To Be Argued By:
Avi Schick
Time Requested: 10 Minutes

New York Supreme Court

APPELLATE DIVISION — THIRD DEPARTMENT

Docket No.
CV-23-0756

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-Respondents,

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-Appellants.

BRIEF FOR PETITIONERS-RESPONDENTS

TROUTMAN PEPPER HAMILTON SANDERS LLP
Attorneys for Petitioners-Respondents
875 Third Avenue
New York, New York 10022
212-704-6000
avi.schick@troutman.com

Of Counsel:
Avi Schick
Mary Grace W. Metcalfe

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TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Bills

Other Authorities

PRELIMINARY STATEMENT

The flaw in the New Regulations and in SED's defense of them is revealed in the very first sentence of Respondents-Appellants' brief. They write that "New York's Education Law requires that instruction at a nonpublic school be at least substantially equivalent to the instruction given at public schools." That is not accurate. What the Education Law does provide is that "a minor required to attend upon instruction . . . may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction." Education Law § 3204(1).

Substantial equivalency, like all provisions of the compulsory education law, is directed at parents, not schools. For that reason, it provides that the "[d]uties of persons in parental relation" to a child include to "cause such [child] to attend upon instruction as hereinbefore required." *Id*. § 3212. Those obligations are enforced via the truancy laws, which are also directed at parents and not schools. *Id*. § 3233.

SED's misreading of this fundamental precept of the Education Law resulted in the New Regulations, which authorize the closure of nonpublic schools and contain directives requiring parents to unenroll their children from those schools.

Respondents-Appellants labor to avoid defending the New Regulations as written. They engage in verbal gymnastics to argue that nonpublic schools are not forced to "close" under the New Regulations, even as their students are required to

enroll elsewhere and the schools may not continue to provide instruction. Respondents-Appellants list other activities that can be conducted at the premises by the "entity" but that confuses a *school* with the *building* housing it.

To avoid confronting the legal merits of the New Regulations, Respondents-Appellants also argue that Petitioners do not have standing to maintain this Article 78 proceeding because any claim is "speculative" and not "justiciable." They are wrong, and not only because SED has applied the New Regulations to Petitioners' schools to find them not substantially equivalent both before and since the filing of this lawsuit. As the First Department has recently explained, Petitioners have standing to sue "because the regulation subjects them to the peculiar risk that they will be targets," characterizing the argument that there is "no standing to challenge this regulation until someone at least is an actual target of the regulation" as an attempt to "put this regulation out of reach from judicial scrutiny."

On the merits, Supreme Court was correct in finding that the Education Law "places the burden for ensuring a child's education squarely on the *parent*, not the school" and "does not authorize or contemplate the imposition of penalties or other consequences upon a *nonpublic school* that has been found to not provide substantially equivalent instruction," (emphasis in original), because "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." R.22–23.

The New Regulations to the contrary impermissibly exceed the scope of the authority granted to SED by the Legislature. Ten bills seeking to amend the Education Law to impose obligations or penalties contained in the New Regulations have been considered but not adopted by the Legislature over the past several years. *See infra* pp.44–45. In adopting the New Regulations, SED did far more than "merely fill[ ] in the interstices" of the Education Law. Br.22. They overstepped from "administrative rule-making" into "legislative policy-making." *See infra* pp.38–50.

Finally, SED has it backwards when it argues that "no provision of the Education Law gives parents the right to ensure that their children receive a substantially education through a combination of sources." Br.32. Fulfilling the compulsory education obligation through multiple sources is not only well enshrined in law and practice, it is a right a parent has even absent the affirmative permission of the Education Law.

For all of these reasons, the decision of Supreme Court striking the school closure provisions from the New Regulations and confirming that parents have the right to fulfill the compulsory education law from a combination of sources should be affirmed.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the New Regulations, which authorize the State Education Department to direct the closure of parochial and private schools and to instruct parents to unenroll their children from those schools is immune from legal scrutiny or challenge until a school is ordered to close and parents are directed to enroll their children elsewhere.

2. Whether Supreme Court properly concluded that nothing in the Education Law limits a parent's right to fulfill the compulsory education mandate by arranging for their child to receive an education from a combination of sources.

3. Whether Supreme Court properly concluded that nothing in the Education Law authorizes the State Education Department to direct the closure of a nonpublic school that it believes does not offer instruction that is substantially equivalent to that provided in the local public schools.

COUNTERSTATEMENT OF FACTS

A. The Education Law Imposes the Compulsory Education Requirement and its Substantial Equivalence Mandate on Parents

The New York Education Law, in effect since 1947, requires parents to arrange for their children to receive adequate educational instruction. The Education Law requires that "each minor from six to sixteen years of age shall attend upon full time instruction," Education Law § 3205(1)(a), and provides that children "may attend [instruction] at a public school or elsewhere," *id.* § 3204(1). The law states that "[i]nstruction 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." *Id.* § 3204(2)(i).

Significantly, and consistent across 150 years of all applicable legislation,[1] the Education Law provides that it is among the "[d]uties of persons in parental relation" to "cause [a child] to attend upon instruction as hereinbefore required." Education Law § 3212. Parents who fail to comply with these duties are subject to financial penalties and imprisonment. *Id.* § 3233.

[1] The predecessor to the Education Law similarly imposed the compulsory education responsibilities on parents and not on parochial and private schools. *See* L. 1910, ch. 140, § 624 (it was among the "[d]uties of persons in parental relation to children" to "cause such child to attend upon instruction"); L. 1894, ch. 671, § 4 ("Every person in parental relation to a child . . . shall cause such child to attend upon instruction or shall give notice . . . of his inability so to do."); 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.").

Importantly, the Education Law does not require parents to comply with their compulsory education obligations, including substantial equivalency of instruction, by means of any single source. Instead, it affords parents flexibility in ensuring their children receive substantially equivalent instruction "elsewhere" than a public school. *Id.* §§ 3204(1), 3204(2)(i).

Simply stated, the Education Law does not impose obligations on nonpublic schools. The substantial equivalency provision is a requirement that parents must fulfill, not a regulation of nonpublic schools. *Id.* § 3212.

Nor does the Education law authorize the imposition of financial penalties on nonpublic schools, related to the adequacy of the instruction they provide or otherwise. What the Education Law does permit is a penalty for *public* school districts that violate it: the Commissioner of Education "may withhold one-half of all public school moneys from any city or district, which, in his judgment, willfully omits and refuses to enforce the provisions of part one of this article." *Id.* § 3234.

The Felder Amendment to the Education Law, *see* L. 2018, ch. 59, part SSS, is consistent with this approach. The Felder Amendment applies to a small subset of nonpublic schools—those that are nonprofit corporations having a bilingual program and operating at prescribed hours—and sets forth the criteria for evaluating the substantial equivalency of instruction at those schools. Education Law § 3204(ii), (iii), (v). It does not impose any requirements on a nonpublic school, or

authorize the imposition of any penalties or other consequences if such a school is deemed not to provide such instruction.

B. The New Regulations Improperly Authorize the State Education Department to Direct Parochial and Private Schools to Close

Over the past several years, New York State Education Department ("SED") has repeatedly attempted to assert greater control over parochial and private schools by means of guidance and regulations.

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 would have imposed rigid instruction mandates on nonpublic schools and would have required public officials to inspect all nonpublic schools to determine whether they provide instruction substantially equivalent to that offered in public schools. Lawsuits challenging the 2018 Guidelines were brought by parochial and private schools and organizations whose members included private schools and parents whose children attended those schools. *See N.Y. State Ass'n of Indep. Schs. v. Elia*, 110 N.Y.S.3d 513 (Albany Cnty. Sup. Ct. 2019).

In a decision dated April 17, 2019, Supreme Court struck down the 2018 Guidelines as "null and void," finding that their "mandates are akin to 'sufficiently fixed standards' that required compliance with the [State Administrative Procedure Act]"—requirements with which SED had not complied. *Id.* at 517. SED did not appeal the judgment.

Subsequently, SED attempted to promulgate the 2018 Guidelines as regulations. SED later abandoned that effort. R.45.

In early 2022, SED promulgated a set of regulations (the "New Regulations"), which create a new inspection process for all nonpublic schools that is not provided for or contemplated by the Education Law, that were adopted in September 2022. 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.[2] Upon a determination that a nonpublic school does not provide substantially equivalent instruction, the New Regulations provide that "the nonpublic schools shall no longer be deemed a school which provides compulsory education" and require parents "to enroll their children in a different, appropriate

[2] The New Regulations do not allow substantial equivalency to be satisfied by foreign language instruction. Br.6; 8 N.Y.C.R.R. § 130.9(b). Yet SED continues to promote dual language programs in the public schools. To that end, there are hundreds of dual language programs in New York public schools offering classes in social studies, math and science that are conducted in a host of foreign languages. These are programs to help students become proficient in the foreign language, and are in addition to those catering to students learning English as a second language. R.43. Respondents-Appellants assert that foreign language restrictions "apply to public and nonpublic schools alike," Br.6, but that is not true. At a recent SED training on the New Regulations, the senior SED official overseeing their implementation conceded that its ban on foreign language instruction 'is one difference between the substantial equivalence regulations and what happens in district [public] schools." *See* Professor Aaron Twerski, *An Education in Double Standards*, City Journal (Dec. 4, 2023), https://www.city-journal.org/article/new-yorks-double-standards-on-yeshivas.

educational setting, consistent with Education Law § 3204." *Id.* § 130.6(c)(2)(i)-(ii). The New Regulations also provide that "[l]egally required services to the nonpublic school and students" can be cut off at "the end of the reasonable timeframe provided to the parents and persons in parental relationship" to enroll their children in a different educational setting. *Id.* § 130.6(c)(2)(iv).

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.44–45.

C. Petitioners-Respondents' Article 78 Challenge to the New Regulations

On October 9, 2022, Petitioners-Respondents filed a petition in Supreme Court, Albany County challenging the New Regulations. R.29–72.

Petitioners-Respondents 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. Five Orthodox Jewish yeshivas, each of which has operated in New York for more than one hundred years, also are Petitioners-Respondents. R.34–36.

The Petitioners-Respondents and their members are directly subject to the requirements of the New Regulations. R.34–36. Indeed, yeshivas—including Petitioners-Respondents and members of organizational Petitioners-Respondents—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-Respondents moved for a preliminary injunction on November 21, 2022. R.811–962. Petitioners-Respondents 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," impose an "*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*, 298 N.Y. 184 (1948)," and "violate Petitioners' constitutional rights in several ways." R.926–27. In particular, Petitioners-Respondents 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-

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

D. Supreme Court Invalidated the Provisions of the New Regulations that Authorized the Closure of Nonpublic Schools

After a hearing, Supreme Court issued a decision and judgment on March 23, 2023, granting in part and denying in part the petition. R.6–26.

Supreme Court held that SED exceeded its authority in promulgating the New Regulations and that the New Regulations are inconsistent with the Education Law in authorizing the closure of nonpublic schools. R.24.

The Court observed that the Education Law "places the burden for ensuring a child's education squarely on the *parent*, not the school," and "does not authorize or contemplate the imposition of penalties or other consequences upon a *nonpublic school* that has been found to not provide substantially equivalent instruction." R.22 (emphasis in original). 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 concluded that "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. 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," Supreme 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. The Court stated that under the Education Law "parents should be given a reasonable opportunity to prove that the substantial equivalency requirements for their children's education are satisfied by instruction provided through a combination of sources." R.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.

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 [IHIP] if they choose to keep their child enrolled at said school." R.24. (emphasis in original).

Supreme Court denied Petitioners-Respondents' other requested relief and dismissed the attendant claims, preserving Petitioners-Respondents' right to return to court to challenge the New Regulations on an as-applied basis because "their 'as-

applied' constitutional challenge is not yet ripe" and determining that Petitioners-Respondents' challenge to the New Regulations' unlawful licensing scheme "has been rendered moot and is dismissed on that ground" in light of the court's determination that SED "lack[s] the authority to [ ] direct closure of nonpublic schools." R.18, 25.

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

ARGUMENT

I. Point I: Supreme Court Properly Found that Petitioners-Respondents Have Standing to Maintain this Article 78 Petition

Respondents-Appellants do not claim that Petitioners-Respondents were the wrong persons to challenge the New Regulations because they are not impacted by them. Instead, SED claims that they filed their Article 78 challenge too soon. According to Respondents-Appellants, they should have waited until the New Regulations were invoked to close one or more schools before filing suit because until that point Petitioners-Respondents' challenges are not "justiciable" and are mere "speculat[ion]." Br.19, 21. This is not the law.

In New York, parties have standing to maintain a claim when they "have something truly at stake in a genuine controversy." *Saratoga Cnty. Chamber of Com. v. Pataki*, 100 N.Y.2d 801, 812 (2003). Consistent with this general rule, a challenge to government action, including the adoption of new regulations, may be brought before petitioners "suffer the irreparable and unconstitutional consequences

they claim [a regulation] may produce," because such a challenge is designed "precisely to avoid having to subject themselves to the evil complained of in order to prove their case." *Niagara Recycling, Inc. v. Town of Niagara*, 83 A.D.2d 316, 328 (4th Dep't 1981). For this reason, a petitioner challenging government action by seeking declaratory and injunctive relief has standing to assert such claims against "prospective" harm from that government action, even in "the absence of specific alleged instances in which the right . . . has been violated" and such claims are immediately justiciable. *See, e.g.*, *N.Y. Cnty. Laws.' Ass'n v. State*, 294 A.D.2d 69, 73–74 (1st Dep't 2002).

The First Department's recent ruling on standing in *Stevens v. New York State Division of Criminal Justice Services*, 206 A.D.3d 88 (1st Dep't 2022), which portion of the opinion the Court of Appeals affirmed, *rev'd on other grounds by* 2023 WL 6983470 (N.Y. Oct. 24, 2023), illustrates how that standard is applied when a newly enacted government rule is challenged.

In *Stevens*, the petitioners challenged the DNA Databank Act, which includes "a statewide database of DNA records based on samples collected from people convicted of crimes," and allowed the government "to determine whether DNA in the databank provided a direct match to DNA recovered in connection with a criminal investigation." *Id.* at 92–93. Several agencies adopted regulations expanding the use of the DNA to allow familial DNA matching, meaning partial

matching of DNA found at crime scenes to people who were convicted of crimes to determine if a blood relative of the former criminal may have committed the new offense. *Id.*

"[R]elatives of persons whose genetic profiles are in the New York State DNA database" filed an Article 78 petition case against several state agencies challenging the regulations that permit familial DNA matching. *Id.* at 90. The agencies argued that petitioners did not have standing because they had only "speculative" injuries that were "based upon events which may never come to pass" because they had not yet "been targeted for investigation as a result of a familial DNA search." *Id.* at 97.

The First Department rejected the agencies' standing argument. The Court held that the petitioners had standing to sue immediately "because the regulation subjects them to the peculiar risk that they will be targets of criminal investigations for no other reason than that they have close biological relatives who are criminals." The Court rejected the agencies' argument that there was "no standing to challenge this regulation until someone at least is an actual target of the regulation and then only after they have personal contact with law enforcement," reasoning that "would put this regulation out of reach from judicial scrutiny." *Id.* at 98, 99-100.

The Court explained that because the agencies created this system of familial DNA matching via regulation, petitioners must challenge it through an Article 78 proceeding "subject to a four-month statute of limitations." *Id.* at 97. What that

means, the First Department explained, is that the government's constrained view of standing "would result in no one having the ability to challenge the promulgation of this regulation." *Id.* at 100. That is true even if some party could later raise a challenge to the regulation in the context of a defense to a criminal proceeding arising from the DNA matching program. *Id.* at 100–01. Thus, the First Department held that the petitioners "did not have to wait for the specific adverse contact contemplated by the regulation to occur in order to sustain an injury-in-fact." *Id.* at 99. The Court of Appeals affirmed the Appellate Division's standing analysis and ruling, concluding that the petitions established "a unique risk of being identified through the Databank and targeted for police scrutiny because of his familial relationship and shared genetic material" in the future. *Stevens*, 2023 WL 6983470, at *4 (citation omitted).

The *Stevens* decision mirrors other long-standing precedent. *See, e.g.*, *Swinton v. Saffir*, 93 N.Y.2d 758, 763–67 (1999) (permitting lawsuit to proceed before harm sought to be prevented has occurred); *McMinn v. Town of Oyster Bay*, 66 N.Y.2d 544, 548 n.* (1985) (permitting petitioners "to challenge the legal limitations imposed on their properties and their ability to rent such properties in the future"); *Kraham v. Mathews*, 305 A.D.2d 746, 747 (3d Dep't 2003) (noting the availability of declaratory relief for "prospective harm"); *Atlas Henrietta, LLC v.*

Town of Henrietta Zoning Bd. of Appeals, 995 N.Y.S.2d 659, 669–70 (Monroe Cnty. Sup. Ct. 2013) (same); *N.Y. Cnty. Laws.' Ass'n*, 294 A.D.2d at 73–74.

This caselaw clearly establishes that Petitioners-Respondents have standing to challenge the New Regulations. Petitioners-Respondents specifically alleged that the New Regulations targeted nonpublic schools like them and their members by subjecting them in particular to onerous reviews and heightened oversight given that yeshivas overwhelmingly do not fall into the categorical exemptions from the LSA review process. R.31–32. These reviews permit SED to declare that a nonpublic school is "no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law," and to remove all legally required services from students at the nonpublic school. R.46, 48–49 (quoting 8 N.Y.C.R.R. § 130.6(c)(2)(i)). Upon SED's or an LSA's ultimate determination that a nonpublic school was no longer deemed substantially equivalent, the parents whose children were enrolled there would be directed to unenroll them from that school under threat of criminal penalties. R.49.

This New Regulations therefore "subject [Petitioners-Respondents] to the peculiar risk that they will be targets" of the substantial equivalency reviews and school-closure penalties imposed by the New Regulations. *Stevens*, 206 A.D.3d at 98. This is sufficient for standing, without "hav[ing] to wait for the specific

adverse contact contemplated by the [New Regulations] to occur," particularly given the four-month statute of limitations to challenge them. *Id.* at 99, 100–01.

Standing in this case is even stronger than in *Stevens* since Petitioners-Respondents and their members had already received "specific adverse contact" as a direct consequence of SED's adoption of the New Regulations. R.3073–85. Before Petitioners-Respondents even filed suit, SED applied the New Regulations to one of their yeshiva members to support a determination that it was not substantially equivalent. R.3079, 3084. That determination overturned an LSA recommendation, made prior to the adoption of the New Regulations, that the yeshiva was substantially equivalent. *Id*. Moreover, the New York City Department of Education ("DOE") said in a sworn affidavit that the adoption of the New Regulations required it to conduct additional substantial equivalency reviews of yeshivas that would otherwise not have occurred. R.3059. And throughout this litigation, SED and LSAs have continued to issue substantial equivalency determinations against yeshiva members of Petitioners-Respondents. *See* R.3064–67, 3073–85; Cayla Bamberger, *State Clamps Down and Issues Deadline for NYC*

to Finish Investigations into Yeshivas, N.Y. Daily News (Jan. 20, 2023);[3] R.3087–91. Thus, Petitioners-Respondents not only faced the *exact* sorts of "peculiar risk that they will be targets of . . . investigations" the *Stevens* Court found sufficient for standing, *Stevens*, 206 A.D.3d at 98, the New Regulations have already been applied to them.

Petitioners-Respondents also represent yeshivas throughout New York in connection with the precise interests that the New Regulations impact. This renders irrelevant Respondents-Appellants' arguments about the likelihood that any individual school would face school closure, Br.21–22, and makes this challenge to the New Regulations immediately justiciable under Article 78. *N.Y. Cnty. Laws.' Ass'n*, 294 A.D.2d at 431–33.

II. Point II: Supreme Court Correctly Held that the New Regulations Exceed SED's Authority Under the Education Law by Authorizing the Closure of Parochial and Private Schools and Directing Parents to Unenroll their Children from Such Schools

Supreme Court properly concluded that Sections 130.6(c)(2)(i) and 130.8(d)(7)(i) of the New Regulations were invalid and stricken as inconsistent with the Education Law. This ruling reflects that (1) "the Compulsory Education Law

[3] *See also State Education Department Rules That Brooklyn Yeshiva Is Not Substantially Equivalent Even Though It Provides Instruction In English And Math That is Substantially Equivalent*, The Yeshiva World, https://www.theyeshivaworld.com/news/general/2248505/state-education-department-rules-that-brooklyn-yeshiva-is-not-substantially-equivalent-even-though-it-provides-instruction-in-english-and-math-that-is-substantially-equivalent.html.

does not authorize or contemplate the imposition of penalties or other consequences upon a *nonpublic school* that has been found to not provide substantially equivalent instruction;" and (2) nothing within the Education Law mandates that parents fulfill the substantial equivalency mandate from a single source. R.22–23.

A. Supreme Court Correctly Held that Sections 130.6(c)(2)(i) and 130.8(d)(7)(i) Authorize the Closure of Nonpublic Schools

The New Regulations plainly empower SED and LSAs to direct the closure of a nonpublic school for failure to obtain substantial equivalency. Notably, Respondents-Appellants nowhere claim that they have the statutory authority—whether under the Education Law or anywhere else—to close private schools for a violation of the compulsory education requirements or substantial equivalency failures. *See* Br.28–31.[4] Thus, if the New Regulations did grant SED and LSAs this authority, that would render them inconsistent with the Education Law and invalid to that extent, as Supreme Court held.

The New Regulations explicitly provide that a nonpublic school that receives an unfavorable final determination on substantial equivalency "shall no longer be

[4] Respondents-Appellants suggest that the Education Law permits SED to revoke certain forms of services such as busing and textbooks from nonpublic schools deemed not substantially equivalent. Br.30–31. But like other aspects of the Education Law those services are made available to students, not schools. *See* Education Law §§ 3635(1)(a) ("school district" must provide "[s]ufficient transportation facilities . . . for all the children residing within the school district"), 701(3) ("school districts . . . have the power and duty" to provide textbooks . . . to all children residing in such district who are enrolled in a nonpublic school").

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). That also triggers the revocation of any critical public services students at the school were entitled to receive there—8 N.Y.C.R.R. §§ 130.6(c)(2)(iv), 130.8(d)(7)(iii)—and a requirement that parents "enroll their children in a different, appropriate educational setting"—8 N.Y.C.R.R. § 130.6(c)(2)(ii)—under the threat of civil and criminal penalties, 8 N.Y.C.R.R. § 130.14.

In this context, no one can reasonably dispute that the New Regulations effect the closure of a nonpublic school deemed not substantially equivalent. 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, a non-substantially equivalent school is no longer considered an educational "institution" by the State and no longer has "children" to "teach[ ]" because their parents have been threatened with criminal punishment if they remain. *Id.* In other words, the New Regulations' "plain meaning," *Andryeyeva v. N.Y. Health Care, Inc.*, 33 N.Y.3d 152, 172 (2019), allows the SED to declare a nonpublic school that it deems not to be substantially compliant "no longer . . . a school" under the law, 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i).

Respondents-Appellants offer nothing more than semantic games in an attempt to avoid that obvious conclusion. First, they state unequivocally that the New Regulations "do not provide for closure of nonpublic schools that fail to demonstrate substantial equivalency." Br.30. Later, they acknowledge that the effect of Sections 130.6(c)(2)(i) and 130.8(d)(7)(i) of the New Regulations is to declare a non-substantially compliant school as "no longer qualif[ying] as a 'school' under the law," and admit that the goal of the New Regulations is to prohibit nonpublic schools deemed nonequivalent from "providing . . . instruction [to] its pupils." Br.28, 30.

Respondents-Appellants' argue that the New Regulations do not authorize nonpublic closures because whatever "entity"[5] remains after the school is shut down under the New Regulations "may continue to operate and provide some form of instruction—just as Sunday schools, Hebrew schools, and similar institutions likewise operate and provide religious instruction even though they do not qualify as schools." Br.31. This confuses the *school* with the *building* in which it operates. 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.

[5] Tellingly, Respondents-Appellants do not say that "the s*chool* may continue to operate and provide some form of instruction." Instead, they refer only to "the entity" continuing to operate. Br.at 31.

B. Supreme Court Correctly Held that Sections 130.6(c)(2)(i) and 130.8(d)(7)(i) Impermissibly Restrict How Parents Can Fulfill their Compulsory Education Obligations

The Education Law explicitly permits parents to fulfill their Compulsory Education obligations, including the substantial equivalency provisions, "elsewhere" than 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) (emphasis added). And the Education Law similarly requires parents or guardians to "furnish proof that an individual who is not attending upon instruction at a public or parochial school in the city or district where the person in parental relation resides is attending upon required instruction elsewhere." *Id.* § 3212(2)(d); *see also id.* § 3233 (imposing compulsory education obligation and attendant civil or criminal fines for noncompliance, on parents).

The Education Law's plain-language use of the term "elsewhere" to describe where students may receive their education clearly envisions allowing parents to comply with the compulsory education law by obtaining a substantially equivalent education for their children via multiple sources of instruction. Dictionary definitions of the term "elsewhere," *see Nadkos, Inc. v. Preferred Contractors Ins. Co. Risk Retention Grp. LLC*, 34 N.Y.3d 1, 7 (2019), confirm this understanding.

For example, the Cambridge Dictionary defines "elsewhere" as "at, in from or to another place *or other places*."[6] Similarly, the Collins Dictionary defines "elsewhere" as "in other places or to another place,"[7] and the Oxford Advanced Learner's Dictionary defines it as "in, at or to another place or other places."[8] In other words, the term "elsewhere" as used in the Education Law clearly envisions *multiple* places or providers of education. The Legislature's choice of the word "elsewhere" in describing where other than at a public school a parent could fulfill the compulsory education requirement evidences its "intent," *Liberius v. N.Y.C. Health & Hosps. Corp.*, 129 A.D.3d 1170, 1171 (3d Dep't 2015), to permit parents to fulfill their duties via instruction from multiple sources.

Longstanding judicial interpretations of the flexibility inherent in the Education Law are wholly consistent with Supreme Court's interpretation. For example, *In re Myers*, 119 N.Y.S.2d 98 (Dom. Rel. Ct. 1953), 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

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

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

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

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." *Id.* at 101. Similarly, *In re Lash*, 401 N.Y.S.2d 124 (Fam. Ct. 1977), held that parents fulfilled their Compulsory Education Law obligations by hiring *two* teachers, working together and separately, to provide instruction. *Id.* at 126.

The State and SED have also consistently acknowledged in other contexts that the Education Law permits multisourced education. For example, New York Department of Labor regulations for child performers provide that an employer must offer a child performer a "provided teacher" to educate the child performer on set on workdays, in order to supplement the education the child performer receives "at the minor's regular school." 12 N.Y.C.R.R. § 186-5.1(4), (6). In other words, a child performer is allowed to receive her compulsory education through a combination of sources—including a traditional school *and* private teaching—without running afoul of the Education Law. *Id.* Similarly, in guidance, SED allows that homeschooling "[p]arents may engage the services of a tutor to provide instruction for all *or a portion* of the home instruction program," and 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.[9] In other words, SED itself has acknowledged that students may receive their education from multiple sources, including by combining home schooling and group instruction.

Even Respondents-Appellants acknowledge, as they must, that the Education Law permits multisourced education. As Respondents-Appellants explain, Education Law § 3602-c does not merely allow but *requires* school districts to permit students enrolled at a nonpublic school to simultaneously enroll in the local public schools for occupational training, gifted and talented programs, and disability services. Br.34–35.

For these reasons, Supreme Court's determination that the Education Law not only permits but reflects parents' right to direct their children's education, including by obtaining substantially equivalent education through multiple sources, is wholly consistent with the Education Law's plain text and the State's longstanding practice.

In another misguided attempt to avoid having to defend the merits of the New Regulations, Respondents-Appellants erroneously contend that Supreme Court did not have authority to recognize that parents may fulfill their compulsory education obligations from a combination of sources because the "issue . . . was not presented." Br.32. Yet Petitioners-Respondents argued that the New Regulations impermissibly

[9]Available at https://www.nysed.gov/nonpublic-schools/home-instruction-questions-and-answers (emphasis added).

shifted enforcement and penalties for noncompliance with compulsory education laws from their statutory object, parents, to nonpublic schools, R.950–54, 3194–98, and sought a declaration that "the New Regulations conflict with governing law and are therefore null and void," as well as "any further relief as the Court deems just and proper." R.72. The core issue put before Supreme Court was whether the New Regulations erroneously attempt to impose the obligation for a compulsory education on schools rather than parents and whether SED has the legal authority to impose the obligations, restrictions, and penalties of the New Regulations on private schools and parents. That is precisely what Supreme Court's ruling addressed.[10]

Respondents-Appellants are also incorrect to rely on *Hearst Corp. v. Clyne*, 50 N.Y.2d 707 (1980), for their contention that Supreme Court erred in addressing the New Regulations' impermissible restriction on how parents may fulfill their compulsory education obligations. *See* Br.32. The Court of Appeals in *Hearst* determined that any issue arising from the closure of a courtroom to the press during a plea hearing was subsequently mooted by offering interested reporters a transcript of the hearing. 50 N.Y.2d at 712–13. Thus, that case dealt with mootness, not a

[10] Respondents-Appellants' contention is especially frivolous because even when a party did not—as Petitioners here did—seek a particular form of relief, when ruling on a declaratory judgment "the court has an exceedingly broad discretion in deciding the issues" and a plaintiff is not "denied relief merely because he does not ask for the relief to which he might be entitled." *Cahill v. Regan*, 5 N.Y.2d 292, 298 (1959); *see also Kerri W.S. v. Zucker*, 202 A.D.3d 143, 155 (4th Dep't 2021).

Supreme Court's broad discretion to fashion relief in a declaratory judgment proceeding. Mootness, of course, goes to a court's subject matter jurisdiction, *see, e.g.*, *In re Grand Jury Subpoenas for Locs. 17, 135, 257 & 608 of the United Bhd. of Carpenters & Joiners of Am.*, 72 N.Y.2d 307, 311 (1988), and deprives a court of the authority to offer relief. That is not relevant here.

Respondents-Appellants also express misplaced reliance on Education Law §§ 3204(1), 3212(2)(d), 3205(2)(c)(ii), 3602(1)(n) to support their argument that neither the Constitution nor New York law permits parents to obtain their children's substantially equivalent education through a combination of sources. Br.32–34.

As an initial matter, this simply flips the legal framework on its head. Absent an express statutory limitation—and even in the face of one—parents have a broad constitutional right to direct their child's education. *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Parents do not need an explicit, affirmative authorization from New York to provide their children a substantially equivalent education through a combination of sources. In any event, as previously explained, *supra* pp.24–25, Education Law §§ 3204(1) and 3212(2)(d) envision students receiving their compulsory education "elsewhere" than in public schools, and so by their plain language permit students to receive such compulsory education from a combination of sources. The remaining provisions cited by Respondents-Appellants offer them no support. They either have nothing

to do with compulsory education, *see id.* § 3205(2)(c)(ii), or merely discuss the various avenues available to parents to ensure their children receive an equivalent education, while also guaranteeing that *all* eligible children will be accurately counted for data purposes, *id.*§ 3602(1)(n)(1).

III. Point III: Supreme Court Correctly Invalidated the Provisions of the New Regulations that Are Inconsistent with the Education Law and Constitute Impermissible Administrative Policymaking

Supreme Court rightly concluded the New Regulations are unlawful in providing for the closure of nonpublic schools. *First*, the New Regulations are inconsistent and out of harmony with the Education Law, which requires parents to ensure their children receive substantially equivalent instruction and does not authorize hampering the fulfillment of that mission by closing nonpublic schools. *Second*, SED exceeded its authority in adopting the New Regulations because they amount to administrative policymaking in closing nonpublic schools.

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

1. Regulations that Are Inconsistent or Out of Harmony with an Enabling Statute Are Unlawful

New York law bars agencies from promulgating regulations that are inconsistent or out of harmony with statutory law. "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). "Even when broad rule-making authority has been granted, an agency cannot promulgate rules in contravention of the will of the Legislature." *Beer Garden*, 79 N.Y.2d at 276. "If an agency regulation is 'out of harmony' with an applicable statute, the statute must prevail." *Weiss v. City of New York*, 95 N.Y.2d 1, 5 (2000).

Courts regularly invalidate regulations that are inconsistent or out of harmony with legislation. For example, the Court of Appeals in *Weiss* held a regulation was "invalid insofar as it conflicts with Labor Law § 316(1) by imposing liability on nonoperating owners" of factories. *Id*. Because the statute "confine[d]" liability "to factory operators," the regulation unlawfully "expand[ed] liability." *Id.* Similarly, this Court in *New York Schools Board of Regents v. State University of New York* concluded a committee "exceeded its authority" in creating a teacher licensing process as a substitute to the Education Law teacher certification system. 178 A.D.3d 11, 20 (3rd Dep't 2019). The Court concluded "the regulations conflict with provisions of the Education Law that . . . require most teachers in charter schools and prekindergartens to be certified in the same manner as other public school teachers." *Id.*; *see also Beer Garden*, 79 N.Y.2d at 276–77 (no-fault regulation

"cannot override the specific legislative mandate of an awareness element in" statute); *In re Emmanuel B.*, 175 A.D.3d 49, 56–57 (1st Dep't 2019) (regulation subjecting parents to statute did "not carry the force of law" where statute was "expressly aimed at placements in foster care or adoptive settings"); *Mayfield*, 93 A.D.3d at 103–07 (regulation requiring board member to make decision was "an invalid usurpation of legislative authority" where statute allowed non-board member to make decision).

An agency likewise cannot institute a penalty inconsistent with the statute. For example, this Court in *Meit v. P.S. & M. Catering Corp.* 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. 506, 510 (3d Dep't 1955). 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. The board unlawfully "assumed legislative authority" by promulgating a rule that "[wa]s substantive in nature" and conflicted with the statute. *Id.* at 510.

2. Supreme Court Rightly Held that the New Regulations Are Inconsistent and Out of Harmony with the Education Law

Supreme Court correctly invalidated the New Regulations provisions that provided for the closure of nonpublic schools. The court found that the Education

Law "places the burden for ensuring a child's education squarely on the *parent*, not the school," and "does not authorize or contemplate the imposition of penalties or other consequences upon a *nonpublic school* that has been found to not provide substantially equivalent instruction." R.22 (emphasis in original). Because the New Regulations "forc[e] the school to close its doors" even though the statute 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.

Supreme Court thus properly held that provisions of the New Regulations providing that nonpublic schools shall no longer be deemed to provide instruction fulfilling the Education Law "must be stricken." R.24. The Court also rightly construed provisions requiring enrollment of "children in a different, appropriate education setting" to encompass "the parental right to supplement with an [IHIP] if they choose to keep their child enrolled at said school" so that those provisions would be consistent with the Education Law. R.24 (emphasis omitted).

Supreme Court properly construed the Education Law. The Education Law charges parents with ensuring their children receive substantially equivalent

instruction and penalizes parents—not nonpublic schools—if a child does not receive such instruction. New York law places the instruction requirement upon "persons in parental relation" to the children: "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 enforces failure to satisfy that requirement through penalties on the parent, *id.* § 3233. The only other penalties the Education Law provides for is to withhold funds to public school districts that refuse to enforce the Education Law. *Id.* § 3234.

The Legislature plainly knew how to levy penalties on nonpublic schools, yet it purposefully did not do so. Instead, the Legislature afforded parents flexibility in ensuring adequate instruction "elsewhere than at a public school" is provided, including through a combination of sources. *See supra* Part II.B.

By compelling closure of nonpublic schools that LSAs believe do not provide substantially equivalent instruction, the New Regulations contravene the will of the Legislature to afford parents flexibility in ensuring children receive substantially equivalent instruction. Like the regulation in *Weiss* that was inconsistent with the statute by expanding liability to operators where the statute imposed liability only on owners, 95 N.Y. at 5, the New Regulations are invalid because they impose a new enforcement scheme contrary to the system established in the Education Law.

Similar to the teacher licensing regulations in *New York Schools Board of Regents* that exceeded agency authority because the Education Law established a distinct teacher certification system, 178 A.D.3d at 20, the New Regulations are inconsistent with the Education Law because they limit the ability of parents to provide an education for their children from multiple sources. And just as the penalty in *Meit* unlawfully prescribed a penalty different from those in the statute, the New Regulations improperly impose a penalty dissimilar to the Education Law's mechanisms. 285 A.D. at 509–10; *see also Beer Garden*, 79 N.Y.2d at 276–77; *Emmanuel B.*, 175 A.D.3d at 56–57; *Mayfield*, 93 A.D.3d at 103–07.

Respondents-Appellants incorrectly argue SED acted within its authority in promulgating the New Regulations. Br.23–28. SED did not merely "set[ ] forth a process" or establish "procedural rules" in requiring parents to unenroll children from nonpublic schools. Br.22, 26. A regulation that "prescribe[s] a penalty . . . which is found neither expressly nor by necessary implication in the [enabling statute] and which is at variance with the statutory scheme" is "not confined to matters of procedure but is substantive in nature" and is "invalid." *Meit*, 285 A.D. at 510. The New Regulations are contrary to more than a century of statutory precedent affording parents flexibility in ensuring their children receive adequate instruction "elsewhere than at a public school." The New Regulations thus do not "carry into effect the fundamental purpose of the Compulsory Education Law;"

Br.28; rather, they shutter nonpublic schools and limit parents' flexibility in directing the education of their children.[11]

The broad provisions upon which Respondents-Appellants rely fail to grant SED authority to implement penalties that conflict with the Education Law. Br.23 (citing Education Law §§ 207, 305(1)).[12] "[B]road rule-making authority . . . cannot override the specific legislative mandate" of the Education Law that obligates parents—rather than nonpublic schools—with ensuring children receive substantially equivalent instruction and does not impose any penalties on nonpublic schools to enforce that requirement. *Beer Garden*, 79 N.Y.2d at 276.

"In the absence of a specific grant of power by the Legislature, the Regents cannot transform section 207 of the Education Law, the fountainhead of the Regents' rule-making power, into an all-encompassing power." *Moore v. Bd. of Regents*, 44 N.Y.2d 593, 602 (1978) (citation omitted). Indeed, "[w]ere this provision interpreted otherwise, it would run afoul of the constitutional prohibition against the Legislature's delegation of lawmaking power to other bodies." *Id.* (citation omitted).

[11] None of the cited provisions provides that LSAs "are responsible for reviewing whether nonpublic schools provide substantially equivalent instruction." Br.6, 24 (citing Education Law §§ 2(12), 3204, 3204(2), 3210).

[12] SED's reading of the statute is not entitled to deference, "as the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent." *N.Y. State Bd. of Regents*, 178 A.D.3d at 19 (citations omitted).

Their reliance on *Adelphi University v. Board of Regents*, 229 A.D.2d 36 (3rd Dep't 1997), is equally misplaced. Br.26. The enabling statute in *Adelphi University* afforded the board with authority to "remove any trustee," and the regulations simply provided for "the procedure most suitable to accomplish the legislative goal of permitting and conducting trustee removal proceedings." 229 A.D.2d at 38–39. The board did not promulgate a regulation providing that trustees could be removed in the absence of a statute authorizing such a removal.[13]

Respondents-Appellants also tautologically argue that "the specific regulations invalidated by Supreme Court merely state the necessary consequence of a negative substantial equivalency determination." Br.27. But the "consequences" of the New Regulations—including school closures—are only "necessary" because SED seeks to impose obligations on nonpublic schools and limitations on parents that are nowhere to be found in the Education Law.

[13] The other cited authorities fail for similar reasons. Br.26. In *Juarez v. New York State Office of Victim Services*, the Court of Appeals held a regulation that determined a service did not qualify for "reasonable" attorney's fees under a statute was consistent with a statute that "grant[ed] [the agency] the authority to determine whether attorneys' fees are 'reasonable.'" 36 N.Y.3d 485, 493–94 (2021). Similarly, in *Goodwin v. Perales*, the Court of Appeals held a statute "relegated to the agency's sound discretion" promulgating regulations governing "[t]he particular documentation required to establish eligibility—rarely a topic covered in statutes." 88 N.Y.2d 383, 395 (1996). Here, the Education Law is absolutely clear that the compulsory education obligation and its substantially equivalent mandate are directed at parents and not parochial and private schools.

Supreme Court's holding safeguards Legislative policy that protects parents' rights to direct the educational upbringing of their children while still ensuring they receive adequate instruction. The Court of Appeals has recognized that "[p]rivate schools have a constitutional right to exist and parents have a constitutional right to send their children to [private] schools." *Packer Coll.*, 298 N.Y. at 192; *see also Pierce*, 268 U.S. at 534–35 (recognizing the constitutional right of parents "to direct the upbringing and education of children under their control"). As the United States Supreme Court recognized in *Pierce*, "[t]he child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U.S. at 535. By protecting parents' rights to decide how their children receive substantially equivalent instruction, Supreme Court's decision is in line with longstanding precedent safeguarding fundamental parental rights.

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

1. 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), the Court of Appeals 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 policymaking 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).

Courts applying the *Boreali* factors invalidate regulations that resolve matters of public policy. For example, the Court of Appeals 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 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 interferences 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.*[14]

Applying similar principles, the Fourth Department 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

[14] The Court found it unnecessary to address the fourth factor. *Statewide Coal.*, 23 N.Y.3d at 700-01.

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)).

2. Supreme Court Rightly Concluded that the New Regulations Reflect Impermissible Legislative 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*). The 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 supplementation 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[ ] concerning personal autonomy" by deciding to shutter nonpublic schools that it believes do not comply with the Education Law. *Id.* at 699. An edict closing nonpublic schools interferes with a century-old regime obligating parents to ensure their children obtain adequate instruction "elsewhere than at a public school." Education Law § 3204(2). That regime comports with parents' 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 to shutter schools rather than allow parents to ensure their children receive adequate instruction through 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) (citation omitted).

Second, SED did not merely fill in the details of the Education Law but instead wrote on a clean slate by creating a draconian penalty that closes nonpublic schools. SED's desire to close nonpublic schools "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 the closure of nonpublic schools, *Ahmed*, 129 A.D.3d at 440, and

mandating closure "usurped the role of the Legislature in making its policy decision" that nonpublic schools could remain open while charging parents to ensure children receive supplemental instruction, *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. Legislators have introduced numerous bills over the past several years proposing to amend the Education Law to provide for reviews of nonpublic schools and penalties if a nonpublic school is determined not to be substantially equivalent. For example, several bills proposed that upon a negative substantially equivalent 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). Other bills would require nonpublic schools to return state funds and would render them ineligible to receive funds in subsequent years. *See, e.g.*, 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). And other bills would

require informing parents of the school's non-compliance. *See, e.g.*, S.B. S9098, 2017-2018 Leg. Sess. (N.Y. 2018); S.B. S9097, 2017-2018 Leg. Sess. (N.Y. 2018).

The repeated efforts of legislators to amend the Education Law to provide enforcement mechanisms over nonpublic schools "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. SED plainly stepped into the legislative prerogative in seeking to resolve an ongoing debate over vital issues involving parental, educational, and religious rights.

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.

Respondents-Appellants incorrectly argue the *Boreali* factors show SED "did not exceed its authority in promulgating" the New Regulations. Br.37. Their analysis wrongly focuses on regulation relating to oversight of instruction, which is

not at issue in this appeal, rather than regulation that requires the closure of nonpublic schools. Br.37–39. A new draconian enforcement mechanism that closes schools and eviscerates parents' rights to direct the education of their children does not "simply incorporate[ ] and give[ ] effect to" substantially equivalent instruction, nor do the New Regulations merely "state the necessary consequence of a negative substantial equivalency determination." Br.37–38.

The assertion that "the Legislature has not tried, and failed, to set policy in this area" likewise is plainly incorrect, which is true not only as to mechanisms to enforce the Education Law but also as to reviews by public officials generally.[15] Br.38. And Respondents-Appellants set forth no technical expertise SED supposedly leveraged in deciding to implement enforcement mechanisms contrary to the Education Law.

Respondents-Appellants' cited authorities are inapposite. In *Avecedo v. New York State Department of Motor Vehicles*, the Court of Appeals upheld a drunk driving regulation promulgated under a statute that provided for agency discretion to reissue a new license. 29 N.Y.3d 202 (2017). The court relied heavily on the notion that "[t]he legislature, not DMV, made a value judgment between competing

[15] If anything, the Felder Amendment underscores that, while the Legislature decided to allow equivalency reviews of certain nonpublic schools, it does not impose substantial equivalency requirements on nonpublic schools or authorize the imposition of penalties.

ends" between public safety and licensing interests and "expressed a clear intention to delegate broad authority to DMV to decide post-revocation relicensing applications, leaving all reissuance determinations subject to the discretion of the commissioner." *Id.* at 223 (citation omitted). The Legislature here has not "expressed a clear intention" that nonpublic schools can be closed subject to SED's discretion.

Likewise, this Court in *New York City C.L.A.S.H., Inc. v. New York State Office of Parks, Recreation & Historic Preservation* concluded that an outdoor smoking ban in certain locations did not usurp legislative policymaking because the regulation was "consistent with" legislatively expressed goals to provide for the health, safety, and welfare of patrons, the choices made "were not very difficult or complex," no-smoking areas were no longer "the subject of great public debate," and "the Legislature ha[d] taken action" to express "its determination that tobacco smoke, including secondhand smoke, is hazardous to one's health." 125 A.D.3d 105, 109–10 (3rd Dep't 2015). In contrast, the restrictions and penalties imposed by the New Regulations are not consistent with the Education Law's parent-focused approach to substantial equivalency, the regulation of nonpublic schools remains the subject of ongoing debate, and the Legislature has not acted to provide for nonpublic school closure despite opportunities to do so.

3. *Packer Collegiate* Supports that SED Acted Unlawfully

The decision in *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," the Court of Appeals 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 and limiting the ability of parents to satisfy their compulsory education obligations would render the statute unconstitutional under *Packer Collegiate*. If broad provisions that "authorize[ ] the Board of Regents to 'establish rules for carrying into effect the laws and policies of the state, relating to education,' Education Law § 207, and direct[ ] the Commissioner to 'execute all education policies determined upon by the board of regents,' § 305(1)," were construed to afford SED discretion to institute new draconian penalties attendant to a licensing scheme as Respondents-Appellants

argue, Br.23, the statute would be an unconstitutional delegation of authority "with no standards or limitations of any sort." *Packer Coll.*, 298 N.Y. at 189. When *Packer Collegiate* was decided, these provisions were in effect; if they now authorize the current school closure regulations, they also would have authorized the licensing scheme in *Packer Collegiate*. They did not.

Respondents-Appellants wrongly argues the Court of Appeals' decision in *Packer Collegiate* is "inapposite" because "[t]he non-delegation doctrine has no bearing in this context." Br.35–36. The Court of Appeals in *Packer Collegiate* addressed a statute rather than a regulation, but its conclusions instruct courts to avoid statutory constructions of the Education Law that raise serious constitutional questions and should instead reasonably construe the statute to prohibit SED's overreach. *See Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984); *People v. Grasso*, 54 A.D.3d 180, 183 (1st Dep't 2008).[16] Otherwise, SED would be "'acting solely on [its] own ideas of sound public policy' and [ ] therefore operating outside of its proper sphere of authority." *Boreali*, 71 N.Y.2d at 12 (citing *Packer Collegiate*) (first alteration in the original).

[16] Supreme Court found Petitioners-Respondents' claim that the New Regulations "create an impermissible licensing scheme" under *Packer Collegiate* was "moot" in light of the conclusion that SED "lack[s] authority to direct the closure of nonpublic schools." R.25. If this Court were to conclude that SED was authorized to direct nonpublic schools to close, that claim should be remanded for Supreme Court to address it in the first instance because it no longer would be moot.

CONCLUSION

The Court should affirm the judgment of the Albany County Supreme Court striking 8 N.Y.C.R.R. § 130.6(c)(2)(i) and 8 N.Y.C.R.R. § 130.8(d)(7)(i) from the New Regulations and construing Sections 8 N.Y.C.R.R. § 130.6(c)(2)(iii) and 8 N.Y.C.R.R. § 130.8(d)(7)(iii) of the New Regulations so that they permit parents to fulfill their compulsory education responsibilities through a combination of sources.

Dated: New York, NY
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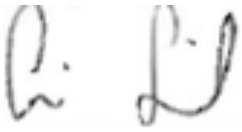
Respectfully Submitted,

TROUTMAN PEPPER
HAMILTON SANDERS LLP
875 Third Avenue
New York, New York 10022
(212) 704-6000
avi.schick@troutman.com

By: 

AVI SCHICK
MARY GRACE W. METCALFE

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