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; YESHIVA CH'SAN SOFER – THE SOLOMON KLUGER SCHOOL; SARAH ROTTENSREICH; DAVID HAMMER; ABRAHAM KAHAN; RAPHAEL AHRON KNOPFLER; and ISAAC OSTREICHER,

Petitioners,

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

-against-

BETTY ROSA, as Chancellor of the Board of Regents of the State of New York; and MARYELLEN ELIA, as Commissioner of the New York State Education Department,

Respondents.

VERIFIED PETITION

1. By and through their undersigned counsel, Troutman Sanders LLP, Petitioners Parents for Educational and Religious Liberty in Schools ("PEARLS"), Agudath Israel of America, Torah Umesorah; Petitioners 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 Petitioners Sarah Rottensreich, David Hammer, Abraham Kahan, Raphael Ahron Knopfler, and Isaac Ostreicher (the "Parent Petitioners") (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 more than one hundred years, Orthodox Jewish yeshivas in New York have been caring for and educating students. Graduates of these yeshivas have maintained their religious practices and beliefs while fully participating in every aspect of New York life. Today, these graduates include doctors and department heads at its leading hospitals; professors and department chairs at its leading universities; partners at its major law and accounting firms; managing directors at its leading investment banks; elected and appointed government officials; teachers, nurses, computer programmers, entrepreneurs, manufacturers, builders, scholars, and employees of every stripe.

3. Central to the success of these individuals and their communities is the system of private schools in which they were educated. In these schools, students are taught that education ranks as the highest value of all. They learn the values of charity, morality, humility, personal responsibility, community, and responsibility to others. They are exposed at a young age to an education that prizes academic rigor and values critical thinking and analytical skills.

4. Parents choose these schools, with their substantial tuition payments, instead of the public schools because they want their children to have an education that is rooted in Jewish texts and informed by Jewish morality, history, culture, ideals, and hopes. They hope that their children grow into citizens with values consistent with their own.

5. On November 20, 2018, the New York State Education Department ("NYSED") attempted to impose a new comprehensive regulatory regime on all private schools, including all yeshivas and other private schools, in the State of New York.

6. Under the guise of issuing "updated guidance," the NYSED issued what it calls the "Substantial Equivalency Review and Determination Process" (the "New Guidelines"). These

New Guidelines contain a comprehensive set of rules, checklists, requirements, and procedures that every private school must comply with. The New Guidelines also require every local school district to inspect every private school within the district and to enforce its requirements.

7. The New Guidelines set forth in exhaustive detail what – and how – a private school must teach in order to be deemed to be providing its students with an education that is, in the language of Education Law § 3204, "substantially equivalent" to the instruction provided at local public schools. If a private school is found to be in noncompliance with the rules, checklists, requirements, and procedures promulgated by the NYSED, children who continue to attend the school will be deemed truant, and their parents will be deemed to be in violation of New York State's compulsory education law and will be subject to fines and imprisonment. N.Y. Educ. Law §§ 3212, 3233.

8. The penalties for a private school that is not deemed to be providing "substantially equivalent" instruction include disallowing students who qualify for textbook, busing, and lunch aid from utilizing that aid at such a school, and directing parents whose children are enrolled at the school to transfer them to another school. In other words, a finding of noncompliance with the New Guidelines subjects a school to closure.

9. Through its New Guidelines, the NYSED has divested yeshivas and other private schools of their right and ability to determine the content of the education they provide, and the process by which that education is delivered. Failure to conform to the NYSED's hundreds of pages of "Learning Standards," to accede to local school districts' views of how those Learning Standards should be presented, or to acquiesce to regulators' views of which personnel should be hired, would subject schools to closure.

10. The mere threat that regulators will exercise such power undermines the autonomy of religious and other private schools and exerts an inappropriate pressure on the schools, with the effect if not purpose of altering their individual missions by demanding conformity to purposes and methods embodied in the New Guidelines.

11. The New Guidelines cannot stand. The New York Court of Appeals previously has struck down a much less pervasive school licensing regime, even though the Legislature had specifically authorized NYSED to create it. *See Packer Collegiate Institute v. University of State of New York*, 298 N.Y. 184, 194 (1948) ("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 [governing private schools] and to grant or refuse licenses to such schools depending on their compliance with such regulations"; striking down statute authorizing the NYSED to license private schools).

12. There are four basic reasons why the New Guidelines must be enjoined as unlawful.

13. *First*, the NYSED's New Guidelines transform the substantial equivalence standard in Section 3204 into something it was never intended to be: a *de facto* licensure requirement for all private schools. Under the NYSED's New Guidelines, private schools will be shut down if they are found to be in noncompliance with the dozens of mandatory requirements included in the New Guidelines. But Section 3204's substantial equivalence standard was not intended to – and does not – authorize the NYSED to create a *de facto* licensure regime for private schools. Indeed, the standard is not even directed to private schools, but instead at parents who choose not to send their children to public schools. For that very reason, the NYSED's previously issued guidance regarding the substantial equivalence standard expressly acknowledged that it does not provide the NYSED or local school officials with authority to oversee or supervise the administration of

private schools: "[T]he board's responsibility is to the children living in the district; it has no direct authority over a nonpublic school." Exhibit A, p. 1. Moreover, Education Law § 5001 exempts most private schools "providing kindergarten, nursery, elementary or secondary education" from any licensure requirement. N.Y. Educ. Law § 5001(2)(b). In any event, *Packer Collegiate* does not permit the NYSED to craft a regulatory regime to license private, religious schools absent specific direction from the Legislature. For this reason alone, the NYSED's New Guidelines should be rejected as inconsistent with governing law.

14. *Second*, the NYSED's New Guidelines create highly intrusive, detailed, rigid, statewide standards for both the curriculum that schools must offer and for determining whether children attending private schools are receiving substantially equivalent instruction. They include, among other things, mandatory "Learning Standards" running into the many hundreds of pages; minimum hours of instruction for each course of study; regulator reviews of teachers' lesson plans; and regulator evaluations of teacher hiring standards and processes. But the plain language of Section 3204 does not permit these types of highly intrusive, detailed, rigid, statewide standards. Section 3204, in fact, creates a flexible standard that is intended to vary from school district to school district and from school to school. Moreover, courts interpreting Section 3204 have long recognized that it creates a "flexible," "comparative" standard – rather than a "singular statewide standard" – and that it thus allows for "variations from district to district." *Blackwelder v. Safnauer*, 689 F. Supp. 106, 126-27, 135 (N.D.N.Y. 1988); *see also Matter of Kilroy*, 467 N.Y.S.2d 318, 320 (Fam. Ct. 1983) (noting that a court must ascertain "whether the child is receiving instruction substantially equivalent in time and quality *to that provided in the public school of the home district*" (emphasis added)); *Matter of Falk*, 441 N.Y.S.2d 785, 789 (Fam. Ct., Lewis Cty.1981) (noting that the court must "determine whether respondents have afforded their son

instruction substantially equivalent *to other first grader*s at the Glenfield Elementary School" (emphasis added)). The NYSED's New Guidelines ignore the plain language of Section 3204 and courts' prior interpretations of it. In any event, under *Packer Collegiate*, such a detailed and intrusive regulatory regime is not permitted unless it has been specifically crafted and tailored by the Legislature. Again, for this reason alone, the NYSED's New Guidelines should be rejected as contrary to governing law.

15. *Third*, the NYSED failed to comply with the procedural requirements that apply to rule-making. Under New York law, a "rule" is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers," *Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 (1985), or a "general course of operation to be effective for the future," *People v. Cull*, 10 N.Y.2d 123, 127 (1961). Applying that standard, the New Guidelines are plainly a rule – they not only impose rigid and mandatory procedures and standards on private schools, but demand compliance by threatening private schools with significant penalties, including penalties that would shut down any non-compliant private school. Notice-and-comment rulemaking would have exposed the unlawful and untenable nature of the New Guidelines before they went into effect. The NYSED's New Guidelines therefore must also be rejected because the NYSED failed to follow the procedural requirements that apply to rule-making under the State Administrative Procedure Act ("SAPA") and the New York State Constitution. *See, e.g.*, N.Y. A.P.A. Law § 202; N.Y. Const. Art. IV, § 8.

16. *Fourth*, the NYSED's New Guidelines violate both the United States Constitution and the New York Constitution. Indeed, as demonstrated below, the NYSED's New Guidelines would effectively frustrate the Petitioners' constitutionally protected right to the free exercise of

religion through a series of onerous requirements; would effectively frustrate the Petitioners' constitutionally protected free speech rights by dictating what can and cannot be taught in yeshivas; would effectively frustrate the Petitioners' constitutionally protected 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 would hamper and inhibit the educational system that is central to Petitioners' way of life, raising issues similar, and relevantly indistinguishable, to those addressed by the United States Supreme Court in *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

17. For each of these reasons, and for the additional reasons provided below, Petitioners seek a declaration that the NYSED's New Guidelines are null and void, and a judgment enjoining Respondents from enforcing the New Guidelines because they are contrary to law, arbitrary and capricious, and an abuse of discretion.

Jurisdiction and Venue

18. This Court has jurisdiction pursuant to 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 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)). This Court also 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.").

19. 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.*, 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

20. **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 uniform secular studies curriculum that is both Common Core compliant and culturally sensitive to the values of yeshiva students. The schools that it works with are in New York, and are affected by the New Guidelines.

21. **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 broad Orthodox 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 members of Agudath Israel send their children to Yeshivas that are affected by the New Guidelines.

22. **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, providing them with a broad range of services. Its membership consists of over 675 day-schools and yeshivas with a total student enrollment of over 200,000 students. Most of those schools and students are in New York, and are affected by the New Guidelines. Its mission is to ensure that

every child 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.

23. **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.

24. **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.

25. **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.

26. **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.

27. **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.

28. The Petitioner Yeshivas are the original Orthodox day schools that were founded in New York. At between one hundred and one hundred and twenty years old, they have been operating continuously since shortly after "substantial equivalence" first appeared in the Education

Law in 1894. 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 and are highly functioning and contributing members of New York and American society. They also have contributed to the rejuvenation of Orthodox Jewish life and practice in New York and beyond.

29. Compliance with the New Guidelines would require each Petitioner Yeshiva to revise its curriculum and alter its emphasis on Jewish Studies.

30. **Sarah Rottensreich** lives in Manhattan where she works as the Executive Director of Chabad of Gramercy Park and is a highly regarded early childhood educator, leader, and author. She is the mother of three school-age children, each of whom is enrolled in a yeshiva that is affected by the New Guidelines.

31. **David Hammer** lives in Brooklyn where he works as the chief executive officer of a building services company. He is the father of six school-age children, each of whom is enrolled in a yeshiva that is affected by the New Guidelines.

32. **Abraham Kahan** lives in Brooklyn, New York, where he works as an accountant. He is the father of four school-age children, each of whom is enrolled in a yeshiva that is affected by the New Guidelines.

33. **Raphael Ahron Knopfler** lives in Brooklyn, New York, where he works as a systems specialist at Con Edison. He is the father of four school-age children, each of whom is enrolled in a yeshiva that is affected by the New Guidelines.

34. **Isaac Ostreicher** lives in Brooklyn, New York, where he works as an accountant. He is the father of a school-age child who is enrolled in a yeshiva that is affected by the New Guidelines.

35. Parent Petitioners 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, about 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.

36. Yeshivas are a means of fulfilling that Biblical injunction because they incorporate religious instruction into every aspect of their curriculum. The Second Circuit has recognized that point 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

37. **Respondent Betty Rosa** is Chancellor of the Board of Regents. The Board of Regents is a 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"), and 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.

38. **Respondent MaryEllen Elia** is the Commissioner of the NYSED. *See* N.Y. Educ. Law § 101. As the chief executive of the NYSED, Commissioner Elia 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. New York State's Compulsory Education Law

39. New York law requires parents to provide their school-age children with "full-time instruction." N.Y. Educ. Law §§ 3205(1), 3212(2)(b). That compulsory education requirement is intended to ensure that "children are not left in ignorance, [and] that from some source they will receive instruction that will fit them for their place in society." *People v. Turner*, 98 N.Y.S.2d 886, 888 (4th Dep't 1950). Any violation of the compulsory education law risks criminal sanctions, including imprisonment. N.Y. Educ. Law § 3233. Parents satisfy their duties under New York's compulsory education law by having their children attend parochial schools. N.Y. Educ. Law § 3212(d) (absolving parents of children in local parochial schools from furnishing proof of attendance upon required instruction).

40. As the New York Court of Appeals has held, "[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); *see also Judd v. Bd. of Educ. of Union Free Sch. Dist. No. 2, Town of Hempstead, Nassau Cty.*, 278 N.Y. 200, 220 (1938) ("The Legislature recognizes the right of parents to send their children for instruction to schools other than public schools. It could not do otherwise consistently with the Fourteenth Amendment to the United States Constitution."); *Matter of Falk*, 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.").

41. Consistent with those constitutional limitations, New York's compulsory education scheme 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); *see also Matter of Falk*, 441 N.Y.S.2d 785, 788 (Fam. Ct. Lewis Cty. 1981) (noting that the Laws of 1894 provided that "instruction shall be at least substantially equivalent to the instruction given to children of like age at the public school of the city or district in which such child resides").

B. The Substantial Equivalence Standard

42. While the phrase "substantially equivalent," has not been defined, some content has been given to the standard.

43. As an initial matter, 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.").

44. In addition, the Legislature has mandated that some courses must be taught by all schools, while otherwise leaving private schools with broad discretion as to how they go about satisfying the purpose of New York's compulsory education law. The Legislature, for instance, has provided that instruction may "not be deemed substantially equivalent" to that provided in a local public schools unless certain subjects are taught – specifically, courses in patriotism, citizenship, and human rights (N.Y. Educ. Law § 801(1)); courses in the history, meaning, significance and effects of the provisions of the U.S. Constitution, the Declaration of

Independence, and the New York Constitution (N.Y. Educ. Law § 801(2)); courses in physical education (N.Y. Educ. Law § 803); courses in health education (N.Y. Educ. Law § 804); courses in highway safety and traffic regulation (N.Y. Educ. Law § 806); instruction in fire and emergency drills (N.Y. Educ. Law § 807); and instruction in fire and arson prevention (N.Y. Educ. Law § 808).

45. The Legislature has not imposed mandatory curriculum requirements on private schools beyond the basic citizenship and health and safety courses identified above. For example, pursuant to Education Law § 3204(3) the "course of study for the first eight years" at "full time public day schools" must include instruction in "the twelve common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training, the history of New York state and science." N.Y. Educ. Law § 3204(3). But the Legislature has not provided that private schools must provide the same instruction in those subjects during the first eight years of school. Instead, as to the "twelve common school branches" of instruction, it has said only that private schools must provide "substantially equivalent" instruction. *See* N.Y. Educ. Law § 3204(2).

46. Thus, even as to core subjects of study, the Legislature has acknowledged that private schools are not required to adopt any particular curriculum and have avoided intruding into the content and process by which private schools educate the children in their care.

47. Courts have also interpreted the substantial equivalence standard. For instance, in *Blackwelder v. Safnauer*, the court held that Section 3204 creates a "flexible" and "comparative" standard – rather than a "singular statewide standard" – and that it thus allows for "variations from district to district." *Blackwelder v. Safnauer*, 689 F. Supp. 106, 126-27, 135 (N.D.N.Y. 1988); *see also Matter of Kilroy*, 467 N.Y.S.2d 318, 320 (Fam. Ct. Cayuga Cty. 1983) (noting that a court

must ascertain "whether the child is receiving instruction substantially equivalent in time and quality *to that provided in the public school of the home district*" (emphasis added)); *Matter of Falk*, 441 N.Y.S.2d 785, 789 (Fam. Ct. Lewis Cty. 1981) (noting that the court must "determine whether respondents have afforded their son instruction substantially equivalent *to other first graders at the Glenfield Elementary Schoo*l" (emphasis added)).

48. In addition, the Court of Appeals already 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)

C. The NYSED's Prior Substantial Equivalence Guidance

49. Before it issued the New Guidelines, the NYSED had issued guidance regarding the substantial equivalence standard.

50. The NYSED's previously issued guidance explicitly recognized that a local school district has no direct authority over a nonpublic school. Exhibit A, p. 1. As the guidance provided:

> [T]he board's responsibility is to the children living in the district; it has no direct authority over a nonpublic school. (*Id.*)

51. Instead, the previously issued guidance only purported to "advise" parents and local school officials about "current practices in the field" and provide "advice to help" parents and school officials "work together harmoniously" in determining whether the instruction was substantially equivalent.

52. The NYSED's previously issued guidance, in other words, did not purport to mandate, and in fact did not mandate, any specific review-and-approval procedures or standards.

53. The NYSED's previously issued guidance also acknowledged that substantial equivalence does not provide the NYSED or local school officials with authority to conduct periodic and gratuitous reviews or inspections of private schools. Indeed, the NYSED's previously issued guidance 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, p. 4.

54. Moreover, when a "serious concern" arose regarding the instruction a private school was providing, the NYSED's previously issued guidance provided that any subsequent review or inspection should address only that specific concern:

> If, after the discussion, the superintendent of schools concludes that there is a serious problem, the superintendent should discuss it with the District Superintendent, where appropriate, and with the Nonpublic School Service office. If the problem is not resolved at that point, the superintendent should provide to the nonpublic school officials the basis of the question in writing. In addition, the superintendent of schools should, if necessary, ask to visit the nonpublic school at a mutually convenient time *in order to check on the information which led to the assertion of lack of equivalency*. The superintendent should *review materials and data which respond to the assertion* and discuss with the officials of the nonpublic school plans for overcoming any deficiency. Exhibit A, p. 4 (emphasis added).

55. The NYSED's previously issued guidance, in other words, did not interpret the substantial equivalence to permit the NYSED or local school officials to oversee or supervise the administration of private schools, and in fact interpreted it to permit only limited inspections and reviews of the instruction provided by private schools and even then only in very limited circumstances.

D. The NYSED's Updated Substantial Equivalence Guidelines

56. The NYSED's November 20, 2018 Substantial Equivalency Review and Determination Process ("New Guidelines"), which was amended in part on December 21, 2018, goes much further than the previously issued guidance, and in fact is contrary to several fundamental aspects of it.[1] It also violates the Court of Appeals admonition in *Packer Collegiate* that even with a direct grant of legislative authority to license schools (as then existed), the NYSED cannot issue detailed regulations governing private schools.

1. Mandatory Review-And-Approval Procedures

57. As an initial matter, the New Guidelines establish mandatory and rigid procedures for determining whether private school students are receiving substantially equivalent instruction.

58. With respect to those procedures, the New Guidelines state that it is "the responsibility of the local school board (or the Chancellor in the case of nonpublic schools located in New York City) . . . to determine whether a substantially equivalent education is being provided in religious or independent schools." Exhibit B, p. 1.

59. For all private schools, the New Guidelines mandate that "local school officials" – *i.e.*, the "superintendent who serves as the chief executive officer of the district and the educational system or a designee" – must perform the initial substantial equivalence inspections and reviews. Exhibit B, pp. 1-2, 10.

[1] The Substantial Equivalency Review and Determination Process consists of seven separate documents, which are identified on the NYSED's website as the "Substantial Equivalency Guidance" (Exhibit B); the "Substantial Equivalency PowerPoint Presentation" (Exhibit C); the "Local School Authority Review Toolkit" (Exhibit D); the "Nonpublic School Self-Study Toolkit" (Exhibit E); the "Commissioner's Determination Elementary and Middle School Review Toolkit" (Exhibit F); the "Commissioner's Determination High School Review Toolkit" (Exhibit G); and "Frequently Asked Questions on the Substantial Equivalency Guidance" (Exhibit H). *See* New York State Education Department, Substantial Equivalency, available at http://www.nysed.gov/nonpublic-schools/substantial-equivalency (last visited Jan. 31, 2018).

60. The New Guidelines also mandate a timeline and cycle for the substantial equivalence inspections and reviews. They provide that local school officials "will begin to conduct substantial equivalence reviews on behalf of their schools boards using the updated process during the 2018-2019 school year," and that "[a]ll religious and independent schools will be visited as part of the process and initial reviews for all nonpublic schools within a district shall be completed by the end of the 2020-2021 school year." Exhibit B, p. 3. They then provide that, after the initial inspection and review, local school officials "should plan to re-visit the religious and independent schools in their district on a five-year cycle" and, between visits, should keep informed "of important information, such as changes in leadership, curriculum, school building locations, grade level served, etc." Exhibit B, p. 3.

61. The New Guidelines provide for local school districts to review and evaluate essentially every aspect of a school's educational program; to insist on wholesale revisions of any aspect of the school's operations to which it objects, under threat of closing the private school; and then, to initiate closure and close down the private school if it rejects the demands.

62. The New Guidelines also require private schools to "[p]repare, compile, and provide [to local school officials] for review documentation needed for substantial equivalency determinations." Exhibit B, p. 11. The documents to be provided and reviewed reach deep into the operation of the private school, including its policies and practices for hiring and training teachers; its curriculum, lesson plans, textbook choices, and methodology for instruction; and its methods for measuring, evaluating, and improving student performance.

63. Thus, each private school is required to submit, among other things, documentation establishing:

- The qualifications of the its teachers, including its policy for teacher hiring and hiring standards and qualifications, evidence that its instructional staff have qualifications

consistent with its hiring policy, its policy for teacher and staff evaluations, and its policy and schedule for teacher and staff training and professional development. Exhibit E, p. 6; Exhibit F, p. 7; and Exhibit G, p. 6.

- The courses and subjects to be taught and corresponding curricula for each grade level in the school, as well as a description of the curriculum; representative samples of daily, weekly, monthly, and yearly schedules; the framework for teaching and learning in required subjects; sample lesson plans; a list of textbooks or other instructional resources; evidence of textbook / resource use in curriculum and lesson plans. Exhibit E, pp. 3-5; Exhibit F, pp. 4-10; and Exhibit G, pp. 5-9.

- The academic progress of students attending the school in the form of a list of the standardized tests it administers in each grade, data on its students' standardized test scores, its other assessments for progress monitoring, its goals for student achievement and its educational program, its process for administering assessments and analyzing data, its graduation rates (if applicable), and its plan for improving academic outcomes. Exhibit B, p. 9; Exhibit F, p. 11; and Exhibit G, p. 10.

64. The local school districts do not merely have authority to review each aspect of the private school's operations, but also to force changes under threat of closure. The New Guidelines require that schools and local school districts "should work collaboratively to develop a clear plan and timeline, including benchmarks and targets, for attaining substantial equivalency in an amount of time that is reasonable given the concerns identified [by the local school district]." Exhibit B, p. 6. The "collaboration" envisioned by NYSED is to take place between a private school with its own education vision and values, and a local school district competing with it for students, and with a potentially very different set of values – which is empowered to enforce its vision under threat of closure. If local school officials determine that a private school is *not* providing substantially equivalent instruction, they (1) notify the local board of education of their negative finding, so that the board can then make the final determination via a vote in a regularly scheduled, public board meeting; (2) notify the private school of their negative finding; (3) notify the SORIS of their negative finding; and (4) take steps to shut down the school – *i.e.*, by instructing the parents of the children attending the school that they must enroll their children in a different school, and

by cutting off funds and services that would have otherwise been available to the school. Exhibit B, pp. 6-7.

65. As relevant here, the procedures for certain private schools subject to a determination by the Commissioner are similar, with the most significant difference being that the Commissioner makes the final substantial equivalence determination after receiving a recommendation from local school officials. Exhibit B, pp. 7-9.

2. Mandatory Review-And-Approval Standards

66. The New Guidelines also establish mandatory and rigid standards that must be met for determining whether private school are providing substantially equivalent instruction, and in fact references these standards as "requirements" that must be satisfied.

67. With regard to curriculum, the New Guidelines require private schools to offer a long list of specified courses, including courses not required by statute, to satisfy the substantial equivalence standard.

68. For grades 1 through 6, the New Guidelines, as amended on December 21, 2018, require private schools to offer the following courses at each specified grade level:

Grades 1-4 (8 NYCRR §§100.2, 100.3, 135.3, 135.4)

During grades one through four, all students shall receive instruction that is designed to facilitate their attainment of the State elementary learning standards in:	
Mathematics, Science, and Technology	☐
English language arts, including reading, writing, listening, and speaking aligned to the current New York State learning standards	☐
Social studies, including geography and United States history	☐
The arts, including visual arts, music, dance, theater, and media arts	☐
Career development and occupational studies	☐
Health education[1], physical education, and family and consumer sciences • *Instruction in health education pursuant to Ed. Law §804; 8 NYCRR §135.3* • *Instruction in physical education pursuant to Ed. Law §803(4); 8 NYCRR §135.4(b)*	☐

Grades 5-6 (8 NYCRR §§100.2, 100.4, 135.3, 135.4)

During grades five and six, all students shall receive instruction that is designed to facilitate their attainment of the State intermediate learning standards in:	
Mathematics, Science, and Technology	☐
English language arts, including reading, writing, listening, and speaking aligned to the current New York State learning standards	☐
Social studies, including geography and United States history	☐
The arts, including visual arts, music, dance, theater, and media arts	☐
Career development and occupational studies	☐
Health education[1], physical education, and family and consumer sciences • *Instruction in health education pursuant to Ed. Law §804; 8 NYCRR §135.3* • *Instruction in physical education pursuant to Ed. Law §803(4); 8 NYCRR §135.4(b)*	☐

Exhibit E, pp. 13-14.

69. For grades 7 and 8, the New Guidelines, as amended on December 21, 2018, not only require private schools to offer specific courses, including courses not required by statute, but also require private schools to devote 17.5 hours of instruction time each week to those courses:

Grades 7-8 (8 NYCRR §§100.2, 100.4, 135.3, 135.4)

The unit of study requirements in the chart below must be met by the end of grade 8 and apply to the two-year span of grades 7 and 8 (unless otherwise noted); they are not annual requirements. For example, one unit of mathematics could be completed in grade 7 and one unit of mathematics could be completed in grade 8. A unit of study means at least 180 minutes of instruction per week throughout the school year or the equivalent (8 NYCRR 100.1[a]).

The unit of study requirements may be met by incorporating, or integrating, the State learning standards into subjects that are not listed below. While doing so, nonpublic schools must meet all unit of study requirements and demonstrate that students are provided with instruction that enables them to achieve the State learning standards.

By the end of grade eight, all students shall be provided instruction designed to enable them to achieve State intermediate learning standards through:	
Mathematics, two units of study	☐
English language arts, two units of study	☐
Social studies, two units of study	☐
Science, two units of study	☐
Career and Technical Education, one and three-fourths unit of study *May be initiated in grade 5	☐
Physical education *Ed. Law §803(4); 8 NYCRR §135.4(b)*	☐
Health education[2], one half-unit of study *Ed. Law §804; 8 NYCRR §135.3* *May be provided in grade 6	☐
Visual arts, one half-unit of study	☐
Music, one half-unit of study	☐
Library and information skills, the equivalent of one period per week in grades 7 and 8 *May be incorporated or integrated into any other subjects	☐
Career development and occupational studies, no unit of study requirement *May be incorporated or integrated into any other subjects	☐

Exhibit E, pp. 13-14; *see* Exhibit H, p. 3 (acknowledging that 17.5 hours per week requirement)

70. The New Guidelines require the local school district to evaluate and determine whether these mandatory curricular requirements are being met, and to complete that portion of the checklist that imposes the curricular requirements by answering either "Y" or "N" to the question "is the requirement met."

Statutory and Regulatory Mandates

Law/Regulation	Requirement	Possible Evidence	Is the requirement met? Notes
8 NYCRR §§100.2, 100.3, 100.4, 100.5, 135.3, 135.4	Instruction is provided in required subjects, consistent with the NYS learning standards, as defined by Part 100 of the Commissioner's Regulations (see Appendix A for a detailed list of Program Requirements)	• Description of curriculum • Representative samples of daily, weekly, monthly, yearly schedules • Framework for teaching and learning in the core academic areas of English language arts, math, science, and social studies • Sample lesson plans • List of textbooks or other instructional resources • Textbook/resource use demonstrated in curriculum and lesson plans • Other:	☐ Y ☐ N

Exhibit E, p. 5.

71. The New Guidelines do not stop at imposing a uniform curriculum at all of the State's nearly 2000 private schools. They also dictate that instruction may be given only by a "competent teacher" and require (1) every private school to submit documentation regarding the qualifications of its teachers, and (2) local school districts to assess and determine whether this "competent teacher" requirement is met. Again, the local school district reviewer must complete a checklist and answer either "Y" or "N" to the question "is the requirement met."

Law/Regulation	Requirement	Possible Evidence	Is the requirement met? Notes
Ed. Law §3204(2)(i)	Instruction may be given only by a competent teacher	• Nonpublic school policy for teacher hiring standards and qualifications • Documentation that instructional staff employed by the school have qualifications consistent with school policy • Nonpublic school policy for teacher/staff evaluation • Nonpublic school policy and schedule for teacher/staff training and professional development • Other:	☐ Y ☐ N

See, e.g., Exhibit E, p. 6.

72. The toolkit also includes a statement immediately under the Title "Program Requirements" which provides that "Learning standards for all grade levels may be referenced at http://www.nysed.gov/curriculum-instuction. The link leads to learning standards that consist of hundreds of pages of highly detailed "standards" of instruction.

73. While the blizzard of materials associated with the New Guidelines are intrusive, rigid, and overly detailed, the NYSED provides no guidance on how these materials are to be applied in evaluating individual schools. Schools with exemplary attendance and graduation rates could be deemed noncompliant if the local school district was dissatisfied with its teacher-hiring policies or instruction hours. The New Guidelines are thus entirely ineffective as a means of evaluating performance, but are extraordinarily effective in providing local school districts with authority to alter any aspect of a private school's operations with which it disagreed.

Argument

I. The New Guidelines transform the substantial equivalence standard into something it was never intended to be, turning it into a *de facto* licensure requirement.

74. The NYSED's New Guidelines should be rejected because they create a *de facto* licensure regime, but neither Education Law § 3204 nor any other statutory provision authorizes the NYSED to subject all private schools to a licensure requirement.

75. 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, 194 (1948), the Court of Appeals head 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." 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. In other words, the Court held that the NYSED general power to enforce the Education Laws did not permit the creation of a *de facto* licensure regime. And yet, here, that is precisely what the NYSED has done with the New Guidelines.

76. Moreover, the Education Law requires some private schools to seek and obtain a license from the NYSED. Section 5001, in fact, 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).

77. The Legislature, however, chose 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). Yeshiva Petitioners meet the terms of the statutory exemption.

78. Recognizing these limits on its licensure authority, the NYSED has not previously required otherwise exempt schools 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 . . . .").

79. The NYSED's New Guidelines attempt to make an end-run around the licensure exemption for private schools providing kindergarten, nursery, elementary, or secondary education by creating a *de facto* licensure requirement for these schools.

80. Under the New Guidelines, a private school will be shut down if it fails to comply with the New Guidelines' mandatory review-and-approval procedures, or if a local school board official – or, in some circumstances, the Commissioner – determines that it does not provide children with instruction that satisfies the new mandatory course and hour requirements, or any of the other myriad new requirements of the New Guidelines. In other words, the New Guidelines create an involuntary, permission-based barrier to entry and operation – just like any other licensure regime.

81. The NYSED cannot reasonably dispute that the New Guidelines create a mandatory and *de facto* licensure regime. The New Guidelines expressly acknowledge that secondary schools that *voluntarily* register with the Board of Regents are not subject to its mandatory review-and-approval procedures and standards:

> If a nonpublic school is registered, the Board of Regents has determined that it is providing substantially equivalent instruction and such State action divests the local school district of authority to determine substantial equivalence locally. Exhibit E, p. 15.

And the New Guidelines "strongly encourage" private schools to *voluntarily register*, noting that the "State Education Department strongly encourages every secondary school to become registered." Exhibit E, p. 15.

82. Section 3204, however, was not intended to – and does not – authorize the NYSED to create a *de facto* licensure regime for private schools. That is apparent from its plain language,

which does not even suggest a licensure requirement. And it is also apparent because reading Section 3204 to require, authorize, or permit a licensure and registration requirement would violate a fundamental principle of statutory construction, which requires that "statutes relating to the same general subject-matter taken as a whole" and "read together." *Betz v. Horr*, 276 N.Y. 83, 88 (1937). Applying that rule, Section 3204 cannot be interpreted to require, authorize, or permit a licensure requirement, because Section 5001 expressly exempts private schools "providing kindergarten, nursery, elementary or secondary education" from any such requirement.

83. Moreover, pursuant to the doctrine of constitutional avoidance, New York courts interpret statutes whenever reasonably possible in a manner that avoids serious constitutional questions. *See Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984) ("Courts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground."); *People v. Grasso*, 54 A.D.3d 180, 183 (1st Dep't 2008) (noting the "obligation to construe a statute whenever reasonably possible so as to avoid serious constitutional questions"). Thus, here, the Court should avoid the serious constitutional issues addressed below by ruling for Petitioners on their statutory claims, including by interpreting the Education Law to avoid those difficult constitutional issues.

84. Accordingly, the New Guidelines are inconsistent with governing law, because they create a *de facto* licensure regime, while neither Education Law § 3204 nor any other statutory provision authorizes the NYSED to subject all private schools to a licensure requirement. *See Hodgkins v. Cent. Sch. Dist. No. 1 of Towns of Conklin Et Al., Broome Cty.*, 355 N.Y.S.2d 932, 938 (Sup. Ct. Broome Cty. 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").

II. The New Guidelines create rigid, statewide standards for determining whether children attending private schools are receiving substantially equivalent instruction, but the plain language of Section 3204 does not permit rigid, statewide standards.

85. The NYSED's New Guidelines should also be rejected because they create a rigid, statewide set of curricular and other standards for determining whether children attending private schools are receiving substantially equivalent instruction.

86. That is contrary to the plain language of Section 3204, which acknowledges the differences that exist from school district to school district. It therefore provides that children attending private schools must receive instruction that is "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) (emphasis added).

87. Consistent with that approach, the NYSED has created and approved numerous paths to satisfy the substantial equivalence standard that do not mirror the local public school instruction but in fact deviate substantially from it.

- **Homebound instruction.** The NYSED has issued regulations for "homebound" instruction – *i.e.*, instruction when a pupil is unable to attend school due to medical reasons. Under the regulations, homebound elementary school students are only required to have five hours of instruction per week, and homebound high school students are only required to have ten hours of instruction per week. *See* N.Y. Comp. Codes R. & Regs. tit. 8, § 175.21.

- **City-As-School Instruction.** The New York State Department of Education allows some schools to provide only two days of instruction per week, so long as students spend three days a week interning at local businesses. *See* http://www.businessinsider.com/what-its-like-to-attend-alternative-high-school-2015-3

- **Part-time, Evening and Parental Schools.** Section 3204(3) provides a series of looser standards for part-time day schools ("such subjects as will enlarge the civic and vocational intelligence and skill"); evening schools ("at least speaking, writing and reading English") and parental schools ("vocational training and for instruction in other subjects appropriate to the minor's age and attainments").

88. In addition, courts interpreting Section 3204 have long recognized that it creates a "flexible," "comparative" standard – rather than a "singular statewide standard" – and that it thus

allows for "variations from district to district." *Blackwelder v. Safnauer*, 689 F. Supp. 106, 126-27, 135 (N.D.N.Y. 1988); *see also Matter of Kilroy*, 467 N.Y.S.2d at 320; *Matter of Falk*, 441 N.Y.S.2d at 789.

89. The *Blackwelder* court held, in fact, that the flexibility inherent in the substantial equivalence standard is essential to avoiding a violation of parents' rights under the Free Exercise Clause of the First Amendment:

> The "substantially equivalent" standard is flexible enough to allow local school officials sufficient lee-way to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue. There may be cases in which the manner the state enforces the mandate of § 3204 unnecessarily infringes the free exercise rights of particular parents, but the mere possibility that such cases might arise is not enough to invalidate § 3204 on its face. *Blackwelder*, 689 F. Supp. at 135.

90. The NYSED's New Guidelines ignore the plain language of Section 3204 and courts' prior interpretations of it and create rigid, statewide standards for determining whether children attending private schools are receiving substantially equivalent instructions. Those rigid, statewide standards include mandatory inspection and review procedures as well as a specific list of curricular and hour requirements they every private school in New York state must implement.

91. In addition to the rigid, statewide standards imposed by the New Guidelines, the New Guidelines also direct local school districts to conduct highly intrusive evaluations of the educational offerings being made by each school and to evaluate and pass judgment on those offerings. Local school boards are directed to evaluate and pass judgment on teacher hiring standards, evaluations, training and professional development. Exhibit E, p. 6; Exhibit F, p. 7; and Exhibit G, p. 6. They are directed to evaluate the courses and subjects to be taught and corresponding curricula for each grade level in the school, as well as a description of the curriculum. Their reviews are to include representative samples of daily, weekly, monthly, and yearly schedules, the framework for teaching and learning in required subjects, sample lesson

plans, a list of textbooks, and evidence of textbook / resource use in curriculum and lesson plans." Exhibit E, pp. 3-5; Exhibit F, pp. 4-10; and Exhibit G, pp. 5-9. Local school districts are directed to evaluate the academic progress of students attending the school, including the schools' process for analyzing data, and its plan for improving academic outcomes. Exhibit B, p. 9; Exhibit F, p. 11; and Exhibit G, p. 10.

92. These intrusive inspections were never authorized by the Legislature. As NYSED long has recognized, the substantial equivalence standard is intended to address case-by-case concerns about student truancy, not authorize the creation of a mandatory, rigid, and invasive regulatory regime. Such a regime never was authorized by the Legislature, and therefore must be struck down on separation of powers grounds. *Boreali v. Axelrod*, 130 A.D.2d 107, 114, (3d Dep't) *aff'd*, 71 N.Y.2d 1 (1987) (striking down anti-smoking regulation because they "effectively usurped the prerogative of the Legislature to establish State policy in direct contravention of the separation of powers doctrine," despite broad legislative grant of authority).

93. Moreover, even if the Legislature had authorized the type of rigid, invasive and comprehensive type of regime contained in the New Guidelines, such a grant of authority would have been impermissible under the Constitution.

94. Because the New Guidelines create rigid, statewide standards for determining whether children attending private schools are receiving substantially equivalent instruction, direct local school district to conduct invasive evaluations of every aspect of the schools' operations, and fail to provide metrics to help avoid arbitrary determinations, they are inconsistent with the plain language of Section 3204 and established case law.

95. In addition, NYSED's New Guidelines fail to provide any criteria for measuring school performance against the rigid standards it identifies. The New Guidelines implicitly and

explicitly empower local school districts to review and evaluate each aspect of private schools' educational offerings, and to demand that private schools alter those offerings in any manner, under threat of potential closure.

96. Accordingly, because the New Guidelines create rigid, statewide standards for determining whether children attending private schools are receiving substantially equivalent instruction, and do not contain any reasonable measurement criteria, they are inconsistent with the plain language of Section 3204 and impermissibly vague, and should be rejected.

III. The NYSED failed to follow the procedural requirements that apply to rule-making under the State Administrative Procedure Act and the New York State Constitution.

97. The NYSED's New Guidelines must also be rejected because the NYSED failed to comply with the procedural requirements that apply to rulemaking.

98. Both the Board of Regents and the Commissioner of the NYSED, when acting pursuant to authority conferred by the Board, may adopt "rules for carrying into effect the laws and policies of the state [] relating to education." N.Y. Educ. Law § 207.

99. But when adopting a rule, both the Board of Regents and the Commissioner must comply with the rule-making procedures established by the State Administrative Procedure Act and the New York State Constitution. *See, e.g.*, N.Y. A.P.A. Law § 202; 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.").

100. Those 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).

101. They also require that the notice "cite the statutory authority, including particular sections and subdivisions, under which the rule is proposed for adoption." N.Y. A.P.A. Law § 202(f)(i). They require the agency engaged in rule-making to consider "utilizing approaches which are designed to avoid . . . overly burdensome impacts of the rule upon persons . . . directly impacted by it." N.Y. A.P.A. § 202-a. And they require an agency engaged in rule-making to issue a regulatory impact statement which must include, among other things, statutory authority, needs and benefits, costs, and local government mandates. N.Y. A.P.A. § 202-a(3).

102. NYSED did not comply with any of those requirements when issuing the New Guidelines.

103. As relevant here, the SAPA defines 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." N.Y. A.P.A. Law § 102(2)(a).

104. Applying that statutory language, the Court of Appeals has held that a rule is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers," *Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 (1985), or a "general course of operation to be effective for the future," *People v. Cull*, 10 N.Y.2d 123, 127 (1961). *See also Alca Indus., Inc. v. Delaney*, 92 N.Y.2d 775, 778 (1999) ("Rulemaking, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications."); *Connell v. Regan*, 114 A.D.2d 273, 275 (3d Dep't 1986) ("Where agency

determinations are based solely on a firm, rigid, unqualified standard or policy, a quasi-legislative norm or prescription is established that carves out a course of conduct for the future.").

105. Because the New Guidelines create rigid, statewide procedures and standards, they are a "rule" as that term is defined in the SAPA.

106. Moreover, the NYSED cannot credibly argue that rule-making is not required here. In 2004, the NYSED wanted to address the standards for determining whether home school students are receiving substantially equivalent instruction as required by Education Law § 3204. At that time, it determined that rule-making was required, and followed the requisite procedures of SAPA to promulgate and issue a new rule. *See* N.Y. Comp. Codes R. & Regs. tit. 8, 100.10; *see also Notice of Revised Rule Making: Requirements for Conferral of a College Degree and Home Instruction*, N.Y.S. Register, Rule Making Activities at 19 (July 14, 2004), *available at* https://docs.dos.ny.gov/info/register/2004/july14/toc.htm (asserting that the NYSED "has statutory authority to establish in regulation requirements . . . for the education of students of compulsory school age"). The same requirements that compelled the NYSED to comply with SAPA in 2004 when addressing substantial equivalence of home school students pursuant to Education Law § 3204 exist with even greater force with respect to New Guidelines, which are addressed to schools and not parents.

107. The New York City Department of Education ("DOE") has demonstrated that it too understands that the New Guidelines constitute regulations. In February 2019, the DOE posted two new job openings on its website for positions as Executive Director for Substantial Equivalency and Senior Director of Operations for Substantial Equivalency. The posting for the Executive Director position indicated that the person filling the position would be responsible for ensuring that the education offered "in approximately 800 nonpublic schools is substantially

equivalent to that in public schools . . . in alignment with New York State Education Department (NYSED) *regulations.*" Exhibit I.

108. Similarly, the posting for the Senior Executive Director position indicated that the person filling the position would ensure that private schools in New York City "meet City and State *regulatory standards*." Exhibit J.

109. For all of these reasons, the New Guidelines must also be rejected because the NYSED failed to follow the procedural requirements that apply to rule-making under the SAPA.

IV. The NYSED's New Guidelines violate the Petitioners' constitutional rights.

110. The NYSED's New Guidelines should also be rejected because they violate Petitioners' rights under the United States Constitution and the New York Constitution.

111. ***Free Exercise Clause.*** 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. By virtue of the Fourteenth Amendment, the Free Exercise Clause is binding on the States. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

112. Similarly, the New York Constitution 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.

113. ***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 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 Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 756-57 (1976).

114. Similarly, the New York Constitution 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 (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.")

115. The Free Speech Clauses of the United States Constitution and New York Constitution prohibit the government from either restricting or compelling certain speech. "'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994).

116. Laws that act as a deterrent to and chill free speech, even where not directly prohibiting the exercise of free speech, are also subject to constitutional scrutiny. *Bd. of Cty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Both compelled speech and restricted speech are afforded identical constitutional protection. *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796-97 (1988). Moreover, a content-based regulation is "presumptively invalid." *R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). Such a regulation is subject to strict scrutiny and will be tolerated only upon a showing that it is narrowly tailored to a compelling government interest. *Turner Broad. Sys.*,

512 U.S. at 642. The New Guidelines violate the free speech rights of Petitioners, by limiting certain of their speech and compelling other speech.

117. ***Due Process Clauses.*** 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. I.

118. Similarly, the New York Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." N.Y. Const. art. I, § 6

119. State laws limiting the rights of parents to choose the education for their children violate substantive due process. In *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court invalidated a statute that banned the teaching of certain foreign languages to young children in public and private schools. The Court recognized that, among the fundamental liberties protected by the Due Process Clause, "it is the natural duty of the parent to give his children education suitable to their station in life." *Id.* at 399-400.

120. Two years later, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Court struck down a statute that compelled parents to send their children to public school. Citing *Meyer*, the Court concluded that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control," observing that "rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state." *Id.* at 534-35. Significantly, the Court reasoned that the government lacks power "to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

121. The central question to emerge from *Meyer* and *Pierce* was what type of law constitutes a *reasonable* regulation of private education, and the Court shed light on that issue in *Farrington v. Tokushige*, 273 U.S. 284 (1927). In *Farrington*, parents of children educated in private foreign language schools in the territory of Hawaii challenged a federal regulation as violating their due process rights under the Fifth Amendment. *Id.* at 290. Among other things, the regulation provided the Department of Public Instruction with the power to prescribe the subjects and courses of study, the entrance and attendance prerequisites or qualifications of education, age, and other considerations, and the text books used in all foreign language schools. *Id.* at 294. The law also proscribed the teaching of subjects and the use of text books outside those permitted by the Department. *Id.* at 295. In striking down the comprehensive law as unconstitutionally regulating private schools, the Court identified the constitutionally problematic aspects of the regulations: "They give affirmative direction concerning the intimate and essential details of such schools, intrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum and text-books." *Id.* at 298. Due process invalidates laws that "would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful," because a parent "has the right to direct the education of his own child without unreasonable restrictions." *Id.*

122. *Meyer*, *Pierce*, and *Farrington* are still binding today. Throughout the past fifty years, the Supreme Court has referenced these cases repeatedly in recognizing parents' right to direct the education of their children. For example, in *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court cited *Pierce* as holding that "a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice." *Id.* at 461. In *Troxel v. Granville*, 530 U.S. 57 (2000), the Court

noted that "the interest of parents in the care, custody, and control of their children [ ] is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Id.* at 65; *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015) (citing *Pierce* and *Meyer* as protecting the "rights of childrearing, procreation, and education"); *Zelman v. Simmons*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring) ("This Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children."); *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997) ("[T]he 'liberty' specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children."); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972) (highlighting that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition" and "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .").

123. While the Supreme Court held in *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that courts must apply a lower level of scrutiny in adjudicating most free exercise claims, it also created an important exception to that rule: the so-called "hybrid" free exercise claim. In *Smith*, the Supreme Court reasoned that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881. The *Smith* Court identified the "right of parents . . . to direct the education of their children" as an example of such a right, citing *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

124. In *Yoder*, the Supreme Court had held that a law that compelled school attendance beyond the eighth grade was invalid under the Free Exercise Clause as applied to Amish objectors who claimed that formal education beyond the eighth grade violated their central religious beliefs. The *Yoder* Court applied strict scrutiny to the law, reasoning that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 406 U.S. at 233. Notably, *Yoder* recognized the "interrelationship of belief with [the Amish] mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization." *Id.* at 235.

125. The Supreme Court has also held that state authorities may not target religion even in facially neutral laws or regulations. *See Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2019); *Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 567 (1993). A majority of the private schools subject to the New Guidelines are religious schools.

126. **Constitutional Violations.** As the foregoing demonstrates, the NYSED's New Guidelines would effectively frustrate the Petitioners' constitutionally protected rights to the free exercise of religion through a series of onerous requirements; would effectively frustrate the Petitioners' free speech rights by dictating what can and cannot be taught in Yeshivas; would effectively frustrate 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 would inhibit the entire Orthodox and Chasidic 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).

Claims For Relief

First Claim

127. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 126.

128. Under the NYSED's New Guidelines, all private schools – including Yeshiva Petitioners – will be penalized and perhaps shut down if they fail to comply with the mandatory review-and-approval procedures included in the New Guidelines, or if a local school board determines that they do not meet the numerous requirements that are imposed by the New Guidelines.

129. 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.

130. Petitioners are thus harmed by the NYSED's New Guidelines, which are contrary to law.

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

Second Claim

132. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 131.

133. The NYSED's New Guidelines create rigid, statewide curricular and other requirements that are necessary for every private school in New York State to fulfill in order to be deemed to be providing substantially equivalent instruction.

134. Neither Section 3204 nor any other provision in New York's compulsory education scheme created or permits a single, statewide set of curricular and other requirements for determining whether parents who choose private schools for their children are in compliance with the compulsory education law. Instead, as courts have held, Section 3204 was intended to create, and in fact creates, a "flexible," "comparative" standard – rather than a "singular statewide standard" – and allows for "variations from district to district." The NYSED's New Guidelines are therefore contrary to law.

135. The NYSED's New Guidelines also do not identify the criteria to be used for measuring school performance against the rigid standards it identifies. The New Guidelines implicitly and explicitly empower local school districts to review and evaluate each aspect of private schools' educational offerings, and to demand that private schools alter those offerings in any manner, and under threat of potential closure.

136. The NYSED's New Guidelines therefore are impermissibly vague.

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

Third Claim

138. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 137.

139. The NYSED's New Guidelines create a rigid, statewide procedure and standards for determining whether children attending private schools are receiving substantially equivalent instruction, and imposes harsh penalties, including closure, for schools that do not comply with those procedures and standards.

140. Because the NYSED's New Guidelines create rigid, 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"); *see also Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 (1985) (holding that a "rule" is "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers"); *People v. Cull*, 10 N.Y.2d 123, 127 (1961) (holding that a "rule" is a "general course of operation to be effective for the future"); *Alca Indus., Inc. v. Delaney*, 92 N.Y.2d 775, 778 (1999) ("Rulemaking, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications."); *Connell v. Regan*, 114 A.D.2d 273, 275 (3d Dep't 1986) ("Where agency determinations are based solely on a firm, rigid, unqualified standard or policy, a quasi-legislative norm or prescription is established that carves out a course of conduct for the future.").

141. 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.").

142. In issuing the New Guidelines, the NYSED did not comply with any of those procedural requirements, and the New Guidelines are therefore contrary to law.

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

Fourth Claim

144. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 143.

145. 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.

146. Parent Petitioners have a protected interest in sending their children to privately-operated schools that inculcate students with instruction consistent with Parent Petitioners' values and beliefs.

147. The New Guidelines deprive Parent Petitioners of the due process right to control the education of their children through a series of onerous requirements, as detailed above.

148. If they comply with the New Guidelines, yeshivas chosen by Parent Petitioners for their children would be required to alter their curriculum, and their emphasis on Jewish studies and the use of Jewish texts.

149. The NYSED does not have a sufficient interest in prescribing the substantive, secular courses that the yeshivas must teach, the manner in which it must be taught and the timing thereof, and the New Guidelines' requirements are not sufficiently related to any interest in promoting a certain type of education.

150. Accordingly, Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the NYSED's purported guidance is contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the NYSED's purported guidance is contrary to law, arbitrary and capricious, and an abuse of discretion and enjoining Respondents from enforcing the guidance against them.

Fifth Claim

151. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 150.

152. 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.

153. 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).

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

155. The New Guidelines violate Petitioners constitutionally protected rights to the free exercise of religion through a series of onerous requirements, as detailed above.

156. Accordingly, Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the NYSED's purported guidance is contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the NYSED's purported guidance is contrary to law, arbitrary and capricious, and an abuse of discretion and enjoining Respondents from enforcing the guidance against them.

Sixth Claim

157. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 156.

158. 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.

159. 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.

160. Pursuant to the United States Supreme Court's opinions in *Yoder* and *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), that hybrid right to provide for and choose the religious education for their children is afforded heightened constitutional protection.

161. The New Guidelines violate Petitioners' constitutionally protected rights to the free exercise of religion through a series of onerous requirements, as detailed above.

162. Accordingly, Petitioners are entitled to a judgement, pursuant to C.P.L.R. § 3001, declaring that the NYSED's purported guidance is contrary to law and thus null and void; and to a judgment, pursuant to C.P.L.R. § 7803(3), that the NYSED's purported guidance is contrary to law, arbitrary and capricious, and an abuse of discretion and enjoining Respondents from enforcing the guidance against them.

Seventh Claim

163. Petitioners repeat and reallege, as if fully set forth herein, each of the foregoing paragraphs through 162.

164. Petitioners have a constitutionally protected right to free speech.

165. 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.

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

167. In particular, the New Guidelines' course requirements burden the free speech rights of Petitioners by compelling that Yeshiva Petitioners deliver certain particular lessons chosen by NYSED, and that those lessons be delivered for a mandated length of time.

168. The New Guidelines also burden the free speech rights of Petitioners by effectively restricting the amount of religious instruction, a form of speech, that Yeshiva Petitioners may provide students.

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

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

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

Eighth Claim

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

173. Petitioners are likely to succeed on the merits of their challenges to the NYSED's New Guidelines.

174. Unless the Court enters a stay prohibiting the NYSED from implementing and enforcing the New Guidelines, Petitioners will suffer irreparable harm. The New Guidelines require Yeshiva Petitioners 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 Parent Petitioners to direct the education of their children.

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

176. 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 Guidelines and to thus maintain the status quo that has been in place since 1894.

177. Accordingly, and pursuant to C.P.L.R. § 7805, the Court should enter a stay prohibiting Respondents from implementing or enforcing the New Guidelines.

Request for Relief

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

178. Declaring that the NYSED's New Guidelines conflict with governing law and are therefore null and void;

179. Enjoining Respondents Rosa and Elia from enforcing the NYSED's New Guidelines; and

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

Dated: March 7, 2019

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 Petitioner schools: Agudath Israel of America, Torah Umesorah, Yeshiva Rabbi Chaim Berlin, Yeshiva Torah Vodaath, Mesivta Tifereth Jerusalem, Rabbi Jacob Joseph School and Yeshiva Ch'san Sofer– The Solomon Kluger School; and the Parent Petitioners: Sarah Rottensreich, David Hammer, Abraham Kahan, Raphael Ahron Knopfler, and Isaac Ostreicher (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
March 7, 2019

Yossi Grunwald
YOSSI GRUNWALD

BLIMA DEUTSCH
Notary Public, State of New York
No. 01-DE6319510
Qualified in Kings County
Commission Expires 02/23/2023

5/7/19