STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of PARENTS FOR EDUCATIONAL AND RELIGIOUS LIBERTY IN SCHOOLS; AGUDATH ISREAL OF AMERICA; TORAH UMESORAH; MESIVTA YESHIVA RABBI CHAIM BERLIN; YESHIVA TORAH VODAATH; MESIVTHA TIFERETH JERUSALEM; RABBI JACOB JOSEPH SCHOOL; AND YESHIVA CH'SAN SOFER - THE SOLOMON KLUGER SCHOOL,

Petitioners,

DECISION/JUDGMENT

-against-

Index No. 907655-22

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

Respondents.

APPEARANCES:

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RYBA, J.,

Since 1895, New York State law has required parents to enroll their school-aged children at a public school or other location that provides instruction by competent teachers in certain specified common courses of study, and has required that instruction provided "elsewhere than a public school

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" (Education Law of 1894, ch 671, §3). This mandate is now codified in the statutory scheme found in Article 65 of the Education Law (Education Law §3201 through §3244), also known as the Compulsory Education Law, wherein the New York State Legislature has established compulsory educational standards for both public and nonpublic schools including minimum hours of instruction, the amount and character of required attendance, and mandated courses of study. Among these standards are those articulated in Education Law § 3204 relating to the required quality, language and subject matter of instruction provided to students. Specifically, Education Law § 3204 (2) (i) requires in relevant part that:

> Instruction may be given only by a competent teacher. * * *
>
> The course of study for the first eight years * * * shall provide for instruction in at least 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. * * *
>
> In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English.

In addition, the Education Law mandates instruction for all students in the following subjects: patriotism and citizenship (Education Law §801 [1]); the history, meaning, significance, and effect of the provisions of the Constitution of the United States and its amendments, the Declaration of Independence, the Constitution of the State of New York and its amendments (Education Law §801 [2]); physical education and kindred subjects (Education Law § 803 [4]); health education regarding alcohol, drugs, and tobacco abuse (Education Law § 804); highway safety and traffic regulation (Education Law § 806); and fire drills and fire and arson prevention and life safety education

(Education Law §§ 807, 808).

Notably, the substantive requirements of the Compulsory Education Law apply "irrespective of the place of instruction," i.e., whether the student receives instruction "at a public school or elsewhere" (Education Law § 3204 [1]). For those students attending a nonpublic school, Education Law § 3204 provides that "[i]nstruction 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" (Education Law §3204 [2]). The burden to evaluate and determine substantial equivalency of instruction is placed upon on local school authorities (hereinafter LSAs)[1] for nonpublic schools located within their geographical boundaries (see, Education Law §§2 [12], 3204 [2], 3205, and 3210). Significantly however, the burden to ensure that a student is attending the required instruction at either a public school or at a substantially equivalent nonpublic school is placed upon those in a "parental relation" with the student (Education Law § 3212), and the failure to satisfy this requirement may result in criminal penalties of fines and imprisonment (see, Education Law § 3233).[2] In addition, a city or school district that wilfully fails to enforce the requirements of the Compulsory Education Law may be penalized through the withholding of public school moneys (see, Education Law § 3234 [1]).

In furtherance of her statutory duty to enforce and execute all laws and policies relating to the education system of this State (see, Education Law § 305), respondent Commissioner of the Department of Education (hereinafter the Commissioner) adopted regulations at 8 NYCRR Part 130

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[1]The Education Law defines "school authorities" as the board of education or corresponding officers of a school district. (Education Law §2 [12]).

[2] A failure to comply with the Compulsory Education Law may also support a finding of educational neglect against the parent (see, Family Court Act § 1012[f] [i] [A]).

(hereinafter the "New Regulations") to provide updated guidance and procedures for substantial equivalency determinations for nonpublic schools under the Compulsory Education Law (see, Education Law §§ 3204, 3205, and 3210).[3] The New Regulations, which went into effect on September 28, 2022, first reiterate the requirement for LSAs to make substantial equivalency determinations for all nonpublic schools within their geographical boundaries (see, 8 NYCRR 130.2), except for those nonpublic schools for which the Commissioner is statutorily required to make the substantial equivalency determination (see, Education Law §3204 [2] [ii]-[iii]) and those that have satisfied the substantial equivalency requirement through other specified alternative pathways (see, 8 NYCRR 130.3). The alternative pathways that permit a nonpublic school to bypass LSA substantial equivalency reviews are identified in the New Regulations as follows: voluntary registration with the Board of Regents; State-approval through Article 85, 87, or 88 of the Education Law; accreditation by an approved accreditation organization, use of instruction approved by the United States government for instruction on a military base or service academy; participation in the international baccalaureate program, or regular use of approved academic assessments (see, 8 NYCRR 130.3).

For nonpublic schools that elect not to pursue the alternative pathways, the New Regulations require substantial equivalency reviews in one of two ways. For nonpublic schools that require a final substantial equivalency determination by the Commissioner, the LSA conducts an initial

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[3] Respondents previously attempted to establish guidance and procedure for substantial equivalency determinations through the implementation of informal "guidelines" in November 2018. In a prior CPLR Article 78 proceeding, this Court found those guidelines to be null and void because they were not promulgated in compliance with the SAPA (see Association of Independent Schools v Elia, 100 NYS3d 513 [2019]). The prior guidelines are not at issue in the present case.

substantial equivalency review and makes a recommendation to the Commissioner (see, 8 NYCRR 130.8). For nonpublic schools that require a final determination by the LSA, the school district superintendents conduct a substantial equivalency review and render a preliminary determination, which is presented to the LSA at a public board meeting for a vote on a final determination (see, 8 NYCRR 130.6). Under either scenario, the New Regulations require all substantial equivalency reviews to be based upon consideration of the following criteria:

> 8 NYCRR 130.9 Criteria for Substantial Equivalency Reviews
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> When reviewing a nonpublic school for substantial equivalency, other than schools deemed substantially equivalent pursuant to section 130.3 of this Part, the following must be considered:
>
> (a) whether instruction is given only by a competent teacher or teachers as required by Education Law § 3204(2)(I);
>
> (b) whether English is the language of instruction for common branch subjects as required by Education Law § 3204(2)(I);
>
> (c) whether students who have limited English proficiency have been provided with instructional programs enabling them to make progress toward English language proficiency as required by Education Law § 3204(2-a);
>
> (d) accreditation materials from the last five years;
>
> (e) whether the instructional program in the nonpublic school as a whole incorporates instruction in mathematics, science, English language arts, and social studies that is substantially equivalent to such instruction required to be provided in public schools pursuant to Education Law § 3204(3);
>
> (f) whether the nonpublic school meets the following other statutory and regulatory instructional requirements:
>
>> (1) instruction in patriotism and citizenship pursuant to Education Law § 801(1) and section 100.2(c)(1) of this Title;
>>
>> (2) instruction in the history, meaning, significance and effect of the provisions of the Constitution of the United States and the amendments thereto, the Declaration of Independence, the Constitution of the State of New York and the amendments thereto, pursuant to Education Law § 801(2) and section

100.2(c)(3) of this Title;

(3) instruction in New York State history and civics pursuant to Education Law § 3204(3) and section 100.2(c)(7) of this Title;

(4) instruction in physical education and kindred subjects pursuant to Education Law § 803(4) and section 135.4(b) of this Title and instruction in health education regarding alcohol, drugs, and tobacco abuse pursuant to Education Law § 804 and section 100.2(c)(4) of this Title. Pursuant to Education Law § 3204(5), a student may, consistent with the requirements of public education and public health, be excused from such study of health and hygiene as conflicts with the religion of the students' parents or guardian; provided that such conflict must be certified by a proper representative of their religion as defined in Religious Corporations Law § 2;

(5) instruction in highway safety and traffic regulation, pursuant to Education Law § 806 and section 100.2(c)(5) of this Title;

(6) instruction in fire drills and in fire and arson prevention, injury prevention and life safety education, pursuant to Education Law §§ 807 and 808, and section 100.2(c)(6) of this Title; and

(7) instruction in hands-only cardiopulmonary resuscitation and the use of an automated external defibrillator pursuant to Education Law § 305(52) and section 100.2(c)(11) of this Title; and

(g) For nonpublic schools meeting the criteria in Education Law § 3204(2)(ii)-(iii), the criteria enumerated in such statute for such schools.

Notably, if a substantial equivalency review results in an unfavorable finding, the matter does not immediately proceed to a final determination. Instead, the New Regulations require the LSA to collaboratively develop, within sixty days, a timeline and plan with the nonpublic school for attaining substantial equivalency in an amount of time that is reasonable given the reasons identified in the review (see, 8 NYCRR §§ 130.6; 130.8). If the nonpublic school thereafter fails to attain substantial equivalency within the prescribed timeline, the matter then proceeds to final determination. If the final determination on substantially equivalency is also unfavorable, the New Regulations state that "the nonpublic school shall no longer be deemed a school which provides

compulsory education fulfilling the requirements of Article 65 of the Education Law", and require the parents "to enroll their children in a different, appropriate educational setting, consistent with Education Law § 3204" (8 NYCRR §§ 130.6; 130.8). Finally, as to penalties and enforcement, the New Regulations provide that "any violation of the compulsory education requirements contained in Article 65 of the Education Law is subject to the penalties prescribed in Education Law § 3233"[4] (8 NYCRR 130.14). Under the New Regulations, those considering themselves aggrieved by an LSA's substantial equivalency final determination may file an appeal to the Commissioner, who may in her discretion stay such determination pending her decision on appeal (see, Education Law § 310; 8, NYCRR 130.12).

Petitioners, consisting of Orthodox Jewish day schools known as "yeshivas" and other organizations that advocate on behalf of Orthodox Jewish interests, commenced this hybrid CPLR Article 78 proceeding and action for a declaratory judgment seeking to annul the New Regulations and enjoin their enforcement. The crux of petitioners allegations is that the substantial equivalency requirements established by the New Regulations improperly target yeshivas, subject them to criteria and heightened standards of scrutiny not imposed on other nonpublic schools, and require them to completely revise their curricula and alter their intended emphasis on Jewish Studies. The first eight causes of action in the petition allege that the New Regulations: 1) were promulgated in violation of the notice and comment procedures of the State Administrative Procedure Act (SAPA); 2) impose greater requirements and restrictions on yeshivas than on other public and nonpublic schools; 3)

[4] As relevant here, Education Law § 3233 provides that "a violation of [the Compulsory Education Law] shall be punishable for the first offense by a fine not exceeding ten dollars or ten days' imprisonment; for each subsequent offense by a fine not exceeding fifty dollars, or by imprisonment not exceeding thirty days, or by both such fine and imprisonment."

impermissibly create a de facto licensing requirement for nonpublic schools; 4) violate the First Amendment right to free exercise of religion under the US Constitution; 5) violate the First Amendment right to freedom of speech under the US Constitution; 6) violate the Constitutional due process right of parents to control the education and upbringing of their children; 7) violate parents' hybrid Constitutional rights to control the religious education of their children; and 8) subject yeshivas to unequal treatment on the basis of their religious observance in violation of the equal protection clause of the US Constitution. The ninth and final cause of action in the petition seeks an order temporarily staying respondents' enforcement of the New Regulations pursuant to CPLR 7805 pending the outcome of this proceeding. In addition, petitioners have filed a filed a motion for a preliminary injunction enjoining respondents from implementing or enforcing the New Regulations during the pendency of this proceeding. Respondents oppose petitioners' application for injunctive relief, and have also filed a motion to dismiss the petition pursuant to CPLR 3211 and for a judgment in their favor declaring that the New Regulations are valid. Petitioners oppose the motion.

Also before the Court are three separate applications for leave to file amicus curiae briefs. The Union of Orthodox Jewish Congregation of America (hereinafter "UOJCA"), an Orthodox Jewish synagogue organization representing over 1000 congregations across the Nation, including 141 affiliate congregations in the State of New York, filed a motion and a subsequent amended motion for leave to file an amicus curiae along with documents in support. The Center for Educational Equity, Teachers College, Columbia University ("CEE") filed a motion for an order granting CEE leave to file an amicus curiae in support of respondents' position that the new regulations comply with applicable law. Finally, the Young Advocates For Fair Education ("YAFFED") filed an order to show cause seeking leave to file a Memorandum of Law as amicus

curiae in support of respondents' position. Additionally, petitioners filed an affidavit of Rabbi David Zweibel dated February 24, 2023 in support of their position ahead of oral argument scheduled for March 1, 2023. Similarly, respondents filed a letter dated February 28, 2023 which established that petitioner Yeshiva Ch'san Sofer and its grades 1-8 programs were deemed substantially equivalent pursuant to the New Regulations. Oral argument on the petition and pending motions was conducted on March 1, 2023, and the matter is now ripe for this Court's determination.

AMICUS CURIAE

First addressing the respective applications for leave to file amicus curiae briefs, "[a]n amicus curiae—friend of the court—is a person appearing in a judicial proceeding to assist the court by giving information or otherwise . . . [and] is heard only by leave of the court" (1 NY Jur, Actions § 81; see, New York Coal. for Quality Assisted Living, Inc. v Daines, 24 Misc 3d 1250(A) [Sup Ct, Albany County 2009]). "[T]he function of an 'amicus curiae' is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration" (Kemp v Rubin, 187 Misc 707, 709 [Sup Ct, Queens County 1946]). While "[i]n cases involving questions of important public interest [such] leave is generally granted," leave has been denied "[w]here all possible points of view were represented by counsel, . . . as nothing would be served by allowing additional appearances" or "where the granting of amicus curiae status might delay the case" (Kruger v Bloomberg, 1 Misc 3d 192, 196, 196-97 [Sup Ct, New York County 2003]; see, State of New York v Philip Morris, Inc., 179 Misc 2d 435, 446 [Sup Ct, New York County 1998]). In deciding whether to permit the filing of amicus curiae briefs, the Court considers a variety of factors including whether granting amicus curiae status would substantially prejudice the rights of the parties, including delaying the original proceeding, whether the amicus curiae brief would invite

new law or information to Court's attention or would otherwise be of special assistance to the Court, and whether the case concerns questions of important public interest (see, Kruger v Bloomberg, 1 Misc 3d at 198 [Sup Ct, New York County 2003]).

Here, upon considering all of the relevant factors, the Court finds that the respective applicants have made a sufficient showing to warrant amicus curiae status. Accordingly, the Court grants the applications and accepts the submitted briefs.

CONSTITUTIONAL CLAIMS

The Court will first address respondents' motion to dismiss the petition as to the fourth, fifth, sixth, seventh and eighth causes of action which seek a declaration that the New Regulations are unconstitutional. It is well settled that a constitutional attack on a statute or regulation must be analyzed in the context of an action for declaratory judgment, rather than a proceeding pursuant to CPLR Article 78 (see, Board of Educ. v Gootnick, 49 N.Y.2d 683 [1980]). It is equally well settled that in order to prevail on a challenge to the constitutionality of a statute or regulation, a party "must surmount the presumption of constitutionality accorded to legislative enactments by proof beyond a reasonable doubt" (Moran Towing Corp. v Urbach, 99 NY2d 443 [2003]). Challenges to the constitutionality of a statute or regulation fall within two categories: a claim that the law is unconstitutional on its face, or a claim that it is unconstitutional as applied to the particular facts of the case. A party seeking to invalidate a law as facially unconstitutional bears the substantial burden of establishing that "in any degree and in every conceivable application, the law suffers wholesale constitutional impairment" and that the law is unconstitutional in all of its conceivable applications (Moran Towing Corp. v Urbach, 99 NY2d at 448 [2003]; see, Americans for Prosperity Foundation

v Bonta, 141 S. Ct. 2373 [2021]; White v Cuomo, 38 NY3d 209 [2022]; Sullivan v New York State Joint Comm'n on Pub. Ethics, 207 AD3d 117, 125 [2022]). Facial challenges to laws are highly disfavored because legislative acts enjoy a strong presumption of constitutionality, and "courts must avoid, if possible, interpreting a presumptively valid statute in a way that will needlessly render it unconstitutional" (LaValle v Hayden, 98 N.Y.2d 155, 161 [2002]). On the other hand," an as-applied challenge calls on the court to consider whether a statute can be constitutionally applied to the [challenger] under the facts of the case" (People v Stuart, 100 NY2d 412, 421 [2003]). A party generally cannot prevail on an as-applied challenge without showing that the law has in fact been, or is sufficiently likely to be, applied to him or her in an unconstitutional manner (see, Church of St. Paul & St. Andrew v Barwick, 67 NY2d 510, 523 [1986]). Indeed, under well settled principles of judicial restraint, the Court should not entertain hypothetical or speculative applications of a law because it is bound "never to anticipate a question of constitutional law in advance of the necessity of deciding it" (United States v Raines, 362 US 17, 21 [1960]).

In support of their constitutional claims, petitioners contend that the New Regulations unconstitutionally infringe upon their rights to freedom of speech and religion under the First Amendment, the due process rights of parents to control the education and upbringing of their children, the hybrid Constitutional right of parents to control the religious education of their children, and the Equal Protection rights of yeshivas to be free from unequal treatment on the basis of their religious observance. According to the petition, these constitutional violations stem from provisions of the New Regulations which (1) allow secular government oversight over religious schools, (2) require core subjects to be taught in English, (3) require instruction by competent teachers, (4)

mandate instruction in more than 20 different subject areas, and (5) allow English-as-a-second language programs to provide instruction in languages other than English.

Petitioners' constitutional challenges to the New Regulations are without merit. The compulsory education and substantial equivalency requirements that petitioners claim are unconstitutional are not established by the New Regulations, but by the enabling statutes set forth in Article 65 of the Education Law, i.e., the Compulsory Education Law. As previously explained, it is the Compulsory Education Law that expressly requires the Commissioner to exercise supervision and oversight over nonpublic religious schools, requires instruction only by competent teachers, mandates instruction in various specified courses of study, requires that core subjects be taught in English, and provides instruction accommodations for students learning to become proficient in the English language. The New Regulations merely reiterate the compulsory education and substantial equivalency requirements that have already been mandated by the Legislature, which constitutes an entirely proper exercise of an agency's authority to adopt and enforce regulations consistent with their enabling legislation (see, LeadingAge New York, Inc. v Shah, 32 NY3d 249, 260 [2018]). Petitioners do not challenge the constitutionality of these legislative mandates as set forth in the Education Law itself.

Inasmuch as petitioners challenge only the constitutionality of the New Regulations rather than the statutory source of the mandates set forth therein, their constitutional attack on the New Regulations must fail. In any event, a plain reading of the New Regulations reveals entirely neutral language that draws no distinctions in its applicability, thus rendering petitioners unable to carry their substantial burden of establishing that the New Regulations are unconstitutional on their face.

Moreover, as the New Regulations have yet to be applied to petitioners in an unconstitutional manner, their "as-applied" constitutional challenge is not yet ripe and must also fail. Accordingly, respondents are entitled to dismissal of petitioners fourth, fifth, sixth, seventh and eighth causes of action seeking a declaration that the New Regulations are unconstitutional.

SAPA CLAIM

The Court will next address respondents' motion to dismiss petitioners' first cause of action alleging that the New Regulations were not promulgated in compliance with the requirements of SAPA and the New York State Constitution. The New York State Constitution and the SAPA sets forth the procedures for the creation of rules and regulations, which must be promulgated in "substantial compliance" with SAPA's provisions (see, SAPA § 202 [8]; Owner Operator Indep. Drivers Ass'n, Inc. v. New York State Dep't of Transportation, 205 AD3d 53, 64 [2022]). Prior to the adoption of a rule, an agency must 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 (see, SAPA § 202 [1] [a]). Unless a different time is specified by statute, the notice of proposed rule making must appear in the state register at least sixty days prior to either (i) the addition, amendment or repeal of a rule for which statute does not require that a public hearing be held prior to adoption, or (ii) the first public hearing on a proposed rule for which such hearing is so required (see, SAPA § 202 [1] [a]).

Petitioners contend that the New Regulations were not adopted in compliance with SAPA because the required notice and comment period was a "sham," as evidenced by respondents' failure to make any substantive revisions to the regulations in response to the multitude of negative

public comments it received. The Court rejects this proposition. First, the record reflects that respondents received approximately 350,000 public comments in response to the New Regulations, and that they thereafter prepared and published a full Assessment of Public Comment in the State Register which summarized the public comments and sufficiently addressed the concerns raised therein. Respondents were not required to revise the proposed regulations simply because members of the public opposed them, and as no "significant alternatives" to the regulations were suggested in the public comments, respondents were not required to provide a statement explaining why the public's suggestions were not incorporated into the rules (see, SAPA § 202[5][b][i]; Owner Operator Indep. Drivers Ass'n, Inc. v New York State Dep't of Transportation, 205 AD3d at 64 [2022]).

Inasmuch as the record reveals that respondents appropriately published the proposed regulations in the state register with notice and opportunity for public comment, and otherwise complied with applicable SAPA requirements, the Court finds that the New Regulations were established in substantial compliance with SAPA. Accordingly, respondents' motion to dismiss petitioners' first cause of action is granted.

ARTICLE 78 CLAIMS

The Court will next turn to respondents' motion to dismiss petitioners' second cause of action pursuant to CPLR 7803 which alleges that the New Regulations are arbitrary and capricious and an abuse of discretion, "including an abuse of discretion as to the measure or mode of penalty or discipline imposed."[5] Administrative agencies have "all the powers expressly delegated to [them]

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[5] Although the second cause of action is entitled "Violation of State Administrative Procedure Act", the substance of the cause of action seeks review under the arbitrary and capricious standard of CPLR Article 78.

by the Legislature" (Matter of Consolidated Edison Co. of NY, Inc. v Department of Envtl. Conservation, 71 NY2d 186, 191 [1988]), and are "permitted to adopt regulations that go beyond the text of [their] enabling legislation, so long as those regulations are consistent with the statutory language and underlying purpose" (Matter of Acevedo v New York State Dept. of Motor Vehs., 29 NY3d 202, 221 [2017]). Where the legislature has left to an agency's discretion the determination of "what specific standards and procedures are most suitable to accomplish the legislative goals," the agency's rulemaking, "[i]f reasonably designed to further the regulatory scheme, . . . cannot be disturbed by the courts unless it is arbitrary, illegal or runs afoul of the enabling legislation or constitutional limits" (Matter of Mercy Hosp. v New York State Dept. of Social Servs., 79 NY2d 197, 204 [1992]). Thus, a regulation should be upheld if it has a rational basis and is not, arbitrary, capricious or contrary to the statute under which it was promulgated. (see, Juarez v New York State Off. of Victim Servs., 36 NY3d 485, 491–92 [2021]). Here, the question therefore becomes whether the New Regulations are inconsistent with the authority granted by their enabling legislation or are otherwise "so lacking in reason" so as to be "essentially arbitrary" (Matter of Acevedo v New York State Dept. of Motor Vehs, 29 NY3d at 226–227 [2017]; see, Juarez v New York State Off. of Victim Servs., 36 NY3d at 492–93 [2021]).

Petitioners first claim that the New Regulations are arbitrary and irrational because they impose more onerous standards on yeshivas than other nonpublic schools and permit LSAs to assess the competency of yeshiva faculty. The Court disagrees. To the extent that petitioners contend that the New Regulations unfairly single out yeshivas for substantial equivalency reviews by failing to provide them with an alternative pathway that would allow them to avoid such reviews, there is nothing in the New Regulations that precludes yeshivas from pursuing the same alternative

pathways to substantial equivalency available to other schools. Moreover, as previously noted in this decision, the compulsory educational standards and substantial equivalency review requirements at issue are not derived from the New Regulations but from the Education Law itself, which petitioners do not challenge. Insofar as the disputed requirements of the New Regulations merely reiterate statutory requirements that have not been challenged, the Court declines to disturb them.

However, the Court reaches a different conclusion with regard to petitioners' assertion that the New Regulations are arbitrary and irrational because they allow LSAs to require the closure of any educational institution that fails to meet the applicable substantial equivalency requirements. Under the separation of powers doctrine, the role of the Legislature is to make critical policy decisions through the enactment of an enabling statute, while the role of the executive branch is to implement those policies through agency rulemaking (see, Leadingage New York, Inc. v Shah, 153 AD3d 10, 16 [2017], aff'd 32 NY3d 249 [2018]; Greater NY Taxi Assn. v New York City Taxi & Limousine Commn., 25 NY3d 600, 609 [2015]). While agencies are permitted to adopt regulations that expand upon the precise text of the enabling legislation, the regulations must remain consistent with the authority conferred by the statute, the statutory language itself, and the underlying purpose of the legislation (see, Matter of General Elec. Capital Corp. v. New York State Div. of Tax Appeals, Tax Appeals Trib., 2 NY3d 249, 254 [2004]). Any portion of an agency rule or regulation that exceeds the power conferred by the Legislature is deemed to be impermissible legislative policymaking and must be struck down (see, Boreali v Axelrod, 71 NY2d 1, 12–14 [1987]).

The Court finds that certain portions of the New Regulations impose consequences and penalties upon yeshivas above and beyond that authorized by the Compulsory Education Law, the enabling legislation herein. The purpose of the Compulsory Education Law is to ensure that

"children are not left in ignorance, that from some source they will receive instruction that will fit them for their place in society" (People v Turner, 277 AppDiv 317, 319 [1950]; see, Matter of Andrew TT, 122 AD2d 362, 364 [1986]). However, the statutory scheme places the burden for ensuring a child's education squarely on the *parent*, not the school. As previously noted, Education Law § 3212 requires those in a "parental relation" with a child to ensure that he or she is attending the required instruction at either a public school or at a substantially equivalent nonpublic school. The only penalties for noncompliance authorized by the Compulsory Education Law are the imposition of fines and/or penalties upon a *parent* (see, Education Law § 3233) and the withholding of public moneys from a *city or public school district* that fails to enforce the law (see, Education Law §3234 [1]). Notably, the Compulsory Education Law does not authorize or contemplate the imposition of penalties or other consequences upon a *nonpublic school* that has been found to not provide substantially equivalent instruction.

Nonetheless, the New Regulations state that if a nonpublic school receives an unfavorable final determination on substantial equivalency, " the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law" (8 NYCRR 130.6 [c] [2] [i]; 8 NYCRR 130.8 [d] [7] [I]). Parents are then required "to enroll their children in a different, appropriate educational setting, consistent with Education Law § 3204" (8 NYCRR 130.6 [c] [2] [iii]; 8 NYCRR 130.8 [d] [7] [iii]). Furthermore, the New Regulations provide that "any violation of the compulsory education requirements contained in Article 65 of the Education Law is subject to the penalties prescribed in Education Law § 3233", i.e., fines, imprisonment or both (8 NYCRR 130.14). The effect of the foregoing language is to force parents to completely unenroll their children from a nonpublic school that does not meet all of the

criteria for substantial equivalency, thereby forcing the school to close its doors.

This result is inconsistent with the Legislative goal of the Compulsory Education Law and exceeds the rule-making authority conferred upon respondents. Notably, there is no provision of the Compulsory Education Law that requires parents to completely unenroll their children from nonpublic schools that do not fulfill all of the substantial equivalency requirements. Nor is there any provision of the Compulsory Education Law that requires a nonpublic school to close its doors if it does not meet each and every criteria for substantial equivalency. Most importantly, there is nothing in the Compulsory Education Law that limits a child to procuring a substantially equivalent education through merely one source of instruction provided at a single location. So long as the child receives a substantially equivalent education, through some source or combination of sources, the Legislative purpose of compulsory education is satisfied.

Accordingly, the Court finds that respondents lack authority to direct parents to completely unenroll their children from nonpublic schools that have been determined to fall short of meeting each and every substantial equivalency criteria, nor do respondents have authority to direct the closure of such schools. Rather, the parents should be given a reasonable opportunity to prove that the substantial equivalency requirements for their children's education are satisfied by instruction provided through a combination of sources. For example, parents should be permitted to supplement the education that their children receive at a nonpublic school with supplemental instruction that specifically addresses any identified deficiencies in that education, such as by providing supplemental home instruction in compliance with the home schooling regulations set forth at 8 NYCRR 100.10. Therefore, if a student is found to be attending a school that is not deemed "substantially equivalent", the home schooling rules shall apply if the parent chooses to keep their

child enrolled at that school. As such, the parent may submit a plan that utilizes said school along with supplemental education as needed to create a satisfactory Individualized Home Instruction Plan (IHIP) (see 8 NYCRR 100.10).

In sum, respondents exceeded their authority by promulgating rules that require parents to automatically unenroll their children from nonpublic schools that have been found to not provide substantially equivalent instruction, without allowing them the opportunity to prove that satisfactory supplemental instruction is being provided. For the above reason, the Court finds that 8 NYCRR 130.6 [c] [2] [i] and 8 NYCRR 130.8 [d] [7] [i] - - stating that " the nonpublic school shall no longer be deemed a school which provides compulsory education fulfilling the requirements of Article 65 of the Education Law" - - must be stricken.[6] The second cause of action in the petition is granted only to the extent of striking the aforementioned provisions from the New Regulations. Respondents' motion to dismiss the remainder of the second cause of action is granted. While sections 8 NYCRR 130.6 [c] [2] [iii] and 8 NYCRR 130.8 [d] [7] [iii] - - require parents "to enroll their children in a *different*, appropriate educational setting, consistent with Education Law § 3204"- - the Court finds that the term *different* does not mean parents are required to unenroll their children from a school that is not deemed substantially equivalent, but rather the term *different* encompasses the parental right to supplement with an IHIP if they choose to keep their child enrolled at said school.

Turning to the third cause of action in the petition, petitioners allege that the New

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[6] The invalid portions of the New Regulations may be severed without affecting the validity of the remaining provisions (see, 8 NYCRR 130.15).

Regulations are arbitrary and capricious because they create an impermissible licensing scheme by not permitting yeshivas to operate unless they receive a favorable substantial equivalency determination. In view of the Court's finding above that respondents lack the authority to the direct closure of nonpublic schools, petitioners' third cause of action has been rendered moot and is dismissed on that ground. Finally, in light of the fact that the Court has rendered a determination on the merits herein, petitioners' motion for a preliminary injunction and ninth cause of action seeking a temporary stay have been rendered moot.

To the extent that the parties' arguments have not been specifically addressed, they have been considered by the Court and found to either be lacking in merit or otherwise unnecessary to address.

For the foregoing reasons, it is hereby

ORDERED that the respective applications by The Union of Orthodox Jewish Congregation of America, The Center for Educational Equity, Teachers College, Columbia University and the Young Advocates For Fair Education to file briefs as amicus curiae are granted, and it is further

ORDERED AND ADJUDGED that respondents' motion to dismiss the petition is granted in part, to the extent that the first, third, fourth, fifth, sixth, seventh, eighth and ninth causes of action are dismissed in their entirety, and the second cause of action is dismissed only in part, and it is further

ORDERED AND ADJUDGED respondents' motion to dismiss the petition is denied in part as to the second cause of action only, and it is further

ORDERED AND ADJUDGED that petition is granted in part, only to the extent that respondents' regulations at 8 NYCRR 130.6 [c] [2] [i] and 8 NYCRR 130.8 [d] [7] [i] are declared to be invalid and are stricken, and the petition is otherwise dismissed, it is further

ORDERED that with the exception of 8 NYCRR 130.6 [c] [2] [i] and 8 NYCRR 130.8 [d] [7]][i], the New Regulations promulgated at 8 NYCRR Part 130 are declared to be valid; and it is further

ORDERED AND ADJUDGED that the petition in all other respects is dismissed, and it is further

ORDERED AND ADJUDGED that petitioners' motion for a preliminary injunction is denied, as moot.

This shall constitute the Decision and Order of the Court, the original of which is being transmitted to the Albany Court Clerk for electronic filing and entry. Upon such entry, respondents' counsel shall promptly serve notice of entry on all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

Dated: March 23, 2023

HON. CHRISTINA L. RYBA
Supreme Court Justice