

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter 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,

For a Declaratory Judgment and a Judgment Pursuant to
Article 78 of the Civil Practice Act and Rules

-against-

LESTER YOUNG JR., as Chancellor of the Board of Regents of
the State of New York; and BETTY A. ROSA, as Commissioner
of the New York State Education Department,

Respondents.

**VERIFIED
PETITION**

1. By and through their undersigned counsel, Troutman Pepper Hamilton Sanders LLP, Petitioners Parents for Educational and Religious Liberty in Schools (“PEARLS”), 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 (the “Yeshiva Petitioners,” and collectively “Petitioners”) respectfully allege on knowledge as to their own actions, and upon information and belief as to the actions of others and matters of public record, as follows:

Preliminary Statement

2. For nearly 125 years, Orthodox Jewish yeshivas have devoted themselves to the education of students in New York. Their graduates have pursued successful careers in all walks

of life, and include doctors and department heads at leading hospitals; professors and department chairs at leading universities; partners in major law and accounting firms; managing directors at leading investment banks; elected and appointed government officials; teachers, nurses, computer programmers, entrepreneurs, manufacturers, builders, and laborers.

3. Graduates of New York yeshivas have, more importantly, gone on to found and lead Jewish educational, social service, and religious institutions in New York and across the United States. The Orthodox Jewish community's Rabbis, teachers, scholars, spiritual authorities, and social workers are educated and trained in New York yeshivas. These graduates, with the knowledge, skills and commitment to Jewish life they received while attending New York yeshivas, are responsible for the growth and vibrancy of Orthodox Jewish life across New York and the United States.

4. Yeshivas teach their students that education and service are the highest values of all. They learn to cherish and practice the values of charity, morality, humility, personal responsibility, and responsibility to community and others. They are exposed at a young age to an education that prizes academic rigor and collaboration between students, which cultivates critical thinking and analytical skills, and that creates life-long learners.

5. For this reason, yeshivas are the central and irreplaceable pillar of the Orthodox Jewish life in New York. Parents choose yeshiva education for their children, despite their substantial tuition payments, instead of the local public schools because they want their children to have an education that is rooted in Jewish texts and informed by Jewish morality, history, culture, values, ideals, and hopes. Above all, the parents of yeshiva students hope that their children grow into fully fledged and thoughtful citizens, while sustaining and upholding their culture and their religious beliefs, values and traditions.

6. Despite the considerable success of yeshivas, the New York State Education Department (the “NYSED”) has spent the last half decade seeking to impose greater requirements and heightened oversight on these schools than are imposed on other schools in New York, whether public or private. In an attempt to achieve this goal, the NYSED has repeatedly introduced rules and regulations that are a marked departure from how nonpublic schools in New York have functioned for over 125 years.

7. Earlier iterations of these regulations have been struck down by the courts of New York and received considerable backlash from the public. Nonetheless, the NYSED has persisted, and on September 13, 2022, the New York State Board of Regents adopted new regulations (the “New Regulations”) which impose a system of review and evaluation on nonpublic schools in New York. The New Regulations have been carefully drafted to divide nonpublic schools into two separate tiers: the first tier consists of schools excused from the burdensome review process of the New Regulations, while the second tier consists exclusively or almost exclusively of Orthodox Jewish yeshivas.

8. There are several independent reasons why the New Regulations, which require yeshivas to obtain the approval of local school authorities after a review and inspection that covers more than 20 different subjects, are improper and must be struck down.

9. First, the New Regulations violate the New York State Administrative Procedures Act (SAPA), because the public comment process was a sham. SAPA requires a period of notice and comment of proposed rulemaking. The public comment period is not an end in itself, but rather a means by which the agency is required to receive input from the public and consider reasonable alternatives. Here, NYSED received more than 300,000 comments in opposition to the proposed regulations but did not truly consider them and did not make any substantive revisions.

10. NYSED decided in advance not to make any revisions to the regulations – because SAPA requires an additional comment period if proposed regulations are revised. Because it was determined to evade this element of SAPA, NYSED violated SAPA’s notice and comment requirements, by refusing to truly consider alternatives that were proposed.

11. Second, the New Regulations violate SAPA by imposing on yeshivas obligations and restrictions not found in other schools. Only yeshivas will be inspected for instruction in more than twenty different subject areas, and only yeshivas will be prohibited from offering instruction in those subjects in a student’s home language. The New Regulations are therefore arbitrary, capricious, and in violation of law.

12. Third, the New Regulations create an impermissible *de facto* licensing requirement through the review and determination process to which yeshivas must repeatedly submit in order to operate in New York. The New York Court of Appeals has held that NYSED does not have the authority to impose *de facto* licensing requirement on nonpublic schools. The New Regulations must therefore be struck down as exceeding NYSED’s authority.

13. Fourth, the New Regulations violate both the New York Constitution and the United States Constitution. The New Regulations frustrate the Petitioners’ constitutionally protected rights to the free exercise of religion and free speech, and violate their due process rights and right to equal protection.

14. For each of these reasons, and as explained in greater details below, Petitioners seek a declaration that the NYSED’s New Regulations are null and void, and a judgment enjoining Respondents from enforcing the New Regulations because they are contrary to law, arbitrary and capricious, and an abuse of discretion.

Jurisdiction and Venue

15. This Court has jurisdiction pursuant to New York Civil Practice Law and Rules (“C.P.L.R.”) §§ 7801-7806 to review the actions of a governmental office whose determination was based in an error of law, was arbitrary or capricious, or was an abuse of discretion. *See, e.g., New York City Health & Hosps. Corp. v. McBarnette*, 84 N.Y.2d 194, 205 (1994) (holding that a claim that challenging a rule as inconsistent with governing law may be brought under C.P.L.R. § 7803(3)); *Thrun v. Cuomo*, 112 A.D.3d 1038, 1040, 976 N.Y.S.2d 320, 323 (3d Dep’t 2013) (challenges to validity of regulations “were capable of being reviewed in the context of a CPLR article 78 proceeding.”)

16. This Court further has jurisdiction pursuant to C.P.L.R. § 3001 to issue a declaratory judgment as to the rights and other legal relations of the parties to this justiciable controversy. *See Klostermann v. Cuomo*, 61 N.Y.2d 525, 538 (1984) (“The primary purpose of declaratory judgments is to adjudicate the parties’ rights before a ‘wrong’ actually occurs in the hope that later litigation will be unnecessary”).

17. Venue in the County of Albany is proper pursuant to C.P.L.R. § 506(b)(2) because Petitioners assert claims against the Commissioner of Education. *See We Transp., Inc. v. Bd. Of Educ. of Uniondale Union Free Sch. Dist.*, 92 A.D.2d 1074, 1075, 462 N.Y.S.2d 286, 287 (3d Dep’t 1983) (citing C.P.L.R. § 506(b)(2) and noting that “[v]enue is properly set in Albany County when this petition was originally brought because the Commissioner of Education was named as a respondent”).

Petitioners

18. **Petitioner PEARLS** is a non-profit organization based in Brooklyn, New York. Its mission is to protect the fundamental right of parents to choose a yeshiva education for their children, and to facilitate the preparation and implementation of a secular studies curriculum that is culturally sensitive to the values of yeshiva students. The school and parent members of PEARLS are impacted by the New Regulations.

19. **Petitioner Agudath Israel of America** was founded in 1922, and is a national Orthodox Jewish organization headquartered in New York, with offices, chapters, affiliated synagogues, and constituents across North America. Agudath Israel has been at the forefront of advocacy on behalf Orthodox Jewish interests and rights, perhaps most significantly on behalf of the Jewish school community, and has been active in legislative bodies, executive agencies, and judicial forums on a wide array of issues affecting that community. Thousands of Agudath Israel members send their children to New York yeshivas affected by the New Regulations.

20. **Petitioner Torah Umesorah: National Society for Hebrew Day Schools** serves as the pre-eminent support system for Jewish Day Schools and yeshivas in the United States. Its membership consists of over 675 day-schools and yeshivas with a total student enrollment of over 200,000 students. Its mission is to ensure that every student in the schools it services receives the highest standards of Torah education, along with the skills to lead a successful life and become a productive member of society. Most of those schools and students are in New York, and are affected by the New Regulations.

21. **Petitioner Mesivta Yeshiva Rabbi Chaim Berlin** was established in 1904 in Brooklyn, New York, and has been in continuous operation since that time. It is still located in Brooklyn, where it operates a K-12 school, as well as undergraduate and graduate programs.

22. **Petitioner Yeshiva Torah Vodaath** was established in 1918 in Brooklyn, New York, where it has been in continuous operation since that time. The yeshiva operates a K-12 school, as well as undergraduate and graduate programs.

23. **Petitioner Mesivtha Tifereth Jerusalem** was established in 1907 on the Lower East Side of Manhattan. The yeshiva has been in continuous operation since that time, and currently operates two campuses: a K-12 school and undergraduate and graduate programs on the Lower East Side, and a high school and undergraduate and graduate programs on Staten Island.

24. **Petitioner Rabbi Jacob Joseph School** was founded in 1899 on the Lower East Side of Manhattan, and has been in continuous operation since that time. Its affiliated elementary schools currently operate on Staten Island. It received its charter from the Board of Regents in 1903.

25. **Petitioner Yeshiva Ch'san Sofer – The Solomon Kluger School** is the successor to Yeshiva Rabbi Solomon Kluger, which was founded on the Lower East Side of Manhattan in 1902. The school moved to Brooklyn in 1948, where it now operates a boys K-12 school as well as an undergraduate program.

26. The Petitioner Yeshivas are the original Orthodox day schools that were founded in New York at the close of the nineteenth century and the dawn of the twentieth. Ranging between 100 and nearly 125 years old, they have been operating continuously since shortly after the “substantially equivalent” standard first appeared in the Education Law in 1894.

27. Since that time, they have collectively produced tens of thousands of graduates who have participated successfully in New York and American society. Their graduates have succeeded in every professional field. More importantly, their graduates serve as Rabbis,

Principals, Deans, teachers and spiritual authorities throughout New York and across the United States and in those capacities have contributed to the rejuvenation of Orthodox Jewish life.

28. The New Regulations subject the Yeshiva Petitioners to heightened standards of scrutiny and review not imposed on other nonpublic schools, require Yeshiva Petitioners to demonstrate compliance with criteria that are not substantially equivalent to the education provided by similarly situated schools, and require Yeshiva Petitioners to revise curricula and alter the emphasis on Jewish Studies.

29. Petitioners have members who are parents of children who attend yeshivas in New York. These parents choose yeshiva education for their children to fulfill the Biblical injunction that “You shall place these words of Mine upon your heart and upon your soul ... and you shall teach them to your children to speak in them.” Deuteronomy 11:18-19. This follows the example of Abraham, of whom it is written, “I have known him because he commands his sons and his household after him, that they should keep the way of the Lord.” Genesis 18:19.

30. Yeshivas, including the Yeshiva Petitioners, offer a means of fulfilling that Biblical injunction because they incorporate religious instruction into every aspect of their curriculum. The Second Circuit has recognized this essential characteristic in describing yeshiva education:

Even general studies classes are taught so that religious and Judaic concepts are reinforced. ... In an effort to provide the kind of synthesis between the Judaic and general studies for which the school aims, the curriculum of virtually all secular studies classes is permeated with religious aspects, and the general studies faculty actively collaborates with the Judaic studies faculty in arranging such a Jewish-themed curriculum.

Westchester Day Sch. v. Vill. of Mamaroneck, 504 F.3d 338, 344-45 (2d Cir. 2007).

Respondents

31. **Respondent Lester Young Jr.** is Chancellor of the Board of Regents. The Board of Regents is the governmental agency responsible for establishing “rules for carrying into effect the laws and policies of the state, relating to education.” N.Y. Educ. Law § 207. The Board of Regents appoints a Commissioner to be the chief administrative officer of the New York State Education Department (“NYSED”). The NYSED, in turn, is responsible for the “general management and supervision of all public schools and all of the educational work of the state.” N.Y. Const. art. V, § 4; *see also* N.Y. Educ. Law § 101.

32. **Respondent Betty A. Rosa** is the Commissioner of the NYSED. As the chief executive of the NYSED, Commissioner Rosa is responsible for enforcing all “laws relating to the educational system of the state” and executing “all educational policies determined upon the board of regents.” N.Y. Educ. Law § 305.

Statement of Facts

A. Yeshivas

33. It is impossible to overstate the centrality of yeshivas and the education they provide to the growth and vitality of Orthodox Jewish life in the United States.

34. After the Holocaust, the American Jewish community set out to rebuild that which had been destroyed in Europe. That effort placed a primary focus on the creation of a network of Jewish day schools across the United States:

toward the end of World War II ... there were roughly 30 day schools with an enrollment of between 6,000 and 7,000 student in the entire country and only six were outside of New York City. By the early 1970s, the figure exceeded 67,000 students in 330 day schools.

“Spotlight on Jewish Day School Education.” JEWISH EDUCATION SERVICE OF NORTH AMERICA, Summer 2003.

35. There now more than 170,000 students educated in approximately 450 yeshivas across New York State alone. This dramatic increase is not a result of the growth of New York's Orthodox community, but rather the catalyst for that growth.

36. Numerous studies have confirmed that the single most determinative factor of involvement in Jewish life and observing Jewish tradition among adult members of the Jewish community is whether they attended a Jewish day school as a child. (*See, e.g.* Sylvia Barack Fishman, "Jewish Education and Jewish Identity Among Contemporary American Jews: Suggestions from Current Research," BUREAU OF JEWISH EDUCATION, CENTER FOR EDUCATIONAL RESEARCH AND EVALUATION, Boston, 1995 ("Younger American Jewish adults (25-44) who have received six or more years of Jewish education are the group most likely to join, volunteer time for, and donate money to Jewish causes, to belong to synagogues and attend services at least several times a year, to seek out Jewish neighborhoods and Jewish friends, to perform Jewish rituals in their homes...").

37. Parents choose a yeshiva education for their sons and daughters because these schools offer an education rooted in their community's culture, religion, traditions, and language. In doing so, they are providing their children with an educational and spiritual foundation that reaches far beyond the classroom, and are sustaining a culture and way of life.

B. New York State's Compulsory Education Law

38. New York law requires that parents provide their school-age children with "full time instruction." N.Y. Educ. Law §§ 3205(1), 3212(2)(b). Parents may satisfy their duties under New York's compulsory education law by having their children attend parochial schools. N.Y. Educ. Law § 3212(2)(d) (absolving parents of children in local parochial schools from furnishing proof of attendance upon required instruction).

39. As the New York Court of Appeals has put it, “[p]rivate schools have a constitutional right to exist, and parents have a constitutional right to send their children to such schools.” *Packer Collegiate Inst. v. Univ. of State of New York*, 298 N.Y. 184, 191-92 (1948). *Matter of Falk*, 110 Misc.2d 104, 107-108, 441 N.Y.S.2d 785, 788 (Fam. Ct. Lewis Cty. 1981) (“Parents have the right to provide their children a basic education in a privately operated system.”) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

40. Consistent with those constitutional rights and limitations, New York’s compulsory education scheme – which dates to 1874 – does not rigidly prescribe the mode or method of instruction that parents who choose private schools must arrange for their children. Instead, since at least 1894, parents have only been required to provide their school-age children with instruction that is – as Section 3402 still provides – “substantially equivalent” to the instruction they would receive in their local public school:

Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

N.Y. Educ. Law § 3204(2).

C. The Substantial Equivalence Standard

41. While the phrase “substantially equivalent,” has not been explicitly defined by the Legislature – either in 1894 or in more than 125 years since – the Legislature has provided some insight into what the standard requires.

42. With regard to the length of the school day, the Legislature has mandated that children attending private schools receive at least as many hours of instruction as children attending public schools. N.Y. Educ. Law § 3210(2) (“If a minor included by the provisions of

part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.”).

43. Beyond statutory guidance, both the state and federal courts of New York have provided some interpretation of the substantial equivalence standard. In *Blackwelder v. Safnauer*, the court held that “[t]he ‘substantially equivalent’ standard is flexible enough to allow local school officials sufficient leeway to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue” – and thus allows for “variations from district to district” rather than a “singular statewide standard.” *Blackwelder v. Safnauer*, 689 F. Supp. 106, 126-27, 135 (N.D.N.Y. 1988).

44. In addition, the Court of Appeals has held that the substantial equivalence standard does *not* authorize NYSED to issue detailed regulations concerning the curriculum, course offerings and teacher qualifications at private schools. As the court said about a statutory regime that already included the “substantial equivalence” standard, “it would be intolerable for the Legislature to hand over to any official or group of officials, an unlimited, unrestrained, undefined power to make such regulations as he or they should desire, and to grant or refuse licenses to such schools, depending on their compliance with such regulations.” *Packer Collegiate Inst. v. Univ. of State of New York*, 298 N.Y. 184, 192 (1948).

D. The NYSED’s Prior Substantial Equivalence Guidance

45. Until recently, NYSED’s view regarding substantial equivalence were expressed in written guidance that it issued to local school boards and districts. This guidance explicitly acknowledged that a local school district “has no direct authority over a nonpublic school”. Exhibit A at 1.

46. NYSED noted that these guidelines were “based upon current practices in the field which have proven to be effective” and were aimed at providing “advice to help” parents and school officials “work together harmoniously.” Exhibit A at 1.

47. Thus, not only did NYSED’s guidance recognize that substantial equivalence does not provide local school officials with direct authority over a nonpublic school to conduct periodic and gratuitous reviews or inspections of private schools, it explicitly acknowledged that private schools should not be subject to any substantial equivalence reviews or inspections unless a “serious concern” arose about the instruction they were providing. Exhibit A at 4.

E. NYSED Promotes Language and Cultural Diversity in Public Schools

48. More broadly, the NYSED has highlighted the importance of, and reaffirmed a commitment to, the type of education that the Yeshiva Petitioners offer – at least when such education is offered in the public schools.

49. In 2018, “the New York State Board of Regents directed the Office of P-12 Education and Higher Education to convene a panel of experts” to “develop ... a framework for culturally responsive-sustaining education.” Exhibit B at 2. The NYSED has since presented the resulting “guidance document to students, teachers, parents, school and district leaders, higher education faculty, community advocates, and policymakers.” *Id.*

50. Recognizing that “[h]istorically, education debates have been polarized, with difference sometimes being viewed as an individual deficit,” the NYSED noted that the guidance “is intended to help education stakeholders create student-centered learning environments that affirm cultural identities.” Exhibit B at 2. Specifically, the guidance document provides that

New York State understands that the responsibility of education is not only to prevent the exclusion of historically silenced, erased, and disenfranchised groups, but also to assist in the promotion and perpetuation of cultures, languages and

ways of knowing that have been devalued, suppressed, and imperiled by years of educational, social, political, economic neglect and other forms of oppression.

and

Culture far transcends practices such as cuisines, art, music, and celebrations to also include **ways of thinking, values, and forms of expression**. These ways and forms are in constant flux, renegotiation, and evolution. ... From this perspective, **learning is rooted in the lives and experiences** of people and cultivated through activities that people find meaningful. **When teaching is not rooted in students' lives, student learning suffers.**

Exhibit C at 6 & 12. (emphasis added).

51. In issuing this guidance, which seeks to “affirm and value the various aspects of students’ cultural identities,” NYSED noted it was encouraging educators to “[c]ommit to understanding the role of culture in education” and “[p]ractice mutual respect for qualities and experiences that are different from one’s own.” Exhibit C at 8-9.

52. In light of these objectives, the guidance recommends “work to encourage cultural pluralism and not cultural assimilation,” including “aligning curriculum and instruction to the histories, languages, and experiences of traditionally marginalized voices.” Exhibit C at 13, 12. Specifically, the guidance instructs school district leaders to adopt a curriculum that “includes culturally authentic learning experiences that mirror students’ ways of learning, understanding, communicating, and demonstrating curiosity and knowledge,” and which “highlights contributions and includes texts reflective of the diverse identities of students.” *Id.* at 39.

53. In turn, the guidance instructs policymakers within the Education Department itself to act in furtherance of the same goals of pluralism and promoting diversity of identity within New York’s education system. Exhibit C at 53.

54. Ultimately, the NYSED notes that, in education, “differences should not just be seen as strengths, but they should also be maintained because they are what make students and families unique.” Exhibit C at 13.

55. In addition to its written guidance on culturally sustaining education, the NYSED has implemented a number of programs that promote and support the use of languages other than English in the classroom, including transitional bilingual education programs and dual language programs.

56. In transitional bilingual education programs, classes of students are taught the majority of their academic subjects in a language other than English, with the goal of “allowing students the opportunity to develop bilingually”. Exhibit D at 1. In New York City alone, there are almost 300 different iterations of the transitional bilingual education program and speakers of eight different languages are able to receive classroom instruction in public schools primarily in the language they speak at home. Exhibit E.

57. The dual language programs, in turn, “seek to offer students the opportunity to become bilingual, biliterate, and bicultural while improving their academic ability.” Exhibit D at 1. Again, in New York City alone, there are more than 220 different general education dual language programs across roughly 200 public schools, with coursework taught in Arabic, Bengali, Chinese, French, Haitian Creole, Italian, Japanese, Korean, Polish, Russian, and Spanish. Exhibit E.

58. In the majority of these dual language programs, “students receive half of their instruction in their primary or home language, and the remainder of their instruction in the target language,” but NYSED also approves of programs in which the non-English language is used for as much as 90% of all classroom instruction. Exhibit D at 1-2.

59. Ultimately, in New York City, which is home to the majority of yeshivas and yeshiva students in New York State, there are more than 550 different programs through which students are receiving half or more of their classroom instruction in a language other the English.

60. In the last year and a half, the NYSED has also taken additional steps to make various core aspects of public school curricula available in other languages, including “expanding, from six to nine, the number of languages in which the Mathematics Tests will be available” to students in grades 3 through 8 (Exhibit F at 2) and promoting the use of “opportunities for students to respond using multiple modalities, including drawings, written English (both words and full sentences), and/or home language” while “in the science classroom” (Exhibit G at 3).

F. The Proposed 2018 Guidelines and 2019 Regulations

61. On November 20, 2018, NYSED issued comprehensive rules governing all nonpublic elementary and high schools, including private religious schools, in New York.

62. These guidelines (hereinafter “2018 Guidelines”), amended in part on December 21, 2018, contained an array of rules, checklists, and procedures imposed on every private school in the State. *See New York State Assoc. of Independent Schools v. Elia*, 65 Misc.3d 824, 829, 110 N.Y.S.3d 513, 516–17 (Albany Cnty. Sup. Ct. 2019) (hereinafter “PEARLS”).

63. Those 2018 Guidelines required specific instruction in numerous subjects for all elementary and middle school students (*see* Exhibit H), and further mandated inspections of all nonpublic schools on a strict timeline (*see* PEARLS, 110 N.Y.S.3d at 517).

64. Following their issuance, several private schools, associations, and interested individuals challenged these 2018 Guidelines in the Albany County Supreme, alleging, in part, that the Commissioner did not have the authority to unilaterally impose those rules. This was because the 2018 Guidelines amounted to a rule under SAPA because they created a new

mandatory “inspection regime” and imposed “rigid, statewide procedures and standards” on nonpublic schools. *PEARLS*, 110 N.Y.S.3d at 516.

65. The Supreme Court agreed, finding that the 2018 Guidelines involved a “mandate that the LSAs conduct reviews at every school and dictate[s] when they commence,” making them akin to ‘sufficiently fixed standards’ that required compliance with the SAPA.” *Id.* at 517. Because the 2018 Guidelines were issued without adhering to the requirements of SAPA, Supreme Court struck them down pursuant to CPLR § 3001, declaring that they were “null and void.”

66. Thereafter, in July of 2019, NYSED first attempted to formally promulgate the rejected 2018 Guidelines under the processes for formal rulemaking. *See* Exhibit I at 1. The rulemaking for these proposed guidelines was published in the State Register on July 3, 2019, and the public comment period ended September 3, 2019. *Id.* NYSED received more than 140,000 comments in opposition to them and, after little progress or public discussion on these proposed regulations, NYSED ultimately abandoned them.

G. The New Regulations

67. On March 30, NYSED released a draft of the New Regulations, with the stated purpose of providing “guidance to local school authorities to assist them in fulfilling their responsibilities under the Compulsory Ed Law.” Exhibit J at 19.

68. NYSED indicated that “Public comment will be received until 60 days after publication of this notice” – that is, until May 29, 2022 – and that “if adopted at the September 2022 Regents meeting, the proposed rule will become effective on September 28, 2022.” Exhibit J at 21; Exhibit K at 11.

69. The New Regulations contain many of the same flaws present in the Proposed 2018 and 2019 Regulations. Yet again, the regulations contradict the existing substantial equivalency

framework, violate the admonition from the Court of Appeals in *Packer Collegiate*, and have failed to comply with the requirements of SAPA.

1. Mandatory Review and Determination Criteria and Procedures

70. The New Regulations, much like the Proposed 2018 and 2019 Regulations, establish mandatory and rigid guidelines for substantial equivalency, which are to be used by various “local school authorities (LSAs)” in evaluating nonpublic schools. Exhibit L at 130.1(c).

71. The New Regulations mandate that “LSAs shall make substantial equivalency determinations for all nonpublic schools within their geographical boundaries” consistent with the criteria contained in the New Regulations, and “all reviews shall include at least one site visit to the nonpublic school by the LSA.” Exhibit L at 130.2(a).

72. The New Regulations list a wide variety of criteria that “must be considered” by LSAs, in making their determinations. Significantly, among the most prominent criteria for a review of a yeshiva is “whether English is the language of instruction for common branch subjects.” This despite the robust home language instruction promoted in the public schools.

73. In addition to instruction in the core subjects of English, Math, Social Studies and Science, the local school authority review of yeshivas must also include a review of instruction in:

- (1) patriotism and citizenship
- (2) the history, meaning, significance and effect of the provisions of the Constitution of the United States and the amendments thereto, the Declaration of Independence, the Constitution of the State of New York and the amendments thereto
- (3) instruction in New York State history and civics
- (4) instruction in physical education and kindred subjects and instruction in health education regarding alcohol, drugs, and tobacco abuse
- (5) instruction in highway safety and traffic regulation

- (6) instruction in hands-only cardiopulmonary resuscitation and the use of an automated external defibrillator.

74. Moreover, the New Regulations require LSAs to assess “whether instruction is given only by a competent teacher”. Exhibit L at 130.9. Nothing in the New Regulations restricts an LSA from assessing faculty teaching Jewish Studies. And as the Second Circuit Court of Appeals has noted, in yeshivas “the curriculum of virtually all secular studies classes is permeated with religious aspects.” *Westchester Day Sch. v. Vill. of Mamaroneck*, 504 F.3d 338, 345 (2d Cir. 2007). Thus, the New Regulations require LSAs to assess and review religious studies curriculum and faculty.

2. Pathways to Avoid Local School Board Reviews

75. The New Regulations also provide several alternative pathways that permit non-public schools to avoid an LSA review.

76. First, the New Regulations exempt all schools that have a registered high school that administers the Regents examinations. A school that is K-8 is not eligible for this exemption.

77. Second, the New Regulations exempt all schools that are accredited by an accrediting body approved by the NYSED. Only a small number of New York’s 450 yeshivas are accredited.

78. While some yeshivas will qualify for the registration or accreditation exemption, all or nearly all non-Jewish nonpublic schools will qualify. As a result, LSA reviews will be limited exclusively, or almost exclusively, to yeshivas.

79. That is because many yeshivas are elementary-only (*see, e.g.*, Exhibit M), meaning they are not connected to a registered high school (*see* Exhibit L at 130.3), and so cannot take advantage of the exemption offered by that pathway.

80. Moreover, “there are virtually no accrediting agencies that have dealt with the yeshiva community” (Exhibit M), so yeshivas in particular, even in comparison to other religious nonpublic schools, will not be able to access these alternatives.

81. By contrast, it is believed that all of New York’s Catholic and Independent schools are either registered or accredited, and will therefore be exempt from the LSA inspections mandated by the New Regulations.

82. While LSA reviews of yeshivas will focus on instruction in numerous non-core subjects, such as the “patriotism and citizenship,” New York State Constitution, cardiopulmonary resuscitation and a dozen others such topics, registered and accredited schools will be exempt from such scrutiny even though neither registration nor accreditation focuses on those areas.

83. And third, the New Regulations offer an exemption to nonpublic schools that can demonstrate compliance via assessments approved by NYSED. However, the New Regulations do not identify what these assessments are, and whether a nonpublic school is exempt based on the use of these assessments remains dependent on the subjective judgment of the LSA.

3. Penalties Imposed by the New Regulations

84. A determination under the New Regulations that a school is not substantially equivalent triggers a variety of immediate and extreme consequences affecting yeshiva students, parents, and the school itself.

85. The New Regulations provide that when an “LSA renders a negative substantial equivalence determination” for a nonpublic school then “the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law.” Exhibit L at 130.06(c)(2)(i). Put more simply, the LSA’s opinion

automatically renders the nonpublic school, and the parents of its students, in violation of New York law.

86. The New Regulations provide for a right of appeal by the nonpublic school, and they simultaneously require that parents be informed of the determination and be provided with “a reasonable timeframe ... to enroll their children in a different appropriate educational setting, consistent with Education Law §3204.” Exhibit L at 130.06(c)(2)(ii). The New Regulations further allow for the cessation of “[l]egally required services to the nonpublic school and students” at the end of the same timeframe. Exhibit L at 130.06(c)(2)(iv).

87. For the parents, the threat is even worse. Under the New Regulations, the moment that the LSA makes its negative determination, the parents who have enrolled their children in the nonpublic school are no longer providing their children with an education that meets the compulsory education requirements of Article 65 of the Education Law. That means that – even if they do not yet have notice of the LSA’s determination – these parents are now in violation of the law.

88. The New Regulations explicitly provide that “[a]ny violation of the compulsory education requirements contained in Article 65 of the Education Law is subject to the penalties prescribed in Education Law §3233.” Exhibit L at 130.14(a) (emphasis added). Education Law §3233, in turn provides that violations of the compulsory education law

shall be punishable for the first offense by a fine not exceeding ten dollars or ten days’ imprisonment; for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment.

89. Put simply, the New Regulations threaten parents of yeshiva students with imprisonment based on the determinations made by an LSA.

90. By disrupting instruction in the middle of the school year, threatening parents with imprisonment and unpredictably terminating legally required services to students, the consequences outlined in the New Regulations only serve to punish parents and harm the very students that the NYSED professes to want to protect.

H. Notice and Comment on the New Regulations

91. On March 3, 2022, the Board of Regents indicated that “the proposed amendment will be presented for permanent adoption at the September 2022 Regents meeting after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act.” Exhibit K at 11. Thus, even prior to the start of the public comment period, the NYSED made it clear that it was not going to consider any alternatives suggested, but was instead going to adopt the New Regulations as they were proposed.

92. On March 30, the NYSED confirmed that public comments would be received until May 31, 2022.

1. The Overwhelming Negative Public Response

93. Between March 30 and May 31, 2022, the NYSED “received approximately 350,000 comments on” the New Regulations. Exhibit N at 1. The overwhelming majority of these public comments expressed opposition to the New Regulations.

94. Above all, the public comments raised concerns that the review and determination procedure outlined in the New Regulations was contradicted by law and contrary to public policy.

95. The public comments repeatedly noted that the requirement that nonpublic schools be subject to a review and determination every seven years in order to operate effectively acted as a licensing requirement in violation of the applicable law.

96. The public comments noted that the New Regulations would effectively contradict the guidance applicable to public schools regarding cultural sustaining education and the availability of home language instruction.

97. The public comments expressed concern that a yeshiva's loss of control over its curriculum and faculty will undermine its ability to fulfill its religious and educational mission.

98. The public comments expressed extreme concern over the penalties contained in the New Regulations, noting that they allowed for the abrupt closure of schools, the cessation of legally required services to students, and criminal fines and punishment for parents.

2. The NYSED's Review of the Public Comments

99. On September 9, 2022, the NYSED released a statement acknowledging that approximately 350,000 comments had been received and stating that they made only "non substantial revisions to the proposed rule in response to public comment and to provide clarification." Exhibit N at 1-2.

100. NYSED recommended that the New Regulations "be added, as submitted, effective September 28, 2022." Exhibit N at 12.

101. In the accompanying "assessment of public comment" the NYSED presented responses to a selection of the comments it had received. Exhibit O. Despite acknowledging the repeated iteration of the concerns described above, the NYSED consistently avoided responding to or addressing some of the most frequently raised concerns, or came to conclusions that directly contradict the applicable law.

102. For example, the NYSED noted that "[t]ens of thousands of individuals commented that the proposed regulation is unnecessary because yeshivas do a good job, have successful graduates, and/or that their religious community has less crime, drugs, suicide, incarceration, and

unemployment than other communities” and that these commenters expressed concerns that “nothing has changed to warrant the promulgation of a rule and that a small group of disgruntled yeshiva graduates are driving the proposed regulations.” Exhibit O at 39. The comments repeatedly expressed concern that the New Regulations were “discriminatory” and rooted in animosity to schools such as the Yeshiva Petitioners. *Id.* at 48, 39.

103. NYSED did not revise the New Regulations in response to the comments. To the contrary, NYSED stated explicitly that it was not making any substantive revisions to the New Regulations. Exhibit N at 1-2.

3. September 2022 Regents Meeting

104. The New Regulations were briefly addressed at the Regents Meeting on September 13, 2022. The meeting contained no substantive discussion of the 350,00 comments received. Nor was there any discussion of workable alternatives. Instead, the New Regulations were subject only to a brief, cursory discussion before being put to a vote and adopted.

105. That yeshivas are the target of the New Regulations is beyond dispute.

106. The New York Times article reporting on the Regents vote on September 13, 2022, ran under the headline “New State Rules Offer Road Map for Regulating Private Hasidic Schools.”

107. The Daily News article previewing the Regents vote was titled “Tougher private school regulations aimed at ultra- Orthodox yeshivas advances to Tuesday vote at NY Board of Regents.”

108. The Wall Street Journal weighed in with an article titled “New York Stiffens Religious-School Policy.” The religious schools referenced in the article were yeshivas.

109. These articles merely said out loud what everybody else understood: that the New Regulations were targeted at yeshivas.

I. The New Regulations Violate the State Administrative Procedures Act

110. The SAPA rule-making procedures require an agency to provide notice of the proposed rule making to the Secretary of State for publication in the state register and to provide the public an opportunity to submit comments on the proposed rule: “Prior to the adoption of a rule, an agency shall submit a notice of proposed rule-making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule.” N.Y. A.P.A. Law § 202(1)(a). In evaluating public comments, the rulemaking body must address concerns raised in comments.

111. The New Regulations, like the 2018 Guidelines that preceded them, are rules subject to the SAPA. The New Regulations violate the SAPA requirements in two separate ways.

112. First, NYSED has again failed to meet the notice and comment requirements of SAPA by ignoring the hundreds of thousands of comments it received regarding the New Regulations. The review process for the roughly 350,000 comments repeatedly underscores the lack of genuine review or consideration. That is because NYSED had determined in advance that it was not going to alter or revise the New Regulations in response to alternatives proposed during the Notice and Comment period – because such revisions would trigger an additional public comment period. The public comment process run by NYSED was therefore a sham.

113. This was demonstrated by the total lack of meaningful review or discussion of the public comments – and the concerns advanced or alternatives proposed therein – at the Regents meeting. More than 350,000 comments, concerns and alternatives were apparently shared, considered, discussed, and rejected – all in a handful of minutes. This makes a mockery of SAPA and its Notice and Comment requirements.

114. Second, SAPA was violated not only by the process of the adoption of the New Regulations, but also by their content. The New Regulations single out yeshivas for a more invasive, heightened review of their curricula and instructors than other nonpublic schools. Moreover, the New Regulations would penalize yeshivas for offering instruction in their students' home language despite home language instruction being offered – and, indeed, lauded – in similarly situated public schools. These difference in required instruction, scrutiny and permissible language of instruction apply exclusively to yeshivas.

115. Under the New Regulations, a yeshiva offering home language instruction similar to nearby public schools will be determined to be not substantially equivalent. Such a determination would effectively result in the shuttering of a school and dispersal of its students, faculty, and staff.

116. NYSED currently permits numerous public schools to teach classes in languages other than English. For example, Respondents explicitly encourage and laud public school “Dual Language Programs” that allow students to “receive half of their instruction in their primary or home language, and the remainder of their instruction in the target language,” while also promoting some such programs that offer “a 90% to 10% model, [where] a greater percentage of the instruction is in the target language other than English and decrease[s] over time until reaching 50% to 50%.” NYSED, *Program Options for English Language Learners/Multilingual Learners* (discussing “Dual Language Programs”) (available at <http://www.nysed.gov/bilingual-ed/program-options-english-language-learnersmultilingual-learners>).

117. Yeshivas and other private schools that must prove substantial equivalency via the LSA-investigation method, on the other hand, require that “English is the language of instruction for common branch subjects,” 8 N.Y.C.R.R. § 130.9(b), with only a single temporary exception

permitting nonpublic schools to offer “students who have limited English proficiency” a special program that “enabl[es] them to make progress toward English language proficiency,” 8 N.Y.C.R.R. § 130.9(c), only for a limited time.

118. Similarly, only yeshivas will be subject to scrutiny regarding instruction in numerous non-core subject areas such as patriotism and citizenship; the history, meaning, significance and effect of the provisions of the Constitution of the State of New York and the amendments thereto; and instruction in hands-only cardiopulmonary resuscitation.

119. Nonpublic schools that are registered or accredited will be exempt from such instructional requirements and scrutiny, even though registration and accreditation do not focus on such instructional areas.

120. In this manner, the New Regulations plainly violate the “substantial equivalency” standard by imposing more onerous standards on nonpublic schools than on public schools. Because the New Regulations contradict the express language of the statute and seek to impose rules that depart from those passed by the Legislature, the New Regulations are null and void.

J. The New Regulations Impose an Impermissible *de facto* Licensure Requirement

121. The New Regulations create a *de facto* licensure regime, despite neither Education Law § 3204 nor any other statutory provision authorizing the NYSED to subject all private schools to a licensure requirement.

122. In 1948, the Court of Appeals struck down an attempt by the Legislature to grant the NYSED authority to license private schools because the grant was not accompanied by any legislative direction as to the appropriate procedures and standards to be applied to the licensure requirement. In *Packer Collegiate Institute v. University of State of New York*, 298 N.Y. 184 (1948), the Court of Appeals held that

it would be intolerable for the Legislature to hand over to any official or group of officials an unlimited, unrestrained, undefined power to make such regulations . . . and to grant or refuse licenses to such schools depending on their compliance with such regulations.

Id. at 194. The Court noted that state regulation of private schools was not a “small or technical matter” because the United States Supreme Court has already ruled that “[p]rivate schools have a constitutional right to exist, and parents have a constitutional right to send their children to such schools”, and that the “Legislature, under the police power, has a limited right to regulate such schools in the public interest.” *Id.* at 192.

123. In other words, the Court has long held that the NYSED general power to enforce the Education Laws do not permit the creation of a *de facto* licensure regime. And yet, here, that is precisely what the NYSED is attempting with the New Regulations.

124. In fact, the Education Law requires some private schools to seek and obtain a license from the NYSED. Section 5001 provides that “[n]o private school which charges tuition or fees related to instruction and which is not exempted hereunder shall be operated by any person or persons, firm, corporation, or private organization for the purpose of teach or giving instruction in any subject or subjects, unless it is licensed by the department.” N.Y. Educ. Law § 5001(1).

125. The Legislature, however, has expressly chosen to exempt most, but not all, private schools “providing kindergarten, nursery, elementary or secondary education” from that requirement. N.Y. Educ. Law § 5001(2)(b).

126. Yeshiva Petitioners and the yeshiva members of Petitioners meet the terms of the statutory exemption.

127. Recognizing these limits on its licensure authority, the NYSED has not previously required schools exempt under NY Educ. Law 5001(2)(b) to seek or obtain licensure. To the extent it has advanced any licensure or registration regime for these schools, the regimes have been

voluntary. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 8, § 125.1 (creating a voluntary registration regime for private nursery schools and kindergartens); N.Y. Comp. Codes R. & Regs. tit. 8, § 100.2 (“Nonpublic schools may be, and public elementary, intermediate, middle, junior high, and high schools shall be, registered by the Board of Regents . . .”).

128. The New Regulations attempt to make an end-run around the statutory licensure exemption for nonpublic schools. Under the New Regulations, yeshivas can be shut down if they fail to comply with the New Regulations mandatory review-and-approval procedures. These schools could also be shut down if the LSAs in which they are located determine that they do not provide children with instruction or language requirements that satisfy the New Regulations. In other words, the New Regulations create an involuntary and mandatory permission-based barrier to entry and operation – just like any other licensure regime.

129. The New Regulations are therefore inconsistent with governing law because they create a *de facto* licensure regime, though neither Education Law § 3204 nor any other statutory provision authorizes the NYSED to subject all nonpublic schools to a licensure requirement. *See Hodgkins v. Cent. Sch. Dist. No. 1 of Towns of Conklin*, 78 Misc.2d 91, 97, 355 N.Y.S.2d 932, 938 (Sup. Ct. Broome Cnty. 1974) (noting that the Board of Regents’ and Commissioner’s “rule-making authority does not, of course, encompass the right to enact regulations in conflict with a statute or at odds with a clearly defined statutory policy”).

K. The Proposed 2022 Guidelines Violate Petitioners’ Constitutional Rights.

130. The New Regulations should also be struck down because they violate Petitioners’ rights under the United States Constitution and the New York Constitution. In particular, the New Regulations

- violate the Petitioners right to free exercise of religion and to equal protection under the law by targeting yeshivas such as the Yeshiva Petitioners for separate and unequal treatment under the law;

- violate the Petitioners' free speech rights by dictating what can and cannot be taught in yeshivas
- violate the Petitioners' due process right to control the upbringing and the education of their children, as recognized by *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and *Meyer v. Nebraska*, 262 U.S. 390 (1923); and
- violate Petitioners right to free exercise of religion by seeking to inhibit the entire Orthodox Jewish community's education system that is central to Petitioners' way of life, raising issues similar, if not identical, to those addressed by the United States Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

131. **The Right to the Free Exercise of Religion.** The First Amendment to the United States Constitution, through the Fourteenth Amendment, forbids States from enacting laws prohibiting or inhibiting the free exercise of religion. The First Amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” U.S. Const. Amend. I. The Free Exercise Clause is binding on the States pursuant to the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

132. The New York Constitution similarly provides that the “free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind.” N.Y. Const. Art. I, § 3.

133. The yeshiva education system is indispensable to the continuity and growth of the Jewish community in New York and around the country, and it is the primary vehicle for imparting Jewish ethical, moral and religious obligations to children, as well as teaching Jewish cultural identity, traditions, and history.

134. By instituting invasive secular oversight of religious instruction and teachers, and by empowering LSAs to determine whether a yeshiva can continue to educate students, the New Regulations hamper and interfere with religious education and development of the children

studying in yeshivas. In particular, the New Regulations will require yeshivas to alter their emphasis on religious studies.

135. The New Regulations target religious conduct for harsh and disparate treatment because the burden of the required substantial equivalency reviews fall almost exclusively on yeshivas.

136. The New Regulations do not survive strict constitutional scrutiny, because the NYSED does not have a compelling interest in conducting invasive oversight of religious education and the New Regulations are not narrowly tailored to ensure children receive a meaningful education. This is particularly true in the face of the considerable successes of yeshivas.

137. Even if a lower level of constitutional scrutiny applied to a free exercise of religion claim, the New Regulations still fail because the NYSED does not have a legitimate interest in imposing licensing regulations and requiring yeshivas to offer instruction in more than 20 different subject areas.

138. The New Regulations thus violate Petitioners' right to the free exercise of religion under the United States Constitution and the New York Constitution.

139. **The Right to Freedom of Speech.** The First Amendment to the United States Constitution protects freedom of speech. The Free Speech Clause of the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. Amend. I. The right to free speech, as incorporated by the Fourteenth Amendment, is safeguarded from unlawful impairment by the States. *See, e.g., Gitlow v. New York*, 268 U.S. 652, 666 (1925). The Free Speech Clause protects both the speaker of the communication and its recipients. *See, e.g., Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976).

140. The New York Constitution further provides that “[e]very citizen may freely speak, write and publish his or her sentiments on all subjects” and “no law shall be passed to restrain or abridge the liberty of speech.” N.Y. Const. art. I, § 8; *see also O’Neill v. Oakgrove Const., Inc.*, 71 N.Y.2d 521, 529 n.3 (1988) (“The protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the First Amendment.”).

141. The New Regulations’ requirements that yeshivas offer instruction in more than 20 different subject areas compels certain speech, which also burdens free speech by effectively restricting the amount of religious instruction that yeshivas can provide to their students.

142. The New Regulations do not survive strict constitutional scrutiny, because the NYSED does not have a compelling interest in conducting invasive oversight of the content of religious instruction and the New Regulations are not narrowly tailored to ensure children receive a meaningful education. This is particularly true in the face of the considerable successes of yeshivas.

143. Even if a lower level of constitutional scrutiny applied to a free speech claim, the New Regulations still fail because they burden substantially more speech than is necessary in imposing licensing regulations and requiring yeshivas to offer instruction in more than 20 different subject areas.

144. The New Regulations thus violate Petitioners’ right to free speech under the United States Constitution and the New York Constitution.

145. **The Right to Due Process.** The Fourteenth Amendment to the United States Constitution provides that no State shall “deprive any person of life, liberty, or property without

due process of law.” U.S. Const. Amend. 1. The Fourteenth Amendment to the United States Constitution protects the right to due process.

146. The New York Constitution likewise provides that “[n]o person shall be deprived of life, liberty or property without due process of law.” N.Y. Const. Art. I, § 6.

147. State laws limiting the rights of parents to choose the education for their children violate substantive due process and have repeatedly been held to be unconstitutional. The Supreme Court has expressly upheld the right of parents to send their children to nonpublic, religious schools (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)), to educate their children in languages other than English (*Meyer v. Nebraska*, 262 U.S. 390 (1923)), and to choose a school system that prepares their children for life within their community and traditions (*Wisconsin v. Yoder*, 406 U.S. 205 (1972)). In these cases and others, the Supreme Court has repeatedly invalidated restrictions on those rights.

148. Moreover, the Supreme Court has recognized that the intersection of free exercise and other constitutional rights creates a “hybrid” free exercise claim. In such cases, including those involving the right of parents to direct the education of their children, a heightened level of scrutiny applies to the law being challenged. *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

149. The New Regulations unduly burden Petitioners’ constitutionally-protected interest in sending their children to private religious schools that provide students with educational instruction consistent with the parents’ religious values and beliefs and are free from secular oversight and intrusion. In particular, the New Regulations compel public school authorities to conduct invasive substantial equivalency review of religious instruction and require religious schools to offer instruction in numerous subject areas with teachers reviewed and approved by public school authorities.

150. The New Regulations do not survive strict constitutional scrutiny, because the NYSED does not have a compelling interest in conducting invasive oversight of the content of religious instruction and the New Regulations are not narrowly tailored to ensure children receive a meaningful education.

151. Even if a lower level of constitutional scrutiny applied to a non-hybrid rights due process claim, the New Regulations still fail because the NYSED does not have a legitimate interest in imposing licensing regulations and requiring yeshivas to offer instruction in more than 20 different subject areas.

152. The New Regulations thus violate Petitioners' right to due process under the United States Constitution and the New York Constitution.

153. **The Right to Equal Protection.** The Fourteenth Amendment to the United States Constitution protects the right to equal protection. "Under the Constitution, the government may not discriminate against religion generally or against particular religious denominations." *Morris Cnty. Bd. of Chosen Freeholders v. Freedom From Religion Found.*, 139 S. Ct. 909 (2019). As such, the Supreme Court "has repeatedly held, governmental discrimination against religion – in particular, discrimination against religious persons, religious organizations, and religious speech – violates the Free Exercise Clause and the Equal Protection Clause." *Id.*

154. The New York Constitution likewise provides that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his or her civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state." N.Y. Const. Art. I, § 11.

155. The New Regulations seek to deprive yeshivas and their students of the protection and support offered to other communities. In hundreds of public schools, dual language education is not just permitted but supported. Public school students in New York State are able to receive up to 90% of their instruction in the language they speak at home – whether Spanish, Chinese, Italian, Bengali or Arabic – and proficiency through these programs is recognized and commended at graduation.

156. The New Regulations, however, prohibit yeshivas from offering education in their students' home language. Moreover, the New Regulations were deliberately designed to subject yeshivas to levels of scrutiny and restriction not imposed on other nonpublic and public schools.

157. Put simply, yeshivas are subject to unequal treatment and are threatened with closure for offering the sort of culturally and linguistically sustaining education the NYSED lauds in public schools.

158. The New Regulations do not survive strict constitutional scrutiny, because the NYSED does not have a compelling interest in conducting invasive oversight of religious instruction and the New Regulations are not narrowly tailored to ensure children receive a meaningful education.

159. The New Regulations thus violate Petitioners' right to equal protection under the United States Constitution.

Claims for Relief

First Claim

Violation of State Administrative Procedures Act

160. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 159.

161. The New Regulations imposes a review process and criteria for determining whether children attending nonpublic schools are receiving substantially equivalent instruction, and imposes harsh penalties, including closure, for schools that do not comply with those procedures and criteria.

162. Because the New Regulations create statewide procedures and standards, they are a “rule” as that term is defined in the SAPA. See N.Y. A.P.A. Law § 102(2)(a) (defining a “rule” as a statement of “general applicability that implements or applies law,” or a statement of “the procedure or practice requirements of an agency”);

163. Under the SAPA and the New York Constitution, rule-making is subject to various procedural requirements, including notice-and-comment requirements. See, e.g., N.Y. A.P.A. Law § 202(1) (requiring, among other things, notice-and-comment procedures); N.Y. Const. Art. IV, § 8 (“No rule or regulation made by any state department, board, bureau, officer, authority or commission, except such as relates to the organization or internal management of a state department, board, bureau, authority or commission shall be effective until it is filed in the office of the department of state.”).

164. The Notice and Comment period for the New Regulations was a sham. The NYSED did not – and never intended to – consider the concerns expressed and the alternatives

proposed in the public comments. The New Regulations therefore did not comply with SAPA, and should be declared null and void.

Second Claim

Violation of State Administrative Procedures Act

165. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 164.

166. The New Regulations also are contrary to law in that they impose greater requirements and restrictions on yeshivas than on other nonpublic and public schools.

167. The New Regulations subject yeshivas to a review process with fewer protections and more perilous consequences than those applicable to other schools.

168. The New Regulations limit the ability of yeshivas to teach students in their home language, despite the NYSED's efforts to promote and expand home language instruction in public schools. Similarly, the New Regulations require a review of the yeshivas' curricula, including instruction in a dozen subjects that is not required for other nonpublic and public schools.

169. There is no articulable justification for these aspects of the New Regulations and they are contrary to law.

170. Accordingly, the New Regulations are "arbitrary and capricious or an abuse of discretion, including an abuse of discretion as to the measure or mode of penalty or discipline imposed." CPLR 7803(3).

171. Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the New Regulations are contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the New Regulations are contrary to law, arbitrary and capricious, and an abuse of discretion, and enjoining Respondents from enforcing them.

Third Claim

Violation of State Administrative Procedures Act

172. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 171.

173. The New Regulations do not allow yeshivas to operate unless they receive a determination from an LSA that they are permitted to do so.

174. Neither Section 3204 nor any other provision in New York's compulsory education scheme created or permits a licensure regime for private schools in New York. *See Packer Collegiate*, 298 N.Y. at 188–92.

175. Petitioners are thus harmed by the New Regulations, which are contrary to law.

176. Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the New Regulations are contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the New Regulations are contrary to law, arbitrary and capricious, and an abuse of discretion, and enjoining Respondents from enforcing the New Regulations against them.

Fourth Claim

Violation of Right to Free Exercise of Religion

177. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 176.

178. The First Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment, forbids the States from enacting laws inhibiting the free exercise of religion. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The New York Constitution provides similar, if not greater, protections. *See* N.Y. CONST. art. I, § 3.

179. Petitioners have a constitutional right to freely exercise their religious beliefs and practices by providing a religious upbringing for their children. *See Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972).

180. Petitioners have a constitutional right to freely exercise their religious beliefs and practices by providing their children with an education that inculcates religious beliefs and values.

181. By requiring the sacrifice of religious autonomy and substantially interfering with the religious development of Jewish children in yeshivas, the New Regulations violate Petitioners' constitutionally-protected rights to the free exercise of religion.

182. Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the New Regulations are contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the New Regulations are contrary to law, arbitrary and capricious, and an abuse of discretion and enjoining Respondents from enforcing the New Regulations against them.

Fifth Claim

Violation of Right to Freedom of Speech

183. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 182.

184. The First Amendment to the United States Constitution, through the Fourteenth Amendment, restricts the States from unlawfully compelling speech and impairing the right to free speech. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796-97 (1988). The New York Constitution provides similar, if not greater, protections. *See N.Y. CONST.* art. I, § 8.

185. The New Regulations unlawfully compel certain speech and restrict other speech, in violation of Petitioners' First Amendment rights.

186. In particular, the New Regulations burden the free speech rights of Petitioners by effectively restricting the amount of religious instruction, a form of speech, that Petitioners may provide students.

187. By compelling secular speech and restricting religious speech, the New Regulations constitute a content-based abridgment of speech and are presumptively invalid. *See R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

188. The NYSED has no sufficient justification for its abridgement of this free speech.

189. Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the New Regulations are contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the New Regulations are contrary to law, arbitrary and capricious, and an abuse of discretion, and enjoining Respondents from enforcing the New Regulations against them.

Sixth Claim

Violation of Right to Due Process

190. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 189.

191. The Due Process Clause of the Fourteenth Amendment to the United States Constitution affords parents a fundamental, protected right to control the upbringing and the education of their children. *See Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923). The New York Constitution provides similar, if not greater, protections. *See* N.Y. CONST. art. I, § 6. Petitioners have a protected interest in sending their children to privately-operated schools that inculcate students with instruction consistent with Petitioners’ culture, values, and beliefs.

192. The New Regulations deprive Petitioners of their due process right to control the education and upbringing of their children through impermissible interference, including by compelling public school authorities to conduct invasive review of religious education and instruction.

193. The New Regulations rigid instructional requirements and restrictions are not related to a legitimate interest in providing students with a meaningful education.

194. Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the New Regulations are contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the New Regulations are contrary to law, arbitrary and capricious, and an abuse of discretion, and enjoining Respondents from enforcing the New Regulations against them.

Seventh Claim

Violation of Parents' Hybrid Right to Control the Religious Education of Their Children

195. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 194.

196. The Free Exercise Clause of the First Amendment affords Petitioners the right to the free exercise of their religion, and the Due Process Clause of the Fourteenth Amendment furnishes Petitioners the right to direct the upbringing of their children. The New York Constitution provides similar, if not greater, protections. See N.Y. CONST. art. I, § 3; N.Y. CONST. art. I, § 8.

197. Together, the First and Fourteenth Amendments, and their New York Constitution analogues, provide Petitioners with a hybrid right to control the religious education of their children.

198. Pursuant to the United States Supreme Court's opinions in *Yoder* and *Smith*, that hybrid right to provide for and choose the religious education for their children is afforded heightened constitutional protection.

199. The New Regulations violate Petitioners' constitutionally protected rights to the free exercise of religion by imposing rigid instructional requirements and restrictions.

200. Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the New Regulations are contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the New Regulations are contrary to law, arbitrary and capricious, and an abuse of discretion, and enjoining Respondents from enforcing the New Regulations against them.

Eighth Claim

Violation of Right to Equal Protection

201. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 200.

202. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects religious persons, religious organizations, and religious speech from discriminatory treatment by the government on the grounds of religion. *See Morris Cnty. Bd. of Chosen Freeholders v. Freedom From Religion Found.*, 139 S. Ct. 909 (2019).

203. The New Regulations deliberately target yeshivas such as Petitioners and the parents that send their children to these yeshivas for unequal treatment on the basis of their religious observance.

204. Because the New Regulations were designed to and will result in discriminatory treatment of the Petitioners, the New Regulations violate the Equal Protection Clause.

205. Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the New Regulations are contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R.

§ 7803(3), that the New Regulations are contrary to law, arbitrary and capricious, and an abuse of discretion, and enjoining Respondents from enforcing the New Regulations against them.

Ninth Claim

Stay Pursuant to C.P.L.R. § 7805

206. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 205.

207. Petitioners are likely to succeed on the merits of their challenges to the New Regulations.

208. Unless the Court enters a stay prohibiting the NYSED from implementing and enforcing the New Regulations, Petitioners will suffer irreparable harm. The New Regulations require yeshivas to transform the nature and content of the instruction they provide, thereby frustrating their religious mission, and would alter and limit the choices made by parents to direct the education of their children.

209. Respondents, on the other hand, cannot show that any immediate harm would result from a stay of the implementation and enforcement of the New Regulations .

210. The balance of the equities favors granting the Petitioners' request for a stay. While Petitioners will suffer substantial and irreparable harms if the requested stay is not issued, Respondents cannot show that they will suffer any harm if a stay is entered to restrain them from implementing and enforcing the New Regulations, and to thus maintain the status quo that has been in place since 1894.

211. Pursuant to C.P.L.R. § 7805, the Court should enter a stay prohibiting Respondents from implementing or enforcing the New Regulations.

Request for Relief

For all these reasons, Petitioners respectfully request that the Court enter a judgment:

212. Declaring that the New Regulations conflict with governing law and are therefore null and void;

213. Enjoining Respondents Rosa and Young from enforcing the New Regulations; and

214. Awarding Petitioners such other and further relief as the Court deems just and proper.

Dated: October 9, 2022
New York, New York

TROUTMAN PEPPER HAMILTON SANDERS LLP

By: /s/ Avi Schick

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Counsel for Petitioners

VERIFICATION

YOSSI GRUNWALD hereby affirms the following to be true under penalty of perjury:

1. I am the Executive. Secretary of Petitioner Parents for Educational and Religious Liberty in Schools (“PEARLS”) in this Article 78 proceeding.

2. I make this verification on behalf of PEARLS because PEARLS is a domestic corporation, and I am an officer thereof.

3. I have also been authorized to make this verification of behalf of the individual Yeshiva Petitioners: Agudath Israel of America, Torah Umesorah, Mesivta Yeshiva Rabbi Chaim Berlin, Yeshiva Torah Vodaath, Mesivtha Tifereth Jerusalem, Rabbi Jacob Joseph School, Yeshiva Ch’san Sofer – The Solomon Kluger School (collectively “Petitioners”).

4. Based on my personal knowledge, review of PEARLS and other relevant records, and communications with representatives of the Petitioners, I confirm that the foregoing Petition is true to my knowledge, except as to matter alleged upon information and belief, which matters I believe to be true.

Dated: Brooklyn, New York
October 8, 2022


YOSSI GRUNWALD

SHAUL SPITZER
Notary Public State of New York
No. 01SP0433098
Qualified in Kings County
Commission Expires May 23, 2026

10/8/22 Shaul spitzer