To be argued by
Beezly J. Kiernan
10 minutes requested

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

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,

v.

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

Respondents/Defendants-Appellants.

No. 534406

BRIEF FOR DEFENDANT STATE EDUCATION DEPARTMENT

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PRELIMINARY STATEMENT

Education Law § 3635 requires central school districts to provide "[s]ufficient transportation" for all resident school children, including those who attend nearby nonpublic schools. The State Education Department (SED) reasonably interprets this provision to require central school districts to provide transportation to nonpublic school students residing within their districts when the districts are in session, and to permit, but not require, districts to provide such transportation on days when a district's public schools are closed.

Petitioners in this hybrid declaratory judgment action and C.P.L.R. article 78 proceeding, who reside in Washingtonville Central School District (Washingtonville) and send their children to nearby nonpublic schools, challenge SED's guidance as contrary to the statute, unconstitutional, and procedurally improper. Petitioners also demand that Washingtonville provide transportation to their children whenever their nonpublic schools are in session. Supreme Court, Albany County (Lynch, J.), entered a final judgment annulling SED's interpretive guidance and declaring that Washingtonville must provide the

transportation demanded by petitioners. Both Washingtonville and SED appealed.[1]

This Court should reverse because Supreme Court's judgment is based on an erroneous interpretation of Education Law § 3635. Under petitioners' interpretation of that statute, which Supreme Court adopted, central school districts must transport nonpublic school children to and from their schools whenever those schools are in session, even on days when the public schools are closed. The Legislature could not have intended to burden school districts with such an unconditional obligation. Rather, the only reasonable interpretation of § 3635 is that it requires a school district to provide sufficient transportation to nonpublic school students, on par with the transportation it offers to its public school students. Central school districts satisfy that obligation by providing equal transportation services, on the same days, to public and nonpublic school children alike.

Moreover, while petitioners argued below that SED's guidance violates the State Constitution, exceeds SED's statutory authority, and

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[1] This brief is submitted on behalf of SED. Washingtonville is separately represented.

is procedurally improper, those arguments lack merit. Supreme Court thus correctly declined to address those arguments, and this Court should not affirm on those alternative bases. Rather, the Court should enter judgment declaring that SED's interpretation of Education Law § 3635 is both correct and lawful.

QUESTIONS PRESENTED

1. Whether Supreme Court erred in holding that Education Law § 3635 requires central school districts to provide transportation to non-public school students whenever their schools are open—including on days when public schools are closed.

2. Whether the Court should decline to affirm Supreme Court's judgment on the alternative grounds petitioners raised below, and instead declare that SED's interpretation of Education Law § 3635 is both correct and lawful.

STATEMENT OF THE CASE

A. Statutory Framework

1. Education Law § 3635

Education Law § 3635 sets forth the obligations of school districts to provide transportation to resident school children. Central school

districts must provide "[s]ufficient transportation" "for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children." Education Law § 3635(1)(a). These districts must provide transportation to children attending kindergarten through eighth grade if they live between two and 15 miles of the school they attend, and to high school students if they live between three and 15 miles of the school they attend. *Id.* The costs of such transportation, including for nonpublic school students, are borne by the school districts, *see id.*, although the State provides for aid up to 90% of the costs, *id.* § 3602(7).

The statute entitles nonpublic school children to public transportation services upon request. Parents of nonpublic school students must request transportation by April 1 preceding the year for which they seek transportation. Education Law § 3635(2). This allows central school districts sufficient time to prepare budgets before the annual budget vote in May and plan for transportation operations. *See id.* §§ 2002, 2022. If a school district rejects a parent's request for transportation under § 3635, the parent may appeal the district's

determination to the Commissioner of Education. *Id.* § 3635(2); *see also id.* § 310.

A separate set of transportation obligations, described in subsection 2-a of Education Law § 3635, governs the New York City school district. Under that subsection, the New York City school district must provide transportation to nonpublic students "for the same number of days as the public schools are open," but no more than 180 days. Education Law § 3635(2-a). The district must "notify officials of nonpublic schools . . . of the days on which the public schools will be in session in the following school year." *Id.* If a nonpublic school's calendar is not aligned with the New York City school district's calendar, then the nonpublic school may choose up to five days (and in certain years a maximum of ten days) "on which the public schools are scheduled to be closed" to receive transportation services. *Id.* Other city school districts outside New York City need not provide transportation services to school students, whether public or nonpublic. *See id.* § 3635(1)(c). But if a city school district chooses to provide transportation, "such transportation [must] be offered equally to all such children in like circumstances." *Id.*

2. Statutory History

The statutory text now at Education Law § 3635 originated in the 1930s. At that time, school districts were authorized, but not required, to transport children to and from public schools. *See* Education Law former § 206; L. 1936, ch. 541. The Legislature passed a series of three bills in the 1930s extending such transportation to nonpublic school students.

The Legislature passed the first such bill in 1935. *See* 1935 Senate Bill S1182. While the bill would have required school districts to transport nonpublic school children, this proposed obligation was not absolute. It would have applied only to school districts that were already providing transportation to public school students, and only to nonpublic school children who resided on public school bus routes. *See id.* The Governor vetoed this bill, noting that it was "a radical departure from the public policy of the State." Governor's Mem., Veto Jacket, 1935 Senate Bill S1182, at 1. The bill, according to the Governor, "for the first time would require the public school system to provide facilities for private school pupils." *Id.*

In 1936, the Legislature passed—and the Governor signed—a similar bill. L. 1936, ch. 541. The enacted statute allowed the voters in a

school district to authorize transportation to and from nonpublic schools. Education Law former § 206(18). Additionally, the statute further provided that "all children of school age in said district shall equally be afforded transportation facilities." *Id.* This 1936 statute was struck down as unconstitutional by the Court of Appeals. *See Judd v. Board of Educ.*, 278 N.Y. 200 (1938). Citing a decision by the Commissioner of Education, the Court described the operation of the statute as follows: "if free transportation should be provided for pupils who attended the free common schools, similar transportation facilities must be provided for all pupils similarly situated who were attending private and parochial schools." *Id.* at 204-05. The Court held that providing such support for nonpublic school students violated the New York State Constitution, which prohibits the use of public money in aid of religious schools. *Id.* at 210-11 (citing N.Y. Const. former art. IX, § 4, now art. XI, § 3).

In 1938, the State Constitution was amended to allow the Legislature to "provide for the transportation of children to and from any school or institution of learning." N.Y. Const. art. XI, § 3. The Legislature did so in 1939, enacting the following provision:

> In providing or granting transportation for children pursuant to the provisions of this chapter, sufficient transportation

> facilities (including the operation and maintenance of motor vehicles) shall be provided for all the children residing within the school district to and from the school they legally attend, who are in need of such transportation because of the remoteness of the school to the child or for the promotion of the best interest of such children.

L. 1939, ch. 465, § 5 (adding Education Law former art. 18, § 503). That provision, now at Education Law § 3635, has remained substantially the same since its enactment.

In 1985, the Legislature enacted the New York City-specific provisions quoted above. *See* L. 1985, ch. 902. The purpose of the 1985 bill was to "provide for transportation to nonpublic schools on a limited number of days upon which public schools are scheduled to be closed." SED Mem. in Support, Bill Jacket, L. 1985, ch. 902, at 5, 19. (R. 131, 145.) During a debate on the bill, Senator Donovan (one of the bill's sponsors) explained that the New York City Board of Education was not providing bus transportation to nonpublic school students when public schools were closed. N.Y. Senate Debate on Senate Bill 5229A (June 4, 1985), at 4106. (R. 749.) Senator Donovan noted by way of example that "Catholic schools are in session on Rosh Hashanah," and "Yeshivas are in school during Christmas week." *Id.* (R. 753.) By giving nonpublic schools in New York City the option to select five alternative days for bus transportation when

New York City public schools were closed, the bill was intended to "provide greater flexibility in scheduling for those nonpublic schools." SED Mem. in Support, Bill Jacket, L. 1985, ch. 902, at 6, 20. (R. 132, 146.)

As originally drafted, the 1985 bill would have covered *all* school districts in the State. Nonpublic schools outside New York City would have been "limited to a maximum of two" (instead of the five or ten that applied within New York City) "alternative days" of transportation services. SED Mem. in Support, Bill Jacket, L. 1985, ch. 902, at 6. (R. 132.) The bill was amended, however, to eliminate any requirement for school districts outside New York City to provide transportation for nonpublic school students on days when public schools are not in session. *See* Letter from SED to Governor, Bill Jacket, L. 1985, ch. 902, at 18. (R. 144.)

3. SED's Interpretation of Education Law § 3635

SED has long interpreted Education Law § 3635 as permitting, but not obligating, central school districts to provide transportation to nonpublic school students on days when the public schools are not in session. For example, a 1992 Transportation Supervisor's Handbook stated that "[s]chool districts are not required to provide transportation

to nonpublic schools on days when public schools are scheduled to be closed." (R. 507.) Similarly, guidance issued on SED's website in 2007 stated that

> [p]ublic school districts also do not have the legal authority to provide transportation on the legal holidays that the state requires that the public school district be closed. On other optional holidays and other days a district is closed (conference days, training, etc.), then the public school district . . . may choose to provide transportation to private schools. However, if they decide not to, that intent and information must have been provided to private schools when the calendars and start/dismissal times were shared, prior to the start of the school year.

(R. 727.)

SED's website currently provides guidance on Education Law § 3635 in the form of a question and answer:

> With the exception of New York City, are school districts required to provide transportation to nonpublic schools on days when public schools are scheduled to be closed?
>
> No. However, districts that do provide transportation to nonpublic schools on days when the public schools are closed may claim State aid for providing that service.

(R. 730, available at http://www.p12.nysed.gov/nonpub/handbookonservices/transportation.html.) This question and answer and others on the website are not formally promulgated rules; rather, they

merely "contain information on the[] specific [statutory] provisions for transportation." (R. 729.)

SED's guidance is consistent with decisions by the Commissioner of Education upholding school districts' denials of transportation services to nonpublic school students on days when public schools are closed. In *Appeal of Brautigam*, 47 Ed. Dep't Rep., Decision No. 15,772, 2008 WL 8715501 (2008), for example, the Commissioner upheld a school district's decision to limit such transportation to days when the district's public schools were open. (R. 736-767.) The nonpublic school at issue in *Brautigam* "ha[d] chosen to adopt a school schedule of operation that does not coincide with the district's schedule of operation." (R. 737.) Accommodating the nonpublic school's schedule, the school district asserted, would have imposed additional costs. (R. 737.) Because "the obligation of a school district to provide transportation for students attending nonpublic schools is not absolute," the Commissioner found that the school district's denial of transportation did not violate Education Law § 3635. (R. 737.)

SED nonetheless strongly urges public and nonpublic school officials to cooperate in planning schedules that efficiently and

economically accommodate the needs of all pupils. (*See* R. 729.) Indeed, the Commissioner in *Brautigam* noted that "[p]ublic and nonpublic school authorities have an obligation to cooperate in a reasonable manner in the scheduling of classes and transportation." (R. 737.)

B. Factual Background

Petitioners Joel Stern and Yitzchok Ekstein reside in the Washingtonville School District and send their school-aged children to nonpublic schools in the Village of Kiryas Joel. (R. 60-62.) These nonpublic schools have chosen to follow a different schedule than Washingtonville. (R. 62-63.) Washingtonville provides transportation for nonpublic school students only on days when the district's public schools are in session. (R. 63, 104.)

In June 2021, petitioners' counsel sent a letter to Washingtonville's counsel requesting that the district provide transportation on "on all days that the District is closed and the nonpublic schools are open" during the 2021-2022 school year, "except for legal holidays set forth by statute." (R. 107; *see also* R. 66.) Those days include:

- August 30 and 31, 2021, before the public school year began;
- November 24 and 26, 2021, *i.e.*, the Wednesday before and Friday after Thanksgiving;

- December 24 and 27 to 31, 2021;
- February 21 to 25, 2022, *i.e.*, winter break—including the state holiday of Washington's Birthday; and
- April 11 to 14, 2022, *i.e.*, spring break.

(R. 107.) Petitioners thus requested transportation on nearly every day Washingtonville's schools were closed during the school year, apart from weekends and federal holidays.

C. Proceedings Below

Petitioners brought this hybrid declaratory judgment action and article 78 proceeding in Albany County Supreme Court in July 2021. Petitioners challenged Washingtonville's policy of transporting nonpublic school children to and from their schools only on days when the public schools are in session. (R. 62-65.) Petitioners also challenged SED's guidance which interprets Education Law § 3635 as permitting, but not obligating, central school districts to provide transportation to nonpublic school students residing in their districts when public schools are scheduled to be closed. (R. 65-66.) Petitioners alleged that SED's guidance is invalid because (a) it incorrectly interprets § 3635; (b) SED did not issue the guidance in accordance with the State Administrative Procedure Act (SAPA); (c) SED exceeded its statutory authority in issuing

the guidance; and (d) § 3635, as interpreted by SED, violates the Equal Protection and Free Exercise Clauses of the New York State Constitution. (R. 67-73.)

Petitioners sought equitable relief, including a declaration that Education Law § 3635 requires central school districts to provide transportation to nonpublic school students whenever their schools are open for instruction. (R. 73.) Petitioners also sought a declaration invalidating SED's interpretive guidance. (R. 74.) Additionally, petitioners sought to compel Washingtonville to transport their children on all days their nonpublic schools are open. (R. 74.)

By decision and order dated August 25, 2021, Supreme Court entered a preliminary injunction which "mandated" that Washingtonville "provide transportation to and from school for all non-public students within the district on each day that the non-public schools are in session, regardless of whether the district's public schools are closed." (R. 307-308.) Additionally, by decision and order dated September 9, 2021,

Supreme Court denied SED's cross-motion to dismiss the petition and complaint. (R. 311-312.)[2]

After Washingtonville and SED answered, petitioners moved for summary judgment on their declaratory judgment claims. (R. 759-761.) As relevant to SED, petitioners sought a declaration that Education Law § 3635 requires central school districts to transport nonpublic school children whenever their nonpublic schools are open for instruction; that SED's interpretive guidance is invalid because it violates § 3635 and SAPA; and that SED's interpretation of § 3635 also violates the Equal Protection and Free Exercise Clauses of the State Constitution. (R. 760-761.) Petitioners sought an award of damages in addition to this declaratory relief. (R. 761.) SED opposed this motion and cross-moved for summary judgment. (R. 848-854.)

By decision, order, and judgment dated November 18, 2021, Supreme Court (Lynch, J.) issued a declaratory judgment against SED and Washingtonville. The court's declaration was based on its

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[2] Washingtonville and SED appealed these orders. Because Supreme Court entered a final judgment before these earlier appeals were perfected, they are now abated.

interpretation of Education Law § 3635. According to the court, "the text of the statute is clear": it "does not condition the obligation to provide transportation to nonpublic schools on the public schools also being open." (R. 10-11.) The court acknowledged that in 1985, the Legislature considered—and ultimately rejected—requiring central school districts to transport nonpublic school students on two alternative days when public schools were closed. (R. 12-13.) Nevertheless, the court held that § 3635's "plain language is neither subject to, nor defeated by the cited legislative history." (R. 14.) The court declined to address petitioners' alternative challenges to SED's interpretative guidance. (*See* R. 9.) The court also declined to award damages, noting that petitioners had "not submitted any cognizable proof of monetary damages." (R. 6.)

Both SED and Washingtonville appealed, thus automatically staying the final judgment under C.P.L.R. 5519(a)(1). (R. 20, 39.) Petitioners moved in this Court to vacate Washingtonville's stay. The Court denied that motion, while also directing respondents to perfect this appeal by January 14, 2022.

ARGUMENT

POINT I

EDUCATION LAW § 3635 DOES NOT UNCONDITIONALLY OBLIGATE CENTRAL SCHOOL DISTRICTS TO PROVIDE TRANSPORTATION SERVICES TO NONPUBLIC SCHOOL STUDENTS WHENEVER THEIR NONPUBLIC SCHOOLS ARE IN SESSION

SED reasonably and properly interprets Education Law § 3635 as requiring central school districts to provide transportation to nonpublic school children residing within their district when public schools are in session, and permitting, but not requiring, the districts to provide such transportation when public schools are closed. That longstanding and commonsense interpretation is consistent with the text and history of the statute, and this Court should follow it. By contrast, under petitioners' interpretation, which Supreme Court adopted, § 3635 imposes an unconditional obligation on central school districts to transport nonpublic school children whenever their schools are open. That interpretation is not compelled by the plain language of the statute and would unreasonably burden the public schools. Moreover, Supreme Court's interpretation judicially reverses the Legislature's decision in 1985 to forgo the requirement that central school districts provide transportation

to nonpublic school children when public schools are closed. This Court therefore should reverse.

A. SED Reasonably Interprets Education Law § 3635 as Permitting, but Not Requiring, Central School Districts to Transport Nonpublic School Students on Days When Public Schools Are Closed.

Where, as here, a court is presented with an issue of statutory interpretation, the court's "primary consideration is to ascertain and give effect to the intention of the Legislature." *Matter of Walsh v. New York State Comptroller*, 34 N.Y.3d 520, 524 (2019) (citation omitted). "[T]he clearest indicator of legislative intent" is statutory text. *Id.* But courts must also "interpret statutes so as to avoid an unreasonable or absurd application of the law," and in a manner that accords with the Legislature's intent when it enacted the statute. *People ex rel. McCurdy v. Warden, Westchester County Corr. Facility*, 36 N.Y.3d 251, 262 (2020) (ellipsis and brackets omitted) (quoting *Lubonty v. U.S. Bank N.A.*, 34 N.Y.3d 250, 255 [2019]). This Court gives "great weight and judicial deference" to an interpretation of a statute by an agency charged with its enforcement. *Matter of Carmel Acad. v. New York State Educ. Dep't*, 169 A.D.3d 1287, 1288 (3d Dep't 2019), *lv. denied*, 35 N.Y.3d 901 (2020).

Starting with the text, Education Law § 3635 requires that school districts provide "[s]ufficient transportation facilities" to "all" school children, within certain mileage limits. This transportation obligation is qualified, not absolute: each district must provide "sufficient," *i.e.*, "adequate" transportation to resident school children. Black's Law Dictionary (11th ed. 2019) (defining "sufficient" as "[a]dequate; of such quality, number, force, or value as is necessary for a given purpose"). Providing the same transportation services to public and nonpublic school students alike—and thus transporting nonpublic school students whenever the district is in session, as Washingtonville does—satisfies this standard. Nothing in the text of the statute expressly directs public schools to provide transportation on days when the public schools are not in session, and such a specific and onerous mandate cannot reasonably be inferred from the districts' general obligation to provide nonpublic students with sufficient transportation.

In accordance with the plain text of Education Law § 3635, SED has long interpreted the statute as permitting, but not requiring, central school districts to transport nonpublic school children to and from their schools on days when the public schools are closed. This interpretation

dates at least as far back as 1992, when SED stated in its Transportation Supervisor's Handbook that "[s]chool districts are not required to provide transportation to nonpublic schools on days when public schools are scheduled to be closed." (R. 507.) SED reiterated this guidance on its website in 2007. (R. 727.) And SED currently provides this guidance on its website in the form of a question and answer. (R. 730.) The Commissioner of Education, to whom a parent may appeal a school district's denial of transportation under Education Law §§ 3635(2) and § 310, has interpreted the statute in the same way. *See, e.g.*, *Appeal of Brautigam*, 47 Ed. Dep't Rep., Decision No. 15,772, 2008 WL 8715501 (2008). (R. 737.) This interpretation is reasonable and gives effect to the plain language of the statute. Accordingly, this Court should adopt it even without affording SED the benefit of deference. Alternatively, the Court may defer to SED's interpretation, as that of the agency charged with enforcing the statute. *See Matter of Carmel Acad.*, 169 A.D.3d at 1288.

Supreme Court's contrary interpretation would lead to unreasonable results, and should be rejected for this reason alone. *See People ex rel. McCurdy*, 36 N.Y.3d at 262. Supreme Court interpreted the

qualifier "sufficient" as pertaining "to the means, not the scope, of the transportation mandate." (R. 16.) Thus, under Supreme Court's reading, Education Law § 3635 imposes a transportation mandate of unlimited scope. Such a mandate would place an extraordinary burden—both financial and logistical—on school districts. If school districts must transport nonpublic school students whenever those schools are in session, then nonpublic schools could demand transportation on federal holidays; on weekends; during the summer months; or even on days when public schools close because of hazardous weather conditions.

The Legislature could not have intended to impose such an onerous obligation on school districts. Nor do petitioners point to any authority from any point during Education Law § 3635's 80-year history supporting such an unreasonable result. Supreme Court thus erred in adopting petitioners' interpretation of § 3635.

B. The History of Education Law § 3635 Supports SED's Interpretation.

The history of Education Law § 3635 further supports SED's interpretation of the statute. This history clearly evinces the Legislature's intent not to impose an unconditional obligation on central

school districts to transport nonpublic school children whenever the nonpublic schools are open. Rather, the Legislature has consistently limited that transportation obligation for nonpublic school students to the services already offered to public school students. In other words, whatever services a school district provides to its public school students, it must provide equivalent services to similarly situated resident school children who attend nonpublic schools.

This focus on providing transportation equally, rather than unconditionally, to nonpublic school students is apparent even in the initial iterations of the statute. The original 1935 bill, which the Governor vetoed, would have required school districts to transport nonpublic school students only if they were already transporting public school students. *See* 1935 Senate Bill S1182. And that obligation only covered nonpublic school students who resided on public school bus routes. The next law, which was enacted but then held unconstitutional by the Court of Appeals, *see Judd v. Board of Educ.*, 278 N.Y. 200 (1938), provided that "all children of school age in said district shall equally be afforded transportation facilities," Education Law former § 206(18). As the Court of Appeals explained in *Judd*, the Commissioner of Education

interpreted that statute as requiring "similar transportation facilities" "for all pupils similarly situated who were attending private and parochial schools." 278 N.Y. at 204-05.

The 1939 statute that would later become Education Law § 3635 likewise limited school districts' transportation obligation for nonpublic school students to the services already offered to public school students. The statute read:

> In providing or granting transportation for children pursuant to the provisions of this chapter, sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided for all the children residing within the school district to and from the school they legally attend . . . .

Education Law former art. 18, § 503. This statute, like its earlier iterations, was conditional: it required only "sufficient transportation facilities" for all children, and only insofar as the district was already "providing or granting transportation for children pursuant to the provisions of this chapter." This latter condition necessarily limited a school district's transportation obligation for nonpublic school children to days when the district transported public school children. On other days, the district would not be "providing or granting transportation for children pursuant to the provisions of this chapter." Thus, the statute as

originally enacted imposed no unconditional obligation to transport nonpublic school children.

Nor has the Legislature broadened the statute since its enactment in 1939 to cover days when public schools are closed. The relevant statutory text has remained substantially the same. And SED's interpretation of that text also has remained the same since at least 1992. As the Court of Appeals has noted, "[w]here an agency has promulgated regulations in a particular area for an extended time without any interference from the legislative body, [a court] can infer, to some degree, that the legislature approves of the agency's interpretation." *Greater N.Y. Taxi Ass'n v. New York City Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 612 (2015). Here too, the Legislature's silence regarding SED's longstanding interpretation of Education Law § 3635 implies its approval thereof.

As further proof of the Legislature's acquiescence to SED's interpretation of the statute, in 1985 the Legislature considered, and ultimately rejected, requiring central school districts to transport nonpublic school students on at least two days when public schools are closed. The Legislature did enact subsection 2-a of Education Law § 3635

in 1985, requiring New York City public schools to provide up to five alternative days of transportation to nonpublic schools when the public schools are closed.[3] *See* L. 1985, ch. 902.

As the legislative history of the 1985 amendment reveals, the Legislature was clearly aware that New York City public schools—as well as central school districts—were providing bus transportation only when public schools were in session. *See* SED Mem. in Support, Bill Jacket, L. 1985, ch. 902, at 5, 19 (R. 131, 145); N.Y. Senate Debate on Senate Bill 5229A (June 4, 1985), at 4106 (R. 749). Thus, the purpose of the five-day requirement was to "provide for transportation to nonpublic schools on a limited number of days upon which public schools are scheduled to be closed." SED Mem. in Support, Bill Jacket, L. 1985, ch. 902, at 5, 19. (R. 131, 145.) This alternative transportation was intended to give nonpublic schools greater flexibility in scheduling. *Id.* at 6, 20. (R. 132, 146.) In other words, it was conceived as an additional burden on the New York City public school district—not a limitation on a previously

[3] As noted above, in certain years, the maximum number of days is ten.

unlimited obligation to provide transportation whenever the nonpublic schools are open.

The original draft of the amendment would have covered school districts outside New York City, requiring them to provide two alternative days of transportation to nonpublic school students. SED Mem. in Support, Bill Jacket, L. 1985, ch. 902, at 6. (R. 132.) But the Legislature deliberately chose to omit that requirement from the final bill. *See* Letter from SED to Governor, Bill Jacket, L. 1985, ch. 902, at 18. (R. 144.)

Thus, when the Legislature intended to require transportation services for nonpublic school students on days when public schools were closed, it made that requirement explicit. And the Legislature chose not to create a similar requirement for central school districts like Washingtonville. That choice reflects the Legislature's intention *not* to require central school districts to provide transportation whenever nonpublic schools choose to be in session. *See, e.g.*, *Commonwealth of the N. Mariana Islands v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013) ("[T]he failure of the legislature to include a term in a statute is a significant indication that its exclusion was intended.").

Petitioners below offered a different interpretation of this legislative history. They implausibly claimed that by omitting the two-day requirement for districts outside New York City in the final bill, the Legislature rejected an *upper* limit on the number of alternative days when central school districts must provide transportation to nonpublic school students. Thus, petitioners contended, there is no such upper limit. That reading of the legislative history makes no sense, however, given that the entire purpose of the 1985 enactment was to *provide* transportation for nonpublic school students, not *limit* it. *See* SED Mem. in Support, Bill Jacket, L. 1985, ch. 902, at 5, 19. (R. 131, 145.) Notably, even Supreme Court rejected that argument, though it nevertheless held that this legislative history did not "take precedence over the plain statutory text." (R. 13.) The Legislature chose not to provide for additional transportation to school children in central school districts, and petitioners' interpretation of Education Law § 3635 runs contrary to that legislative choice.

In sum, SED reasonably interprets Education Law § 3635 as permitting, but not requiring, central school districts to transport nonpublic school children on days when public schools are closed. That

interpretation is consistent with the plain text and history of the statute. Indeed, it is the only reasonable interpretation of the statute. Supreme Court thus erred in rejecting it.

POINT II

PETITIONERS' ALTERNATIVE CLAIMS ARE MERITLESS, AND THIS COURT SHOULD ENTER A DECLARATORY JUDGMENT IN SED'S FAVOR

Petitioners' alternative claims challenging SED's interpretive guidance, which Supreme Court did not address, are similarly meritless. Thus, the Court should not affirm on any of these alternative grounds. Instead, the Court should enter judgment declaring SED's interpretive guidance both correct and lawful.

A. Petitioners Cannot Show an Equal Protection Violation.

First, SED's interpretation of Education Law § 3635 does not violate the Equal Protection Clause of the State Constitution. *See* N.Y. Const. art. I, § 11. As an initial matter, § 3635 creates no suspect classification. Notably, the law treats religious nonpublic schools the same as secular nonpublic schools. Thus, petitioners must show that the government action here was not "rationally related to a legitimate

governmental purpose." *People v. Aviles*, 28 N.Y.3d 497, 502 (2016). Petitioners cannot meet this burden.

There is clearly a rational basis for requiring school districts to transport nonpublic school children only on days when its public schools are in session: such transportation is sufficient under Education Law § 3635, and additional transportation would be financially and logistically burdensome. The Fourth Department upheld this same rationale in *Matter of Cook v. Griffin*, 47 A.D.2d 23 (4th Dep't 1975). There, a school district provided transportation to public school students, but not private school students, for field trips. As the court noted, "parents clearly have the right to send their children to nonpublic schools," but "there is no corresponding right to equal aid or even to any aid at all in the absence of specific legislative authorization." *Id.* at 28; *accord Finkel v. New York City Board of Educ.*, 474 F. Supp. 468, 471 (E.D.N.Y. 1979), *aff'd*, 622 F.2d 573 (2d Cir. 1980). Because § 3635 rationally distinguishes between public and nonpublic school students, it does not violate the Equal Protection Clause of the State Constitution.

B. Petitioners Cannot Show a Free Exercise Violation.

Second, SED's interpretation of Education Law § 3635 does not violate the Free Exercise Clause of the State Constitution. *See* N.Y. Const. art. I, § 3. To prevail on that claim, petitioners bear the burden of showing some "interference with religious practice." *Catholic Charities of Diocese of Albany v. Serio*, 7 N.Y.3d 510, 526 (2006). Again, petitioners cannot meet this burden.

Petitioners are free to send their children to a religious school, and there is no allegation that SED's interpretive guidance interferes with that choice. Nor is there any allegation that SED's guidance discriminates against religious schools as compared to other nonpublic schools. Rather, petitioners complain only about the lack of publicly-funded transportation to their children's nonpublic schools. (*See* R. 65.)

The State Constitution does not require school districts to provide transportation to nonpublic schools, religious or otherwise. It is well settled that "parochial schools have no [constitutional] right to share in State largesse on an equal basis with public schools or otherwise, and while a State may use State funds to provide transportation to parochial schools, it need not do so." *O'Donnell v. Antin*, 81 Misc. 2d 849, 854 (Sup.

Ct. Westchester County 1974), *aff'd*, 36 N.Y.2d 941 (1975) (citing, *e.g.*, *Norwood v. Harrison*, 413 U.S. 455 [1973]; *Everson v. Board of Educ.*, 330 U.S. 1 [1947]); *accord Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (holding, under Federal Constitution, that "[a] State need not subsidize private education").

O'Donnell is instructive. There, the court held that a school board "resolution eliminating transportation of private and parochial school students to schools outside the boundaries of the school district" did not violate the Free Exercise Clause. *O'Donnell*, 81 Misc. 2d at 850. As the court explained, plaintiffs could show only that the resolution had "made it inconvenient to send their children to parochial schools outside the district," causing them "to incur some financial burden in order to do so." *Id.* at 854. Because public support of nonpublic schools is not constitutionally mandated in any event, the court further held, plaintiffs' free exercise rights were not burdened by the lack of transportation services. *Id.*[4] Petitioners' free exercise claim here fails for the same reason.

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[4] Separately, the court in *O'Donnell* held that the school board resolution did not violate Education Law § 3635. Because the school

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C. Petitioners Cannot Show that SED Exceeded Its Statutory Authority or Violated the State Administrative Procedure Act.

Finally, petitioners cannot show that SED's interpretive guidance is invalid either because SED exceeded its statutory authority in issuing the guidance, *see Boreali v. Axelrod*, 71 N.Y.2d 1 (1987), or that SED violated SAPA by not promulgating the guidance through notice-and-comment rulemaking.

SAPA's rulemaking requirement does not apply to "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory." SAPA § 102(2)(b)(iv); *see also Matter of Elcor Health Servs. v. Novello*, 100 N.Y.2d 273, 279 (2003); *Matter of Board of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist. v. State of New York*, 110 A.D.3d 1231, 1233-34 (3d Dep't 2013), *lv. denied*, 22 N.Y.3d 861 (2014). SED's guidance, now in the form of a question and answer on its website, is a classic example of an interpretive statement:

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district at issue was a city school district, § 3635 required the district to offer transportation equally to all children in like circumstances. *See* Education Law § 3635(1)(c). The court held that "pupils attending school outside the district are not in like circumstances to those attending school within the district," and thus the resolution did not violate the statutory mandate. *O'Donnell*, 81 Misc. 2d at 852.

it provides SED's interpretation of the scope of Education Law § 3635. And the website itself makes clear that this question and answer, like others on the website, simply "contain information" on the statutory provisions for transportation. (R. 729.) Thus, as this Court has held with regard to other questions and answers on SED's website, SED's guidance is an interpretive statement of existing law and did not need to be promulgated. *See Matter of Board of Educ. of the Kiryas Joel Vil. Union Free Sch. Dist.*, 110 A.D.3d at 1234.

Petitioners' *Boreali* challenge fails for the same reason. Under the separation of powers doctrine, the Legislature can delegate power to administrative agencies but "cannot pass on its *law-making functions* to other bodies." *Boreali*, 71 N.Y.2d at 10 (citation omitted) (emphasis added). In *Boreali*, the Court of Appeals described factors that distinguish between "administrative rule-making and legislative policy-making." *Id.* at 11. But an interpretive statement that lacks the force of law implicates no separation of powers problem; it does not even rise to the level of an administrative rule. Thus, SED did not exceed its statutory authority under Education Law § 3635 merely by issuing guidance interpreting central school districts' obligation under the statute.

Therefore, the Court should not affirm Supreme Court's judgment on any of these alternative grounds, and the Court instead should enter a declaratory judgment in SED's favor. "In an action for declaratory judgment, where the disposition is on the merits, the court should make a declaration, even though the plaintiff is not entitled to the declaration he seeks." *Hirsch v. Lindor Realty Corp.*, 63 N.Y.2d 878, 881 (1984); *see also Dodson v. Town Bd. of the Town of Rotterdam*, 182 A.D.3d 109, 112-13 (3d Dep't 2020); Siegel & Connors, N.Y. Prac. § 440 (6th ed. 2021). For all the reasons explained above, SED's interpretive guidance is both correct and lawful. The Court should enter a declaratory judgment to that effect.

CONCLUSION

For the foregoing reasons this Court should reverse the judgment of Supreme Court, and enter judgment declaring that (1) Education Law § 3635 requires central school districts to provide transportation to nonpublic school children residing within their district only when public schools are in session; (2) this interpretation of § 3635 does not violate either the Equal Protection or Free Exercise Clauses of the New York State Constitution; and (3) SED neither exceeded its statutory authority nor violated SAPA in issuing its interpretive guidance.

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Respectfully submitted,

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