To Be Argued by: Mark C Rushfield
(Time Requested: 15 Minutes)

Supreme Court of the State of New York
Appellate Division – Third Department

No. 534406

UNITED JEWISH COMMUNITY OF BLOOMING GROVE, INC., JOEL STERN, as Parent and Natural Guardian of K.S., M.S., R.S., B.S., and F.S., Infants Under the Age of Eighteen years, and YITZCHOK EKSTEIN, as Parent and natural Guardian of J.E., C.E., M.E., and P.E., Infants Under the Age of Eighteen Years,

Petitioners/Plaintiffs-Respondents,

-against-

WASHINGTONVILLE CENTRAL SCHOOL DISTRICT and THE NEW YORK STATE EDUCATION DEPARTMENT,

Respondents/Defendants-Appellants,

BRIEF FOR RESPONDENT/DEFENDANT-APPELLANT WASHINGTONVILLE CENTRAL SCHOOL DISTRICT

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STATEMENT OF QUESTION PRESENTED

WHETHER THE LOWER COURT ERRED IN GRANTING A SUMMARY JUDGMENT TO THE PETITIONERS/ PLAINTIFFS IN DETERMINING THAT, CONTRARY TO THE CONSTRUCTION OF EDUCATION LAW SECTION 3635 BY THE NEW YORK COMMISSIONER OF EDUCATION AND THE NEW YORK STATE EDUCATION DEPARTMENT, THAT STATUTE REQUIRED THE WASHINGTONVILLE CENTRAL SCHOOL DISTRICT TO PROVIDE SCHOOL DISTRICT–FUNDED SCHOOL TRANSPORTATION TO RESIDENT NONPUBLIC SCHOOL STUDENTS ON DAYS WHEN THE WASHINGTONVILLE CENTRAL SCHOOL DISTRICT'S PUBLIC SCHOOLS ARE CLOSED?

The lower court erred in rejecting the historic construction of Education Law § 3635 by the Commissioner of Education and the New York State Education Department, and the legislative history of that statute, each establishing that the statute does not require a public school district to provide school district-funded

school transportation to resident nonpublic school students on days when a school district's public schools are closed.

As more fully set forth in the Argument below, the Commissioner's and State Education Department's historic construction and application of the language in Education Law § 3635, especially in light of the legislative history of that statute and the language of other legislation (e.g., Education Law § 3604[8]), constitutes a rational and reasonable construction of an ambiguous provision of the statute, and the lower court erred in reaching a conclusion as to the construction of that statute diametrically opposite to that of the Commissioner of Education and the State Education Department.

STATEMENT OF THE NATURE OF THE PROCEEDINGS AND OF THE FACTS

The Petitioners/Plaintiffs ("Petitioners") commenced this hybrid Article 78 proceeding and action for declaratory relief on July 19, 2021.

In the Petition/Complaint ("Petition"), as against the Respondent-Defendant-Appellant Washingtonville Central School District ("District"), the Petitioners contended as a First Cause of Action that the District had violated Education Law § 3635(1) "on multiple occasions, including for the entire upcoming 2021-22 school

year, in violation of its mandatory statutory duty" (R.68[1]); as a Fourth Cause of Action, that the District's Policy No. 5730 deprived the Petitioners and all other nonpublic school students of the equal protection of the law under the New York State Constitution (R.72) and that the District's interpretation of Education Law § 3635(1) lacked a rational basis and was arbitrary and irrational (R.72); and as a Fifth Cause of Action, that the District's actions consistent with the District's Policy No. 5730 of denying nonpublic school students transportation to their nonpublic schools on days when the District's schools were closed or not otherwise in session violated the Free Exercise clause of the New York State Constitution (R.72 to R.73).

As against the Respondent/Defendant-Appellant New York State Education Department ("SED"), the Petitioners contended as a Second Cause of Action that the SED's issued guidance and statements communicating to school districts in the State of New York that Education Law § 3635(1) does not require school districts to provide school transportation services to resident nonpublic school students on days when the public schools are not in session violated the State's Administrative Procedure Act ("APA") and for that reason, and otherwise, was of no force and effect (R.68 to R.70); as a Third Cause of Action that the SED had adopted its

[1] All references to the Record on Appeal are designated as "R." followed by the page number. The Record has been produced and is being filed by the Respondent/Defendant-Appellant New York State Education Department.

Transportation Guidance, providing that school districts had no obligation under Education Law § 3635(1) to provide school transportation services to resident nonpublic school students on days upon which the school district's public schools were closed (R.70 to R.71); and as a Fourth Cause of Action that the SED's Transportation Guidance deprived the Petitioners of the equal protection of law under the New York State Constitution. R.71 to R.72.

By Decision and Order dated August 25, 2021, the lower court granted the Petitioners' motion for a mandatory preliminary injunction compelling the District to commence providing school transportation services to resident nonpublic school students on days when the District's public schools were closed (R.296 to R.308). Thereafter, after joinder of issue, the Petitioners moved for summary judgment for a declaration that they were entitled to a mandatory permanent injunction requiring the District to provide transportation to resident nonpublic school students on days when the District's public schools were closed, as to which the SED cross-moved for summary judgment to dismiss the Petition/Complaint and the District opposed the Petitioner's motion. R.754 to R.865.

On November 18, 2021, the lower court rendered a Decision, Order and Judgment granting the Petitioners' motion for summary judgment and denying SED's cross-motion for summary judgment. R.3 to R.19. The lower court ordered, adjudged and decreed therein that (1) Education Law § 3635(1) required the District

to provide transportation to all nonpublic school students on all days when their nonpublic schools were open for instruction, regardless of whether the District public schools were open, and directed the District to "provide transportation to all nonpublic school students on all days that the nonpublic schools are open for instruction, as required by Education Law § 3635(1)" (R.17); (2) the District was in "violation of Education Law § 3635(1) by refusing to provide transportation to nonpublic school students on all days when the nonpublic schools are open for instruction" (R.18); (3) the SED's "guidance on transportation for nonpublic school students to the extent that it states transportation is required only on those days when the public schools are open is null and void, on the grounds that it violates Education Law § 3635(1)" (R.18); and (4) that the District was "permanently enjoined from denying transportation to any nonpublic school students on all days that their nonpublic schools are open for instruction." R.18.

The lower court did not address the Petitioners' other claims set forth in the Petition/Complaint and denied the Petitioners' claim for an award of monetary damages and attorney fees. R.18.

In reaching these conclusions, the lower court acknowledged that since at least 1992, the SED had taken the position that, under Education Law § 3635(1), public school districts lacked the legal authority to provide transportation on legal holidays that the State requires that the public school district be closed and that on other days

that a school district's public schools were closed, school districts had the option as to whether to provide school transportation of resident nonpublic school students to their private schools. R.5 The lower court also noted that Education Law § 3635(2)(a) provided for allowance of up to five to ten days of transportation to nonpublic schools when public schools in cities with a population of greater than one million were closed and that, "[i]n the legislative history, a similar restriction of two (2) days for all other districts was struck from the legislation" R.6.

The lower court held that the issue before it was limited to the interpretation of the provisions of Education Law § 3635 (R.7) and that in the lower court's view "it is fundamental error to assume that the identification of SED's transportation practice is equivalent to a determination of the legislative mandate under Education Law § 3635 (1) (a)," that "[t]o the contrary, the record shows that SED has long implemented a self-serving practice, in derogation of its statutory obligation." R.7.

Although concluding that Education Law § 3635(1) was clear and unambiguous in obligating the District to provide school transportation services to resident nonpublic school students whenever their nonpublic schools were open for instruction, regardless of whether the District's public schools were closed, and therefore, that the lower court need not consider the legislative history (R.14), the lower court engaged in a review of the legislative history of Education Law § 3635, evidencing that Education Law § 3635(1) had not previously ever been read to

mandate an obligation of public school authorities to provide transportation services for nonpublic school students to attend their nonpublic schools on days when public schools were not in session. Thus, although noting that, Education Law § 3635(1)(a) was initially enacted in 1939 (R.15), the lower court noted:

> In 1985, Education Law § 3635 was amended, adding paragraph 2-a to designate between 5 and 10 transportation days for nonpublic schools when public schools were scheduled to be closed in cities with a population more than one million people. The legislative history clearly indicated that New York City public schools were not, in practice, providing transportation unless they were open. R.12 to R.13.

The lower court went on to note that the statutory language of Education Law § 3635(2)(a) "indicates that the designation of 5-10 transportation days for nonpublic schools was an addition to the New York City practice of only providing transportation on days when the public schools were open" and that "a 2-day designation for transportation to non-public schools when public schools were closed for all other districts, was initially proposed in 1985 but eliminated from the legislation." R.13.

The lower court further noted in its review of the legislative history of Education Law § 3635(1)(a) that with the passage of legislation in 1960 that included the transportation provisions of Education Law §3635(1)(a), upon its approval, then Gov. Nelson Rockefeller issued a Memorandum stating: "The law requires that children attending private schools be afforded transportation on a

parity with public school pupils." (**Emphasis** added in lower court decision). R.15. The lower court further noted that the Memorandum accompanying the Senate Bill provided that "[t]he law requires that children attending private school be afforded transportation on a **parity** with public school . . . [and] . . . such transportation must be furnished equally to all children residing in the district **attending both public and non-public schools**." (**Emphasis** added in lower court decision). R.15 to R.16.

From these Memorandums indicating that transportation was to be offered to nonpublic school students "on a parity" with public school students, the lower court made the unjustified leap that the legislative history thus evidenced "a legislative intent that the obligation to provide transportation to private school students within the District stands as an independent mandate and is not dependent upon the public schools being open." R.16. The lack of support for such a finding of legislative intent is reinforced by the actual history surrounding implementation of Education Law § 3635(1)(a) over the intervening decades.

The undisputed facts were that from the time the relevant legislation was adopted and through its amendments in 1960 and 1985, at no time until the instant action was commenced has SED's interpretation of the statute that it only required non-City school districts like the District to provide the same transportation services to both resident public school and nonpublic school students, i.e., on days upon

which the public schools were open for instruction, i.e., the "parity" required by the statute, been effectively challenged.

SED's historic interpretation is not only consistent with the language of Education Law §3635(1)(a), which requires the District to provide only "sufficient transportation facilities" (R.777), but was sanctioned by the Commissioner of Education in both *Appeal of Brautigam*, 47 Ed. Dept. Rep. 454, Decision No. 15,772 (2008), wherein the Commissioner of Education expressly ruled that resident nonpublic school students have no statutory right to be provided with school district-provided transportation to a resident student's private school on days when the school district's public schools are not in operation. The Commissioner held that, as the school district would face additional costs attributable to such transportation on days when its public schools were not in session, the school district's determination to not provide such private school transportation on those days was not "improper, unreasonable or in violation of law." R.736 to R.737.[2] See also *Appeal of Richard E. Cooper,* 1995 NY Educ Dept. LEXIS 156, *3, Decision No. 13,484 (1995), holding that a school district "has no legal obligation to provide identical

[2] In the case of the District, presuming that the District can secure the additional transportation that would be necessary to transport all its resident nonpublic school students to all their private schools on the days when the District's public schools are not in session, the cost for the District is an additional $14,372.04 per day of such transportation. R.772 to R.773.

transportation to all students," but "must merely provide equivalent transportation to all students under like circumstances."

Such an interpretation is also consistent with the legislative history of the statute, which evidences that, in the context of a status quo in which no school district was being required to provide nonpublic school transportation services on days when their public schools were not in session, special legislation was adopted in 1985 to provide a limited entitlement to resident students of the City of New York, but not to resident students of other school districts – which had also been proposed – to a limited number of days of City-paid transportation for attendance at nonpublic schools on days when the City's public schools were not in session. R.117 to R.118, R.126 to R.165 and R.745 to R.753.

The District timely filed its notice of appeal from the lower court's Decision & Order on November 22, 2021. R.20.

ARGUMENT

THE LOWER COURT'S DECISION, ORDER AND JUDGMENT SHOULD BE VACATED AND REVERSED BY THE COURT AS IN ERROR

The SED and the Commissioner of Education have determined for decades that Education Law § 3635(1)(a) does not mandate school districts throughout the State of New York to provide resident nonpublic school students with transportation

on days on which the school districts' public schools are not in session. In addressing any ambiguity whatsoever in that statute, this Court should defer to the SED and Commissioner's longstanding interpretation of that statute, i.e., that it does not establish the mandate of publicly funded resident nonpublic school transportation on whatever days private schools may decide to provide services to their students despite the responsible school district's public schools being closed. As stated by the Court of Appeals in *Lezette v. Board of Education*, 35 N.Y.2d 272, 281 (1974):

> It is a cardinal principle of construction that, "[in] case of doubt, or ambiguity, in the law it is a well-known rule that the practical construction that has been given to a law by those charged with the duty of enforcing it, as well as those for whose benefit it was passed, takes on almost the force of judicial interpretation [cases cited]". (*Town of Amherst* v. *County of Erie*, 236 App. Div. 58, 61, affd. 260 N. Y. 361, 369-370.) In *Matter of Howard* v. *Wyman* (28 N Y 2d 434, 438) former Chief Judge Fuld wrote for the court, "[it] is well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld."

See also *Davis v. Mills*, 98 N.Y.2d 120, 125 (2002) ("[T]his Court treads gently in second-guessing the experience and expertise of state agencies charged with administering statutes and regulations"), *Kransdorf v. Board of Educ. of Northport Union Free School Dist.*, 81 N.Y.2d 871, 874-875 (1993) (holding that as the statute at issue, on its face, required interpretation, and the Commissioner's interpretation was neither irrational nor unreasonable, "it should be accepted") and *Ward v. Nyquist*, 43 N.Y.2d 57, 63 (1977) (noting that the Court's reasoning was consistent

with the interpretation applied by the Commissioner and "the construction given statutes by the agency responsible for their administration should not be lightly set aside").

As this Court more recently held in *Matter of Board of Educ. of the Minisink Valley Cent. Sch. Dist. v. Elia*, 170 A.D.3d 1472, 1473-1474 (3d Dept. 2019):

> To begin, "we may not substitute our judgment for that of the Commissioner unless we conclude that such determination was 'arbitrary and capricious, lacked a rational basis or was affected by an error of law'" (*Matter of Donato v Mills*, 6 AD3d 966, 967, 774 NYS2d 846 [2004], quoting *Matter of Board of Educ. of Monticello Cent. School Dist. v Commissioner of Educ.*, 91 NY2d 133, 139, 690 NE2d 480, 667 NYS2d 671 [1997]; *see Matter of Donlon v Mills*, 260 AD2d 971, 972, 689 NYS2d 260 [1999], *lv denied* 94 NY2d 752, 722 NE2d 506, 700 NYS2d 426 [1999]). . . . Deference is therefore afforded to the Commissioner's determination where, as here, it is based upon her expertise in applying an ambiguous statutory and regulatory framework (*see Matter of Davis v Mills*, 98 NY2d at 125; *Matter of Kransdorf v Board of Educ. of Northport-E. Northport Union Free School Dist.*, 81 NY2d 871, 874, 613 NE2d 537, 597 NYS2d 631 [1993]; *cf. Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills*, 4 NY3d 51, 59, 823 NE2d 1265, 790 NYS2d 619 [2004]).

The interpretation of Education Law § 3635 by the SED and Commissioner of Education to the effect that the statute does not mandate the special treatment of providing publicly funded transportation to resident nonpublic school students different than that provided to public school students, i.e., that it need only be provided on the days the public schools are in session, is not only reasonable, but

reflects the legislative history of that statute and the Legislature's intent as reflected by that statute and Education Law § 3604(8).

Prior to 1985, under Education Law § 3635 and its predecessors, no school district in the State of New York was ever deemed required to provide transportation to students residing within its jurisdiction who were attending nonpublic schools on days other than when the school district's public schools were open for instruction; all that was required was equal treatment, i.e., on days public school students residing in the district were being provided with school transportation, nonpublic school students residing in the District had to also be provided with such transportation. See e.g., *O'Donnell v. Antin*, 36 N.Y.2d 941, 942 (1975) (affirming upon reasoning in *O'Donnell v. Antin*, 81 Misc. 2d 849, 851-854 [Sup. Ct. Westchester Co. 1974]) and *Wenner v. Board of Education*, 71 Misc. 2d 978, 981-982 (Sup. Ct. Suffolk Co. 1972).

As stated in NY Statutes § 192: "In accordance with general rules of statutory construction, amendments and the original statute will be construed together…. Not only does the prior statute explain the meaning of the amendment thereto, but the amendment may be useful as an indicium of the legislative intent in the enactment of the prior statute; for a change in the wording of a statute generally indicates a change in meaning." As stated in NY Statutes § 96: "A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment

and that construction is to be preferred which furthers the object, spirit and purpose of the statute [and amendment]."

When searching for the collective legislative intent, the courts have relied on references to other provisions of the particular statute in question for context, canons of construction, and legislative history that may all provide insight into legislative meaning. In this regard, the 1985 statutory amendment that added Section (2)(a) to Education Law § 3635 would have been unnecessary if Education Law § 3635(1)(a) had the meaning asserted by the Petitioners, i.e. that NYS Education Law § 3635(1)(a) confers New York State resident students attending nonpublic schools a right to transportation on all days when nonpublic schools are open but public schools are closed.

It appears clear from the legislative history of Education Law § 3635, that the 1985 amendment to Education Law § 3635 at Section (2)(a) added five (5) days of transportation that could be alternatively selected for nonpublic school transportation on days when City public schools were closed but nonpublic schools were open; that an earlier version of the amendment had proposed a similar provision to be applicable to Central and Union Free public school districts outside of New York City, but that language was excluded from the final statutory amendment adopted; that the legislative notes reflect that the additional language was rejected due to the increased cost of coordinating and implementing an additional two days

of nonpublic school transportation outside of New York City, a municipality in which public transportation is used for the transportation of nonpublic school students and switching five days of transportation could be done at little, if any, cost; and that this clearly reflects a legislative intent in 1985 to permit to continue the same policies and practices then (and since) being followed by non-City school districts such as the District to transport private school students to and from their private schools only on days when the public schools were open.

Such a legislative intent is also reflected by the provisions of Education Law § 3604(8). That statute provides that a school district may elect to schedule its superintendent's conference days, i.e., days on which there is no public school student attendance, which routinely are held at the beginning of the school year in September, in the last two weeks of August instead. However, that statute contains the following caveat: "provided however, that such scheduling shall not alter the obligation of the school district to provide transportation to students in non-public elementary and secondary schools." Clearly, such a proviso concerning nonpublic school transportation would be totally superfluous if nonpublic school students possessed a right to publicly funded transportation to their nonpublic schools on days on which the public schools were not in session. It is well established that a statute should be construed to avoid rendering any of its provisions superfluous. *Kimmel v. State of New York*, 29 N.Y.3d 386, 393 (2017).

CONCLUSION

For the reasons set forth herein, the Decision, Order and Judgment of the lower court should be reversed, and the District granted such other and further relief as the Court may deem just and proper.

Dated: January 14, 2022

Respectfully submitted,
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