

No. APL-2024-00125

To be argued by:
BEEZLY J. KIERNAN
15 minutes requested

State of New York
Court of Appeals

In the Matter of the Application of

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-Appellants,

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-Respondents.

BRIEF FOR RESPONDENTS

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
BEEZLY J. KIERNAN
*Assistant Solicitor General
of Counsel*

LETITIA JAMES
*Attorney General
State of New York*
Attorney for Respondents
The Capitol
Albany, New York 12224
(518) 776-2023
(518) 915-7723 (f)
Beezly.Kiernan@ag.ny.gov

Dated: February 13, 2025

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
PRELIMINARY STATEMENT.....	1
QUESTIONS PRESENTED	5
STATEMENT OF THE CASE	5
A. Legal Background	5
1. Statutory Framework	5
2. The Felder Amendment.....	8
3. SED’s Substantial Equivalency Regulations	10
B. Procedural History	16
ARGUMENT	21
POINT I	
SED’S SUBSTANTIAL EQUIVALENCY REGULATIONS ARE CONSISTENT WITH THE EDUCATION LAW	21
A. The Regulations Ensure that Nonpublic Schoolchildren Receive Substantially Equivalent Instruction.	22
B. Petitioners Misinterpret the Regulations as Authorizing the Closure of Nonpublic Schools.	29
C. The Regulations Do Not Impair Any Statutory Right to Instruction from Multiple Sources.	35
1. The Education Law does not entitle parents to supplement deficient instruction at a nonpublic school with partial home instruction.	35

2. The regulations do not impair any rights parents have under the Education Law. 40

POINT II

SED DID NOT ENGAGE IN LEGISLATIVE POLICYMAKING IN VIOLATION OF THE SEPARATION-OF-POWERS DOCTRINE 44

A. *Boreali* Factor One: SED Made No Complex Policy Judgment. 45

B. *Boreali* Factor Two: SED Engaged in Interstitial Rulemaking. 47

C. *Boreali* Factor Three: The Legislature Has Not Tried, and Failed, to Set Policy in This Area. 49

D. *Boreali* Factor Four: SED Acted Within Its Area of Expertise. 53

CONCLUSION 55

AFFIRMATION OF COMPLIANCE

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Andryeyeva v. New York Health Care, Inc.</i> , 33 N.Y.3d 152 (2019)	30
<i>Aristy-Farer v. State of New York</i> , 29 N.Y.3d 501 (2017)	5
<i>Boreali v. Axelrod</i> , 71 N.Y.2d 1 (1987)	44, 46
<i>Campaign for Fiscal Equity v. State of New York</i> , 86 N.Y.2d 307 (1995)	22
<i>Garcia v. New York City Dep’t of Health & Mental Hygiene</i> , 31 N.Y.3d 601 (2018)	45, 48
<i>Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn.</i> , 25 N.Y.3d 600 (2015)	53
<i>Matter of Acevedo v. New York State Dep’t of Motor Vehs.</i> , 29 N.Y.3d 202 (2017)	45, 47-50, 54
<i>Matter of Adam D.</i> , 132 Misc. 2d 797 (Fam. Ct., Schoharie County 1986).....	36
<i>Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib.</i> , 2 N.Y.3d 249 (2004)	22
<i>Matter of Juarez v. New York State Off. of Victim Servs.</i> , 36 N.Y.3d 485 (2021)	29, 47, 53
<i>Matter of Lash</i> , 92 Misc. 2d 642 (Fam. Ct., Nassau County 1977).....	36
<i>Matter of LeadingAge N.Y., Inc. v. Shah</i> , 32 N.Y.3d 249 (2018)	44, 46, 53

Cases	Page(s)
<i>Matter of New York State Assn. of Ind. Schs. v. Elia</i> , 65 Misc. 3d 824 (Sup. Ct., Albany County 2019)	11
<i>Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health & Mental Hygiene</i> , 23 N.Y.3d 681 (2014)	46
<i>Matter of NYC C.L.A.S.H., Inc. v. New York State Off. of Parks, Recreation & Historic Preserv.</i> , 125 A.D.3d 105 (3d Dep’t 2014)	47
<i>Matter of Puah B. (Autumn B.)</i> , 173 A.D.3d 422 (1st Dep’t 2019)	42
<i>Packer Coll. Inst. v. University of State of N.Y.</i> , 298 N.Y. 184 (1948)	48
<i>Pierce v. Society of Sisters</i> , 268 U.S. 510 (1925)	35
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	35, 38
<i>Young Advocates for Fair Educ. v. Cuomo</i> , 359 F. Supp. 3d 215 (E.D.N.Y. 2019)	24, 48
 Constitutions	
N.Y. Const. art. V, § 4	6
 State Statutes	
L. 1894	
ch. 671, § 3	6, 23
L. 1974	
ch. 507	14, 27, 33

State Statutes

Page(s)

L. 2018

ch. 59, part SSS..... 8, 50

Education Law

§ 2(12)..... 7
§ 101 6
§ 207 6, 47
§ 305 48
§ 305(1) 6
§ 305(2) 6
§ 801(1)-(2) 7, 23, 46
§ 803(4) 7, 23, 46
§ 804 7, 23, 46
§ 806 7, 23, 46
§ 807 7, 23, 46
§ 808 7, 23, 46
§ 3204 13-14, 32, 39
§ 3204(1) 6-7, 38
§ 3204(2) 7
§ 3204(2)(i) passim
§ 3204(2)(ii) 9, 24
§ 3204(2)(ii)-(iii) 8, 23, 37
§ 3204(2)(ii)-(v) 50
§ 3204(2)(iii) 10, 24, 37, 46
§ 3204(2)(v) 10, 24, 28, 37, 48, 50
§ 3204(3)(a) 7, 23
§ 3205 7
§ 3205(1)(a) 3, 6, 41
§ 3205(2)(c)(ii) 37
§ 3210(2) 7
§ 3212(2)(b) 8, 30, 33, 41
§ 3233 8, 41
§ 3234 8
§ 3602(1)(n) 36
§ 3602-c 39
§ 3635(1)(a) 14, 27, 33

State Statutes	Page(s)
Family Court Act	
§ 1012(f)(i)(A)	42
Labor Law	
§ 152	40
 State Regulations	
8 N.Y.C.R.R.	
part 130	12, 25
§ 100.10	36
§ 100.10(a)	37
§ 100.22	40
§ 130.1(b)	41
§ 130.1(d)	26
§ 130.3	25
§ 130.3(a)	12
§ 130.3(a)(1)	12, 25
§ 130.3(a)(3)	12
§ 130.4	13, 25
§ 130.5	13, 25, 41
§ 130.6	41
§ 130.6(a)	13, 26, 31
§ 130.6(a)(1)(iii)	13, 26, 28, 31, 35
§ 130.6(a)(2)	13, 26, 28, 31, 35
§ 130.6(a)(3)	31
§ 130.6(b)	13, 26
§ 130.6(c)(2)(i)	passim
§ 130.6(c)(2)(ii)	15, 27, 42-43
§ 130.6(c)(2)(iv)	15, 27, 42
§ 130.8	41
§ 130.8(a)-(d)	13, 26, 31
§ 130.8(d)	13, 26
§ 130.8(d)(2)	13, 26, 28, 31, 35
§ 130.8(d)(7)(i)	passim
§ 130.8(d)(7)(ii)	15, 27, 42-43
§ 130.8(d)(7)(iii)	15, 27, 42

State Regulations **Page(s)**

8 N.Y.C.R.R. (cont'd)

 § 130.9 13

 § 130.14(a) 30

 § 130.14(a)-(b) 15

 § 130.14(b) 31

 § 130.14(c) 15, 31

12 N.Y.C.R.R.

 § 186-5.1 40

Miscellaneous Authorities

2015-2016 Regular Session Assembly Bill A9947 51

2015-2016 Regular Session Senate Bill S7629-A 51

2017-2018 Regular Session Assembly Bill A1305 52

2017-2018 Regular Session Assembly Bill A4367 51

2017-2018 Regular Session Senate Bill S1733 52

2017-2018 Regular Session Senate Bill S1366 51

2019-2020 Regular Session Assembly Bill A3272 52

2019-2020 Regular Session Senate Bill S142 52

2019-2020 Regular Session Senate Bill S6589 51

2021-2022 Regular Session Assembly Bill A1317 52

2021-2022 Regular Session Senate Bill S1983 51

2023-2024 Regular Session Assembly Bill A2832 51-52

2023-2024 Regular Session Senate Bill S5462 52

Appeal of Fusion Academy-Brooklyn, 56 Ed. Dep't Rep.,
Decision No. 17,070, 2017 WL 1408921 (2017) 14

Miscellaneous Authorities	Page(s)
“Elsewhere,” Merriam-Webster.com, available at https://www.merriam-webster.com/dictionary/elsewhere	38
SED, Home Instruction Questions and Answers, available at https://www.nysed.gov/nonpublic-schools/home-instruction-questions-and-answers	36
SED, Substantial Equivalency Implementation Guidance, available at https://www.nysed.gov/sites/default/files/programs/nonpublic-schools/final-se-guidance_08-23-2023-2.pdf (Aug. 23, 2023)	12

PRELIMINARY STATEMENT

New York law requires that instruction at a nonpublic school “be at least substantially equivalent” to the instruction provided at public schools. Education Law § 3204(2)(i). In furtherance of this statutory mandate, the New York State Education Department (SED) and Board of Regents promulgated regulations in 2022 that set forth a process for reviewing whether nonpublic schools provide substantially equivalent instruction. The review process under the regulations is collaborative and it provides opportunities for remediation. At the end of that review process, the Commissioner of Education and local school authorities are responsible for determining whether a nonpublic school has met the minimum substantive standards for instruction set by statute. The regulatory provisions challenged on this appeal state the logical consequence of a determination that a nonpublic school does not provide substantially equivalent instruction: such a nonpublic school “shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law,” also known as the Compulsory Education Law. 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i).

Petitioners brought this hybrid C.P.L.R. article 78 proceeding and declaratory judgment action challenging the regulations on their face. Supreme Court, Albany County (Ryba, J.), granted the petition in part and held that SED exceeded its statutory authority by promulgating the above two provisions. The court otherwise rejected petitioners' claims and upheld the regulations. On appeal, the Appellate Division, Third Department reversed in part and upheld the regulations in their entirety. As the court explained, the regulations are a proper exercise of SED's authority to enforce the substantial equivalency standard and do not conflict with any statutory provisions.

This Court should affirm. SED's regulations are consistent with the Education Law. By setting forth a process for reviewing whether nonpublic schools meet the substantive standards for instruction set by statute, the regulations give effect to the Legislature's substantial equivalency mandate while providing due process and opportunities for remediation to nonpublic schools. And the specific provisions challenged here merely state the necessary consequence of a negative substantial equivalency determination: instruction at that nonpublic school does not fulfill the requirements of the Compulsory Education Law.

Petitioners fail to show any statutory conflict. First, petitioners misconstrue the regulations as improperly authorizing the “closure” of nonpublic schools. That is not so. The regulations are designed to assist all nonpublic schools achieve substantial equivalency and give them ample opportunity to remediate any deficiencies. Only if a nonpublic school fails to remediate does it lose its status as a school under the Compulsory Education Law. That is not equivalent to “closure” because such an institution may continue to provide extracurricular instruction and any prekindergarten, kindergarten, and higher education programs, which are not subject to compulsory education requirements. To be sure, as a result of a final negative substantial equivalency determination, parents may no longer rely upon the institution to meet their obligation to ensure that their children “attend upon full time instruction,” Education Law § 3205(1)(a), and the institution is no longer entitled to state aid or state-funded transportation for its pupils of compulsory attendance age. But these consequences flow from the Education Law itself and simply give effect to the substantial equivalency requirement. The regulations do not conflict with the Education Law merely by setting forth a framework for making substantial equivalency determinations.

Second, the regulations do not impair any purported right of parents to provide their children with substantially equivalent instruction through a combination of sources because no such right exists. Petitioners cite no provision of the Education Law entitling parents to supplement deficient instruction at a nonpublic school with home instruction. Moreover, the regulations impose no new restrictions or obligations on parents. Parents are already obligated by statute to ensure that their children attend upon full time instruction that meets state standards. Thus, after a final negative substantial equivalency determination, parents are notified that they need to enroll their child either at a different (substantially equivalent) nonpublic school, a public school, or an approved home instruction program. That is merely another necessary consequence of a negative substantial equivalency determination.

Petitioners' separation-of-powers argument is similarly unavailing. SED's regulations do not cross the line into legislative policymaking; rather, the Legislature itself imposed the substantial equivalency mandate. SED engaged in typical interstitial rulemaking by setting forth a process for determining whether nonpublic schools satisfy the substantive standards for instruction set by statute. Because SED's regulations

are wholly consistent with the Education Law and do not fall afoul of the separation-of-powers doctrine, this Court should uphold the regulations in their entirety.

QUESTIONS PRESENTED

1. Whether the Appellate Division correctly held that SED’s substantial equivalency regulations are consistent with the Education Law.
2. Whether the Appellate Division correctly held that SED did not violate the separation-of-powers doctrine in promulgating the challenged rules.

STATEMENT OF THE CASE

A. Legal Background

1. Statutory Framework

The New York State Constitution requires the State to offer children “the opportunity of a sound basic education.” *Aristy-Farer v. State of New York*, 29 N.Y.3d 501, 505 (2017) (quoting *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 316 [1995]). To carry out this constitutional mandate, the Education Law vests SED with “the general management and supervision of all public schools and all of the

educational work of the state.” Education Law § 101. The head of the department is the Board of Regents. *See id.*; *see also* N.Y. Const. art. V, § 4. “Subject and in conformity to the constitution and laws of the state,” the Board of Regents “shall exercise legislative functions concerning the educational system of the state, determine its educational policies, and, except [] as to the judicial functions of the commissioner of education, establish rules for carrying into effect the laws and policies of the state, relating to education.” Education Law § 207. The Commissioner of Education, who is appointed by the Board, is responsible for “execut[ing] all educational policies determined upon by the board of regents.” *Id.* § 305(1). The Commissioner is also responsible for “advis[ing] and guid[ing] the school officers of all districts and cities of the state in relation to their duties.” *Id.* § 305(2).

Since 1895, New York’s Education Law has required that minors “attend upon full time instruction.” Education Law § 3205(1)(a); L. 1894, ch. 671, § 3. Minors “may attend at a public school or elsewhere.” Education Law § 3204(1). But “[i]nstruction given to a minor elsewhere than at a public school,” *i.e.*, either 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.” *Id.* § 3204(2)(i).

Article 65 of the Education Law, known as the Compulsory Education Law, sets forth certain minimum requirements for instruction. For example, only “a competent teacher” may provide instruction. Education Law § 3204(2)(i). And required subjects must be taught in English, subject to certain exceptions for students with limited English proficiency. *Id.* These provisions apply to public and nonpublic schools alike. *See id.* § 3204(1) (“The requirements of this section shall apply to such a minor, irrespective of the place of instruction.”). Education Law § 3204(3)(a) lists the core subjects required to be taught at public schools, while other provisions of the Education Law require instruction in specific topics (including civics, highway safety, and fire drills) at both public and nonpublic schools. *See id.* §§ 801(1)-(2), 803(4), 804, 806, 807, 808.

Local school authorities, *i.e.*, school district boards, have the primary responsibility for ensuring that resident children receive the instruction to which they are entitled under the Education Law. *See, e.g.*, Education Law §§ 2(12), 3204(2), 3205, 3210(2). The Commissioner is

charged with supervising the enforcement of the Compulsory Education Law and may withhold state money from school districts that willfully fail to enforce the provisions of the Compulsory Education Law, including the substantial equivalency requirement. *Id.* § 3234. Additionally, parents who fail to cause their child to attend upon required instruction, *id.* § 3212(2)(b), are subject to civil and criminal penalties, *id.* § 3233.

2. The Felder Amendment

In 2018, the Legislature enacted a bill commonly known as the “Felder Amendment” after the bill’s sponsor, State Senator Simcha Felder. L. 2018, ch. 59, part SSS. This legislation shifts responsibility for making final substantial equivalency determinations at certain non-public schools from local school authorities to the Commissioner of Education. These “Felder Amendment schools” are defined as nonprofit corporations with a bilingual program and extended hours, among other criteria. Education Law § 3204(2)(ii)-(iii).

The Felder Amendment also provides additional—though not the exclusive—criteria for the Commissioner to determine whether Felder Amendment schools meet the substantial equivalency standard. For nonpublic elementary and middle schools subject to the Amendment, the

Commissioner must determine whether the schools provide “academically rigorous instruction that develops critical thinking skills in the school’s students, taking into account the entirety of the curriculum.”

Education Law § 3204(2)(ii). The Amendment specifically requires:

- instruction in English that will prepare pupils to read fiction and nonfiction text for information and to use that information to construct written essays that state a point of view or support an argument;
- instruction in mathematics that will prepare pupils to solve real world problems using both number sense and fluency with mathematical functions and operations;
- instruction in history by being able to interpret and analyze primary text to identify and explore important events in history, to construct written arguments using the supporting information they get from primary source material, demonstrate an understanding of the role of geography and economics in the actions of world civilizations, and an understanding of civics and the responsibilities of citizens in world communities; and
- instruction in science by learning how to gather, analyze and interpret observable data to make informed decisions and solve problems mathematically, using deductive and inductive reasoning to support a hypothesis, and how to differentiate between correlational and causal relationships.

Id.

For nonpublic high schools subject to the Felder Amendment, the Commissioner must determine “if the curriculum provides academically rigorous instruction that develops critical thinking skills in the school’s

students, the outcomes of which, taking into account the entirety of the curriculum, result in a sound basic education.” Education Law § 3204(2)(iii). As noted, the Felder Amendment designates the Commissioner 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).

3. SED’s Substantial Equivalency Regulations

Since at least 2001, SED has offered guidance to local school authorities on how to determine whether nonpublic schools satisfy the substantial equivalency standard. (R. 1053-1054.) This guidance did not mandate a specific process for reviewing substantial equivalency at nonpublic schools. In the absence of a process for such review, and in light of concerns that neither local school authorities nor nonpublic schools fully understood their obligations regarding substantial equivalency, it became apparent to SED that school districts were not ensuring that all students at nonpublic schools received the instruction to which they were legally entitled. (R. 1054-1057.) SED updated this guidance in 2018. (R. 1058-1059.) This updated guidance, which did not take the form of regulations, included specific timeframes for reviewing substantial

equivalency at nonpublic schools. (R. 1059.) Supreme Court, Albany County (Ryba, J.), invalidated this guidance as an unpromulgated rule, in violation of the State Administrative Procedure Act (SAPA). *Matter of New York State Assn. of Ind. Schs. v. Elia*, 65 Misc. 3d 824, 830 (Sup. Ct., Albany County 2019). As a result, there was no uniform, statewide process in place to review substantial equivalency at nonpublic schools. (See R. 1062-1065.)

Following the invalidation of the substantial equivalency guidance and the enactment of the Felder Amendment, SED commenced the rulemaking process at issue in this case. SED held numerous meetings with stakeholders in the educational community, including several of the petitioners in this proceeding, and prepared a report summarizing the feedback from these meetings. (R. 1060-1062.) SED also reviewed over 350,000 comments on its proposed rules. (R. 1066-1068.) SED's final rules were designed to guide local school authorities in fulfilling their responsibilities under the Education Law to evaluate whether students at the nonpublic schools located in their districts are receiving substantially equivalent instruction, and how to do so in a fair, orderly, and respectful manner. (R. 1664, 1666.) The Board of Regents voted to adopt the rules,

which are codified at part 130 of title 8 of the New York Compilation of Codes, Rules and Regulations. The regulations came into effect on September 28, 2022.

The regulations provide a framework for evaluating whether nonpublic schools meet the substantial equivalency standard. Nonpublic schools may demonstrate substantial equivalency in a few different ways. For example, nonpublic schools may voluntarily register with the Board of Regents. 8 N.Y.C.R.R. § 130.3(a)(1). Registration requires a nonpublic school to demonstrate that “it provides an academic program which allows students at the commencement level to meet the requirements necessary to earn a Regents Diploma.” SED, Substantial Equivalency Implementation Guidance 8 (Aug. 23, 2023).¹ Nonpublic schools also may receive accreditation by a body approved by SED for purposes of demonstrating compliance with the regulations. 8 N.Y.C.R.R. § 130.3(a)(3). Schools that demonstrate the sufficiency of their instruction in one of these ways (or one of the other “pathways” listed in the regulations) are “deemed substantially equivalent.” *Id.* § 130.3(a).

¹ For sources available on the internet, full URLs appear in the table of authorities.

Nonpublic schools that have not otherwise established substantial equivalency must be periodically reviewed by their local school authority. 8 N.Y.C.R.R. § 130.5. The regulations set forth a timeframe in which to conduct this review, *id.* § 130.4, and factors that must be considered as part of each review, *id.* § 130.9. These factors do not impose any new requirements but instead merely incorporate the substantive requirements set forth by statute. *See, e.g.*, Education Law § 3204.

After this periodic review is conducted, the appropriate entity (the local school authority or, for Felder Amendment schools, the Commissioner) makes a preliminary determination as to whether the nonpublic school has sufficiently demonstrated the substantial equivalency of its instruction. 8 N.Y.C.R.R. §§ 130.6(a), 130.8(a)-(d). A negative preliminary determination triggers a collaborative process designed to help the nonpublic school achieve substantial equivalency. (*See* R. 1096.) The school has an opportunity to improve its instruction by the end of the following academic year. *Id.* §§ 130.6(a)(1)(iii), (a)(2), 130.8(d)(2). At the end of that review period, the local school authority or Commissioner then makes a final determination as to whether the nonpublic school has demonstrated substantial equivalency. *Id.* §§ 130.6(b), 130.8(d).

As a consequence of a negative final 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) (for negative determinations rendered by local school authorities), 130.8(d)(7)(i) (for negative determinations rendered by the Commissioner). That does not mean the institution must cease providing all instruction. Instead, it is no longer eligible for various forms of state aid. *See, e.g.*, L. 1974, ch. 507 (providing mandated services aid for “a nonprofit school in the state, other than a public school, which provides instruction in accordance with” Education Law § 3204). And its students are not eligible for state-funded transportation. *See* Education Law § 3635(1)(a) (providing for transportation “to and from the school [children] legally attend”); *Appeal of Fusion Academy-Brooklyn*, 56 Ed. Dep’t Rep., Decision No. 17,070, 2017 WL 1408921 (2017) (“For attendance at a nonpublic school to be lawful, the instruction provided must be substantially equivalent in amount and quality to that required in the public schools.”).

The local school authority or the Commissioner also must provide a letter for the nonpublic school to distribute to parents advising them of

the negative determination. 8 N.Y.C.R.R. §§ 130.6(c)(2)(ii), 130.8(d)(7)(ii). The local school authority or the Commissioner must then “provide a reasonable timeframe for parents or persons in parental relationship to enroll their children in a different appropriate educational setting, consistent with Education Law § 3204.” *Id.* §§ 130.6(c)(2)(ii), 130.8(d)(7)(ii). During that “reasonable timeframe,” local school authorities and SED must continue to provide “[l]egally required services,” like state aid or transportation. *Id.* §§ 130.6(c)(2)(iv), 130.8(d)(7)(iii).

The regulations reference the statutory penalties that may be imposed on school districts for failing to enforce the Compulsory Education Law, and on parents who fail to comply with their obligations under the Compulsory Education Law. 8 N.Y.C.R.R. § 130.14(a)-(b). The regulations also allow the Commissioner to enforce the Compulsory Education Law by issuing a negative substantial equivalency determination upon finding that a nonpublic school intentionally prohibited a local school authority from conducting a review. *Id.* § 130.14(c). The regulations do not provide for any civil penalties against nonpublic schools, however. And while a negative final substantial equivalency determination entails a loss of a nonpublic school’s legal status as a school for

purposes of the Compulsory Education Law, along with associated state funding and transportation, the regulations do not mandate closure of the nonpublic school.

B. Procedural History

Petitioners—five yeshivas, and three organizations whose members include yeshivas and parents of yeshiva students—commenced this hybrid C.P.L.R. article 78 proceeding and declaratory judgment action in Supreme Court, Albany County, on October 9, 2022. (R. 27-73.) Petitioners named the Chancellor of the Board of Regents, Lester Young Jr., and the Commissioner of Education, Betty A. Rosa, as respondents. (R. 37.) The petition challenged the substantial equivalency regulations on numerous grounds, claiming that: (1) SED violated the State Administrative Procedure Act (SAPA) by failing to adequately consider comments made during the rulemaking process; (2) the regulations are inconsistent with the statute in that the regulations treat yeshivas more restrictively than other nonpublic and public schools; (3) the regulations unlawfully create a licensure regime for nonpublic schools; (4) the regulations violate petitioners’ free exercise, free speech, and equal protection rights; and (5) the regulations violate petitioners’ substantive due process right (or

hybrid due process and free exercise right) to control the upbringing and education of their children. (R. 64-71.)

For relief, petitioners sought a declaration that the regulations “conflict with governing law and are therefore null and void,” and an injunction restraining respondents from enforcing the regulations. (R. 72.) Petitioners also moved for a preliminary injunction. (R. 811-812.) Respondents answered (R. 1010-1043) and moved to dismiss petitioners’ claims for lack of standing and for failure to state a cause of action (R. 1008-1009).

In a decision and judgment dated March 23, 2023, Supreme Court (Ryba, J.) granted the petition in part. Specifically, the court invalidated 8 N.Y.C.R.R. §§ 130.6(c)(2)(i) and 130.8(d)(7)(i), which state that if a local school authority or the Commissioner, respectively, makes a final determination that a nonpublic school does not provide substantially equivalent instruction, then “the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements” of the Compulsory Education Law. According to the court, these provisions “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.” (R. 22-23.) The court held that SED “lack[s] authority to direct parents to completely unenroll their children from nonpublic schools that have been determined to fall short of meeting each and every substantial equivalency criteri[on],” and lacks “authority to direct the closure of such schools.” (R. 23.)

Supreme Court otherwise denied the petition and granted respondents’ motion to dismiss on the merits. Accordingly, the court declared valid all of 8 N.Y.C.R.R. part 130 *except* §§ 130.6(c)(2)(i) and 130.8(d)(7)(i), which it declared “invalid” and “stricken.” (R. 25-26.) The court did not address standing. Respondents appealed. (R. 3.)

The Third Department reversed in part and declared valid §§ 130.6(c)(2)(i) and 130.8(d)(7)(i). Initially, the court rejected respondents’ argument that petitioners lacked standing. The court held that “petitioners have alleged that they are reasonably certain to suffer imminent harm from the regulations so as to afford standing to sue.” (R. 3239.) On the merits, the court upheld the regulations as a proper exercise of the Commissioner’s authority “to enforce the minimal standards of our Education Law.” (R. 3239.) As the court explained, the invalidated

regulations merely describe “the logical result” of a negative substantial equivalency determination. (R. 3241.) “By definition, a nonpublic school that fails to demonstrate substantial equivalency necessarily fails to fulfill the requirements of the compulsory education mandate.” (R. 3241.) Thus, §§ 130.6(c)(2)(i) and 130.8(d)(7)(i) are “a direct, measured exercise of the Commissioner’s vested authority to determine whether a nonpublic school is in compliance with the substantial equivalency requirement, and to supervise the enforcement of this standard.” (R. 3240.)

The Third Department rejected petitioners’ argument that the regulations mandate closure of nonpublic schools. As the court explained, “the loss of status as a substantially equivalent nonpublic school is not equivalent to closure; the institutions may in fact continue to operate and provide some form of instruction.” (R. 3241.) The court also held that the Education Law and regulations “do not limit the parents’ opportunity to enroll their children in any extracurricular instruction or activities that they deem appropriate and helpful, and nothing in the regulations prohibits the children from being enrolled in such institutions—the sole limitation is that the statutory mandate must be met.” (R. 3241.) Thus, the regulations simply make clear that parents “cannot discharge their

statutory duty” to ensure their children attend upon full time instruction “by relying upon a nonpublic school that fails to meet the minimal standards of our state law.” (R. 3241.)

Judge Egan dissented. The dissent opined that the Education Law affords parents “wide discretion in fashioning an acceptable program of instruction,” so long as it is substantially equivalent to a public school education. (R. 3243.) The dissent agreed with petitioners that the regulations contravene this statute by requiring parents to “remove” their children from schools that fail to demonstrate substantial equivalency. (R. 3244.) In the dissent’s view, parents have the right to utilize such schools as a “component” of a home instruction plan.² (R. 3244.) The dissent further reasoned that the regulations “improperly penalize[] a school” by discontinuing services after a negative substantial equivalency determination. (R. 3244.) In the dissent’s view, SED lacks authority “to impose those consequences” by regulation. (R. 3245.)

The Third Department granted leave to appeal. (R. 3247.)

² The majority rejected this suggestion as impractical. As the majority explained, children attending Felder Amendment schools with lengthy school days “cannot adequately supplement [a] substandard curriculum in the few hours remaining in the week.” (R. 3241.)

ARGUMENT

POINT I

SED’S SUBSTANTIAL EQUIVALENCY REGULATIONS ARE CONSISTENT WITH THE EDUCATION LAW

As the Third Department held, SED’s substantial equivalency regulations are consistent with the Education Law. The regulations give meaningful effect to the Legislature’s mandate that children who attend nonpublic schools receive “substantially equivalent” instruction. Petitioners attempt to manufacture a conflict with the Education Law in two ways. First, petitioners misconstrue the regulations as authorizing the closure of nonpublic schools, even though the regulations on their face do no such thing. Instead, the regulations give nonpublic schools ample opportunity to remedy any deficiencies. And even if nonpublic schools fail to remediate, they can still operate and offer religious or other extracurricular and non-compulsory instruction; they are simply not considered schools satisfying the requirements of the Compulsory Education Law. Second, petitioners mistakenly argue that the regulations violate a purported right of parents to obtain instruction for their children from multiple sources. But the Education Law provides no such right—let alone one that would allow a nonpublic school to continue to operate as a

school for compulsory education purposes despite failing to provide substantially equivalent instruction. Properly construed, the regulations do not conflict with the Education Law.³

A. The Regulations Ensure that Nonpublic Schoolchildren Receive Substantially Equivalent Instruction.

The substantial equivalency regulations promulgated by SED 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]). Indeed, the regulations carry out the Education Law’s mandate that all nonpublic schoolchildren in the State receive substantially equivalent instruction in the subjects prescribed by law.

Under the New York State Constitution, all children are entitled to a “sound basic education” at the State’s public schools. *Campaign for Fiscal Equity v. State of New York*, 86 N.Y.2d 307, 316 (1995) (citing N.Y. Const. art. XI, § 1). And while parents have the right to provide

³ While respondents challenged petitioners’ standing below, the Third Department rejected that challenge and we do not assert it here.

instruction for a child “elsewhere than at a public school,” *i.e.*, at home or at a nonpublic school, such instruction must “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). In other words, instruction at nonpublic schools must be substantially equivalent to the sound basic education provided by public schools.

This substantial equivalency mandate has been enshrined in New York law since 1895. *See* L. 1894, ch. 671, § 3. Over the years, the Legislature has elaborated on educational requirements at both public and nonpublic schools by imposing numerous substantive standards for instruction. For example, Education Law § 3204(3)(a) lists the core subjects required to be taught. Other provisions of the Education Law require instruction in civics, highway safety, fire drills, and other topics. *See* Education Law §§ 801(1)-(2), 803(4), 804, 806, 807, 808. Additionally, in 2018, the Legislature enacted the Felder Amendment, which sets forth non-exclusive criteria for instruction at certain nonpublic schools. *See id.* § 3204(2)(ii)-(iii). These standards cover instruction in English, mathematics, history, and science at nonpublic elementary and middle schools

subject to the Felder Amendment. *Id.* § 3204(2)(ii). For nonpublic high schools subject to the Felder Amendment, the curriculum as a whole must “result in a sound basic education.” *Id.* § 3204(2)(iii).

SED promulgated the challenged regulations to implement the substantial equivalency mandate. Before the regulations were promulgated, there was no mechanism by which nonpublic schools were regularly evaluated. (*See* R. 1054-1057, 1062-1065.) To be sure, without the regulations, local school authorities and the Commissioner of Education have the *statutory* authority to determine whether nonpublic schools provide substantially equivalent instruction. For schools not subject to the Felder Amendment, “[i]t is generally up to the local school board, through the district superintendent, to determine whether its students are receiving a ‘substantially equivalent’ education.” *Young Advocates for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215, 220 (E.D.N.Y. 2019). The Felder Amendment expressly contemplates that nonpublic schools are generally subject to substantial equivalency determinations, and designates the Commissioner as “the entity that determines whether nonpublic elementary and secondary schools are in compliance with the academic requirements” for the schools that fall within its purview. Education Law § 3204(2)(v).

But the Education Law does not prescribe the *process* by which nonpublic schools should be reviewed for substantial equivalency. As a result, the Education Law leaves a gap between the substantive standards it imposes and the enforcement mechanism to ensure those standards are met.

The regulations fill that enforcement gap. They set forth a framework for local school authorities and the Commissioner to determine whether nonpublic schools satisfy the substantive standards of instruction set by statute. *See* 8 N.Y.C.R.R. part 130. Under the regulations, local school authorities must periodically review nonpublic schools for compliance with those standards.⁴ *Id.* § 130.5. The regulations set forth a timeframe for these reviews. *Id.* § 130.4. And after each periodic review, either the Commissioner (for Felder Amendment schools) or the local school authority (for all other schools) makes a preliminary determination as to whether the nonpublic school has sufficiently

⁴ Additionally, nonpublic schools may be deemed substantially equivalent pursuant to one of the alternative pathways set forth in the regulations. *See* 8 N.Y.C.R.R. § 130.3. For example, a nonpublic school is deemed substantially equivalent as a matter of course if it is registered with the Board of Regents or associated with a registered high school. *See id.* § 130.3(a)(1).

demonstrated the substantial equivalency of its instruction. *Id.* §§ 130.6(a), 130.8(a)-(d).

If a nonpublic school receives a negative preliminary determination, then the nonpublic school and the local school authority must collaboratively develop a plan for the school to attain substantial equivalency within a reasonable timeframe. 8 N.Y.C.R.R. §§ 130.6(a)(1)(iii), (a)(2), 130.8(d)(2). This collaborative process is designed to help nonpublic schools comply with the Education Law’s mandates so that all children receive the instruction to which they are legally entitled. (R. 1096.) At the conclusion of this process, the Commissioner or local school authority must make a final determination as to whether the nonpublic school has demonstrated substantial equivalency. *Id.* §§ 130.6(b), 130.8(d).

A negative final determination means 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.” 8 N.Y.C.R.R. §§ 130.6(c)(2)(i), 130.8(d)(7)(i). In other words, SED no longer views the institution as a “school” within the meaning of the Compulsory Education Law. *Id.* § 130.1(d). The Commissioner or local school authority must nonetheless “provide a reasonable timeframe for

parents or persons in parental relationship to enroll their children in a different appropriate educational setting, consistent with Education Law § 3204.” *Id.* §§ 130.6(c)(2)(ii), 130.8(d)(7)(ii). And during that “reasonable timeframe,” local school authorities and the Commissioner must continue to provide “[l]egally required services.” *Id.* §§ 130.6(c)(2)(iv), 130.8(d)(7)(iii). Upon the conclusion of that reasonable timeframe, the institution is no longer entitled to state aid and its pupils are no longer eligible for state-funded transportation. *See* L. 1974, ch. 507; Education Law § 3635(1)(a).

The specific regulations challenged by petitioners on appeal merely state the necessary consequence of a negative substantial equivalency determination: the nonpublic school at issue “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). This consequence is not only consistent with the Education Law; as the Third Department explained, it is also “the logical result” of a negative determination. (R. 3241.) After all, instruction elsewhere than at a public school must meet the substantial equivalency standard under the Compulsory Education Law. *See* Education Law § 3204(2)(i). Thus,

when 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—by definition—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).

The relief petitioners seek—an order invalidating §§ 130.6(c)(2)(i) and 130.8(d)(7)(i)—would severely impede SED’s ability to enforce the statutory mandate. Again, the regulations are designed to help nonpublic schools provide the substantially equivalent instruction to which their pupils are entitled. *See* 8 N.Y.C.R.R. §§ 130.6(a)(1)(iii), (a)(2), 130.8(d)(2). But if a nonpublic school fails to remedy its deficiencies after ample opportunity for remediation, it cannot be deemed to satisfy the requirements of the Compulsory Education Law. Allowing such an institution to provide insufficient instruction while holding itself out as a “school” within the meaning of the Compulsory Education Law would subvert the statutory entitlement of its students to substantially equivalent instruction. That result, sought by petitioners, would be inconsistent with the Education Law.

Because SED’s regulations are “consistent with the statutory language and underlying purpose” of the Education Law, *Matter of Juarez v. New York State Off. of Victim Servs.*, 36 N.Y.3d 485, 492 (2021) (citation omitted), the regulations are a proper exercise of SED’s rulemaking authority.

B. Petitioners Misinterpret the Regulations as Authorizing the Closure of Nonpublic Schools.

Petitioners argue that the regulations improperly authorize the Commissioner and local school authorities to close nonpublic schools, thereby imposing penalties beyond those authorized by the Education Law. (Br. at 39-45.) They are mistaken. The regulations do not authorize closure of a nonpublic school as a penalty for failing to demonstrate substantial equivalency. Rather, the regulations are designed to assist nonpublic schools achieve substantial equivalency by affording them ample opportunity to remediate after a preliminary negative determination. And even if a nonpublic school fails to improve and is subject to a final negative determination, it still may operate and provide extracurricular instruction—just not as a “school” within the meaning of the Compulsory Education Law.

Preliminarily, any dispute about the meaning of the regulations must be resolved in favor of SED’s reasonable interpretation. “[J]udicial 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, which simply do not authorize the Commissioner or local school authorities to close nonpublic schools.

On their face, none of the provisions in the regulations authorizes the closure of nonpublic schools. The regulations set forth three types of consequences that flow from a failure to comply with the Compulsory Education Law. First, the regulations incorporate statutory civil and criminal penalties for parents who violate the Compulsory Education Law by failing to ensure that their children attend upon full time instruction. *See* 8 N.Y.C.R.R. § 130.14(a) (citing Education Law § 3233); Education Law § 3212(2)(b). Second, the regulations incorporate the statutory provision authorizing the Commissioner to withhold public moneys from local school authorities that willfully omit and refuse to

enforce the Compulsory Education Law. *See* 8 N.Y.C.R.R. § 130.14(b) (citing Education Law § 3234). Third, the regulations authorize the Commissioner to “issue a written decision making a negative substantial equivalency determination” if “the Commissioner determines that a nonpublic school has intentionally prohibited [a local school authority] from conducting a [substantial equivalency] review.” *Id.* § 130.14(c). Nothing in these provisions authorizes the Commissioner to close nonpublic schools.

Nor is a negative substantial equivalency determination itself a closure order. After conducting a substantial equivalency review, the local school authority or Commissioner must make a preliminary determination as to whether instruction satisfies the substantial equivalency standard. 8 N.Y.C.R.R. §§ 130.6(a), 130.8(a)-(d). A negative preliminary determination triggers a collaborative process designed to help the nonpublic school achieve substantial equivalency. (*See* R. 1096.) The school then has the opportunity to improve its instruction by the end of the following academic year. *Id.* §§ 130.6(a)(1)(iii), (a)(2), 130.8(d)(2). And SED can and has been freely willing to extend that remediation period beyond a year upon the request of a cooperative nonpublic school. *See id.*

§ 130.6(a)(3), 130.8(d)(2). The purpose of these regulations is thus not to cause any nonpublic schools to lose their status as schools, but instead to ensure that all nonpublic schools provide the substantially equivalent instruction to which their pupils are entitled under Education Law § 3204.

Moreover, even if a nonpublic school fails to remediate and is subject to a negative final determination, that entity may continue to operate and provide extracurricular instruction. Thus, institutions such as Sunday schools, Hebrew schools, and similar entities are not reviewed under the Education Law and substantial equivalency regulations and no state approval is required for their operation. These institutions provide instruction in religion or other subjects even though they do not qualify as schools for purposes of the Compulsory Education Law. Nonpublic schools subject to a negative final determination are free to do the same. Additionally, many nonpublic schools have prekindergarten, kindergarten, and higher education components. Such programs are unaffected by SED's substantial equivalency regulations. Indeed, state aid for prekindergarten and kindergarten programs is not dependent on satisfying compulsory education requirements.

To be sure, a negative substantial equivalency determination has consequences for parents, students, and the nonpublic school at issue. The regulations provide that a nonpublic school which fails to demonstrate substantial equivalency (or intentionally prohibits a local school authority from conducting a substantial equivalency review) “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). That means parents cannot satisfy their obligations under the Compulsory Education Law by sending their children to the school. *See* Education Law § 3212(2)(b). It also means students are not entitled to state-funded transportation to and from the school, *id.* § 3635(1)(a), and the school is not entitled to state aid, L. 1974, ch. 507.

But these consequences flow from the statute itself. They reflect the reality that a nonpublic school which fails to provide substantially equivalent instruction is not a “school” within the meaning of the Compulsory Education Law. Nor can it receive public funds in the same way as a nonpublic school which fulfills the requirements of the Compulsory Education Law. As explained above, these are the necessary consequences of

a negative final substantial equivalency determination. Such a determination is not a penalty, much less an improper one, merely because it necessarily affects the funding and services a nonpublic school receives. And the regulations do not conflict with the Education Law merely by setting forth a framework for making substantial equivalency determinations. The Legislature made these funds and services conditional on the compliance of a school with substantial equivalency, as it was entitled to do. If a school fails to satisfy that condition, it is not eligible for state funds and services. This is not a penalty created by SED, but simply enforcement of a condition that was established by statute.

Accordingly, even if the consequences of a negative substantial equivalency determination may have the effect of causing a nonpublic school to close—which has not yet happened to any of the petitioners here—that is not a ground for concluding that SED has exceeded its statutory authority or a ground for invalidating the regulations on their face. SED’s regulations protect students’ rights to the minimum instruction required by law and 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 cooperate with local school authorities or improve its secular instruction, it would do so of its own volition—not by order of the Commissioner or local school authority.

C. The Regulations Do Not Impair Any Statutory Right to Instruction from Multiple Sources.

Petitioners are also mistaken in arguing that the regulations conflict with a purported right of parents to provide a substantially equivalent education for their children through a combination of sources. (Br. at 31-39.) Petitioners' argument rests on an incorrect interpretation of the Education Law and the regulations.

1. The Education Law does not entitle parents to supplement deficient instruction at a nonpublic school with partial home instruction.

Petitioners misconstrue the Education Law as entitling parents to cobble together an instructional program from a deficient nonpublic school and supplemental instruction at home. Of course, parents have the right to instruct their children at home or enroll them in a nonpublic school. See *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). The Education Law recognizes

that parents may educate their children “elsewhere than at a public school.” Education Law § 3204(2)(i). Thus, parents may arrange for their children to receive home instruction as approved by the local school authority. 8 N.Y.C.R.R. § 100.10. And SED guidance explicitly recognizes that parents who provide home instruction “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](#); *see also Matter of Lash*, 92 Misc. 2d 642, 645 (Fam. Ct., Nassau County 1977) (parents properly engaged two tutors for their child’s instruction).

The Education Law, however, is based on the premise that whichever form of instruction parents choose—public school, nonpublic school, or home—it must be sufficient, standing alone, to provide the instruction to which children are entitled. *See Matter of Adam D.*, 132 Misc. 2d 797, 802 (Fam. Ct., Schoharie County 1986). Numerous statutes distinguish between instruction at a public school, instruction at a nonpublic school, and home instruction. For example, Education Law § 3602(1)(n) distinguishes between “children on a regular enrollment register of a public school district,” “children eligible to receive home instruction in the school district,” and “children on a regular enrollment register of a

nonpublic school meeting the compulsory attendance law.” *See also* Education Law § 3205(2)(c)(ii) (distinguishing between students attending public schools and “[s]tudents enrolled in non-public schools or in home instruction”).

Each form of instruction must independently fulfill the requirements of the Education Law. As explained above (at 23-24), the Felder Amendment describes the criteria by which certain nonpublic *schools* are to be evaluated for substantial equivalency. Education Law § 3204(2)(ii)-(iii). And for purposes of reviewing whether Felder Amendment schools provide substantially equivalent instruction, the law directs SED to review the school’s “educational program” and consider whether “the *entirety* of the curriculum” at a high school “result[s] in a sound basic education.” *Id.* § 3204(2)(iii) (emphasis added). The law further requires the Commissioner to determine whether such “schools are in compliance with [these] academic requirements.” *Id.* § 3204(2)(v). And for home instruction, regulations describe the requirements for “determining the competency of the instructor and substantial equivalence of instruction being provided *at home*.” 8 N.Y.C.R.R. § 100.10(a) (emphasis added).

Petitioners cite no provision of the Education Law broadly entitling parents to satisfy their compulsory education obligations by simultaneous enrollment of their children in multiple schools, or entitling parents to provide home instruction in certain subjects while relying on a nonpublic school for other subjects. Petitioners attempt to derive this right from the term “elsewhere” in Education Law § 3204(1) (Br. at 32-33), which permits a minor to receive instruction “at a public school or *elsewhere*.” (Emphasis added.) In light of the statutory regime discussed above, petitioners’ interpretation of the term “elsewhere” is incorrect. The dictionary definition of “elsewhere” simply means “in . . . another place.” Merriam-Webster.com. It does not necessarily 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.” *Yoder*, 406 U.S. at 213. The statute leaves to SED the task of determining how to ensure that the alternative schooling chosen by parents provides children with a “substantially equivalent” instruction.

Petitioners' interpretation of the term "elsewhere" in § 3204 is especially implausible because in the few instances in which the Legislature has authorized dual enrollment, it has done so expressly and only for specific programs or services. For example, Education Law § 3602-c requires school districts to make occupational training, gifted and talented programs, and disability services available to students who are enrolled in nonpublic schools, thereby making it unnecessary for the nonpublic schools to provide such services on their own. But no provision of the Education Law authorizes the kind of hybrid instruction envisioned by Supreme Court and the dissent below, in which students are both instructed at home and enrolled in a non-substantially equivalent school. The Education Law does not contemplate that sort of dual enrollment as a means to satisfy compulsory education requirements. And as the Appellate Division observed, that hybrid model would be especially impractical for Felder Amendment schools with long hours. Parents of children attending such schools would not be able to "adequately supplement [a] substandard curriculum in the few hours remaining in the week." (R. 3241.)

Moreover, parents do not have the statutory right to demand that any source of instruction “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). Thus, while parents who provide home instruction may utilize the services of a tutor as part of their home instruction plan, they cannot demand state aid or transportation for those services.⁵ Nor can parents demand state aid or transportation for a nonpublic school that does not fulfill the requirements of the Compulsory Education Law, including the requirement to provide substantially equivalent instruction.

2. The regulations do not impair any rights parents have under the Education Law.

Petitioners also fail to show that SED’s substantial equivalency regulations conflict with parents’ purported rights under the Education Law. The focus of the regulations is the instruction provided by *nonpublic*

⁵ Likewise, tutoring services for child performers—which are mandated by statute, *see* Labor Law § 152—are not entitled to state aid. *See* 12 N.Y.C.R.R. § 186-5.1. School districts may, however, provide tutors for children who cannot attend school in person because of illness or injury (commonly known as “homebound” instruction). *See* 8 N.Y.C.R.R. § 100.22.

schools, not parents. As explained above, the challenged regulations set forth a process for the Commissioner and local school authorities to determine whether nonpublic schools provide substantially equivalent instruction. Thus, the regulations require local school authorities to periodically review substantial equivalency of instruction at nonpublic schools. 8 N.Y.C.R.R. §§ 130.1(b), 130.5. And the regulations require the Commissioner or local school authority to determine whether such schools satisfy the substantial equivalency standard set by statute. *Id.* §§ 130.6, 130.8.

The regulations do not impose any additional obligations on parents. Parents are already required *by statute* to ensure that their children receive the minimal instruction required by law. *See* Education Law §§ 3204(2)(i), 3205(1)(a), 3212(2)(b). And parents who fail to comply with these requirements are subject to civil and criminal penalties *by statute*. *See* Education Law § 3233. SED’s substantial equivalency regulations create no additional enforcement mechanism against parents who fail to comply with their obligations under the Compulsory Education Law. And contrary to petitioners’ contention (at 39), the regulations do not “supplant the individualized process for determining whether a parent

has complied with the Compulsory Education Law, which typically takes place in Family Court. *See* Family Court Act § 1012(f)(i)(A) (defining educational neglect); *Matter of Puah B. (Autumn B.)*, 173 A.D.3d 422, 423-24 (1st Dep’t) (affirming finding of educational neglect based on mother’s failure “to show that her [home] instruction was substantially equivalent to that in public school”), *appeal dismissed*, 33 N.Y.3d 1117 (2019).

In arguing otherwise, petitioners point to one of the procedural steps following a negative final substantial equivalency determination: The Commissioner or local school authority must “provide a reasonable timeframe for parents or persons in parental relationship to 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). During that “reasonable timeframe,” the Commissioner and local school authorities must continue to provide required services, such as state aid and transportation. *Id.* §§ 130.6(c)(2)(iv), 130.8(d)(7)(iii). On their face, these provisions impose obligations on the Commissioner and local school authorities—not on parents. These provisions are designed to give parents the time and flexibility to make alternative educational

arrangements for their children after a negative final substantial equivalency determination.

Petitioners misconstrue these provisions as mandating that parents remove their children from nonpublic schools deemed not substantially equivalent. (*See Br.* at 35-36, 41-42.) This is simply a repackaged version of petitioners' mistaken argument that the regulations mandate closure of non-substantially equivalent schools. As noted (at 32), nonpublic schools are free to provide religious or other extracurricular and non-compulsory instruction even after a negative final substantial equivalency determination. The regulations do not penalize parents for utilizing such instruction, so long as they enroll their children in an educational setting which satisfies the substantial equivalency mandate. *See* 8 N.Y.C.R.R. §§ 130.6(c)(2)(ii), 130.8(d)(7)(ii). The regulations do not conflict with the statute merely because they contemplate that parents will arrange for their children to receive the minimum instruction required by law, and afford parents the time and flexibility to make those arrangements.

POINT II

SED DID NOT ENGAGE IN LEGISLATIVE POLICYMAKING IN VIOLATION OF THE SEPARATION-OF-POWERS DOCTRINE

Petitioners are likewise mistaken in their claim that SED violated the separation-of-powers doctrine by engaging in legislative policymaking rather than administrative rulemaking. *See Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). Petitioners' *Boreali* 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.

Under the *Boreali* doctrine, the Legislature must “make the critical policy decisions, while the executive branch’s responsibility is to implement those policies.” *Matter of LeadingAge N.Y., Inc. v. Shah*, 32 N.Y.3d 249, 259 (2018) (citation omitted). “If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers.” *Id.* Courts consider four “coalescing circumstances” that, “when viewed in combination,” may suggest that the agency improperly engaged in legislative policymaking. *Boreali*, 71 N.Y.2d at 11.

These four *Boreali* factors are whether the agency (i) resolved a problem by making its own “value judgments entailing difficult and

complex choices between broad policy goals,” rather than simply balancing costs and benefits under existing standards; (ii) wrote on a “clean slate,” rather than filled in the details of a broad policy set by the Legislature; (iii) took upon itself to regulate matters on which the Legislature has tried, and failed, to set policy; and (iv) acted outside its area of expertise. *Garcia v. New York City Dep’t of Health & Mental Hygiene*, 31 N.Y.3d 601, 609 (2018) (citations and internal quotation marks omitted). Application of these factors confirms that SED did not exceed its authority in promulgating the regulations.

A. *Boreali* Factor One: SED Made No Complex Policy Judgment.

SED did not make “value judgments entailing difficult and complex choices between broad policy goals to resolve social problems.” *Matter of Acevedo v. New York State Dep’t of Motor Vehs.*, 29 N.Y.3d 202, 222-23 (2017) (citation omitted). It was the Legislature itself—over 100 years ago—that required children educated elsewhere than at a public school be provided with instruction “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). And the Legislature has imposed numerous substantive standards for instruction. *See id.* § 3204(2), (3); *see also id.* §§ 801(1)-(2), 803(4), 804, 806, 807, 808. By implementing these substantive standards, the regulations are “directly tied to [the] specific goal dictated by the legislature” that nonpublic schoolchildren receive substantially equivalent instruction. *Matter of LeadingAge*, 32 N.Y.3d at 263.

Unlike in cases where courts have found *Boreali* violations, SED did not consider any economic or social concerns outside the scope of its authority in promulgating these regulations. *Cf. Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Dep’t of Health & Mental Hygiene*, 23 N.Y.3d 681, 698 (2014). Nor do petitioners point to any “administratively created exemptions” that conflict with the Legislature’s policy goals. *Boreali*, 71 N.Y.2d at 12. And, contrary to petitioners’ argument (Br. at 49-50), the regulations do not reflect any policy judgment about the consequences of a negative substantial equivalency determination that cannot already be found in the Education Law. As explained above, the regulations neither authorize the closure of nonpublic schools nor impose any new obligations on parents. Rather, the regulations give effect to the Legislature’s own

policy judgments regarding the substantially equivalent education to which nonpublic schoolchildren are entitled.

B. *Boreali* Factor Two: SED Engaged in Interstitial Rulemaking.

SED engaged in typical interstitial rulemaking in promulgating the challenged regulations; it did not write on “a clean slate, creating its own comprehensive set of rules without benefit of legislative guidance.” *Matter of Acevedo*, 29 N.Y.3d at 223-24 (quoting *Boreali*, 71 N.Y.2d at 13). As noted, the Legislature set forth by statute the substantial equivalency standard for nonpublic schools. The regulations provide a *process* for reviewing whether nonpublic schools satisfy that statutory standard. That kind of interstitial rulemaking falls well within the province of an administrative agency. See *Matter of Juarez*, 36 N.Y.3d at 492; *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 (3d Dep’t 2014), *aff’d*, 27 N.Y.3d 174 (2016). And indeed, the Board of Regents has broad authority to “establish rules for carrying into effect the laws and policies of the state, relating to education.” Education Law § 207. The regulations as a whole “fall squarely within the confines of this statutory mandate and fill in the

details of the [Education] Law in the manner contemplated by the legislature.” *Matter of Acevedo*, 29 N.Y.3d at 224.

Moreover, the specific regulations challenged on appeal 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). As explained above, 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. In light of this statutory authority to determine substantial equivalency, there can “be no serious claim” that SED lacks authority to regulate the process by which such determinations must be made. *Garcia*, 31 N.Y.3d at 614.

Contrary to petitioners’ argument, the regulations do not give SED “unfettered discretion” to close nonpublic schools. (Br. at 53.) Indeed, SED has no authority at all to close schools under the substantial equivalency regulations. And unlike the statute at issue in *Packer Collegiate Institute v. University of the State of New York*, 298 N.Y. 184 (1948), the

regulations here do not authorize SED to impose any licensing regime on nonpublic schools.⁶ Such schools are free to provide whatever instruction they choose. But if they seek state aid or transportation for their pupils, or purport to provide parents with a means of fulfilling their obligations under the Compulsory Education Law, then they must satisfy the substantial equivalency standard set by statute. Insofar as the regulations set forth a *process* for determining whether nonpublic schools satisfy that statutory standard, they “simply ‘fill[] in the details of broad legislation describing the over-all policies to be implemented.’” *Matter of Acevedo*, 29 N.Y.3d at 224 (quoting *Boreali*, 71 N.Y.2d at 13).

C. *Boreali* Factor Three: The Legislature Has Not Tried, and Failed, to Set Policy in This Area.

Petitioners also fail to show any pattern of legislative inaction “which would indicate that the matter is a policy consideration for the elected body to resolve.” *Matter of Acevedo*, 29 N.Y.3d at 224 (quoting *Greater N.Y. Taxi Assn. v. New York City Taxi & Limousine Commn.*,

⁶ *Packer Collegiate* is inapposite for the additional reason that it was a nondelegation challenge to a statute, rather than a separation-of-powers challenge to a regulation.

25 N.Y.3d 600, 611-12 [2015]). To the contrary, the Legislature has acted over time to flesh out the substantive aspects of the substantial equivalency requirement, and SED has implemented that policy. Most notably, in 2018, the Legislature enacted the Felder Amendment, which provides criteria for determining whether certain nonpublic schools satisfy the substantial equivalency standard. Education Law § 3204(2)(ii)-(v). That law 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.

The explicit delegation of authority in the Felder Amendment is entitled to far greater weight than the unenacted bills petitioners cite. As this Court 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 challenged

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.

Instead, the bills petitioners cite would have imposed more serious consequences than those imposed by the challenged regulations. For example, Senate Bill S1983 and related bills would have considered “[c]hildren attending a non-public school that does not provide substantially equivalent instruction . . . truant.” 2021-2022 Regular Session Senate Bill S1983. And parents would have been required to “transfer their children to either a public school or a non-public school that has been identified as providing substantially equivalent instruction.” *Id.*; *see also* 2019-2020 Regular Session Senate Bill S6589; 2017-2018 Regular Session Senate Bill S1366; 2017-2018 Regular Session Assembly Bill A4367; 2015-2016 Regular Session Senate Bill S7629-A; 2015-2016 Regular Session Assembly Bill A9947.

Assembly Bill A2832 and related bills would have created an administrative mechanism for determining substantial equivalency based on complaints filed by parents, students, or teachers. *See*

2023-2024 Regular Session Assembly Bill A2832. Upon making a negative substantial equivalency determination, the Commissioner would have been authorized to compel the nonpublic school to make changes to its curriculum or even prohibit the school from operating. *Id.*; *see also* 2021-2022 Regular Session Assembly Bill A1317; 2019-2020 Regular Session Senate Bill S142; 2019-2020 Regular Session Assembly Bill A3272; 2017-2018 Regular Session Senate Bill S1733; 2017-2018 Regular Session Assembly Bill A1305.

Finally, Senate Bill S5462—which was proposed after SED’s substantial equivalency regulations took effect—would have amended the substantive requirements for instruction at Felder Amendment schools. 2023-2024 Regular Session Senate Bill S5462. This bill also would have required all nonpublic schools to certify the substantial equivalency of their instruction as a condition for receiving state aid. *Id.* Because each of these bills “dealt with other matters” and did not address the necessary consequence of a negative substantial equivalency determination, as the challenged regulations do, the unenacted bills do not support petitioners’ argument that “the legislature has unsuccessfully

tried to reach agreement on the issue.” *Greater N.Y. Taxi Assn.*, 25 N.Y.3d at 611-12.

And to the extent any of the unenacted bills are relevant, they do not show that the regulations “address a topic exclusively within the legislative domain.” *Matter of LeadingAge*, 32 N.Y.3d at 265. 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*, 36 N.Y.3d at 492 (citation omitted). That is precisely what SED did here by promulgating rules setting forth a process for making substantial equivalency determinations.

D. *Boreali* Factor Four: SED Acted Within Its Area of Expertise.

Finally, SED acted within its area of expertise in promulgating the substantial equivalency regulations. SED engaged extensively with stakeholders in the educational community—including petitioners PEARLS, Agudath Israel, and Torah Umesorah. (R. 1060-1062.) SED prepared a detailed report summarizing the feedback from its stakeholder engagement meetings. (R. 1061.) SED also reviewed over 350,000

comments on its proposed rules and prepared a lengthy and comprehensive assessment of these comments. (R. 1066-1068.) Based on SED's expertise and the feedback it received during the rulemaking process, SED determined that the final rules were necessary to ensure that all children receive the sound basic education to which they are entitled. (R. 1096, 1664, 1666.) These rules "operate squarely within [SED's] area of expertise." *Matter of Acevedo*, 29 N.Y.3d at 226.

* * *

Accordingly, SED acted well within its statutory authority in promulgating the challenged regulations. Because the regulations neither conflict with the Education Law nor cross the line into legislative policymaking, this Court should uphold the regulations in their entirety.

CONCLUSION

The Court should affirm the Appellate Division's order.

Dated: Albany, New York
February 13, 2025

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Respondents

By: 

BEEZLY J. KIERNAN
Assistant Solicitor General

BARBARA D. UNDERWOOD
Solicitor General
JEFFREY W. LANG
Deputy Solicitor General
BEEZLY J. KIERNAN
Assistant Solicitor General
of Counsel

The Capitol
Albany, New York 12224
(518) 776-2023
Beezly.Kiernan@ag.ny.gov

Reproduced on Recycled Paper

AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Beezly J. Kiernan, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 10,001 words, which complies with the limitations stated in § 500.13(c)(1).



BEEZLY J. KIERNAN