Appeal No. 534406

To be argued by: Robert S. Rosborough IV
Time Requested: 15 minutes

New York Supreme Court

Appellate Division – Third Department

IN THE MATTER OF

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 DEPARTMENT OF EDUCATION,

Respondents/Defendants-Appellants.

BRIEF OF RESPONDENTS UNITED JEWISH COMMUNITY OF BLOOMING GROVE, INC. ET AL.

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Petitioners/Plaintiffs-Respondents United Jewish Community of Blooming Grove, Inc., Joel Stern, and Yitzchok Ekstein, and their children (collectively, "UJC") respectfully submit this brief in opposition to the appeals of Respondents/Defendants-Appellants the Washingtonville Central School District (the "District") and the New York State Education Department ("SED") (collectively, "Respondents") from the Decision, Order, and Judgment of Supreme Court, Albany County (Hon. Peter A. Lynch, J.) entered on November 18, 2021, which granted UJC's motion for summary judgment, denied SED's cross motion for summary judgment, and declared that "Education Law § 3635(1) requires the Washingtonville Central School District to provide transportation to all nonpublic school students on all days when their nonpublic schools are open for instruction, regardless of whether the public schools are open" (R15).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does Education Law § 3635(1)(a) require central school districts, like the District here, to provide transportation to and from school for all nonpublic school district students on all days during the normal school year and school week when their nonpublic schools are

open for instruction, including on days when the public schools are closed?

Supreme Court properly held that Education Law § 3635(1)(a) requires central school districts to provide transportation to all nonpublic school students on all days their nonpublic schools are open for instruction, regardless of whether the public schools are open, and the District violated section 3635(1)(a) by refusing to provide the required transportation to Petitioners on non-holiday days when the District is closed.

2. Did SED exceed its statutory authority under Education Law § 3635(1)(a) and the State Administrative Procedure Act by promulgating a rule that authorized central school districts, like the District here, to deny transportation to nonpublic school students on days when the public schools are closed?

Supreme Court properly held that SED's rule authorizing central school districts to deny transportation to nonpublic school students on days when the public schools are closed violates section 3635(1)(a).

3. If Education Law § 3635(1)(a) does not require central school districts to provide transportation to and from school for all nonpublic

3. If Education Law § 3635(1)(a) does not require central school districts to provide transportation to and from school for all nonpublic school students on all days their nonpublic schools are open for instruction during the normal school year and school week, as is provided to public school students, does section 3635(1)(a) violate Petitioners' rights under the equal protection clause of the New York Constitution?

Because Supreme Court held that Education Law § 3635(1)(a) requires central school districts to provide transportation to nonpublic school students on all days when their nonpublic schools are open, Supreme Court did not address this question.

PRELIMINARY STATEMENT

Transportation to and from school is an essential part of a child's education. For many, busing provided by the public school district is the only way nonpublic school students can get to their schools. Many parents' work schedules prevent them from bringing their children to school each day. Many other parents may have only one car that they have to take to get to work. Still others have children of different ages attending nonpublic schools in different locations, so it is impossible to get each child to school at the same time.

The transportation that the New York Legislature has mandated public school districts to provide to nonpublic school students is intended to fix these problems. Under Education Law § 3635(1), the Legislature has mandated that public school districts "*shall*" provide transportation "for *all* children residing within the school district" from kindergarten through 12th grade, within certain distances. All children means all children, regardless of whether they attend the public or nonpublic schools. Indeed, parity between public school students and nonpublic school students is precisely what the Legislature intended. Yet, in practice, Respondents have adopted transportation policies, in

contravention of section 3635(1)'s mandate, that treat nonpublic school students differently than their public school counterparts.

While public school students receive transportation to school every day that their school is in session during the school year, nonpublic school students do not. They are only provided transportation when the public schools are open, under Respondents' policies. If the nonpublic schools choose to follow a different school calendar than the public schools—as many do based on the observation of religious holidays—their students are denied transportation they are required to receive under section 3635(1) on the many days when the public schools are closed, but the nonpublic schools are open.

For example, Hasidic Jewish religious schools in the Village of Kiryas Joel do not close for the District's recesses on the day before and after Thanksgiving, the days around Christmas, and the February recess. These are not federal or state holidays and, yet, the District refuses to provide transportation on those days merely because it chooses to be closed. As Supreme Court properly held, Education Law § 3635(1) makes no such distinction. It places a mandatory duty upon central school districts to provide transportation to all children every

day that their schools are in session, in parity with the public school students, and not merely when it is convenient for a school district to transport the nonpublic school students.

Petitioners have already been deprived of multiple days of transportation to and from their nonpublic schools this school year alone. Respondents argue that that must have been what the Legislature intended, and that it is "sufficient" under the statute to leave nonpublic school students waiting for buses that will never come. The plain language of section 3635(1)'s mandatory transportation guarantee, and the legislative history underlying it, however, show that it is not. Nonpublic school students are entitled to the same transportation that central school districts provide to public school students—busing to and from their nonpublic schools on every non-holiday day their schools are open.

This Court should declare that it is no longer "sufficient" to allow SED and central school districts to deny nonpublic school students the transportation to which they are entitled under the Education Law. Indeed, anything less than equal transportation would violate the student Petitioners' rights under the Equal Protection Clause of the

New York Constitution.

This Court should, therefore, affirm the Supreme Court judgment in its entirety, and confirm that nonpublic school students are entitled to transportation to and from school on every day during the school year that their schools are open for instruction.

STATUTORY BACKGROUND

Education Law § 3635(1)(a) provides that "[s]ufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district for all the children residing within the school district to and from the school they legally attend." Those words are clear and unambiguous. The Legislature guaranteed that nonpublic school students would have transportation, provided by the central school district in which they live, "to and from school" on each day that their nonpublic schools are open for instruction, just as the central school districts provide to public school students.

Respondents rely heavily on the statutory and regulatory history of Education Law § 3635 to argue that the plain words that the Legislature chose to guarantee nonpublic school students equal

transportation to and from their nonpublic schools does not mean exactly what it says. The statutory history, however, belies their assertions. When the legislative history is viewed as a whole, the Legislature's intent to guarantee equal transportation for nonpublic school students on days when their schools are in session during the regular school week and school year shines through. Indeed, the legislative history shows that when the Legislature intended to limit the equal transportation guarantee for nonpublic school students, including by imposing distance limitations or requiring parents to make a formal request for transportation to their children's non-public schools each year, it did so expressly. Respondents' attempt to find legislative support for their own limitation on non-public school students' rights, allowing the denial of equal transportation on days that the central school districts choose to be closed, however, fails.

Prior to 1936, school districts were not required to provide transportation to nonpublic school students. In 1936, the Legislature attempted to enact such a requirement, by amending former Education Law § 206 (the "1936 Law") to allow school districts to transport students to nonpublic schools "within the district or an adjacent district

or city[,]" if the residents of the school district voted to authorize the transportation (L 1936, ch 541).

The New York Constitution, at the time, however, did not permit the State or its subdivisions, including school districts, to use any public money "directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught" (NY Const art XI, former § 4). Thus, when the 1936 Law was challenged, the Court of Appeals struck it down because it authorized the use of public funds to pay for the transportation of students to religious schools (*see Judd v Board of Educ.*, 278 NY 200, 217 [1938]).

Shortly after the Court of Appeals struck down the 1936 Law, the people of this State amended the Constitution to allow the Legislature to "provide for the transportation of children to and from any school or institution of learning" (NY Const art XI, § 3). This amendment overruled the Court of Appeals' holding in *Judd* and firmly fixed the State policy that transportation should be provided to all students in

New York to and from any schools, including nonpublic and religious schools.

To implement the constitutional amendment, the Legislature not only allowed school districts to provide transportation to nonpublic school students, but *mandated* that they do so "when deemed necessary, irrespective of the will of the taxpayers" (Bill Jacket, L 1939, ch 465, at 3). When adopting the new law, the Legislature intentionally chose to abandon the prior restriction in the 1936 Law, which had made it "permissive and determinable by the taxpayers in the district" (*id.*). Specifically, the language adopted by the Legislature in 1939 stated:

> 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 [emphasis added] [the "1939 Law"] [adding Education Law former § 503]).[1]

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[1] Even the New York State School Boards Association noted at the time that the transportation for nonpublic school students required under the new section was "mandatory" and, thus, urged the Governor to veto the bill because it "would open the way to a greatly increased cost of transportation" (Ltr from N.Y.S. Sch. Bds. Assn. Inc., May 12, 1939, Bill Jacket, L 1939, ch 465, at 13).

Respondents incorrectly argue that the 1939 Law "has remained substantially the same since its enactment" (SED's Brf, at 8). In fact, since 1939, the Legislature has revised and clarified the scope of Education Law § 3635 numerous times. And whenever the Legislature sought to limit the transportation rights provided under Education Law § 3635(1), it did so expressly.

For example, in 1960, the Legislature limited the scope of the transportation mandate under Education Law § 3635(1) to students who reside within a certain mileage of the school district (L 1960, ch 1074, § 1 ["1960 Amendment"]). In 1961, the Legislature further limited the scope of the mandate by clarifying that (1) door-to-door transportation from home to a nonpublic school was not required; (2) parochial school students only had the right to transportation to the nearest parochial school of a particular denomination; and (3) city school districts are not required to provide transportation to students (*see* L 1961, ch 959, § 1 ["1961 Amendment"]; Mem to the Governor from Louis J. Lefkowitz, Attorney General, Bill Jacket, L 1961, ch 959, at 8 ["One of the amendments in the above bill is to explicitly exclude city

school districts from any mandatory requirement to provide transportation"]).

Notably, throughout the many times that the Legislature amended Education Law § 3635(1) since it was adopted in 1939, the Legislature has never added any language that permits non-city school districts to refuse to provide the mandatory transportation for nonpublic school students on days when the public schools are closed (*see* Education Law § 3635[1][a]).[2] That legislative omission can only be viewed as intentional, for had the Legislature intended to create that exception to the mandatory transportation that section 3635(1)(a) guarantees on days when the public schools are closed, it was "free . . . to draft appropriately worded legislation" that did so expressly (*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209 [1976]; *see also e.g. Hernandez v State of New York*, 173 AD3d 105, 112 [3d Dept 2019] ["if the drafters had wished to adopt SERA's special definition of 'employees,' they would have had to

[2] The Legislature amended Education Law § 3635 numerous times from 1984 through 2012, in addition to those summarized here. None of these amendments, however, altered or limited the scope of the transportation mandate for nonpublic school students under section 3635(1)(a) (*see* L 1984, ch 53; L 1986, ch 0683, § 22; L 1987, ch 63, § 40; L 1989, ch 653, § 1; L 1990, ch 665, § 1; L 1992, ch 69, § 3; L 1994, ch 545, § 2; L 1999, ch 129, § 1).

incorporate it explicitly into the constitutional amendment. The drafters did not do so, thereby giving rise to the inference that its omission was intentional"]).

Indeed, the legislative history of section 3635(1) fully supports Supreme Court's interpretation. Since 1961, the Legislature has largely chosen to *expand* the scope of the transportation mandate in Education Law § 3635(1), and to solidify the right to transportation for nonpublic students. For example, in 1974, the Legislature amended Education Law § 3635, to increase the mileage parameters to cover more nonpublic school students, as a way to combat fiscal problems at many nonpublic schools (L 1974, ch 755; Bill Jacket, L 1974, ch 755, at 2). The amendment's supporters felt this increase was necessary because (1) "the right to attend a nonpublic school is *meaningless* if the pupil has no way of getting to and from school"; and (2) the "cost of providing the transportation, while high, is much less than the cost of educating the pupils" (*id.* at 9 [emphasis added]). The Legislature also amended Education Law § 3635 to require non-city school districts to (1) designate central pickup points for nonpublic school students; and (2) transport students from the pickup points to nonpublic schools, even

if the students live too far from the nonpublic schools to qualify for direct transportation to the nonpublic schools (*see* L 1981, ch 960; Bill Jacket, L 1981, ch 960; L 1990, ch 718, § 1; NY Session Law Serv. 718 [McKinney 1990]).

Other changes were made to Education Law § 3635(1) in part due to concerns over the discriminatory application of some of the prior restrictions. For example, in 1978, (1) the Legislature eliminated the 1961 clause restricting parochial students' transportation to the nearest available parochial schools of their denomination, following concerns that this restriction discriminatorily limited parents' freedom to choose a parochial school for their children (L 1978, ch 453; Bill Jacket, L 1978, ch 453); and (2) removed a non-city school district's ability to deny a late transportation request if a reasonable explanation was given for the lateness, because the requirements were being inequitably applied to requests for transportation to nonpublic schools (L 1978, ch 719; Bill Jacket, L 1978, ch 719).

The Legislature has also specified expressly when it is not expanding the transportation mandate for nonpublic school students, but rather giving school districts the option to provide additional

transportation with voter approval. For example, the Legislature authorized school districts to voluntarily provide transportation to students (1) who reside outside of the mileage ranges (L 1960, ch 1074, § 1), including those who attend nonpublic schools and reside on an established bus route for the centralized pick-up point (L 1994, ch 571, § 1), or (2) are enrolled in a universal prekindergarten programs, so long as the transportation was offered "equally to all children in like circumstances residing in the district" (2012 McKinney's Session Law News of NY, ch 244 [S7218-A]; L 2012, ch 244, § 1, eff. July 18, 2012). When the Legislature chose to provide schools districts with these options, however, it made clear that the transportation mandate did not apply in those circumstances.

COUNTERSTATEMENT OF FACTS AND PROCEDURAL HISTORY

UJC is a not-for-profit community organization that provides support services for Jewish families throughout Orange County, New York (R61). Petitioners Joel Stern and Yitzchok Ekstein are members of UJC, reside within the District, and send their children to nonpublic Hasidic Jewish religious schools in the Village of Kiryas Joel to foster the children's Jewish faith (R61-R62). Petitioners' residences are more

than 2 miles, but less than 15 miles, from the nonpublic schools that their children attend, and their children are thus statutorily entitled to transportation to their nonpublic schools at the District's expense (R62).

Generally, throughout the school year, the District transports Petitioners' children to their nonpublic schools, as required under the Education Law, but only on days when the District is open for instruction (R63). The District has repeatedly denied Petitioners' requests to provide transportation on days the District is closed, despite the fact that Petitioners have repeatedly informed the District that its mandatory, statutory transportation obligation continues even on those days (R62, 64). For example, in February 2021, UJC requested that the District provide transportation to nonpublic school students, including Petitioners' minor children, between February 15, 2021 and February 19, 2021, during the District's February recess, but when Petitioners' nonpublic schools remained open for instruction (R91-R92). The District denied Petitioners' request (R93-R94).

On June 23, 2021, UJC submitted a second request to the District, on behalf of its members, including Petitioners, requesting that the District provide transportation to nonpublic students on all non-holiday

dates during the 2021-2022 school year when the Jewish nonpublic schools will be open, but the District is scheduled to be closed (R107-R108). Specifically, UJC demanded that the District provide nonpublic school students with transportation on the following dates: August 30 and 31, 2021, November 26, 2021, December 24 to December 31, 2021, February 15, 2022 to February 19, 2022, and March 16, 2022 (R107-108). The District refused to even respond to UJC's request within a reasonable time (R67).

UJC was therefore forced to commence this proceeding seeking, among other things, that the Court declare that Education Law § 3635(1) requires central school districts, such as the District here, to provide transportation to all nonpublic school students on all days when their nonpublic schools are open for instruction during the school year and compelling the District to provide all nonpublic students transportation accordingly (R58-R74). UJC moved for a preliminary injunction to ensure that the required transportation for nonpublic school students would begin on August 30, 2021 when the student Petitioners had their first day of school (R109-R113; R167-R295).

Respondents separately cross-moved to dismiss the Petition (R114-R166).

In a Decision and Order entered August 26, 2021, Supreme Court, Albany County (Lynch, J.) granted Petitioners a preliminary injunction compelling the District to comply with its statutory duty under Education Law § 3635(1)(a) (R296-R309). The Court held that Petitioners had a likelihood of success on the merits because, on its face, the language of Education Law § 3635(1)(a) guarantees "all the children" who meet the grade level and mileage limitations transportation to and from school, without regard to whether the school they attend is private or public (R305-R306; *see* Education Law § 3635[1][a]). The Court also held that section 3635(1)(a) does not condition the school districts' obligation to provide transportation to nonpublic school students on the districts being open (R306). In a separate order entered September 10, 2021, Supreme Court denied Respondents' cross motions to dismiss (R310-R313). Respondents separately appealed the August 26, 2021 Supreme Court preliminary injunction order to this Court, which invoked an automatic stay of enforcement under CPLR 5519(a)(1) and deprived all nonpublic school

students in the District of the statutorily guaranteed transportation for the first day of school on Monday, August 30, 2021.[3] SED appealed and the District moved for permission to appeal the September 10, 2021 Supreme Court order, which this Court granted.

Respondents thereafter answered the Petition (R314-R324 [District's answer]; R325-R337 [SED's answer]). Following joinder of issue, Petitioners moved for summary judgment on their claims for declaratory relief and a permanent injunction (R754-R758). The District opposed the motion (R763-R775), and SED cross-moved for summary judgment (R848-R854).

In a Decision, Order, and Judgment entered November 18, 2021, Supreme Court (1) granted Petitioners' motion for summary judgment, (2) denied SED's cross motion for summary judgment, (3) declared that "Education Law § 3635(1) requires the Washingtonville Central School District to provide transportation to all nonpublic school students on all days when their nonpublic schools are open for instruction, regardless

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[3] Petitioners moved to vacate the automatic stay, and this Court denied the motion, without prejudice to renewal if Respondents failed to perfect their appeals on or before November 29, 2021 (NYSCEF Doc. No. 50).

of whether the public schools are open," and (4) granted a permanent injunction compelling the District to do so (R3-R19).

Supreme Court reasoned that the plain language of section 3635(1)(a) was clear and entitled nonpublic school students to transportation in parity with public school students—that is, transportation on all days during the school year when the nonpublic schools are open for instruction. The Court held, "[p]aragraph 1 (a) of the statute does not expressly impose any other restriction, and certainly does not condition the obligation to provide transportation to nonpublic schools on the public schools also being open; such omission is meaningful and evinces a legislative intent not to limit the express terms thereof" (R11). Indeed, the Court noted, the constitutional and legislative history underlying section 3635(1) confirmed the plain language interpretation that the legislature's intention was to provide equal transportation for both public and nonpublic school students. The Supreme Court judgment thus declared SED's Transportation Rules and the District's transportation policy that had permitted central school districts to deny transportation to nonpublic school students on days when the public schools were closed invalid, as in violation of the

requirements of Education Law § 3635(1). Respondents now appeal from the Supreme Court judgment.

ARGUMENT

POINT I

SUPREME COURT PROPERLY HELD THAT EDUCATION LAW § 3635(1)(A) REQUIRES CENTRAL SCHOOL DISTRICTS TO PROVIDE TRANSPORTATION ON ALL DAYS DURING THE SCHOOL YEAR THAT THE NONPUBLIC SCHOOLS ARE OPEN FOR INSTRUCTION

Supreme Court properly held that Education Law § 3635(1) requires the District to provide transportation to all nonpublic school students on all non-holiday days during the school year when their nonpublic schools are open for instruction.[4] The District's refusal to provide the student Petitioners transportation on days when their nonpublic schools are open, but the District is closed, violates the express terms of Education Law § 3635(1)(a), which, as Supreme Court correctly held, guarantees transportation to "all the children" and

[4] Contrary to SED's assertions, UJC has never asked for "transportation on federal holidays; on weekends; during the summer months; or even on days when public schools close because of hazardous weather conditions" (SED's Brf, at 21). Rather, UJC's request was for "transportation be provided on all days that the District is closed and the nonpublic schools are open, except for legal holidays set forth by statute" during the normal 2021-2022 academic year (R107-R108; *see* Education Law § 3604[8]; General Construction Law § 24). That is what the equal transportation mandate for nonpublic school students under Education Law § 3635(1)(a) guarantees.

contains no limitation whatsoever allowing central school districts to deny nonpublic school students transportation on days during the school year when the public schools are closed.

A. Supreme Court Properly Construed the Plain Language of Education Law § 3635(1)(a).

Education Law § 3635(1)(a) states, in relevant part:

> Sufficient transportation facilities (including the operation and maintenance of motor vehicles) shall be provided by the school district 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. Such transportation shall be provided for all children attending grades kindergarten through eight who live more than two miles from the school which they legally attend and for all children attending grades nine through twelve who live more than three miles from the school which they legally attend and shall be provided for each such child up to a distance of fifteen miles, the distances in each case being measured by the nearest available route from home to school. *The cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district*

(emphasis added).

This Court's analysis begins, and can end, with the plain language of the statute (*see Matter of Theroux v Reilly*, 1 NY3d 232, 239 [2003] ["When interpreting a statute, we turn first to the text as the best evidence of the Legislature's intent."]; *Riley v County of Broome*, 95 NY2d 455, 463 [2000] ["Of course, the words of the statute are the best evidence of the Legislature's intent."]). Where, as here, the language chosen is unambiguous, the plain meaning of the words used must control (*see Jones v Bill*, 10 NY3d 550, 554 [2008] ["As a general proposition, we need not look further than the unambiguous language of the statute to discern its meaning."]; *Riley*, 95 NY2d at 463; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583 [1998]).

This Court applies the "natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction, and courts have no right to add to or take away from that meaning" (*Hernandez*, 173 AD3d at 111 [internal quotations and citation omitted]). In other words, "[w]hen th[e] language is clear and leads to no absurd conclusion, the words must be accorded their plain and ordinary meaning" (*id.*). Moreover, a statute "must be construed as a whole and

its various sections must be considered together and with reference to each other" (*id.*).

Here, Supreme Court correctly held that the plain meaning of Education Law § 3635(1) is clear and demonstrates the legislative intent for the statute. The statute provides that a central school district "*shall*" provide transportation for "*all* the children" who live within the District, attend grades kindergarten through twelve, and attend a school within the applicable mileage restrictions (Education Law § 3635[1][a] [emphasis added]). Section 3635(1) does not differentiate between nonpublic and public school students, and the Legislature's choice to use the broad and expansive term "all the children" in Education Law § 3635(1), "without qualification or restriction, was a deliberate one" (*Hernandez*, 173 AD3d at 112).

Section 3635(1) unambiguously provides that "all the children" shall be given transportation "to and from the school they legally attend" (Education Law § 3635[1][a]). No exceptions are made to that mandate, unlike the statutory language that the Legislature chose to apply to the optional transportation provided by the city school districts (*see id.* § 3635[2-a]).

If the Legislature had intended to carve out a similar exception to section 3635(1)(a)'s unambiguous transportation mandate for central school districts that would obviate the need to provide transportation to nonpublic school students on days when the central school districts are closed, it certainly knew how to do so. It did not. As Supreme Court properly held, the Legislature's purposeful choice to require central school districts to provide transportation to nonpublic school students on all days when their nonpublic schools are open for instruction, as is provided to public school students, must be respected, not simply cast aside for convenience.

SED nevertheless argues that it is "sufficient" under Education Law § 3635(1) to leave nonpublic school students without a way to get to school on approximately 20 days during the school year when their nonpublic schools are open, but the public schools are closed. SED, in effect, asks this Court to add the "like circumstances" standard for optional transportation to situations where, as here, transportation is mandatory because the nonpublic school students clearly meet the mileage and age requirements under Education Law § 3635(1) (*see Davila v State*, 183 AD3d 1164 [3d Dept 2020] ["Absent ambiguity,

courts may not resort to rules of construction to alter the scope and application of a statute, because no such rule gives the court discretion to declare the intent of the law when the words are unequivocal"]. But, as demonstrated above (*see* Statutory Background, *supra*), when the Legislature has allowed school districts the option to provide transportation, but not required them to do so, it has said so expressly (*see* Education Law § 3635[1][c] ["The foregoing provisions of this subdivision shall not require transportation to be provided for children residing within a city school district, but if provided by such district pursuant to other provisions of this chapter, such transportation shall be offered equally to all such children in like circumstances"]; L 2012, ch 244, § 1).

To be sure, the phrase "sufficient transportation facilities" in section 3635(1) does not negate the mandate that transportation "shall be provided" to nonpublic school students, or permit the District to only provide transportation when it is convenient. Rather, that phrase refers to the actual "facilities" required to ensure that nonpublic school students have transportation to and from school each day (*see* Merriam-Webster Online Dictionary, facility ["something that makes an action,

operation, or course of conduct easier—usually used in plural"], *available at* https://www.merriam-webster.com/dictionary/facility). That's why the statute explains that it is referring to, among other things, "the operation and maintenance of motor vehicles" necessary to provide the transportation (*see* Education Law § 3635[1][a]).

If the District does not have enough buses or drivers, the statute commands that it obtain more or to contract with private transportation companies to ensure that sufficient facilities exist to provide the mandatory transportation for nonpublic school students. And the Legislature has specifically provided that the District, through State aid and the taxes levied on its taxpayers, including Petitioners, must bear the costs to do so.

Notwithstanding that the Legislature has determined that nonpublic school students are entitled to equal transportation to their public school counterparts, Respondents' interpretation of the statute, as reflected in the SED Transportation Rules (R95-R102) and the District's Policy No. 5730 (R103-R106), has created an unequal two-tiered system of transportation that denies nonpublic school students the same rights that are guaranteed to public school students. For

public school students, the bus comes to bring them to and from school every day that their schools are open for instruction. For nonpublic school students, however, they are denied transportation, leaving their parents burdened with finding a different way to school, whenever the public schools choose to be closed. That is not "sufficient" transportation, as SED suggests.

Respondents' interpretation of the statute not only conflicts with the plain meaning of the words that the Legislature chose, but also unjustifiably grants central school districts a windfall, as a practical matter. For example, the District is relieved from providing transportation to the student Petitioners on 20 days during the normal school year when the District's schools are open, because Petitioners' nonpublic schools are closed in observance of religious holidays (R108, R170, R268-R269). Thus, Petitioners' request for transportation to their nonpublic schools did not ask the District to provide any more transportation days than it already provides to public school students. Petitioners merely sought transportation, which the District has contracted with a private transportation company to provide (R177-

R179), on different instructional days based on the differences in the nonpublic schools' calendars.[5]

This is not an additional burden on the District. And even if it was, it is a burden that the Legislature has specifically chosen to place on central school districts' shoulders rather than on the parents who choose to send their children to nonpublic schools (*see* Education Law § 3635[1][a] ["The cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district."]).

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[5] The same is true, for example, for the other secular and religious nonpublic schools nearby to which the District provides transportation. John S. Burke Catholic High School is open on 5 days when the District is closed (September 16, October 22, December 10, March 16, May 13), and closed on 8 days when the District is open (*see* 2021-2022 Academic Calendar, *available at* https://www.burkecatholic.com/apps/events2/view_calendar.jsp?id=0&m=8&y=2021 [monthly calendar beginning September 2021]). St. John's Catholic School is open on 11 days when the District is closed (September 16, November 24, February 22, 23, 24 and 25, March 16, April 11, 12 and 13, May 13), and closed on 12 days when the District is open (2021-2022 Academic Calendar, *available at* https://d2y1pz2y630308.cloudfront.net/17870/documents/2021/8/2021%202022%20Calendar.pdf). And Montgomery Montessori School is open on 5 days when the District is closed (October 22, December 10, February 4, March 16, and May 13), and closed on 24 days when the District is open (2021-2022 Calendar, *available at* https://www.montgomeryms.com/uploads/1/2/2/9/122950747/2021-2022_academic_calendar.pdf). In each case, the District is relieved of providing transportation to these nonpublic schools on more academic days than the nonpublic school students would need to be transported on each day their nonpublic schools are open for instruction.

Supreme Court, therefore, properly rejected Respondents' attempt to contort the statute's reference to sufficient transportation facilities into an excuse for refusing to abide by the mandatory statutory duty to provide transportation to and from school to all eligible nonpublic school students all days when their nonpublic schools are in session.

B. The Legislative History of Education Law § 3635 Confirms Supreme Court's Interpretation of the Plain Language of the Statute.

Because the plain language of Education Law § 3635(1) is unambiguous, this Court need not resort to an examination the legislative history to determine the Legislature's intent (*see Matter of Walsh v New York State Comptroller*, 34 NY3d 520, 524 [2019] ["Where the statutory language is unambiguous, a court need not resort to legislative history"]; *Matter of Auerbach v Board of Educ. of City School Dist. of City of New York*, 86 NY2d 198, 204 [1995]; *see also e.g. Matter of Whitfield v Avent*, 192 AD3d 1250, 1252 [3d Dept 2021] [applying the plain language of the statute and noting that although the Court did not need to look further than the statutory language, the legislative history confirmed the interpretation]). Even if this Court were to examine the legislative history of section 3635(1), it only confirms

Supreme Court's interpretation. Supreme Court examined the constitutional and legislative history underlying section 3635(1)(a), and, as demonstrated above (*see* Statutory Background, *supra*), properly held that the Legislature's intent was to provide equal transportation for public and nonpublic school students (R14-R16).

Respondents do not address the Legislature's history of placing only express limitations upon the mandatory rights of nonpublic school students to transportation to and from school under section 3635(1)(a). Rather, Respondents focus their legislative history argument on the 1985 amendment that added section 3635(2-a), which applies only to the optional transportation that city school districts may choose to provide under section 3635(1)(c), and does not address the Legislature's intention when it adopted the mandatory transportation obligation under section 3635(1)(a) (*see People v Barnes*, 26 NY3d 986, 989-990 [2015] ["In light of the statute's plain language, we decline defendant's invitation to consult the legislative history of a *different* statute"]). Respondents ask this Court to use the history of section 3635(2-a) to vary the plain language that the Legislature chose to command central school district to provide transportation to nonpublic school student to

and from school (*see Commonwealth of N. Mariana Is. v Can. Imperial Bank of Commerce*, 21 NY3d 55, 62 [2013] [a court "cannot read into the statute that which was specifically omitted by the legislature"]). This Court should decline Respondents' invitation (*see Makinen v City of New York*, 30 NY3d 81, 88 [2017] ["Even if the NYCHRL was intended to be more protective than the state and federal counterparts, and even if its legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation, the NYCHRL still must be interpreted based on its plain meaning." (cleaned up)]).

The transportation mandate in Education Law § 3635(1) does not apply to city school districts, which are not required to provide any transportation to students (Education Law § 3635[1][c]). Instead, similar to the other optional forms of transportation under section 3635, city school districts are only obligated to provide transportation "equally to all such children in like circumstances" (*id.*). For purposes of student transportation, the Legislature's actions throughout history, including numerous amendments to section 3635 that apply exclusively to city

school districts, demonstrate that it intentionally treats city school districts differently than other school districts across the state.

For example, in 1979 and 1990, the Legislature amended Education Law § 3635 to specifically require only the City of Rochester (and not other city school districts) to comply with the Education Law § 3635 mileage limitations if it chose to provide transportation, to prevent the city from eliminating transportation for nonpublic students outside of the city limits (*see* L 1979, ch 670; L 1990, ch 53, § 49-c). In 1996, the Legislature enacted a similar amendment for small city school districts, but gave them the option not to comply with the mileage limitations if they set alternative mileage limits within a specific time window (L 1996, ch 171, § 20; 1996 McKinney's Session Law News of NY, ch 171 [S7608/A10758]). Additionally, in 2012, the Legislature amended Education Law § 3635 to exempt city school districts from providing transportation "equally" to seventh and eighth grade students with existing contracted bus services (L 2012, ch 42, § 1; 2012 McKinney's Session Law News of NY, ch 42 [A8683-B]).

In 1985, the Legislature amended Education Law § 3635 to add a new Education Law § 3635(2-a), which required New York City school

districts to "provide transportation to nonpublic schools for a maximum of five alternative days on which the public schools are scheduled to be closed" (Bill Jacket, L 1985, ch 906, at 8; *see* L 1985, ch 906 ["1985 Amendment"]). The 1985 Amendment provided that the alternative days would need to be agreed to in advance and were limited to specifically enumerated holidays (Bill Jacket, L 1985, ch 906). The purpose of the 1985 Amendment was to "authorize the transportation of nonpublic school students in New York City for up to five (5) days on which the public schools [were] scheduled to be closed," to "enable the nonpublic schools to carry on a full educational program without being penalized for scheduling a limited number of school days to meet the special needs of the nonpublic schools" (*id.* at 8).

The 1985 Amendment only applies to New York City school districts, however, and does not apply to central school districts, like the District here. Notably, the 1985 Amendment did not change the text of Education Law § 3635(1), or otherwise alter the mandatory obligations of central school districts to provide transportation to nonpublic school students. Respondents nevertheless argue that the 1985 Amendment is proof that the Legislature has "acquiesce[d] to SED's interpretation of"

section 3635(1)(a) because “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” (SED’s Brf, at 24). Respondents, however, have it backward.

The legislative history for the 1985 Amendment does not contain any discussion of why revisions may have been made to the proposed bills that eventually became the 1985 Amendment. Respondents attempt to glean such intent from memos prepared by SED (a Respondent in this case) and the New York State School Boards Association (the amicus curiae) (*see* Bill Jacket, L 1985, ch 902). These self-serving memos suggest that an earlier version of Senate Bill 5529 included language that applied to school districts beyond New York City (*id.*). The legislative history, however, does not contain the original version of Bill 5529 referenced in the memos, and Respondents have not produced it here. And *none* of the legislative history provides any explanation for why any purported earlier version of Bill 5529 was revised to exclude a proposed amendment that would have limited the mandatory transportation obligations that the Legislature has imposed on central school districts.

Respondents nevertheless speculate that the reason for this revision was to prevent the *expansion* of the school districts' obligations to transport nonpublic school students on days when school districts are closed (SED's Brf, at 24-26). In light of the prior amendments to section 3635(1)(a) and the legislative history underlying them, which show that the Legislature intended a broad transportation guarantee for nonpublic school children, notwithstanding any burden that would be placed on the school district, any revision to the language of section 3635(1)(a) clearly would have imposed a significant *limitation* on the rights of the nonpublic school students, and not an expansion (*see* Statutory History, *supra*; Bill Jacket, L 1974, ch 755, at 9 [noting that "the right to attend a nonpublic school is meaningless if the pupil has no way of getting to and from school" and the "cost of providing the transportation, while high, is much less than the cost of educating the pupils"]). When the Legislature has done that previously, it was always done expressly.

The Legislature's rejection of the proposed limitation of central school district's obligations to transport nonpublic school students, to only two days (rather than all non-holiday school days) when the public

schools are closed, therefore, can only be viewed as a reaffirmation of the Legislature's prior intent that nonpublic school students should receive transportation to and from school each day that their schools are open for instruction. Indeed, to the extent the amendment was proposed to expand the nonpublic school students' rights, as Respondents suggest, the Legislature could have easily concluded that no language regarding non-city school districts was needed, because the existing language already requires those school districts to provide transportation on the non-holiday days when nonpublic schools are open but the school districts are closed, and no further limitation of that obligation was intended.[6]

Regardless of the supposed intent, however, the proposed amendment to the central school district's transportation obligations was never adopted, and therefore is not persuasive. And the

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[6] This interpretation of the Legislature's intent is in line with the subsequent history of the 1985 Amendment. Notably, since 1985, the Legislature has twice expanded the list of eligible days off and holidays, and added another provision that, at times, allows nonpublic schools up to ten days of transportation on days when the city school district is closed (L 1996, ch 474, §§ 91, 92; 1996 McKinney's Session Law News of NY, ch 474 [A11335]; L 1997, ch 34, § 1; 1997 McKinney's Session Law News of NY, ch 34 [A6298–A]; L 2005, ch 424, § 1, eff. Sept. 1, 2005; 2005 McKinney's Session Law News of NY, ch 424 [A8398–A/S5423–A]). None of those amendments, however, apply to central school districts or otherwise affect the mandatory transportation required under section 3635(1)(a).

transportation requirements for city school districts are wholly inapposite from the requirements applied to central school districts, such as the District.[7] Thus, Respondents' speculation regarding the 1985 Amendment simply does not support their interpretation (*see e.g. Schultz v Harrison Radiator Div. Gen. Motors Corp.*, 90 NY2d 311, 320 [1997] ["Since neither the statute nor the legislative history behind the enactment of the 4% adjustment in CPLR 5041(e) discloses any intent as to whether the Legislature meant the rate to be the exclusive, or a postverdict adjustment for inflation, the purpose of the 4% adjustment remains unclear. Consequently, until the Legislature provides some other definitive indication, we must apply the terms of the statute as written and in a manner that comports with the policy and practical considerations reflected in this opinion."]).

[7] The 1985 Amendment's requirement that the New York City School District provide transportation on days when it is closed presumably was an additional burden for that district, because it had no obligation under section 3635(1)(c) to provide any transportation at all. Regardless, any additional transportation burden placed on the New York City schools cannot be used to interpret the wholly different and mandatory transportation requirements that apply to central school districts under section 3635(1)(a).

C. Supreme Court Properly Rejected Respondents' Reliance on Prior Determinations of the SED Commissioner.

Respondents have also sought to justify their misconstruction of section 3635(1)(a) based upon a prior Commissioner of Education's determination in the *Appeal of Brautigam* (R736-768). Supreme Court properly rejected Respondents' reliance on the Commissioner's determination because it conflicts with the plain language of section 3635(1)(a).

First, this Court owes no deference to the Commissioner of Education's interpretation of the statute because it involves only a pure question of law, not one calling for any special administrative expertise (*see Matter of Suffolk Regional Off-Track Betting Corp. v New York State Racing and Wagering Bd.*, 11 NY3d 559, 567 [2008] ["Deference to administrative agencies charged with enforcing a statute is not required when an issue is one of pure statutory analysis"]).

Second, this Court should reject the Commissioner's interpretation in *Brautigam*, just as Supreme Court properly did, because it flies in the face of the plain language of the statute. In *Brautigam*, the Commissioner found it was not reasonable for the

school district to provide the requested transportation because the school district would have to use its own employees and buses to provide the transportation, which would implicate a multitude of issues including the union, overtime pay, and use of the school's buses. Here, in contrast, the District has a contract with a private company to provide transportation for the nonpublic school students (R177-R179). Thus, the District will not have to engage its employees, avoiding union issues and overtime pay. Any mere increase in cost should be borne by the District, and not parents and families, as the Legislature intended (*see* Education Law § 3635[1][a]). And, as Supreme Court held, the Commissioner is simply wrong on the law.

Respondents' further reliance on *O'Donnell v Antin* (81 Misc 2d 849 [Sup Ct, Westchester County 1974], *affd* 36 NY2d 941 [1975]) was similarly misplaced. In *O'Donnell*, Supreme Court, Westchester County, considered providing transportation to nonpublic school students in a city school district, which was not compelled by the statute, but was merely optional (*see id.* at 852). That is not the case here, where section 3635(1)(a) provides a mandatory obligation to provide transportation to nonpublic school students to and from their schools (*see* Education Law

§ 3635[1][a]; *see also e.g. Martin v Brienger*, 49 Misc 2d 130, 133 [Sup Ct 1966] [interpreting the command of section 3635(1) for central school districts, at that time: "The court is of the view that the statute means exactly what it says. . . The reasons for its unavailability, while understandable, should not, however, deprive petitioner's son of the transportation afforded him under the Education Law even though it may seem inequitable and to some extent work a financial hardship upon respondent school district."], *affd* 26 AD2d 772 [2d Dept 1966]).

Moreover, *O'Donnell* recognizes that equal treatment between public and nonpublic school students is required. The Legislature determined that nonpublic school students attending a school within 15 miles of their home are entitled to the same transportation right as any public school student. Thus, because public school students get transportation on every school day that their school is open, so too should nonpublic school children.

D. Supreme Court's Interpretation of Section 3635(1)(a) Does Not Render Education Law § 3604(8) Superfluous.

The District argues, for the first time on appeal, that a requirement that central school districts transport nonpublic school students to and from their nonpublic schools when the public schools

are closed would render "totally superfluous" a separate statutory provision that allows school districts to schedule superintendent's conference days in the last two weeks of August without affecting their right to state aid (District's Brf, at 15). Supreme Court's proper interpretation of section 3635(1)(a), however, does no such thing.

Under Education Law § 3604, the Legislature has imposed certain conditions that public school districts must satisfy before they will qualify for an allocation of state aid. In particular, section 3604(8) provides that "[n]o school shall be in session on a Saturday or a legal holiday, except general election day, Washington's birthday and Lincoln's birthday," and that the Commissioner must count toward the required 180 days of instruction up to 4 days during the year, including 2 days in August before the start of the public school year, when public schools districts close for superintendent's conference days (*see* Education Law § 3604[8]).

During the superintendent's conference days, however, the Legislature made sure to clarify in the statute expressly that "such scheduling shall not alter the obligation of the school district to provide transportation to students in non-public elementary and secondary

schools or charter schools" (*id.*). This language not only recognizes that the public schools are, in fact, obligated to provide transportation to nonpublic school students on days when they are closed, such as superintendent's conference days, but also confirms that the Legislature's intent is to protect the rights of nonpublic school students to transportation to and from their nonpublic schools, regardless of whether the public schools are open for instruction (*see* Div of Budget Bill Mem, Bill Jacket, L 2012, ch 260, at 11 ["This bill would enable professional development to be delivered prior to the commencement of classes, but is structured in a manner that protects collective-bargaining rights and the transportation of nonpublic and charter school students."]). Contrary to the District's argument, therefore, the Legislature determined that this language was necessary to ensure that section 3604(8) could not be read as an implicit alteration of the school districts' mandatory transportation obligations under section 3635(1)(a).

POINT II

RESPONDENTS' INTERPRETATION OF SECTION 3635(1)(A) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE NEW YORK CONSTITUTION

If Respondents' interpretation of section 3635 to eliminate the District's mandatory duty to provide transportation for nonpublic school students on days when the public schools are closed was correct, and as Supreme Court held it is not, that construction of the statute would deprive Petitioners and all other nonpublic school students of equal protection under the New York Constitution.[8] Indeed, the District provides transportation to public school students on all days during the school year that their schools are open, but it deprives nonpublic school students the same rights. No rational basis exists for that denial of equal transportation rights. But this Court can avoid declaring section 3635(1)(a) unconstitutional, because a constitutional construction of the statute is possible (*see People v Santorelli*, 80 NY2d 875, 876 [1992] [holding that the Court "must construe a statute . . . to uphold its constitutionality if a rational basis can be found to do so"]; *Matter of*

[8] Although Supreme Court did not address this issue, it was preserved below and may be raised as an alternative ground for affirmance here (*see Parochial Bus Sys. v Board of Educ. of City of N.Y.*, 60 NY2d 539, 546 [1983]).

Lower Manhattan Loft Tenants v New York City Loft Bd., 66 NY2d 298, 306 [1985] ["a statute is to be construed so as to sustain its constitutionality"]; *Eaton v New York City Conciliation & Appeals Bd.*, 56 NY2d 340, 346 [1982] ["[a] statute . . . should be construed in such a manner as to uphold its constitutionality"]).

Under the equal protection clause of the New York State Constitution, "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof" (NY Const art I, § 11). As the Court of Appeals has held, "the wording of the State constitutional equal protection clause 'is no more broad in coverage than its Federal prototype' and that the history of this provision shows that it was adopted to make it clear that this State, like the Federal Government, is affirmatively committed to equal protection, and was not prompted by any perceived inadequacy in the Supreme Court's delineation of the right" (*Esler v Walters*, 56 NY2d 306, 313-314 [1982]). Equal protection requires that any education a state provides "must be made available on equal terms" (*San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 30 [1973]).

Education Law § 3635(1) "mandates the provision of transportation to public and nonpublic school students alike" (*Cook v Griffin*, 47 AD2d 23, 27 [4th Dept 1975] [emphasis added], quoting Education Law § 3635[1]). Additionally, section 3635: (1) states that transportation "shall be provided for *all* children" who meet certain residency, distance, and grade level requirements, (2) does not distinguish between public or nonpublic school students, and (3) does not contain any language restricting the number of school days central school districts must provide transportation to nonpublic school students (Education Law § 3635[1] [emphasis added]). Thus, the statute specifically provides that all students are the same for purposes of transportation to and from school, regardless of whether they attend public or nonpublic schools. So long as their nonpublic schools are within the statutory 15 miles from their homes, and they are thus entitled to transportation, the Constitution commands that nonpublic school students be treated the same as public school students. Accordingly, under Education Law § 3635(1)(a), public and nonpublic school students are similarly situated, since both are entitled to

transportation to and from their schools on days when their schools are in session.

SED's Transportation Rules and the District's Policy 5730, however, draw a distinction between public school students and nonpublic school students, and claim only public school students are entitled to transportation to and from school on all days when their schools are open. There is no rational basis for that distinction, especially when section 3635(1)(a) requires that public school students and nonpublic school students be treated equally for transportation to and from school.

The only justification that Respondents attempt to forward for the disparity—that "additional transportation would be financially and logistically burdensome" (SED Brf, at 29)—has already been considered and rejected by the Legislature itself. Indeed, section 3635(1)(a) specifically provides that "[t]he cost of providing such transportation between two or three miles, as the case may be, and fifteen miles shall be considered for the purposes of this chapter to be a charge upon the district and an ordinary contingent expense of the district." The Legislature has decided that any additional expense for nonpublic

school transportation is to be borne by the school districts because "the right to attend a nonpublic school is meaningless if the pupil has no way of getting to and from school" and the "cost of providing the transportation, while high, is much less than the cost of educating the pupils" (Bill Jacket, L 1974, ch 755, at 9).

Neither *Matter of Cook v Griffin* (47 AD2d 23 [4th Dept 1975]) nor *O'Donnell v Antin* provide a justifiable basis to deny nonpublic school students the same transportation rights that the Legislature has granted to public school students. In *Cook*, the Fourth Department merely held that nonpublic school students were not entitled to transportation for field trips because the relevant statutes did not guarantee those rights (*see Cook*, 47 AD2d at 48 ["Special Term found that no statutory authority existed for providing field trip transportation to either public or nonpublic schools. We have found that authority did exist to transport public school students on field trips but not nonpublic school students. Either way we are dealing not with the question of what a school district may do but what it must do."]). In contrast here, Education Law § 3635(1)(a) specifically guarantees equal transportation for nonpublic school students to and from school.

Similarly, in *O'Donnell*, the Legislature had drawn a "distinction between city and non-city school districts" for purposes of providing transportation to nonpublic schools, where it is mandatory in non-city school districts, but optional in city school districts (*O'Donnell*, 81 Misc 2d at 853 ["A reading of section 3635 indicates that the distinction between city and non-city school districts rests on a legislative determination that rural and suburban areas do not have transportation facilities equal to those of urban areas . . . There has been no showing that on a state-wide basis, the legislative distinction is invalid or irrational. There is no requirement in the law that all school districts, as school districts, be treated alike and the fact that the operation of the statute results in some inequities does not make it violative of the equal protection clause."]). That distinction between non-city and city school districts, which exists still today, does not in any way justify treating public and nonpublic school students differently within a single school district, when the Legislature and the Constitution command that they must be treated the same.

Despite the clear language in Education Law § 3635(1) that applies equally to public and nonpublic school students, the

Respondents' construction of that section provides that *only* public school students, and not nonpublic school students, are entitled to transportation on all days that their schools are open. Because courts in New York must "avoid interpreting a statute in a way that would render it unconstitutional if such a construction can be avoided" *(Alliance of Am. Insurers v Chu*, 77 NY2d 573, 585 [1991]), this Court should reject Respondents' interpretation that would deny Petitioners equal protection under the New York Constitution.

POINT III

SED EXCEEDED ITS STATUTORY AUTHORITY UNDER THE EDUCATION LAW AND VIOLATED THE STATE ADMINISTRATIVE PROCEDURE ACT

A. SED Exceeded its Statutory Authority Under Section 3635(1)(a) by Creating an Exception to the Central School Districts' Mandatory Transportation Obligation for Days When the Public Schools are Closed.

SED argues that its Transportation Rules are not a rule or policy, but rather an interpretation of a statute, and thus SED did not exceed its authority in issuing the guidance. To the contrary, whether to impose a duty upon a school district, or to create an exception to that duty, is precisely the kind of public policy choice that must remain with the Legislature. And throughout section 3635(1)(a)'s history, the

Legislature has implemented and amended the State's transportation policy repeatedly, without enacting any exception for transportation on days when the public schools. Rather, SED has imposed this limitation unilaterally, without any basis in section 3635(1) to do so. As such, SED's promulgation of the Transportation Rules were in excess of its authority and inherently legislative in nature, and were properly annulled.

It is an axiomatic component of the separation of powers doctrine that "[e]ven under the broadest and most open-ended of statutory mandates, an administrative agency may not use its authority as a license to correct whatever societal evils it perceives" (*Boreali v Axelrod*, 71 NY2d 1, 9 [1987]). Accordingly, New York courts have consistently annulled regulations and guidance that go beyond the breadth of the statute, no matter how well intentioned the regulator (*see e.g. Health Ins. Assn. of Am. v Corcoran*, 154 AD2d 61, 67 [3d Dept 1990]). To that end, an agency may not, under any circumstances, legislate by adding a requirement through regulation or guidance that is not authorized by the statute (*Boreali*, 71 NY2d at 9). The "central theme" of the *Boreali* analysis is that "an administrative agency exceeds its authority when it

makes difficult choices between public policy ends, rather than finds means to an end chosen by the [L]egislature" (*Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 697 [2014]).

The Legislature's policy choice to require central school districts to provide transportation for nonpublic school students to and from school, without exception, is the very type of purposeful choice that should be respected. Indeed, the Legislature drew an intentional distinction between central school districts and city school districts when it imposed the duty under Education Law § 3635(1) to transport nonpublic school students. Transportation is optional in city school districts (*see* Education Law § 3635[1][c]), and mandatory for central school districts (*see id.* § 3635[1][a]). When the New York City School District exercises its option to provide transportation to nonpublic school students, section 3635(2-a) further limits its transportation obligation on days when those school district are closed, by (1) capping the number of days that such transportation must be provided (either five or ten depending on when Passover and Easter fall in a school year), and (2) defining the precise days when the transportation must be provided (and excluding

all others) (Education Law § 3635[2-a]). The Legislature clearly determined that the New York City School District should not be required to provide transportation to nonpublic school students on all days that it is closed, and included specific language in the statute to effectuate that intent.

In contrast, the Legislature determined not to include any such restrictions in Education Law § 3635(1) for central school districts. This conclusion is consistent with *Cook v Griffin* (47 AD2d 23 [4th Dept 1975]), where the Fourth Department was tasked with determining whether Education Law 3635(1) requires a public school to provide transportation to nonpublic schools for field trips. The Fourth Department held that "had the Legislature intended subdivision 1 of section 3635 to authorize public school districts to provide transportation for nonpublic school field trips, it would have so stated" (*id.* at 27). So too here. Had the Legislature intended for an exception to central school district's mandatory duty to provide the same transportation to nonpublic school students that is provided to public school students, it would have so stated. But it did not, and SED lacks legislative authority to create such an exception on its own.

Similarly, in *Board of Educ. of Lawrence Union Free School Dist. No. 15 v McColgan* (18 Misc 3d 572, 576 [Sup Ct, Albany County 2007]), the petitioners argued that pre-k students should be given transportation services because, although the statute does not specifically authorize pre-k transportation, it does not prohibit it. The Court rejected the petitioners' interpretation "as not proscribing a school district from providing transportation in circumstances not expressly prohibited by the statute," since this "would render these intricately crafted legislative authorizations superfluous, a result at odds with ordinary principles of statutory construction." (*id.*). SED cannot take on a legislative role to add an exception to the District's transportation duty, through the Transportation Rules, that is not authorized by the statute.

B. SED Violated SAPA by Adopting a Statewide Rule Authorizing Central School Districts to Refuse Transportation to Nonpublic School Students on Days When the Public Schools are Closed.

SED argues that, because the Transportation Rules are not a rule but an "interpretive statement," SED was not required to follow the procedural rulemaking process under SAPA. To the contrary, the Transportation Rules are an inflexible rule that applies statewide, not a

mere interpretation of the scope of Education Law to assist Districts in the exercise of discretion. Indeed, Education Law § 3635(1)(a) affords the District no discretion. It contains a mandatory, non-discretionary statutory duty to provide transportation to nonpublic school students to and from school on every day the nonpublic schools are open. The Transportation Rules were, therefore, unquestionably a rule that was adopted in violation of SAPA.

Section 102(2)(a)(i) of SAPA defines a "rule" as "the whole or part of each agency statement, regulation or code of general applicability that implements or applies law, or prescribes a fee charged by or paid to any agency or the procedure or practice requirements of any agency." Whether an agency labels the new rule a "regulation," "guidance," or "policy", or as here, a "handbook", is irrelevant. Courts must look to the substance of the administrative action to determine its purpose (*see Matter of Cordero v Corbisiero*, 80 NY2d 771, 772-773 [1992] [holding that an appeal "policy" set by the Racing and Wagering Board was a "rule" because it applied to all jockeys without regard to the facts and circumstances of a particular case]; *People v Cull*, 10 NY2d 123, 126 [1961]). Indeed, a rule "embraces any kind of legislative or quasi-

legislative norm or prescription which establishes a pattern or course of conduct for the future" (*Cull*, 10 NY2d at 126-127 [finding that administrative "orders" establishing speed limits were "rules" because they established a course of conduct for the future]).

For purposes of SAPA compliance, New York courts have held that a rule is "a fixed, general principle to be applied by an administrative agency without regard to the facts and circumstances relevant to the regulatory scheme of the statute it administers" (*Cubas v Martinez*, 8 NY3d 611, 621 [2007] [internal quotations marks and citation omitted]). If a policy is "invariably applied across-the-board" to the regulated entities within its ambit "without regard to individual circumstances or mitigating factors . . . [the guidance] falls plainly within the definition of a 'rule'" (*Matter of Schwartfigure v Hartnett*, 83 NY2d 296, 301 [1994]).

Guidance, on the contrary, is meant merely to assist agency officials in the exercise of their discretionary authority granted by existing statutes and regulations (*see e.g. Matter of Alca Indus. v Delaney*, 92 NY2d 775, 778-779 [1999] [finding that bid withdrawal criteria was discretionary guidance because, in part, it applied to only

the bidding for that particular contract]). The chief difference between a rule or regulation and guidance "is that the former set standards that substantially alter or, in fact, can determine the result of future agency adjudications while the latter simply provide additional detail and clarification as to how such standards are met by the public and upheld by the agency" (*Plainview-Old Bethpage Congress of Teachers v New York State Health Ins. Plan*, 140 AD3d 1329, 1331 [3d Dept 2016] [internal quotations omitted]; *see also Matter of Council of the City of N.Y. v Department of Homeless Servs. of the City of N.Y.*, 22 NY3d 150, 155 [2013] [holding that DHS's 9-page Eligibility Procedure amounted to a rule because it directed intake workers to follow a detailed, multi-step process when determining the eligibility of applicants and required the use of uniform standards relating to the degree of cooperation demanded of an applicant]).

SED's Transportation Rules, taken together, clearly constitute a "rule" under SAPA because they establish a norm and pattern for future actions on behalf of all central school districts for transporting nonpublic school students. There is no flexibility in a policy that simply says, in contravention of the plain wording of the statute, that central

school districts are not under any obligation to provide transportation services to nonpublic school students on days that the central school district is not open for instruction, regardless of whether the nonpublic schools remain open. Thus, because the Transportation Rules are clearly a rule, SED was required comply with SAPA in adopting them, which it admits it failed to do (*see Matter of New York State Assn. of Ind. Schs. v Elia*, 65 Misc 3d 824, 830 [Sup Ct, Albany County 2019] [holding that the SED Commissioner must comply with SAPA in adopting a rule]).

CONCLUSION

For the foregoing reasons, this Court should affirm the Judgment of Supreme Court in its entirety, and award UJC such other and further relief as the Court deems just and proper.

Dated: February 28, 2022
Albany, New York

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PRINTING SPECIFICATIONS STATEMENT

Pursuant to Rule 1250.8(j) of the Practice Rules of the Appellate Division (22 NYCRR § 1250.8 [j]), I hereby certify that this brief was prepared on a computer using Microsoft Word 2016.

I further certify that this brief complies with the typeface, point size, and line spacing requirements of Rules 1250.8(f)(1) and 1250.8(h) because it was prepared using a proportional typeface named Century Schoolbook, the body of the brief is 14-point type and double-spaced, the footnotes of the brief are 12-point type and single-spaced, and the margins of the brief are one inch on all sides of the page.

I further certify that this brief complies with the word count requirement of Rule 1250.8(f)(2) because the total number of words in this brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc. is 11,320.

Dated: February 28, 2022

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