Supreme Court of the State of New York
Appellate Division – Third Department

In the Matter of the Application of

No. CV-23-0756

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

Petitioners-Respondents,

v.

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,

For a Judgment Pursuant to Article 78 of the Civil Practice Law & Rules.

REPLY BRIEF FOR APPELLANTS

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PRELIMINARY STATEMENT

Petitioners fail to show that the State Education Department (SED) exceeded its statutory authority in promulgating the substantial equivalency regulations. Article 65 of the Education Law (the Compulsory Education Law) plainly states that instruction "elsewhere than at a public school" must be "substantially equivalent to the instruction given" at public schools. Education Law § 3204(2)(i). To protect the right of every New York child to the minimum instruction guaranteed by law, the Commissioner of Education and local school authorities have the authority to determine whether instruction at a nonpublic school meets the substantial equivalency standard. The regulations invalidated by Supreme Court merely state the logical consequence of a negative substantial equivalency determination: instruction at a nonpublic school which fails to demonstrate substantial equivalency cannot fulfill the requirements of the Compulsory Education Law. *See* 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i). Petitioners fail to explain how these regulations either conflict with the statute or constitute improper legislative policymaking.

Preliminarily, the Court need not reach the merits of petitioners' arguments because petitioners lack standing to challenge the regulations

invalidated by Supreme Court. Petitioners have not come close to showing any reasonable expectation that they or their unidentified member schools will be subject to a negative substantial equivalency determination. Thus, their claimed harm is not reasonably certain to occur, as required for injury-in-fact based on a prospective injury.

On the merits, petitioners' arguments fail because they are based on misinterpretations of both the statute and the regulations. The regulations do not purport to authorize SED to close nonpublic schools, as petitioners contend. Rather, nonpublic schools which fail to demonstrate substantial equivalency are free to provide instruction in religious studies or other subjects. And the regulations do not limit any statutory right to obtain substantially equivalent instruction from multiple sources, as there is no such right. Thus, the regulations are consistent with the statute and do not cross the line into legislative policymaking. The Court should reverse Supreme Court's judgment insofar as it struck down §§ 130.6(c)(2)(i) and 130.8(d)(7)(i) and either dismiss petitioners' claims for lack of standing or declare those provisions valid.

ARGUMENT

POINT I

PETITIONERS LACK STANDING BECAUSE THEY FAIL TO SHOW INJURY-IN-FACT

Petitioners cannot show any injury-in-fact arising from the challenged regulations. For that reason alone, the Court should vacate Supreme Court's judgment insofar as it invalidated 8 N.Y.C.R.R. §§ 130.6(c)(2)(i) and 130.8(d)(7)(i).

None of the individual yeshivas that are petitioners in this proceeding has shown that it is at risk of a negative substantial equivalency determination. Indeed, petitioners do not dispute that four of the five schools—Mesivta Yeshiva Rabbi Chaim Berlin, Yeshiva Torah Vodaath, Mesivtha Tifereth Jerusalem, and Yeshiva Ch'san Sofer—are deemed substantially equivalent as a matter of course. These schools are associated with a high school that has voluntarily registered with the Board of Regents. (R. 877, 891, 1092-1093.) Accordingly, these schools presumptively satisfy the substantial equivalency standard.[1] *See* 8 N.Y.C.R.R.

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[1] These schools would be subject to a substantial equivalency investigation only if the Commissioner or local school authority received a bona fide complaint or otherwise had concerns about instruction. Under

(*continued on the next page*)

§ 130.3(a)(1). At present, the sections invalidated by Supreme Court do not affect these schools, and therefore they lack standing to challenge those sections.[2] *See, e.g.*, *Matter of C.K. v. Tahoe*, 211 A.D.3d 1, 10 (3d Dep't 2022).

Nor do petitioners dispute that the fifth school—Rabbi Jacob Joseph School (RJJ)—demonstrated substantial equivalency when it received a charter from the Board of Regents, and still provides "a well-rounded secular curriculum." (R. 1093.) Petitioners point to no evidence in the record suggesting that instruction at RJJ no longer meets the substantial equivalency standard. Nor do they point to evidence that RJJ is at risk of imminent harm from a negative substantial equivalency determination. *See Matter of Gronbach v. New York State Educ. Dep't*, 221 A.D.3d 1385, 1388 (3d Dep't 2023) (affirming dismissal for lack of

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those circumstances, the Commissioner may direct an investigation to take place. *See* 8 N.Y.C.R.R. § 130.11.

[2] Petitioners cite a letter from the New York City Department of Education to Yeshiva Ch'san Sofer concerning the Department's inquiry into whether the yeshiva meets the substantial equivalency standard. (R. 3064-3067.) The Department later informed Yeshiva Ch'san Sofer that it is deemed substantially equivalent by virtue of its association with a registered high school. (NYSCEF Doc. No. 157.)

standing because record was "devoid of evidence demonstrating actual harm to petitioners").

Indeed, any risk of harm to RJJ is built on three layers of speculation: (1) the local school authority or the Commissioner preliminarily determines that it fails to demonstrate substantial equivalency; (2) RJJ does not improve its instruction during the ensuing collaborative process; and (3) the local school authority or the Commissioner makes a final determination that RJJ fails to demonstrate substantial equivalency. The regulations invalidated by Supreme Court, §§ 130.6(c)(2)(i) and 130.8(d)(7)(i), are triggered only by a negative final substantial equivalency determination at the end of that process. Harm arising from any such final determination is not "reasonably certain to occur" because it is far from reasonably certain that any of the above three events will come to pass. *Matter of Developmental Disabilities Inst., Inc. v. New York State Off. for People with Dev. Disabilities*, 200 A.D.3d 1273, 1275 (3d Dep't 2021); *see also New York State Ass'n of Nurse Anesthetists v. Novello*, 2 N.Y.3d 207, 213 (2004) (plaintiff lacked standing where claimed injury was "founded on two layers of speculation"). Thus, like the other

individual yeshivas, RJJ has not shown that it is at risk of harm from the challenged regulations.

The three petitioner organizations' standing argument fares no better. Parents for Educational and Religious Liberty in Schools (PEARLS), Agudath Israel of America, and Torah Umesorah simply ignore the requirements for associational standing. The Court of Appeals has made clear that when "an association or organization is the petitioner, the key determination to be made is whether one or more of its members would have standing to sue." *Society of Plastics Indus., Inc. v. County of Suffolk*, 77 N.Y.2d 761, 775 (1991); *see also Matter of New York State Bd. of Regents v. State Univ. of New York*, 178 A.D.3d 11, 18-19 (3d Dep't 2019), *lv. denied*, 35 N.Y.3d 912 (2020). The three petitioner organizations have not even named any of their members, let alone pointed to evidence showing that their members have standing to sue. And while petitioners assert on appeal (Br. at 9) that their "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," that bare assertion does not suffice to demonstrate associational standing. As the Court of Appeals explained in *Society of*

Plastics, "standing cannot be achieved merely by multiplying the persons a group purports to represent." 77 N.Y.2d at 775.

Petitioners' reliance on the Court of Appeals' recent decision in *Stevens v. New York State Division of Criminal Justice Services*, -- N.Y.3d -- , 2023 WL 6983470 (2023), is unavailing. Preliminarily, that decision does not displace the longstanding principle that a plaintiff's injury must be actual or imminent, rather than merely speculative or conjectural. *See Novello*, 2 N.Y.3d at 211. The Court merely applied principles of standing to the "particular circumstances" of the case. *Stevens*, 2023 WL 6983470 at *4. The regulation challenged in *Stevens* permits law enforcement officers to search for familial matches in the State's DNA database. Thus, when law enforcement officers collect DNA at a crime scene, they may search both for direct matches in the DNA database and for genetically related matches. *See* 9 N.Y.C.R.R. § 6192.3. The regulations do not provide for notice of the search, or an opportunity to challenge it, before it is conducted. *Stevens*, 2023 WL 6983470 at *3.

The petitioners in *Stevens* demonstrated a genuine injury-in-fact arising from the challenged regulations. Each petitioner had a close relative whose DNA is stored in the State's database. *Stevens*, 2023 WL

6983470 at *3. For this reason, each petitioner faced "a unique risk of being identified through the Databank and targeted for police scrutiny." *Id.* at *4. "Under these particular circumstances," the Court held, "that risk is not 'founded on impermissible layers of speculation.'" *Id.* (quoting *Novello*, 2 N.Y.3d at 213).

Here, by contrast, petitioners have not demonstrated a "unique risk" of harm from §§ 130.6(c)(2)(i) and 130.8(d)(7)(i). Again, four of the five individual yeshivas are not subject to substantial equivalency reviews under Part 130. They are akin to individuals *without* familial matches in the DNA database. Such individuals would not have had standing in *Stevens*. Of the petitioners, only RJJ is subject to periodic substantial equivalency reviews. And even then, the regulations at issue concern only a final determination that a school has failed to demonstrate substantial equivalency. There is no evidence in the record suggesting that RJJ might fail to make this demonstration. Moreover, unlike the petitioners in *Stevens*, who had no notice of or opportunity to challenge a DNA search before it was conducted, *see* 2023 WL 6983470 at *3, RJJ and similarly situated schools will have ample opportunity to demonstrate substantial equivalency. They will also have ample opportunity to

challenge SED's regulations should it become likely that those regulations will be triggered. In sum, while there were no better petitioners in *Stevens*, nor any better time to challenge the regulation at issue there, judicial review of §§ 130.6(c)(2)(i) and 130.8(d)(7)(i) must await a proper challenge by a school (or parent) who is reasonably likely to suffer harm from a negative substantial equivalency determination.

The other cases cited by petitioners (Br. at 17-18) are of no help. At most, those cases stand for the proposition that a claim asserting prospective injury may be justiciable. *See Matter of Swinton v. Safir*, 93 N.Y.2d 758, 765-66 (1999); *New York County Lawyers' Ass'n v. State of New York*, 294 A.D.2d 69, 74 (1st Dep't 2002). True enough. The problem with petitioners' claimed injury, however, is not that it is prospective, but that it is speculative. Absent any reasonable expectation that petitioners will be subject to a negative substantial equivalency determination, they fail to show injury-in-fact arising from §§ 130.6(c)(2)(i) and 130.8(d)(7)(i), and petitioners' challenge to those regulations is not justiciable.

Additionally, insofar as petitioners claim that the regulations violate parents' purported right to obtain education from multiple sources—a claim they did not raise below—they have failed to show any

injury within the statute's zone of interests. The zone-of-interests test "circumscribes the universe of persons who may challenge administrative action." *Soc'y of Plastics*, 77 N.Y.2d at 773. It requires "that a petitioner's injury fall within the concerns the Legislature sought to advance or protect by the statute." *Id.* at 774. As explained *infra* Point II.B.2, petitioners fail to cite any statutory provision entitling parents to obtain substantially equivalent instruction from multiple sources. But even if the Compulsory Education Law could be interpreted in the way petitioners suggest, it would be for parents—not petitioner schools—to vindicate that purported right. *See Matter of Gronbach*, 221 A.D.3d at 1389. Moreover, none of the three organizations has even attempted to show that any of their parent-members have standing. Thus, insofar as petitioners now claim that the regulations violate the purported right of parents to obtain instruction for their children from multiple sources, petitioners are outside the zone of interests protected by the statute.

POINT II

PETITIONERS FAIL TO SHOW THAT SED'S SUBSTANTIAL EQUIVALENCY REGULATIONS ARE UNLAWFUL

Properly construed, SED's substantial equivalency regulations are consistent with the Compulsory Education Law and must be upheld. Petitioners attempt to manufacture a conflict by arguing mistakenly that the regulations (1) authorize the closure of nonpublic schools, even though the regulations on their face simply do not confer such authority, and (2) violate the rights of parents to obtain instruction for their children from multiple sources, even though the statute confers no such right and, even if it did, the regulations would not impair it. Petitioners' separation-of-powers argument likewise fails because it is based on their misinterpretations of the statute and regulations.

A. SED's Regulations Properly Give Effect to the Legislature's Substantial Equivalency Mandate.

As SED explained in its opening brief (at 23-28), its substantial equivalency regulations are fully consistent with New York's Compulsory Education Law. That law provides that "[i]nstruction given to a minor elsewhere than at a public school," *i.e.*, at a nonpublic school or at home, "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." Education Law § 3204(2)(i). It is the obligation of parents to ensure that their children receive the education to which they are entitled. *See id.* § 3212.

The substantial equivalency mandate has been enshrined in New York law since 1895. Over the years, the Legislature has added numerous substantive standards for instruction at public and nonpublic schools. *See* Education Law § 3204(2), (3); *see also id.* §§ 305(52), 801(1)-(2), 803(4), 804, 806, 807, 808. Most recently, in 2018, the Felder Amendment provided additional criteria "[f]or purposes of considering substantial equivalence" at certain schools. *Id.* § 3204(2)(ii)-(iii). For schools falling within its purview, the Felder Amendment designated the Commissioner of Education as "the entity that determines whether nonpublic elementary and secondary schools are in compliance with the academic requirements set forth in paragraphs (ii) and (iii) of this subdivision." *Id.* § 3204(2)(v).

Thus, the statute plainly contemplates—and petitioners do not dispute—that nonpublic schools are subject to substantial equivalency reviews. The statute does not, however, describe the process by which

substantial equivalency reviews should be conducted. The challenged regulations fill this gap.

Part 130 sets forth the process by which local school authorities and the Commissioner determine whether a nonpublic school satisfies the substantial equivalency standard set by statute. *See* 8 N.Y.C.R.R. Part 130. The regulations require local school authorities to periodically review nonpublic schools (other than those deemed substantially equivalent as a matter of course, *see id.* § 130.3) and set forth a timeframe for these reviews. *Id.* §§ 130.4, 130.5. After each periodic review is conducted, either the local school authority or the Commissioner makes a preliminary determination as to whether the nonpublic school has sufficiently demonstrated the substantial equivalency of its instruction. *Id.* §§ 130.6(a), 130.8(d). A negative preliminary determination triggers a collaborative process designed to help the nonpublic school achieve substantial equivalency by the end of the following academic year. *Id.* §§ 130.6(a)(1)(iii), (a)(2), 130.8(d)(2). At the end of the review period, the local school authority or Commissioner makes a final determination as to whether the nonpublic school has demonstrated substantial equivalency. *Id.* §§ 130.6(b), 130.8(d)(7). Upon a negative final determination, "the

nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of [the Compulsory Education Law]." *Id.* §§ 130.6(c)(2)(i), 130.8(d)(7)(i).

By setting out the process for determining substantial equivalency, SED's regulations give effect to the statutory mandate. Thus, the regulations are consistent with their enabling legislation and "'in harmony with the statute's over-all purpose.'" *Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.*, 2 N.Y.3d 249, 254 (2004) (quoting *Goodwin v. Perales*, 88 N.Y.2d 383, 395 [1996]).

Despite upholding much of Part 130, Supreme Court invalidated the two provisions that describe the necessary consequence of a negative substantial equivalency determination: the nonpublic school "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). These provisions do not impose a civil penalty on nonpublic schools, as petitioners suggest. Rather, the provisions make clear that instruction at a nonpublic school which fails to demonstrate substantial equivalency cannot fulfill the requirements of the Compulsory Education Law. In other words, such determination

serves to alert parents that they cannot satisfy their obligation under the Compulsory Education Law by enrolling their children in a non-substantially equivalent school.

Petitioners point to no statute that expressly conflicts with these regulations. Nor could they. Not only are the regulations consistent with the Compulsory Education Law, they are logically required by its plain text. If instruction elsewhere than at a public school must meet the substantial equivalency standard under the Compulsory Education Law, *see* Education Law § 3204(2)(i), and the Commissioner (or local school authority) determines that instruction at a nonpublic school fails to meet that standard, *see, e.g.*, *id.* § 3204(2)(v), then that nonpublic school can "no longer be deemed a school which provides compulsory education fulfilling the requirements of [the Compulsory Education Law]," 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i).

Moreover, Supreme Court's judgment does not, as petitioners contend, ensure that children "receive adequate instruction." (Br. at 38.) Rather, it severely diminishes SED's and local school authorities' ability to ensure that children at nonpublic schools receive the education to which they are entitled. Under the terms of Supreme Court's judgment,

instruction at a nonpublic school can continue to fulfill the requirements of the Compulsory Education Law even if it is *not* substantially equivalent to instruction at public schools. That holding prevents State and local authorities from implementing the Legislature's substantial equivalency mandate.

B. Petitioners' Arguments Are Premised on Misinterpretations of the Statute and Regulations.

Similar to Supreme Court's judgment invalidating the regulations, petitioners' responses to SED's defense of its regulations are premised on misinterpretations of both the regulations and the Compulsory Education Law.

1. The regulations do not improperly authorize closures of nonpublic schools.

Petitioners mistakenly argue that the regulations improperly authorize SED to close nonpublic schools. (Br. at 21-23, 48-49.) According to petitioners, the regulations thereby impose penalties beyond those authorized by the Compulsory Education Law. (Br. at 32-34.) Although closure may be the ultimate *effect* of a final determination that a nonpublic school is not providing a substantially equivalent education, the

regulations themselves do not authorize SED or local school authorities to order the closure of nonpublic schools. Nor is there any evidence of such closures in the record. By way of contrast, during the COVID-19 pandemic, the Governor issued executive orders directing all schools in New York to close. *See* Executive Order 202.4 (Mar. 16, 2020). Here, nonpublic schools which fail to meet the substantial equivalency standard may continue to provide instruction, religious or otherwise.

Petitioners conflate the power to *close* nonpublic schools with the power to *determine* whether a particular school satisfies the substantial equivalency standard. The regulations properly set forth a process for the Commissioner and local school authorities to make such determinations in a fair and respectful manner. *See* 8 N.Y.C.R.R. §§ 130.6, 130.8. The Education Law plainly gives the Commissioner and local school authorities the power to determine whether a nonpublic school satisfies the substantial equivalency standard, and petitioners do not contend otherwise. *See* Education Law §§ 305, 3204(2)(v); *see also Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 220 (E.D.N.Y. 2019) ("It is generally up to the local school board, through the district superintendent, to determine whether its students are receiving a 'substantially

equivalent' education."). Thus, the regulations are not inconsistent with the statute merely because they confer the authority to make substantial equivalency determinations for nonpublic schools and set forth an orderly process for making those determinations.

To be sure, a negative substantial equivalency determination has consequences for both parents and a nonpublic school. It means parents cannot satisfy their obligations under the Compulsory Education Law by sending their children to the school. *See* Education Law § 3212. It also means students are not entitled to transportation to and from the school, *id.* § 3635(1)(a), and the school is not entitled to state aid, L. 1974, ch. 507. These consequences might result in the school having to close. But they are not "penalties" akin to the civil and criminal penalties for parents who fail to cause their child to attend upon instruction. *See* Education Law §§ 3212(2)(b), 3233. Instead, these consequences reflect the reality that a nonpublic school which fails to provide substantially equivalent instruction is not a full-fledged "school" within the meaning of the Compulsory Education Law and cannot receive public funds in the same way as a nonpublic school which fulfills the requirements of the Compulsory Education Law.

And even if these consequences cause a nonpublic school to close—which none of the petitioners has shown is reasonably certain to occur given the ample opportunity for remediation—that is not a ground on which to invalidate the regulations on their face. SED's regulations are designed to help nonpublic schools meet the substantial equivalency standard. Achieving compliance with that statutory standard is the purpose of the collaborative process laid out in the regulations. *See* 8 N.Y.C.R.R. §§ 130.6(a)(1)(iii), (a)(2), 130.8(d)(2). If a nonpublic school chooses to close its doors rather than improve its secular instruction, however, it would do so of its own volition—not by order of the Commissioner or local school authority.

Courts must resolve any disputes over the meaning or scope of agency regulations in favor of the agency's reasonable interpretation. Indeed, "judicial deference to an agency's interpretation of its own regulations is a basic tenet of administrative law." *Andryeyeva v. New York Health Care, Inc.*, 33 N.Y.3d 152, 175 (2019). Applying that tenet here, the Court should defer to SED's interpretation and reject petitioners' attempt to distort the plain meaning of SED's substantial equivalency regulations.

2. The regulations do not impair any statutory right to instruction from multiple sources.

Petitioners mistakenly argue that the regulations violate parents' purported right to obtain instruction for their children from multiple sources. (Br. at 24-30, 34-38.) Preliminarily, petitioners made no such claim below and Supreme Court erred by injecting this issue into the case. Petitioners' argument lacks merit in any event because it misconstrues the regulations and relies on an unduly broad interpretation of the statute.

As respondents explained in their opening brief (at 31-35), the Education Law does not give parents the right to obtain instruction for their children from multiple sources. Numerous statutes explicitly distinguish between instruction at a public school, instruction at a nonpublic school, and home instruction. *See* Education Law §§ 3204, 3212(2)(d), 3205(2)(c)(ii), 3602(1)(n). No statute generally authorizes parents to enroll their children in multiple schools. And in the narrow circumstances in which the Legislature has authorized dual enrollment, it has done so expressly and only for specific programs or services—none of which is at issue here. *See id.* § 3602-c.

In support of their argument that the Education Law gives parents the right to obtain education for their children "via multiple sources of instruction" (Br. at 24), petitioners point to only one statute: § 3204(1), which permits a minor to receive instruction "at a public school or *elsewhere*." (Emphasis added.) But "elsewhere" simply means "in . . . another place." Merriam-Webster.com. It does not mean in more than one place. And the statute's use of the term does not imply that parents may have their children educated in any manner they choose. Rather, it reflects that parents have the right to opt out of public schools and provide for "an equivalent education in a privately operated system."[3] *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Thus, § 3204's use of the term "elsewhere" does not support petitioners' broad interpretation of the Compulsory Education Law.

Nor have petitioners cited any relevant case law or other authority in support of their interpretation of the Compulsory Education Law.

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[3] While petitioners cite parents' "constitutional right to direct their child's education" (Br. at 29), they do not appear to contend that parents are constitutionally entitled to obtain education from multiple sources. Neither *Yoder* nor *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), supports that claim. Nor was any such claim made below.

Neither of the cases they cite suggests that parents have the statutory right to cobble together substantially equivalent instruction from a nonpublic school and other sources. Both cases, in fact, involved parents who provided *home* instruction for their children. *See Matter of Myers*, 203 Misc. 549, 552 (Dom. Rel. Ct., New York County 1953); *Matter of Lash*, 92 Misc. 2d 642, 645 (Fam. Ct., Nassau County 1977). In the home-schooling context, "[p]arents may engage the services of a tutor to provide instruction for all or a portion of the home instruction program." SED, Home Instruction Questions and Answers. Thus, in *Matter of Myers*, the court approved of a child's home instruction in required subjects in addition to classes at "the Metropolitan Opera Ballet School twice a week, art classes at the Educational Alliance and music classes at the Henry Street Music School." 203 Misc. at 552. And in *Matter of Lash*, the parents properly engaged two tutors for their child's instruction. 92 Misc. 2d at 645. As these cases show, parents who provide home instruction have flexibility in providing instruction for their children. But they must still show that their home instruction plan satisfies the substantial equivalency standard. *See* 8 N.Y.C.R.R. § 100.10. Notably, homeschooled children who receive tutoring or attend classes, in religious or other studies,

are not entitled to publicly funded transportation or mandated services aid at such venues. Petitioners cite no authority for the proposition that parents have the statutory right to send their children to a nonpublic school which fails to provide substantially equivalent instruction, and then supplement that deficient instruction with some amount of home-schooling. That scenario is not contemplated by the Compulsory Education Law.

Even if petitioners' interpretation of the statute were correct, petitioners have failed to show that SED's substantial equivalency regulations conflict with it. A negative substantial equivalency determination issued pursuant to the regulations does not require parents to "unenroll" their children from a nonpublic school, as petitioners allege (Br. at 33; R. 23); children may continue to receive instruction from that entity, even if it may no longer operate as a "school." The regulations require the Commissioner and local school authorities to provide parents "a reasonable timeframe" in which to affirmatively "enroll their children in a different, appropriate educational setting, consistent with Education Law § 3204." 8 N.Y.C.R.R. §§ 130.6(c)(2)(ii), 130.8(d)(7)(ii). But the regulations are silent on *how* parents must ensure adequate instruction for their

children, apart from making clear that parents cannot rely on a nonpublic school which fails to "provide[] compulsory education fulfilling the requirements" of the Compulsory Education Law. *Id.* §§ 130.6(c)(2)(i), 130.8(d)(7)(i).

Nor do SED's substantial equivalency regulations affect the rights and obligations of parents who choose to homeschool their children (which parents are not parties in this case). Indeed, as noted above, parents who choose to homeschool their children have the flexibility to "engage the services of a tutor to provide instruction for all or a portion of the home instruction program." SED, Home Instruction Questions and Answers. And parents "may arrange to have their children instructed in a group situation for particular subjects," religious or otherwise, though "not for a majority of the home instruction program." *Id.* Parents do not, however, have the right to enroll their children in a nonpublic school which fails to meet the substantial equivalency standard, demand State aid for that school, and supplement deficient secular instruction at that school with home instruction.

3. The regulations do not reflect improper legislative policymaking.

Finally, petitioners fail to show that SED's substantial equivalency regulations crossed the line into improper legislative policymaking. (Br. at 42-47.) Petitioners offer their *Boreali* argument, which Supreme Court declined to reach (R. 25), as an alternative ground for affirmance. But the argument is based largely on the same misinterpretations of the statute and regulations discussed above. Properly construed, the regulations do not usurp any legislative function.

On the first *Boreali* factor, petitioners argue that SED made a complex value judgment "by deciding to shutter nonpublic schools that it believes do not comply with the Education Law." (Br. at 43.) Likewise, on the second *Boreali* factor, petitioners argue that SED "wrote on a clean slate by creating a draconian penalty that closes nonpublic schools." (Br. at 43.) And on the fourth *Boreali* factor, petitioners argue that SED has no special expertise "permitting it to decide to penalize nonpublic schools by closing them." (Br. at 45.)

Again, the regulations do not purport to authorize the Commissioner or local school authorities to close any nonpublic schools. The regulations merely reflect that a nonpublic school which fails to

demonstrate substantial equivalency cannot "be deemed a school which provides compulsory education fulfilling the requirements of [the Compulsory Education Law]." 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i). This is the natural consequence of a negative substantial equivalency determination, which the Commissioner and local school authorities are plainly authorized to make. *See* Education Law §§ 305, 3204(2)(v); *Young Advocates for Fair Educ.*, 359 F. Supp. 3d at 220. As such, the regulations merely fill in the details of the statutory regime and give effect to the statute's substantial equivalency mandate. *See Matter of Acevedo v. New York State Dep't of Motor Vehs.*, 29 N.Y.3d 202, 222-24 (2017); *Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.*, 125 A.D.3d 105, 108-09 (3d Dep't 2014), *aff'd*, 27 N.Y.3d 174 (2016). And these regulations "operate squarely within [SED's] area of expertise." *Matter of Acevedo*, 29 N.Y.3d at 226. Thus, the first, second, and fourth factors weigh in favor of finding that SED acted within its statutory authority in promulgating the challenged regulations.

On the third *Boreali* factor, petitioners argue that the Legislature's failed attempts to amend the Compulsory Education Law preclude SED

from enforcing the statute's substantial equivalency mandate. (Br. at 44-45.) This cannot be right because the Felder Amendment—enacted in 2018—explicitly authorizes the Commissioner to conduct substantial equivalency reviews and "determine[] whether nonpublic elementary and secondary schools are in compliance with the academic requirements set forth in" the statute. Education Law § 3204(2)(v); L. 2018, ch. 59, part SSS. This explicit delegation of authority is entitled to far greater weight than the unenacted bills petitioners cite. As the Court of Appeals has made clear in assessing the third *Boreali* factor, "legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences." *Matter of Acevedo*, 29 N.Y.3d at 225 (citation omitted).

Moreover, none of the bills cited by petitioners would have enacted by statute what SED promulgated by regulation. Again, the invalidated regulations provide that instruction at a nonpublic school which fails to demonstrate substantial equivalency cannot fulfill the requirements of the Compulsory Education Law. *See* 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i). The unenacted bills did not contain similar language. They dealt with other matters. For example, Senate Bill S1983 and related

bills would have provided "resources and assistance" for local school authorities in determining whether nonpublic schools provide substantially equivalent instruction. Sponsor's Mem., 2021-2022 Regular Session Senate Bill S1983. Assembly Bill A1317 would have created an administrative mechanism for determining substantial equivalency based on complaints filed by parents, students, or teachers. *See* 2021-2022 Regular Session Assembly Bill A1317. And Senate Bill S9098 would have required the Commissioner to designate an entity with "expertise in the curriculum" of Felder Amendment schools to determine substantial equivalency at those schools. 2017-2018 Regular Session Senate Bill S9098, § 5. Because these bills "dealt with other matters" and did not address the necessary consequence of a negative substantial equivalency determination, they do not support petitioners' argument that "the legislature has unsuccessfully tried to reach agreement on the issue." *Greater N.Y. Taxi Ass'n v. New York City Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 611-12 (2015).

To the extent any of the unenacted bills are even relevant, they do not show that the regulations "address a topic exclusively within the legislative domain." *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d

249, 265 (2018). While the Legislature is free to provide for procedural mechanisms by statute, agencies are authorized to "fill in the interstices" of a statutory regime "by prescribing rules and regulations consistent with the enabling legislation." *Matter of Juarez v. New York State Off. of Victim Servs.*, 36 N.Y.3d 485, 492 (2021) (citation omitted). That is precisely what SED did here.

Petitioners' reliance on *Packer Collegiate Institute v. University of the State of New York*, 298 N.Y. 184 (1948), is misplaced. As SED noted in its opening brief (at 36), *Packer Collegiate* is inapposite because it was a non-delegation case—not a separation-of-powers case under *Boreali*. Moreover, for all the reasons explained above, SED does not construe the Education Law as giving it "discretion to institute new draconian penalties attendant to a licensing scheme" (Br. at 48). SED construes the Education Law as authorizing the Commissioner and local school authorities to determine whether nonpublic schools meet the substantial equivalency standard set by statute. And SED construes the Education Law as dictating the consequence of a negative substantial equivalency determination—namely, that the "nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the

requirements of [the Compulsory Education Law]." 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i). SED acted well within its statutory authority in promulgating these regulations.

CONCLUSION

The Court should reverse the decision below insofar as it declared 8 N.Y.C.R.R. §§ 130.6(c)(2)(i) and 130.8(d)(7)(i) invalid, and either dismiss the proceeding for lack of standing or enter judgment declaring that those regulations are lawful.

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