and 8 N.Y.C.R.R. § 130.8(d)(7)(iii), which require parents "to enroll their children in a different, appropriate educational setting, consistent with Education Law § 3204," should be construed so that "the term different does not mean parents are required to unenroll their children from a school that is not deemed substantially equivalent, but rather the term different encompasses the parental right to supplement with an Individualized Home Instruction Plan if they choose to keep their child enrolled at said school." R.24. (emphasis in original).

Petitioners-Appellants' other attendant claims were dismissed. R.18, 25.

Respondents filed a notice of appeal on April 24, 2023. R.3.

C. A divided panel of the Appellate Division reverses Supreme Court but subsequently grants leave to appeal.

Before the Appellate Division, Respondents principally argued that Petitioners-Appellants lacked standing. Respondents admitted that the regulations imposed a "serious consequence" on schools receiving an unfavorable determination—they are "no longer deemed a school," State's App. Div. Br. at 30—

but denied that this amounted to a school closure because they could remain open for extracurricular activities. *Id.* at 31-32. Respondents also argued that parents had no "right to supplement deficient instruction at a nonpublic school" or to use a "combination of sources" to satisfy their compulsory education obligation. *Id.*

After rejecting Respondent's standing arguments, a majority of the Appellate Division held that parents could be required to unenroll their children from their school and enroll them elsewhere. The majority rejected a reading of the New Regulations that would permit parents to combine sources of instruction—on the sole basis that some of the schools governed by the regulations have long school days. R.3241. In the majority's view, a parent whose child did not receive a completely equivalent education during that time "cannot adequately supplement this substandard curriculum in the few hours remaining in the week." *Id.* The majority also found that such an order would not be tantamount to school closure because the schools could still "provide some form of instruction" or offer extracurricular activities. R.3241.

Justice Egan dissented. He agreed with Supreme Court that the Education Law "affords parents . . . wide discretion in fashioning an acceptable program of instruction, be it in a nonpublic school, homeschooling or a mixture of the two, that fulfills their duty of providing an education to children under their care that is substantially equivalent to that available in public schools." R.3243. This followed

from the text of the Education Law, as well as from provisions that contemplate combining multiple sources of education. *Id.*

Justice Egan also noted that "to read the Education Law as restricting that parental discretion may well raise constitutional concerns given the 'liberty of parents and guardians to direct the upbringing and education of children under their control' so long as the children receive an appropriate education." R.3243 (citing *Pierce*, 268 U.S. at 534-35; *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923); *Zorach*, 303 N.Y. at 173; *Packer Collegiate*, 298 N.Y. at 192). He therefore concluded that he would "construe the Education Law 'in a way that avoids placing its constitutionality in doubt.'" *Id.* (quoting *People v. Viviani*, 36 N.Y.3d 564, 579 (2021), and citing *Matter of Lorie C.*, 49 N.Y.2d 161, 171 (1980)).

Petitioners-Appellants moved for leave to appeal its decision to this Court, and the Appellate Division granted the motion. R.3247.

SUMMARY OF ARGUMENT

The Education Law reflects a careful balance that accommodates the unquestioned right of parents to direct their children's education. It includes the "substantially equivalent" obligation of the Compulsory Education Law, the right of parents to choose private schools for their children, their ability to satisfy their obligation through a combination of sources, and enforcement mechanisms against delinquent parents.

The New Regulations upset this careful balance, by authorizing SED and LSAs to direct parents to unenroll their children from the school they chose for them and instead enroll them elsewhere. This impermissibly restricts parental rights, and improperly limits the rights of private schools to educate their students.

While the Education Law gives all parents the right to combine multiple sources of instruction to satisfy their compulsory education obligation, the New Regulations deny that right to parents who choose parochial and other private schools. Instead of assessing whether the totality of the instruction arranged by the parent is substantially equivalent, the New Regulations look only at whether the private school has achieved SED's "substantially equivalent" designation.

And while the Education Law imposes *no penalties* against a private school, the New Regulations impose *the ultimate penalty*. The school is deprived of all of its students, which is the very definition of a school closure order.

The New Regulations violate two bedrock principles of administrative law: that agency regulations must harmonize with their implementing statute and that agencies must not use regulations to engage in policymaking. There is simply no precedent or authority—in the Education Law or caselaw—for SED or LSAs to nullify a parent's choice of private school absent a judicial determination. Nor is there precedent or authority—in the Education Law or caselaw—for SED or LSAs to force a parochial school to close its doors by depriving it of its students.

ARGUMENT

I. The New Regulations Are Inconsistent and Out of Harmony with the Education Law.

As construed by the Appellate Division, the New Regulations restrict parents' rights to direct their children's education in ways that squarely conflict with the Education Law. And they impose on nonpublic schools penalties that the Education Law does not authorize.

This Court has long barred agencies from promulgating regulations that are "inconsistent" or "out of harmony" with statutory law. *See Weiss v. City of New York*, 95 N.Y.2d 1, 5 (2000). "It is of course a fundamental principle of administrative law that agencies are possessed of only those powers expressly delegated by the Legislature, together with those powers required by necessary implication." *Beer Garden, Inc. v. N.Y. State Liquor Auth.*, 79 N.Y.2d 266, 276 (1992). While the Legislature may delegate authority to an agency "to fill in the interstices in the legislative product," regulations must be "consistent with the enabling legislation." *Mayfield v. Evans*, 93 A.D.3d 98, 103 (1st Dep't 2012) (emphasis omitted). "If an agency regulation is 'out of harmony' with an applicable statute, the statute must prevail." *Weiss*, 95 N.Y.2d at 5.

That is particularly true when an agency seeks to overwrite statutory allowances, *In re Emmanuel B.*, 175 A.D.3d 49, 57, 106 N.Y.S.3d 58 (2019) (1st Dep't), impose liability where a statute has not, *Weiss*, 95 N.Y.2d at 5, or create

penalties that are inconsistent with empowering statute, *Meit v. P.S. & M. Catering Corp.*, 285 A.D. 506, 510 (3d Dep't 1955). A few provisions of the New Regulations do all of those things, and those sections should be struck, as Supreme Court did.

A. The New Regulations impermissibly deny parents the right to educate their children through a combination of sources.

1. The New Regulations seek to prohibit what the Education Law permits.

The Education Law imposes compulsory education obligations on parents but expressly allows them to be met "elsewhere" than at a public school. The Education Law mandates that "each minor from six to sixteen years of age shall attend [school] upon full time instruction," Education Law § 3205(1)(a), but allows such minors to "attend at a public school or elsewhere," *id.* § 3204(1).

The statute's structure and surrounding provisions makes plain that parents may fulfill their compulsory education obligation by educating their children through a combination of sources. Parents of children enrolled at nonpublic schools have a right to simultaneously enroll the children in the public school to receive certain instruction, including occupational training, gifted and talented programs, and disability services. Education Law § 3602-c. Parents of child performers may combine instruction received at the child's regular school with instruction received from a teacher provided by the child's employer while the child is away from home. 12 N.Y.C.R.R. § 186-5.1(4), (6). Parents of homeschoolers may hire private tutors

or work in groups to fill the gaps in their home instruction program. SED, *Home Instruction Questions and Answers*, https://www.nysed.gov/nonpublic-schools/home-instruction-questions-and-answers.

The Education Law's use of the term "elsewhere" to describe where students may receive their education also plainly conveys that parents can provide a substantially equivalent education for their children via a combination of sources of instruction. That is exactly what the term "elsewhere" means.

For example, the Cambridge Dictionary defines "elsewhere" as "at, in from or to another place *or other places*."[2] *See Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019) (looking to dictionaries to determine the meaning of a statutory provision). Similarly, the Collins Dictionary defines "elsewhere" as "in other places or to another place,"[3] and the Oxford Advanced Learner's Dictionary defines it as "in, at or to another place or other places."[4] In other words, the common understanding of the term "elsewhere" as used in the Education Law encompasses *multiple* places or providers of education.

As Justice Egan explained in his dissent below: "Affording the term 'elsewhere' its broad and ordinarily accepted meaning of 'in or to another place,'

[2]https://dictionary.cambridge.org/us/dictionary/english/elsewhere.

[3]https://www.collinsdictionary.com/us/dictionary/english/elsewhere.

[4]https://www.oxfordlearnersdictionaries.com/us/definition/english/elsewhere.

and noting that other provisions of the Education Law contemplate that 'elsewhere' may include 'non-public schools or in home instruction, I have no difficulty concluding that the statutory framework affords parents and similarly situated individuals wide discretion in fashioning an acceptable program of instruction, be it in a nonpublic school, homeschooling or a mixture of the two, that fulfills their duty of providing an education to children under their care that is substantially equivalent to that available in public schools." R.3243 (citing Merriam-Webster.com Dictionary, elsewhere (https://www.merriam-webster.com/dictionary/elsewhere); *Gevorkyan v. Judelson*, 29 NY3d 452, 459 (2017)); Education Law § 3205(2)(c)(ii); Education Law § 3602(1)(n)) (internal citations omitted).

Longstanding judicial interpretations of the flexibility inherent in the Education Law further confirm that instruction may be received through multiple sources. *In re Myers*, 119 N.Y.S.2d 98, held that a parent could lawfully combine home instruction with instruction at art schools to satisfy the substantial equivalence standard. *Id.* at 101. *In re Lash*, 401 N.Y.S.2d 124, held that parents could fulfill their obligations by combining the instruction of two private tutors, working individually with the child four days a week and together one day a week. *Id.* at 126.

As Supreme Court put it, "so long as the child receives a substantially equivalent education, through some source or combination of sources, the Legislative purpose of compulsory education is satisfied." R.23.

Interpreting the Education Law to require single-sourced education would also raise serious constitutional questions. *In re Jamie J.*, 30 N.Y.3d 275, 282, 287 (2017) ("[W]e should construe the statute, if possible, to avoid [constitutional] infirmity."); *H. Kauffman & Sons Saddlery Co. v. Miller*, 298 N.Y. 38, 44 (1948) ("Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids . . . constitutional doubts.").

It would render the statute entirely inconsistent with "the liberty of parents . . . to direct the upbringing and education of [their] children" that was recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and strengthened in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which acknowledged the "fundamental interest of parents" to "guide the religious future and education of their children." *See* R.3243 (Egan, Jr., J., dissenting) ("Indeed, to read the Education Law as restricting that parental discretion may well raise constitutional concerns given the 'liberty of parents and guardians to direct the upbringing and education of children under their control' so long as the children receive an appropriate education." (citing *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 400; *Zorach*, 303 N.Y. at 173; *Packer Collegiate*, 298 N.Y. at 192). Compulsory education laws must balance the rights of parents with the State's interest in ensuring that a child receives an education. *Yoder*, 406 U.S. at 213-215; R.77. But the State has no interest in ensuring that all

of a child's educational needs are satisfied at a single location or from a single source.

This Court should therefore "construe the Education Law 'in a way that avoids placing its constitutionality in doubt'" and affirm that it permits parents to meet their compulsory education obligations through a combination of sources. R.3243 (Egan, Jr., J., dissenting) (quoting *Viviani*, 36 N.Y.3d at 579, and citing *Lorie C.*, 49 N.Y.2d at 171).

In sum, the Education Law's plain text and the State's longstanding practice confirm that the Education Law not only permits but also respects parents' right to fulfill their compulsory education obligation by arranging for their children to receive substantially equivalent instruction through a combination of sources.

2. The New Regulations deprive parents of their right under the Education Law to direct the education of their children.

As interpreted by the Appellate Division, the New Regulations purport to prohibit parents from fulfilling their compulsory education obligation through a combination of sources and thus exceed SED's authority. If a nonpublic school does not earn "substantially equivalent" status, the New Regulations require parents "to enroll their children in a different, appropriate educational setting," 8 N.Y.C.R.R. § 130.6(c)(2)(iii); *id.* § 130.8(d)(7)(iii). As Supreme Court explained, the regulations on their face "require parents to automatically unenroll their children from nonpublic schools that have been found to not provide substantially equivalent

instruction, without allowing them the opportunity to prove that satisfactory supplemental instruction is being provided." R.24.

SED agreed with this characterization of the New Regulations, defending them by arguing that "no provision in the State Constitution or Education Law gives parents the right to ensure that their children receive a substantially equivalent education through a combination of sources," State's App. Div. Br. at 32, and thus the New Regulations require that "each form of instruction must independently fulfill the requirements of the Education Law," *id.* at 33.

As explained above, *supra* pp.7-8, 31-35, there is simply no precedent or support for this limitation. This Court should therefore order—as Supreme Court did—that the New Regulations be construed to permit parents to meet their compulsory education obligations by supplementing instruction received at a nonpublic school with instruction from another source. R.24. In other words, this Court should affirm Supreme Court's ruling that the requirement that parents "enroll their children in a different, appropriate educational setting" "does not mean parents are required to unenroll their children from a school that is not deemed substantially equivalent, but rather the term encompasses the parental right to supplement." *Id.* Any other interpretation permits SED to unilaterally override the right of parents to choose where to educate their child.

The Appellate Division majority declined to adopt this interpretation for the sole reason that it believes supplementation to be impractical for children who attend schools with statutorily-defined long hours (stating that children "cannot adequately supplement this substandard curriculum in the few hours remaining in the week"). R.3241. This universal holding is both factually unsupported and legally unsound.

Nothing in the record supports this rationale, which SED itself did not advance. More importantly, the Appellate Division's judgment was not limited to parents whose children were enrolled in schools with that long school day. Instead, its prohibition on a combination of sources to satisfy the compulsory education obligation applies to *all* parents of children at *any* private school, regardless of the length of the school day. Petitioners-Appellants include many schools whose school days are shorter than those defined in Education Law § 3204(2)(ii)(3). Yet even for the parents whose children are enrolled in those schools, the New Regulations prohibit them from relying on a combination of sources and instead require them to unenroll their children from the school they chose and enroll them elsewhere. 8 N.Y.C.R.R § 130.6(c)(2)(iii).

The Appellate Division majority's ruling thus highlights two underlying legal flaws with the SED's regulation: Judgments on the sufficiency of education must be made based on an assessment of the *individual* not the *institution* they attend, and they must be made by the courts and not SED or LSAs. *See supra* pp.8-10. Until

recently, SED's written guidance expressly recognized this reality, stating that "[i]f 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." R.77. Once in Family Court, the State must establish not only that the child's instruction is not substantially equivalent but also that the child's "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired," "as a result of the failure of [the] parent" "in supplying the child with adequate . . . education," N.Y. Fam. Ct. Act § 1012. Absent a court's ruling, there is no basis—and no precedent—for the State to direct parents to alter the education choice made for their children. A determination by regulatory fiat is simply not authorized by the Education Law.

Courts in this State regularly invalidate regulations that alter a person's substantive and procedural rights in this manner. Just as a regulation purporting to impose no-fault liability could not "override the specific legislative mandate of an awareness element in" the statute, *Beer Garden*, 79 N.Y.2d at 276-77, the New Regulations cannot override a parent's right to educate her children through a combination of sources. And just as a regulation that would create a new process for licensing teachers could not supplant the licensing process established by statute, *Board of Regents v. State University of New York*, 178 A.D.3d 11, 20 (3d Dep't

2019), the New Regulations cannot supplant the individualized process for determining whether a parent has complied with the Compulsory Education Law.

This Court should therefore reinstate Supreme Court's ruling that struck those provisions of the New Regulations that authorized SED and LSAs to unilaterally override the educational choices private school parents make for their children.

B. The New Regulations impermissibly penalize private schools.

1. The Education Law does not authorize SED to direct all students at a private school to unenroll.

The Education Law imposes the compulsory education obligation on parents, not schools: "Every person in parental relation to another individual . . . [s]hall cause such individual to attend upon instruction as hereinbefore required." Education Law § 3212(2). And failure to satisfy that requirement is enforced through penalties on the parent. *Id.* § 3233. Until the New Regulations, this simple truth was embodied in SED's published guidance, which acknowledged that the Education Law gives it "no direct authority over a nonpublic school." R.75.[5]

The New Regulations depart from the Education Law and SED's previously published guidance by imposing severe consequences on private schools that are not granted "substantially equivalent" status by SED. Ordering all students at the school

[5]The Felder Amendment, *see* L. 2018, ch. 59, part SSS, is consistent with this approach. The Amendment sets forth the criteria for evaluating the substantial equivalency of instruction at nonprofit schools having a bilingual program and operating at prescribed hours. Education Law § 3204(ii), (iii), (v). It does not impose any requirements on a nonpublic school, or authorize the imposition of any penalties upon them.

to be unenrolled and directing their parents to enroll them elsewhere is an institutional death sentence. Without students, there is no longer a school. In this way as well, the New Regulations expand SED's power far beyond the limits set by the Education Law.

While the New Regulations empower SED to effect the closure of private schools, the Education Law does not even give SED that authority over public schools. Consider Section 211 of the Education Law, which deals with the process to effect the closure of an underperforming public school. That Section carefully establishes safeguards and guardrails to prevent arbitrary and capricious closures of public schools. *See* Education Law § 211-f, *see also id.* § 211-b. When a school ranks among the lowest-performing public schools for *ten consecutive years*, the Education Law permits SED to take action against the school, including appointing a receiver to take control of the school and restructure it. Education Law § 211-f (1)(b)-(c), (2), (7)-(8). The receiver must consult with community stakeholders, develop an intervention plan based on community input and diagnostic evaluations, and provide quarterly progress reports to SED. *Id.* at (3)-(6), (11); *see also Mulgrew v. Bd. of Educ. of City Sch. Dist. of City of New York*, 902 N.Y.S.2d 882, 884-85, 890 (2010) (nullifying a closure decision for failure to follow proper procedures and enjoining an order prohibiting enrollment in the targeted schools).

These provisions reflect the Legislature's deliberate approach to school closures. It demonstrates that the Legislature was explicit and detailed when it granted SED the authority to close public schools. It confirms that SED did not *sub silentio* obtain the authority from the Legislature to effect the closure of a private school by prohibiting parents from enrolling or keeping their children enrolled there. To the contrary, by expressly granting SED only the ability to close public schools, and even then imposing substantial procedural safeguards, the Legislature made it clear that SED lacks the authority to unilaterally effect closure of a private school.

2. The New Regulations authorize LSAs to close private schools by ordering all students to unenroll.

The New Regulations explicitly provide that a nonpublic school that fails to receive a "substantially equivalent" designation from SED "shall no longer be 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)(i), 130.8(d)(7)(i). And once that occurs, parents are directed to unenroll their children and enroll them in a different school. 8 N.Y.C.R.R. §§ 130.6(c)(2)(iii), 130.8(d)(7)(iii).

There can be no reasonable dispute that these provisions of the New Regulations effect the closure of a nonpublic school. Indeed, "[a] school is generally regarded as an institution for teaching children or an establishment for imparting education." *Vill. of East Hampton v. Mulford*, 65 N.Y.S.2d 455, 457 (Suffolk Cnty. Sup. Ct. 1946).

But under the New Regulations' "plain meaning," *Andryeyeva v. N.Y. Health Care*, Inc., 33 N.Y.3d 152, 172 (2019), a private school denied "substantially equivalent" status by SED is no longer considered an educational "institution" by the State and no longer has "children" to "teach."

Supreme Court therefore correctly invalidated the New Regulations' provisions that effect the closure of nonpublic schools. Because the New Regulations "forc[e] the school to close its doors" even though the Education Law does not require "parents to completely unenroll their children from nonpublic schools that do not fulfill all of the substantial equivalency requirements" and does not "limit a child to procuring a substantially equivalent education through merely one source of instruction provided at a single location," R.23, the New Regulations unlawfully "impose consequences and penalties upon yeshivas above and beyond that authorized by the [ ] Education Law," R.21.

Through two rounds of briefing and argument, SED has refused to squarely address whether it has the authority to close nonpublic schools. But even the Appellate Division majority agreed that "[t]he Education Law does not provide for any direct penalt[ies] upon nonpublic schools." R.3241.

Despite that finding, it nevertheless upheld the New Regulations' provision requiring parents to remove their children from the private school they chose for them and enroll them elsewhere. It disagreed that such a requirement effected the

closure of the school because they could offer "extracurricular instruction or activities." *Id.*

But an after-school program, or a program that provides some extracurricular activities, is not an elementary or high school. Such schools are defined by their *curricular* activities. An elementary or high school provides a core education to students enrolled for the school day. Any number of activities may be conducted in a building that formerly housed a school whose students have been required to unenroll. But that does not make them schools.

Consider the example of an attorney who runs her own law practice. If a state agency forbids clients from retaining her, it would be shuttering the law office. No one would take seriously the suggestion that the law practice is not closed because the physical office could remain open while the lawyer offers LSAT prep classes or counsels students about the law school admissions process. And everyone would understand that the agency was improperly circumventing the Appellate Division's authority over attorney disciplinary proceedings and its authority to mete out suspensions and disbarments.

What SED has done with the New Regulations is no different. It circumvents the authority of the courts to determine violations of the Compulsory Education Law and to issue directives overriding a parent's educational choices. And it closes private schools by depriving them of students.

The New Regulations are thus contrary to the rule that agencies may not go beyond a statute by imposing new liability or new penalties. For example, this Court in *Weiss* held a regulation was "invalid insofar as it conflicts with Labor Law § 316(1) by imposing liability on nonoperating owners" of factories. 95 N.Y.2d at 5. Because the statute "confine[d]" liability "to factory operators," the regulation unlawfully "expand[ed] liability" to nonoperating owners. *Id.*

Similarly, the New Regulations unlawfully seek to expand liability for noncompliance with the Compulsory Education Law from parents to private schools.

In *Meit v. P.S. & M. Catering Corp.*, the Appellate Division held a rule that imposed a forfeiture penalty was "invalid" because it "prescribed a penalty . . . which is found neither expressly nor by necessary implication in the Workmen's Compensation Law and which is at variance with the statutory scheme." 285 A.D. at 510. The Court recognized the legislature had "prescribed various penalties," including a monetary fine, but never imposed a penalty that "denied the right to contest important allegations of a claim." *Id.* at 509-10. Here, as in *Meit,* the agency "assumed legislative authority" by promulgating a rule that "[wa]s substantive in nature" and conflicted with the statute. *Id.* at 510.

Because the Education Law does not authorize SED to impose penalties on nonpublic schools, and because even SED has not argued that the Education Law permits SED to direct the closure of nonpublic schools, State's App. Div. Br. at 29,

this Court should reverse the Appellate Division's decision to reinsert into the New Regulations the provision requiring parents to unenroll their children from a nonpublic school that failed to obtain "substantially equivalent" status from SED.

II. SED Violated the Separation of Powers by Engaging in Administrative Policymaking.

The issue of SED authority over private schools is so fraught with policy considerations and constitutional concerns that it can only be addressed by the Legislature. SED's attempt to arrogate power to itself via the New Regulations violates the separation of powers.

A. An agency exceeds its authority when it engages in legislative policymaking.

An agency violates the separation of powers in promulgating a regulation that resolves matters of public policy reserved to the Legislature. "The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions." *LeadingAge, N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 259 (2018) (citation omitted). The doctrine "requires that the Legislature make the critical policy decisions, while the executive branch's responsibility is to implement those policies." *Id.* "A broad grant of authority is not a license to resolve—under the guise of regulation—matters of social or public policy reserved to legislative bodies." *Id.*

In *Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), this Court provided a framework of four "coalescing circumstances" for determining whether an agency has overstepped from "administrative rule-making" into "legislative policy-making." *LeadingAge*, 32 N.Y.3d at 260 (citation omitted). Those factors include:

> (1) the agency did more than balanc[e] costs and benefits according to preexisting guidelines, but instead made value judgments entail[ing] difficult and complex choices between broad policy goals to resolve social problems;
>
> (2) the agency merely filled in details of a broad policy or if it wrote on a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance;
>
> (3) the legislature has unsuccessfully tried to reach agreement on the issue, which would indicate that the matter is a policy consideration for the elected body to resolve; and
>
> (4) the agency used special expertise or competence in the field to develop the challenged regulation.

Id. at 260-61 (alterations in original) (citation omitted).

These criteria are not "discrete, necessary conditions that define improper policy-making by an agency," but instead are "overlapping, closely related factors that, taken together, support the conclusion that an agency has crossed that line." *N.Y. Statewide Coal. of Hispanic Chambers of Com. v. N.Y.C. Dep't of Health & Mental Hygiene*, 23 N.Y.3d 681, 696-97 (2014). An agency thus "may not counter . . . merely by showing that one *Boreali* factor does not obtain." *Id.* at 697. "Any *Boreali* analysis should center on the theme that it is the province of the people's

elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Id.* (citation omitted).

When agencies attempt to resolve matters of public policy via regulations, courts invalidate them under *Boreali*. For example, this Court in *Statewide Coalition* held the New York City Board of Health "exceeded the scope of its regulatory authority" in adopting a rule prohibiting the sale of certain sugary drinks by some establishments. 23 N.Y.3d at 690. The Court found under the first *Boreali* factor that the agency made "a policy choice" regarding the means "to promote a healthy diet," as "[a]n agency that adopts a regulation . . . that interferes with commonplace daily activities preferred by large numbers of people must necessarily wrestle with complex value judgments concerning personal autonomy and economics." *Id.* at 698-99. In contrast, a regulation that has a "very direct" connection to its purpose and involves "minimal interference with [ ] personal autonomy," and for which "value judgments concerning the underlying ends are widely shared," is less likely to cross the threshold to unlawful administrative policymaking. *Id.* at 699.

Applying the second factor, the Court determined that "[d]evising an entirely new rule that significantly changes the manner in which sugary beverages are provided to customers at eating establishments is not an auxiliary selection of means to an end; it reflects a new policy choice." *Id.* at 700. The third factor likewise evidenced administrative policymaking, as "inaction on the part of the state

legislature and City Council . . . simply constitutes additional evidence that the [rule] amounted to making new policy." *Id.*

Applying similar principles, the Appellate Division in *Ellicott Group, LLC v. State of New York Executive Department Office of General Services* held an agency's inclusion of "a provision in a lease agreement requiring plaintiff to pay prevailing wages to certain workers regardless of whether the statutory requirements of the prevailing wage law applied . . . unlawfully impinged upon a legislative function." 85 A.D.3d 48, 49 (4th Dep't 2011). The court concluded the agency "usurped the role of the Legislature in making its policy decision that prevailing wages should be paid even for work that was not public work." *Id.* at 54; *see also Boreali,* 71 N.Y.2d at 11-14 (smoking ban was invalid because the agency "has not been authorized to structure its decision making in a cost-benefit model" to determine how to further public health assessed against competing economic and social concerns (citation omitted)); *Ahmed v. City of New York*, 129 A.D.3d 435, 440 (1st Dep't 2015) (taxi commission "exceeded its authority in promulgating" healthcare rules because it was "motivated by broad economic and social concerns" and nothing in enabling provisions contemplated health and disability insurance (citation omitted)).

B. The New Regulations reflect impermissible policymaking.

Supreme Court correctly held the New Regulations "exceed[ ] the rule-making authority conferred upon" SED. R.23. The court emphasized that "the role

of the Legislature is to make critical policy decisions through the enactment of an enabling statute, while the role of the executive branch is to implement those policies through agency rulemaking," and stated that any regulation "that exceeds the power conferred by the Legislature is deemed to be impermissible legislative policymaking and must be struck down." R.21 (citing *Boreali*).

Supreme Court concluded SED "exceeded [its] authority by promulgating rules that require parents to automatically unenroll their children from nonpublic schools that have been found to not provide substantially equivalent instruction, without allowing them the opportunity to prove that satisfactory supplemental instruction is being provided." R.24.

Each *Boreali* factor supports Supreme Court's "conclusion that [SED] has crossed that line" into unlawful policymaking. *Statewide Coal.*, 23 N.Y.3d at 696-97. First, SED made a "complex value judgment" by deciding that private schools that did not obtain its "substantially equivalent" designation should not be permitted to provide instruction to students. *Id.* at 699. A directive effecting the closure of a private school interferes with the Education Law's recognition of parents' right to direct the education of their children "elsewhere than at a public school," Education Law § 3204(2), and conflicts with their constitutional right to control the education of their children. *Pierce*, 268 U.S. at 534-35; *Packer Coll.*, 298 N.Y. at 192.

It is difficult to imagine a more significant "policy choice" that usurps the role of the Legislature than an agency decision that prohibits parents from satisfying their compulsory education obligation by arranging instruction for their children from a combination of sources. *Statewide Coal.*, 23 N.Y.3d at 696; *see also Boreali*, 71 N.Y.2d at 11-13; *Ahmed*, 129 A.D.3d at 440; *Ellicott Group*, 85 A.D.3d at 54. SED "did more than balanc[e] costs and benefits according to preexisting guidelines;" it overrode them. *LeadingAge*, 32 N.Y.3d at 260 (alteration in original).

Second, SED did not merely fill in the details of the Education Law but instead wrote on a clean slate by requiring parents to unenroll their children from a non-equivalent private school, thereby effecting the closure of that school. The New Regulations' directives "significantly changes the manner in which" education outside of public school is allowed and "reflects a new policy choice." *Statewide Coal.*, 23 N.Y.3d at 700. Nothing in the Education Law contemplates countermanding a parent's choice of private school for her child or depriving such a school of all of its students. *Ahmed*, 129 A.D.3d at 440, and those mandates "usurped the role of the Legislature in making its policy decision" that allows parents to fulfill their compulsory education obligation via a combination of sources. *Ellicott Group*, 85 A.D.3d at 54.

Third, SED promulgated the New Regulations despite the Legislature's refusal to amend the Education Law to penalize nonpublic schools. Various bills

have been introduced over the past several years proposing to amend the Education Law to provide for SED authority over nonpublic schools. For example, several bills proposed that upon a negative substantial equivalence determination, notice of non-compliance would be sent to school administration and parents, and parents would be required to transfer students to another school. *See, e.g.*, S.B. S1983, 2021-2022 Leg. Sess. (N.Y. 2021); S.B. S6589, 2019-2020 Leg. Sess. (N.Y. 2019); S.B. S1366, 2017-2018 Leg. Sess. (N.Y. 2017); Assemb. B. A4367, 2017-2018 Leg. Sess. (N.Y. 2017); S.B. S7629, 2015-2016 Leg. Sess. (N.Y. 2016); Assemb. B. A9947, 2015-2016 Leg. Sess. (N.Y. 2016). None of these proposals were enacted into law.

Other bills would have imposed financial penalties on private schools. *See, e.g.*, Assemb. B. A2832, 2023-2024 Leg. Sess. (N.Y. 2023); S.B. S5462, 2023-2024 Leg. Sess. (N.Y. 2023); Assemb. B. A1317, 2021-2022 Leg. Sess. (N.Y. 2021); S.B. S142, 2019-2020 Leg. Sess. (N.Y. 2019); Assemb. B. A3272, 2019-2020 Leg. Sess. (N.Y. 2019); S.B. S1733, 2017-2018 Leg. Sess. (N.Y. 2017); Assemb. B. A1305, 2017-2018 Leg. Sess. (N.Y. 2017). These proposals were also all rejected.

The repeated failed efforts to amend the Education Law "constitutes additional evidence that the [New Regulations] amounted to making new policy" reserved to the Legislature. *Statewide Coal.*, 23 N.Y.3d at 700. Legislative inaction "in the face of substantial public debate" is "evidence that the Legislature has so far

been unable to reach agreement on the goals and methods that should govern in resolving" important public issues, but "it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Boreali*, 71 N.Y.2d at 13. In promulgating the New Regulations, SED plainly overstepped into a legislative role.

Fourth, no special agency expertise is required to decide how to enforce the Education Law. SED's experience with regulation of instruction at schools offers "no special expertise or technical competence" permitting it to decide to penalize nonpublic schools by closing them. *Id.* at 14.

Packer Collegiate confirms that SED lacks authority to direct the closure of nonpublic schools. Recognizing that "[p]rivate schools have a constitutional right to exist, and parents have a constitutional right to send their children to such schools," this Court concluded "it would be intolerable for the Legislature to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to . . . grant or refuse licenses to such schools." 298 N.Y. at 191-92 (citation omitted).

The Court held it was unconstitutional to grant licensing power "with no standards or limitations of any sort," reasoning that "however good or bad the commissioner's rules may be, they were not controlled, suggested or guided by anything in the statute." *Id.* at 189, 191.

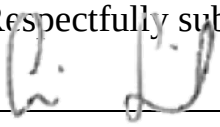
Construing the Education Law to afford SED unfettered discretion to adopt regulations allowing for the closure of nonpublic schools would render the statute unconstitutional under *Packer Collegiate*. Put simply, the same provisions of the Education Law that *Packer Collegiate* held were insufficient to support the regulatory licensing scheme remain insufficient to support the authority of the New Regulations to direct parents to unenroll their children from a nonpublic school that has failed to receive SED's substantially equivalent designation. Neither the Education Law nor the fundamental holding in *Packer Collegiate* have changed. Both compel the reinstatement of Supreme Court's decision.

CONCLUSION

The New Regulations exceed SED's authority and are contrary to the Education Law. This Court should reverse the Appellate Division's judgment and reinstate the decision of the Supreme Court that struck several provisions of the New Regulations.

Dated: November 26, 2024

Respectfully submitted,



Attorney for Petitioners-Appellants.

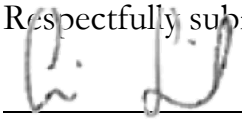
CERTIFICATE OF COMPLIANCE WITH FRAP 32(A)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,017 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond, 14 point font.

Dated: November 26, 2024

Respectfully submitted,



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