Speaker 1:

Please rise for the justices of the court.

Hear ye, hear ye, hear ye, all persons having business before this Appellate Division of the Supreme Court held in and for the Third Judicial Department of the state of New York. Let them draw near, give their attention and they shall be heard.

Today's first case is case number CV230756. Matter of Parents of Educational and Religious Liberty in Schools versus Young. Please be seated.

Speaker 2:

Good afternoon, everyone. Welcome to this special session of the Supreme Court Third Judicial Department held here at Albany Law School. We are so grateful to the law school for hosting us for this afternoon's arguments, an annual event that we most appreciate and I'm thrilled to look out and see so many students here to observe the arguments of our court. So welcome everyone.

Before we begin with the arguments, a few basic rules. If you are the appellant in the Third Department, you are allowed rebuttal time. But you must tell me before you begin the argument that you'd like some time for rebuttal and I will attempt to help you save that time.

If you fail to ask me, you can't ask me later. So you must tell me as you begin your argument and I'll reserve that from the time allotted. The time allotted for your arguments is very brief and so we recommend that you go right to the most important legal points that you wish to address this afternoon. And finally this, like all of our proceedings, is webcast. And so we ask you to be mindful of that and particularly if your case involves minors or crime victims and personal information, be aware that the audience is actually possibly even bigger than the people gathered here. So with that said, our first case, did you call it already? Thank you. Good. Mr. Kiernan.

Beasley Kiernan:

May it please the court, Beasley Kiernan for the State Education Department. I'd like to preserve two minutes for rebuttal.

Speaker 2:

Thank you.

Beasley Kiernan:

Parents have the right to enroll their children in a non-public school and the children attending a non-public school have the right to instruction that is substantially equivalent to a public school education stated promulgated the challenged regulations to ensure that all children receive the education to which they're entitled. The regulations give effect to the statute substantial equivalency mandate and state ed acted well within its statutory authority and promulgating them.

Now, Supreme Court made two errors in striking down these rules.

First, Supreme Court misconstrued the regulations as authorizing the commissioner to close on public schools. And second, Supreme Court incorrectly held that the regulations violate parents' purported right to obtain instructions for their kids from multiple sources.

Speaker 4:

Well, respondents are going to suggest that while it doesn't say closure, it's almost equivalent to that. They're going to tell us that by being deemed a nonconforming school, the parents could be subject to penalties for having a child in a school that doesn't conform and the school district has repercussions. Isn't that right?

Beasley Kiernan:

It is not right because a determination as a substantial equivalency is not tantamount to a closure order. There are consequences to be sure if the commissioner or a school district determines that a non-public-

Speaker 4:

So, are you saying that if there's a determination that a school district is nonconforming, that is a non-public school district nonconforming, you're saying that the parents who send their kids to that nonconforming school will not face consequences or will not be deemed to have their kids in a school appropriately recognized by the state?

Beasley Kiernan:

Whether parents comply with their obligations under the compulsory education law is not a matter addressed by these regulations. These regulations focus on whether the non-public school itself satisfies the substantial equivalency standard.

And if it doesn't, then that school is no longer deemed a school which provides compulsory education fulfilling the requirements of the education law. That's the text of the regulations that Supreme Court struck down. And that language is logically required by the statute itself because substantial equivalency is a requirement of the education law. Now, a school may choose to close its doors, but it doesn't have to. It can continue offering instruction in whatever forces it wants to. It's just not entitled to state aid. It's not entitled to transportation pupils.

Speaker 4:

And the parents don't face any consequences potentially descending their kids to that school.

Beasley Kiernan:

Parents would not be able to fulfill their obligations under the compulsory education law by sending their children to that non-public school. That doesn't mean they can't continue sending their kids to that school for instruction in certain courses. For example, the regulations allow for that. So upon receiving a negative determination, parents can start homeschooling their kids. They can supplement with classes at that non-public school as a portion of the home instruction program. That's consistent with the regulations with the education law. And it shows that it doesn't implicate any purported right to obtain instruction from multiple sources.

Now, Supreme Court went a step further and held that parents are not only entitled to continue enrolling their children at the non-public school, they're also entitled to state aid for that education and parents can supplement with home instruction on the side. And it's the state aid piece that's really the problem that's inconsistent with the education law and indeed undermines the substantial equivalency mandate.

Speaker 5:

Are you going to talk about-

Speaker 2:

Probably the same question.

Speaker 5:

Are you going to talk about standing? Are you abandoning the argument?

Beasley Kiernan:

We are not abandoning it. Thank you for reminding me, your Honor.

Petitioners lack standing because the petitioner schools are not at imminent risk of closure. They're not at imminent risk of a negative substantial equivalency determination because four of the five schools are deemed substantially equivalent by virtue of their registration. The fifth school might be subject to periodic reviews.

I'm informed that Rabbi Jacob Joseph's school is interested in pursuing another pathway, the assessment pathway, which would entitle it to be deemed a substantially equivalent school. But in any event, none of the petitioner organizations have come close to satisfying their burdens of their organizational understanding. They haven't shown that any of their members are at remnant risk of closure. And for that reason alone, the decision below should at least be vacated by the state.

Speaker 6:

What about the idea of facing a future threat?

Beasley Kiernan:

It's certainly possible that parents in a different case could bring a challenge if they foresee that they-

Speaker 6:

Five years from now one of these schools is in danger, somehow it loses its certification.

Beasley Kiernan:

Well, if there is a-

Speaker 6:

And then challenge these regulations or are we going to have the attorney general standing before us arguing, "Well, you're too late. You should have challenged it within four months of enactment of a new regulation."

Beasley Kiernan:

To the extent there's a SAPA claim here; I think that's what our position would be. Supreme Court properly dismissed that claim and petitioners haven't appealed that. So that's not an issue on appeal.

But it's important to note that this is a facial challenge to these regulations. Of course, parents or schools can bring an as applied challenge at some later date. If there's a final determination that a school doesn't demonstrate substantial equivalency, then that's subject to Article 78 review, a number of the [inaudible 00:08:32] you have raised constitutional claims. In a proper proceeding or action, those

claims could be recognizable, but in this particular case, Supreme Court properly dismissed those claims and petitioners have appealed that.

Speaker 7:

Is closure of the schools the only way petitioners can get standing?

Beasley Kiernan:

I think no, your Honor. If parents or a school foresaw that it would be subject to a final determination in the near future and then they said we might have to close for that reason. They might have standing in that situation.

Speaker 7:

So once the state education department determines that school is not in compliance, so then you start putting these steps into place for them to get into compliance, would that give them standing at that point?

Beasley Kiernan:

To the extent they're challenging the process itself?

Speaker 7:

Right.

Beasley Kiernan:

Certainly challenge that and the declaratory judgment action. But these petitioner schools have not been subject to any sort of preliminary determination as to substantial equivalency. Again, four of five are deemed substantially equivalent as a matter of course, and there hasn't been any determination as to the fifth. Briefly on the [inaudible 00:09:47] claim-

Speaker 2:

Before you turn to that, could you address, please, in the reply, you said there was raised this concept of the multiple source approach and in your reply brief you asserted that there is no statutory right to obtain substantially equivalent instruction from multiple sources. Can you just contextualize that for me, Mr. Kiernan? Explain the multiple source and your position relative to that.

Beasley Kiernan:

Sure, sure. This is all in response to Supreme Court's ruling on this issue. The claim was not presented and the petition... So it's not really a record on this claim below for that regional loan. It's not a ground to affirm, but our argument is that the education law does not contemplate the kind of hybrid educational model Supreme Court had in mind in which parents continue sending their children to a non-public school, which fails to demonstrate substantial equivalency, continue receiving state aid for that school, and then supplement the home instruction on the side.

State Ed has homeschooling regulations, which are not an issue here. So long as parents are satisfying those regulations, they can utilize instruction at non-public schools or anywhere else. One of the cases, petitioner site matter of Myers brings that point home. In that case, the parents were providing

instruction at home and they were also sending their kids to various institutions for classes. For example, the Metropolitan Opera Ballet School. And that's fine, but it's clear that the Metropolitan Opera Ballet School is not a school which provides compulsory education fulfilling the requirements of the educational law. That's all the regulations say and it's perfectly consistent with the statute. [inaudible 00:11:39].

Speaker 2:

Thank you. We need a moment to address. There's an issue I understand with the microphones, so before your argument, I'm told hence the buzzing noise that we're experiencing. So I see a lot of nods, Chris. You got a lot of applause for Chris there, so thank you. If it works. That's right. Okay. Thank you.

Mr. Schick:

Thank you, your Honor. May it please the court [inaudible 00:12:14] on behalf of petitioner respondents.

Your Honor, the substantial equivalence requirement has been a part of the compulsory education law for more than 125 years. It has always been understood as an obligation on parents. That is why a few years ago, the state education departments' own published guidance stated that local school authorities "do not have any direct authority over private schools." Nothing in the compulsory education law authorizes SED to unilaterally direct parents to unroll their children from a private school. The SED believes does not meet its current interpretation of the substantial equivalent standard. And nothing in the compulsory education law authorizes SED to unilaterally force the closure of that private school, nor is there anything in the compulsory education law that prohibits parents from fulfilling their obligation to ensure the education of their children by a combination of educational sources or modalities.

Yet in 2022, the challenge regulations were adopted by SED. They require local school authorities to direct parents to unenroll their children from private schools, force the closure of those schools and prohibit parents from satisfying their compulsory education obligation through a combination of sources.

Speaker 4:

But that hasn't really applied here. That hasn't really occurred here, right? Four of the five yeshivas are members of the state education department and with regard to the fifth, there's no intent at this time that they would be deemed to be non-conforming. Isn't that correct?

Mr. Schick:

Your Honor, the Court's Appellate Divisions and the Court of Appeals has repeatedly counseled that in context surely of an Article 78 with a four-month statute of limitations, we do not allow agencies to structure their regulation to avoid a challenge by saying the harm is not here. The harm can't happen in the first four months. The court said that Stevens... The Court of Appeals, it was a divided Court of Appeals except on the issue of standing. On the issue of standing, it was unanimous that the state could not adopt its regulations.

In that case, about the DNA data bank that were insulated because no harm came. It was indisputable. There was no harm at that time at all. Not a single petition in the state had been investigated. It didn't matter. A facial challenge to the promulgation of a regulation is entitled to proceed. Your Honor, it says specifically where the parties seek to challenge administrative rulemaking, a subject to the relatively short statute of limitations set forth in CPLR217-

Speaker 4:

So this is a facial challenge in which you're basically saying that the regulation in question here exceeds the or the mandate of the statute. Is that correct?

Mr. Schick:

Absolutely.

Speaker 4:

And that somehow they're engaged in some sort of policy making. Is that correct?

Mr. Schick:

Well, it well exceeds the authority. They were provided by the education law. And in fact, it's contrary to the education law. That's correct, your Honor. It truly closes the school. There's been this semantic game going on about sort of confusing the building and the school. That they're not putting a Department of Health closure order on the building, but they're saying it's not a school when saying you can't have students there. It's not a school and just Robert got that. And in fact, Counsel has been trying in the papers and an argument to dance around the issue. But a straight-up question, does state ed have the authority to close private schools?

Speaker 2:

But Mr. Schick, it is more nuanced than that because it's not closing the school. And I understand the distinction between the building and the operation, but what they're really saying is we have the authority to deem something to not be offering a substantially similar education and thus deny state funding. Isn't that really what's-

Mr. Schick:

Your Honor, we request, we hope that the court will look at the record. In fact, state aid never came up in their papers below. There was extensive briefing. They had four rounds of briefing before Supreme Court, state aid never came up. In their opening briefing, state aid did not come up. It's an entire red herring. Justice Robert didn't say the words say that it is not at all the issue. So therefore it hasn't even been briefed or discussed. The way aid works. Students are entitled to aid, not schools. Schools in New York state do not get state aid from the state. Students are entitled to certain aid based on choices parents make. It doesn't happen to schools. They're entitled to various forms of aid, but it didn't come up below. It wasn't an issue. It's not an issue in this case, if there's textbook aid the student gets, and it turns out they don't use the textbook, so obviously they're entitled to the money.

It's not a penalty, that's because it's not there. But fundamentally, when you say students can't come, parents are subject to penalties there. And Your Honor, think about... It's not a hypothetical. It happened. It relates to where we are. A number of schools, yeshivas, that are members of the organizational petitioners have in fact been subject to determinations by the state. They call them that final, the preliminary, then there's a few other steps, but they've said it clearly. They've said in a particular school, which I believe also filed Amicus brief, that school, we say your English language instruction from grades one through grade eight perfectly fine. Your math instruction, grade one through grade eight, perfectly fine. Your science instruction, the older grades, perfectly fine. It's substantially equivalent.

However, because we have a problem with your record keeping on your hiring processes, and we didn't like the lower grade science class when we saw it, you're not substantially equivalent. It's all or nothing. It becomes useless. And the law, your Honor-

Speaker 2:

Is this a hypothetical, Mr. Schick or are you asserting this is in our record?

Mr. Schick:

It is in your record, your Honor.

Speaker 2:

Okay.

Mr. Schick:

It's in your record, in our brief where we cite to that, it's in a footnote involving an article, which I'll get through that site in a minute, that discusses it, and it's a lot more in the record than some notion that some school very recently applied for assistant pathway, which the state has put forward.

But Your Honor, it is indisputable the state is taking an all or nothing approach, and it's not only offensive to the schools. The compulsory education law is directed to parents. It says in 3212, those in parental authority have to ensure that their children receive the necessary education. And that's the way it's structured that way is because what the state is concerned about in the compulsory education law is that children not remain in ignorance.

Therefore, the child needs the education. What the state in this litigation is concerned about is control. They don't say a word about education. They say we need to be able to effectively, they concede, force the closure of the school. We need to limit the parental choice that they want to make. You need to constrict it. You can't combine multiple sources. And just a moment on that. First of all, it's not necessary to have a grant of statutory authority for that. Parents have had that authority for at least a hundred years since the United States Supreme Court first said that the most fundamental right-

Speaker 4:

Please bear with me to understand the gist of your legal argument. You say that the statute requires that in non-public schools, they be substantially conforming to the curriculum or to what is required in public schools. That's the statutory mandate. The reg that you challenge, which you say exceeds or is a violation of the separation of powers, basically says for those school districts that are found not to, they shall be deemed non-conforming.

So you say the reg then exceeds the mandate of the statute and violates the separation of powers. Is that right?

Mr. Schick:

If I can clarify, your Honor, what the compulsory education law says explicitly is that a parent has to ensure their child receives instruction that is substantially equivalent. It's a mandate on parents, not on schools. It is not a statute on schools. And that's why until these regulations for a decade, the published guidance of SED... It's in the record at page 75. The guidance that was published by SED until these regs, page 75, it says that local school authorities have no direct authority over public schools.

Your Honor, the goal was to ensure the child gets educated. Parents have the right to direct that through a combination of sources that comes from the federal Constitution. It's been from Society of Sisters 99 years ago, up to today, there's been at least 10 cases of the United States Supreme Court confirming that. But in addition to that, it's clear the legislature was okay with that.

Because trial performance has a statute about that. It says they could combine education, they could go to class in school, private school or public school, whichever they want for the classes that they couldn't make. And then they could have their arts career and get tutoring on the side and you could combine those two. That's in the statute that we cite in our papers. There are 3602C itself. The educational law itself says explicitly that a parent who chooses private school can choose for some services in public school and combine the two. So clearly it is permitted. If I could just-

Speaker 2:

And Mr. Schick though, before you run out of time, I want to circle back around because to me feels very substantial in this case. I heard your argument regarding the facial challenge to the regulation. I understand that. But standing is a major issue here, and I think you have to concede that there has been no impact to date on any of the organizations or petitioners.

Mr. Schick:

I'm glad we take it back to standing and I hope I can give the full presentation I want to on this issue. First of all, they said a school does not have to wait until the unconstitutional or extra legal harm is visited upon it. That's clear through decisions from the Court of appeals, this court, other appellate divisions. Your Honor, if one looks at the Stevens case cited in our papers, and it cited to page 16 and 17 of our brief, the first department explained that the government constrains you of standing, "would result in no one having the ability to challenge the promulgation of this regulation," that the 20683 at 100. And the court continues. That is true even if some party could later raise a challenge to the regulation in the context of a defense of a proceeding arising to the DNA match.

And that decision was affirmed by every judge of the Court of Appeals. I was citing the Appellate Division, Steven's decision, but again, the Court of Appeals and a divided decision, all seven justices determined that there was standing. But there are cases that are replete with that schools suffer a harm when SED holds over the prospect that parents... Parents face criminal penalties. The post-education law had an enforcement mechanism in it. It had teeth in it. It says in 3233 that a parent who does not comply with his or her compulsory education obligation, a parent who doesn't ensure that her child receives instruction that is substantially equivalent, is subject to a range of penalties starting from monetary penalties, running through criminal penalties.

So the difference is the statute deals with it. There's two changes that these regulations make. Number one, the regulations want to make the schools the subject to the penalty, and more importantly, even worse, SED says, we have the unilateral authority to be judge, jury, and executioner. We promulgate these regs, we interpret them, we review the schools and say that you don't comply, and then we meet out the penalty-

Speaker 2:

But Mr. Schick-

Mr. Schick:

[inaudible 00:24:02] says go to court.

Speaker 2:

One last thing on this subject of standing speculative harm because the regs embody an entire collaborative review process.

Mr. Schick:

Your Honor, it is fundamentally... The yeshivas that are represented here today for the object and the target of these regulations, the state has made clear its view by issuing well over a dozen preliminary determinations why they think it's going to change. All they're doing, your Honor, is what the Court of Appeals and the Appellate Division said they can't do, is they're structuring it in a way that avoids the promulgation. It's not something to say they could defend it later. A school can't operate, your Honor, if their parents wonder whether they're going to be subject to criminal penalties by sending the child there.

No one's going to enroll their child for kindergarten or first grade if it may be when they hit third grade, they find out you can't be here anymore. Parents fundamentally... But again, it's a fundamental inversion of the relationship of the way the statute works, which that is on parents, not on schools. I just want to please ask the court if I could have one moment on the issue of-

Speaker 2:

You may, yes.

Mr. Schick:

Thank you, your Honor. On the issue of standing... Because Justice Robello conducted an extensive hearing prior to her decision. The hearing itself, as I said, there were numerous rounds of briefing. That's why the record before court is 3000 pages or more. And during that hearing, after all that extensive briefing and the hearing went for about an hour, just March 1st of last year. There was extensive questioning about the issue of standing. And the transcript of that hearing was not included when the original record on appeal was submitted, but it was supplemented after briefing.

And the court has in front of the supplemental record, which has the transcript of oral argument. One will see in that transcript, two very important things. First, it is absolutely clear that Judge Robert made the correct factual determination that the record contained sufficient allegations for standing. And we start with the organizational plaintiff, your Honor, because they're listed first. Pearls have listed first then [inaudible 00:26:16]. And Your Honor, it's the SED's own concessions.

If one looks at the record at page 1060 and 61, that's part of the affidavit that Commissioner Rosa herself submitted in the court to the court below. At paragraphs 71 and 72 of that affidavit she writes that during the development of the regulations, she met with Pearls, Torah Umesorah, [inaudible 00:26:45] Israel. The three [inaudible 00:26:46] plaintiffs because they were stakeholders representing the interests of their member yeshivas. Indeed. Indeed. There's also letters written by Commissioner Rosa to this case, Torah Umesorah, which discusses the regulations. It wasn't in the development of the regulations when they were proposed but not yet adopted and refers specifically to the impact that the department's proposed regulations would have "on the hundreds of yeshivas united under the banner of the National Society of Hebrew Day Schools," which is Torah Umesorah. That's at the record, 880, 883.

Your Honor, [inaudible 00:27:26], because I think this is important.

Speaker 2:

Mr. Schick. We really... You have to draw. I've been very generous

Mr. Schick:

[inaudible 00:27:32] because I'm just giving the record sites, and I'll leave the argument if I may, your Honor. There are numerous correspondence from LSA's City Department of Education to yeshivas about the application of substantial equivalence regulations, these new regulations. And in each case, they're copied.

They're copied to Mr. Yossi Grunwald of Pearls because he runs Pearls and he represented the yeshivas in that. And in fact, he's the person who verified the complaint. It was a verified petition verified that Mr. Grunwald... If one looks, your Honor, at the record, 3064 to 67. It's a January 4th, 2023 letter. Your Honor, at the record at page 3087 is an October 3rd, 2022 letter from an LSA [inaudible 00:28:21] yeshiva. A copy of Mr. Grunwald. Your Honor, I'll just do one more. If you look at the record, 3088 to 3091. It's November 10th, 2022 letter from the LSA [inaudible 00:28:32] yeshiva copying Mr. Grunwald.

Speaker 2:

Mr. Schick, I'm sure addressed in your brief. Thank you very much. And we've well exceeded the allotted time. Thank you. Mr. Kiernan. You recognize that we were well beyond and I must now offer you the opportunity to have additional time as well if required. Thank you.

Beasley Kiernan:

Just briefly on standing, the issue here is that none of the petitioner organizations named their members in the record below, and they didn't describe any consequences that any specific members might face. And that's why they lack standing to assert any claims on behalf of schools that have been at least subject to a preliminary substantial equivalency determination. And there have been several.

Speaker 2:

You'd have to agree that they have the right to bring the facial challenge though to the regs.

Beasley Kiernan:

Yes. Schools that have been subject to a preliminary determination, and as they're finishing up the collaborative review process, at a certain point, they may have standing to bring a facial challenge to the regulations to be sure. But that's just not this case. Petitioners also are not, they lack standing to serve any claims on behalf of parents who might want education from multiple sources for their children.

There are certainly no affidavits in the record from parents who want to do that. And Mr. Schick allusions to several statutes which permit hybrid education to bring home the point that there are a few discrete areas in which the statute allows for hybrid education. For example, gifted and talented programs and disability services. There's also a specific statute for child performers. That's labor law section 152. Otherwise, the statute contemplates that children are either enrolled in public school, they're enrolled in a non-public school, or they're receiving home instruction.

And state ed has long interpreted those statutes as reasonably requiring parents to fit into one of those slots. And I want to conclude by noting that it's undisputed that the commissioner has the authority to make substantial equivalency terminations. In 2018, the legislature passed the elder amendment, which directed the Commissioner valuing certain non-public schools, taking into account the entirety of the curriculum across grade levels and determine whether those schools are substantially in [inaudible 00:31:04]. The regulations here to implement that statute by providing a framework for the

commissioner and school districts who made substantial equivalency determinations that necessarily has consequences for state aid.

For example, mandated services aid is available only for schools which provide instruction in accordance with Section 3204 of the education law. That's the statute that covers substantial equivalency. It simply beggars disbelief to rule as Supreme Court did that the commissioner can't make these determinations and that these determinations have no consequences for non-public schools. The regulations are consistent with the statute. They give effect to the statute's substantial equivalency mandate, and we urge the court to first the judgment below and declare these valid in their entirety. Thank you very much.

Speaker 2:

Thank you all. No, I'm sorry. Not allowed in the... Yeah. Thank you. Thank you.

Speaker 1:

The next case on the calendar.

Speaker 2:

All right, Beth.

Speaker 1:

The next case on the calendar is case number 113481, People versus Arthur Morgan, Jr.