SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

No. 534406

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

Petitioners/Plaintiffs-Respondents,

-against-

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

Respondents/Defendants-Appellants.

BRIEF *AMICUS CURIAE* OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF RESPONDENTS/DEFENDANTS-APPELLANTS

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Date: February 3, 2022

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INTEREST OF THE *AMICUS CURIAE*

The New York State School Boards Association, Inc. (hereinafter also referred to as "NYSSBA" or "the *amicus" or "amicus curiae"*) submits this brief *amicus curiae* in the instant proceeding in support of reversal of the Decision, Order and Judgment of the court below on the grounds that the issue before this court is one of statewide importance to all school districts throughout New York, and its *amicus curiae* brief will invite the court's attention to law and arguments that might otherwise escape its consideration and be of special assistance to the court.

NYSSBA is a not-for-profit membership organization incorporated under the laws of the State of New York and is located at 24 Century Hill Drive, Suite 200, Latham, New York 12110. Pursuant to New York's Education Law, NYSSBA has a statutory responsibility for devising "practical ways and means for obtaining greater economy and efficiency in the administration of school district affairs and projects" on behalf of public school districts of the State of New York. (N.Y. Educ. Law §1618). In accordance with that responsibility, NYSSBA has an interest in matters such as those involved in the case herein that impact the operation of public school districts throughout the state.

NYSSBA's current membership consists of approximately six hundred and seventy-one (671) or ninety-two percent (92%) of all public school districts and

boards of cooperative educational services (BOCES) in New York State. Throughout the years, NYSSBA has appeared as *amicus curiae* in a number of state and federal court proceedings involving constitutional and statutory issues affecting the administration and operation of public schools. At the state level, some of the more recent of such proceedings include: *Cuomo v. The East Williston Union Free Sch. Dist.*, pending before the New York State Supreme Court Appellate Division, Second Department; *New York State Bd. of Regents v. State Univ. of N.Y.*, 178 A.D.3d 11 (3d Dep't 2019), *lv. to appeal denied*, 35 N.Y.3d 912 (2020); *Larchmont Pancake House v. Board of Assessors*, 33 N.Y.3d 228 (2019); *Bd. of Educ. of the Minisink Valley Cent. Sch. Dist. v. Elia*, 170 A.D.3d 1472 (3d Dep't), *lv. to appeal denied*, 33 N.Y.3d 911 (2019); *Maisto v. State of New York*, 154 A.D.3d 1248 (3d Dep't 2017); *Lawrence Teachers' Assn., NYSUT, AFT, NEA, AFL-CIO v. New York State Pub. Empl. Relations Bd.*, 152 A.D.3d 171 (3d Dep't), *lv. to appeal denied*, 30 N.Y.3d 904 (2017). At the federal level they include: *K.M. v. DeBlasio*, pending before the U.S. Court of Appeals, Second Circuit; *Bd. of Educ. of the North Rockland Cent. Sch. Dist. v. C.M.*, 744 Fed.Appx. 7 (2d Cir. 2018).

STATEMENT OF THE ISSUE

Whether the court below erroneously determined that N.Y. Education Law § 3635(1)(a) requires school districts to provide transportation to nonpublic school students every day their nonpublic school is open.

The *amicus curiae* respectfully submits that the answer is yes.

STATEMENT OF FACTS

The *amicus curiae* will not recite a separate statement of facts, except as hereinafter specifically cited within the text of its brief but will defer instead to the facts outlined in the briefs submitted by the Washingtonville Central School District and the New York State Education Department, and as set forth in the Record on Appeal.

INTRODUCTION

Pursuant to N.Y. Education Law § 3635(1)(a) school districts must provide "[s]ufficient transportation facilities (including the operation and maintenance of motor vehicles)…for all the children residing within the school district to and from the school they legally attend…" The dispute before the parties herein does not concern the validity of that statutory provision. Instead, it relates to their differing interpretations about the scope of a school district's obligation to transport nonpublic school students thereunder.

One interpretation, long held by the State Education Department and relied upon by the Washingtonville Central School District and others throughout the state, is that, with limited exceptions, school districts are required to provide transportation to nonpublic school students only on days when their public schools are open. The other interpretation, advanced by the Plaintiffs-Respondents, is that school districts must transport all nonpublic school students each day that their nonpublic school is in session, regardless of whether the public schools are open.

The court below agreed with the latter interpretation. It is that decision which is presently on appeal before this court.

The court below based its decision on a determination that the text of the statutory provision at issue herein is clear and does not expressly condition the

obligation to transport nonpublic school students on the public schools being open. It found, instead, that obligation "stands as an independent mandate…" (R.16).

The court below acknowledged that courts must "interpret a statute, with full recognition of the underlying legislative intent…" However, they also must "give import to its plain meaning…" (R.10). In its view, N.Y. Education Law § 3635(1)(a) not only plainly establishes an "absolute" mandate, but the absence of an express restriction that limits the obligation to transport nonpublic students further "evinces a legislative intent not to limit the express terms thereof" (R.11).

The *amicus curiae* respectfully submits that the court below erred when it determined that N.Y. Education Law § 3635(1)(a) requires that school districts provide transportation to nonpublic school students every day their nonpublic school is open.

For all the reasons that follow and those discussed by the State Education Department and the Washingtonville Central School District in their respective briefs, this court should reverse the decision of the court below.

ARGUMENT

I. THE COURT BELOW ERRONEOUSLY DETERMINED THAT N.Y. EDUCATION LAW § 3635(1)(a) REQUIRES SCHOOL DISTRICTS TO PROVIDE TRANSPORTATION TO NONPUBLIC SCHOOL STUDENTS EVERY DAY THEIR NONPUBLIC SCHOOL IS OPEN.

It is a fundamental principle of statutory construction that when discerning the meaning of a statute "the primary consideration of the courts is to ascertain and give effect to the intention of the Legislature" (McKinney's Statutes § 92). Such intention is first to be sought in "the words and language used in the statute" (*Id.*, comments). When the literal reading of a statute fails to make its meaning clear, courts must then resort to authoritative sources of information that may legitimately reveal the requisite legislative intent and the use of all available aids to statutory construction (*Id.*, comments).

A. The statutory language at issue herein does not establish the Legislature's alleged intention to require that school districts provide transportation to nonpublic school students every day their nonpublic school is open.

According to the court below, the language of N.Y. Education Law § 3635(1)(a) "must be interpreted in accord with the plain meaning of its text" (R.14). In its view, the import of that text is that school districts have an obligation to transport all resident nonpublic school students on **all** days their nonpublic

school is open (R. 16). Absent express language to the contrary, the words of the statute establish the requisite legislative intent (R.11).

However, for a court to properly ascertain legislative intent from the literal reading of a statute, the words and language used must be both unambiguous and express the Legislature's intention "plainly, clearly and distinctly" (McKinney's Statutes § 76). For "it is clear intent, not clear language, which precludes further investigation as to the interpretation of a statute" (*Id*., comments).

The *amicus curiae* respectfully submits that the statutory language at issue herein fails to establish the requisite legislative intent. In this regard, it is significant that in reaching its conclusion, the court below also engaged in a review of "the primary legislative history" of N.Y. Education Law § 3635(1)(a). That history includes a constitutional amendment and subsequent implementing legislation (R. 14-15), the relevant text of which remains essentially the same to date (R. 15). When reviewing that history, the court below placed special emphasis on the statement of then Governor Nelson A. Rockefeller in an approval memorandum of the legislation that the law allows private school students to receive transportation "on a **parity** with public school pupils" (R. 15).

To better understand the reference to parity in this context it is helpful to consider the historical events that led to the constitutional amendment and implementing legislation referred to by the court below, as reflected in the New

York Court of Appeals decision in *Judd v. Board of Educ. of Union Free Sch. Dist. No. 2 of the Town of Hempstead*, 278 N.Y. 200 (1938).

That case involved a challenge to then section 206 of the Education Law which provided, in relevant part, that:

> Whenever…in any school district children of school age shall reside so remote from the schoolhouse therein or the school they legally attend…the inhabitants thereof entitled to vote are authorized to provide, by tax or otherwise, for the conveyance of any or all pupils residing therein…(b) to the school maintained in said district and to schools, other than public…(*Id.* at 203-204).

An issue arose when district voters approved an appropriation and tax levy to meet the appropriation for the transportation of students attending a parochial school. It was claimed that such appropriation violated then article IX of the State Constitution which provided, in relevant part, that "[p]rivate, denominational and sectarian schools…are no part of and are not within [the state's system of free common schools for the education of all children of this state]" (278 N.Y. at 204-206), and which also "restrict[ed] the use of all public moneys or moneys raised by taxation for educational purposes exclusively to the common schools" (*Id.* at 208).

The *amicus curiae* respectfully submits that the constitutional amendment and the implementing legislation referenced by the court below, and now found at N.Y. Education Law § 3635(1)(a), were intended to and simply removed that barrier. Their purpose was not to create an "independent mandate" (R. 16)

regarding the transportation of nonpublic school students, let alone a requirement for the transportation of such children every day their nonpublic school is open as determined by the court below.

"[T]he quest for legislative intent requires the courts to pierce all disguises of verbal expression, and go straight to the purpose of the bill, aided by formulated rules when they serve, but bound by no rules that hinder discovery of such intent" (McKinney's Statutes § 92, comments). "All available aids to statutory construction should be explored" in that pursuit (*Id.*). This, the court below failed to do.

For the foregoing reasons the decision of the court below interpreting N.Y. Education Law § 3635(1)(a) is erroneous and should be reversed.

B. The court below should have resorted to other aids of statutory construction to ascertain the legislative intent behind the enactment of the statutory provision at issue herein.

As more fully discussed above, a literal reading of N.Y. Education Law § 3635(1)(a) does not make its meaning clear. But even if it did, "the literal meaning of the words used must yield when necessary to give effect to the intention of the Legislature" (McKinney's Statutes § 111, comments). Departure from literal construction would be appropriate, for example, "to avoid a result so unreasonable or absurd as to force the conviction upon the mind that [it] could not have been

intended by the Legislature, and that if it had been presented to that body, it would have disclaimed [such] intention" (*Id*.).

The *amicus curiae* respectfully submits that irrespective of whether the language of N.Y. Education Law § 3635(1)(a) when considered in isolation makes its meaning clear, a reversal of the decision of the court below is necessary to avoid an unreasonable and absurd outcome.

For example, it is well settled that "[l]anguage of a portion of an act, which, when separated from the rest, is plain and unambiguous, may, when read in connection with the whole act, be thereby rendered ambiguous" and give rise to the need for statutory construction (McKinney's Statutes § 76, comments). Legislative intent is then to be determined by construing each part of the statute "in connection with the others. and each is to be kept in subservience to the general intent of the whole enactment" (McKinney's Statutes § 97, comments).

The statutory provision that underlies the dispute between the parties is one portion of the school transportation statute codified at N.Y. Education Law § 3635. Most relevant to the present case, paragraph (1)(a) establishes the obligation of school districts to provide transportation, while also setting specified distance limitations that trigger the availability of such transportation according to grade levels and the remoteness of a resident child's home from the school they attend. Paragraph (1)(b)(i) requires that school districts establish centralized pick-up

points from which to transport nonpublic school students to their school when they live too far from their nonpublic school to qualify for transportation between home and school, while exempting districts from any responsibility to transport nonpublic students from home to the pick-up point. Paragraph (1)(b)(ii) confers discretionary authority on school districts to provide transportation for nonpublic school students who live more than 15 miles from their school in certain specified situations.

Except as otherwise expressly provided in the statute, paragraph (1)(c) exempts city school districts other than the New York City school district from providing transportation to any of their resident students. Paragraph 2-a authorizes and requires the New York City school district to transport nonpublic school students **outside the days when its public schools are closed**, subject to conditions also specified in the statute.

The *amicus curiae* respectfully submits that it cannot be refuted that the general intent of N.Y. Education Law § 3635 is to provide for the transportation of resident children to and from the school they legally attend. Its separate parts set out the various strictures that apply to the provision of such transportation. Each part is connected and cannot be interpreted in a manner that is inconsistent with the others. Otherwise, there would be an "uncertainty of sense" in the statute which

statutory construction is not supposed to create (see McKinney's Statutes § 76, comments).

But uncertainty of sense in the statute is exactly what the decision of the court below engenders. That court's determination that paragraph (1)(a) imposes an independent mandate for school districts to provide transportation to nonpublic school students every day their nonpublic school is open can be deemed to conflict with the provisions of paragraph (1)(c), thereby bringing into question the continued validity of the longstanding exemption afforded to city school districts, other than New York City, from having to provide transportation to and from school to its resident children.

For all the foregoing reasons this court should reverse the decision of the court below.

C. Authoritative materials disregarded by the court below further establish the non-existence of a legislative intent to require that public school districts provide transportation to nonpublic school students every day that their nonpublic school is open.

Prior to the 1985 enactment of N.Y. Education Law § 3635(2-a) discussed above, there had been no legislative authority requiring the provision of transportation to nonpublic school students outside the days on which public schools are open. The court below disregarded the significance of that enactment and its legislative history to the resolution of the issues presently before this court.

Instead, it noted that "the legislature did not amend paragraph (1)(a) in 1985, and its continuing plain language is neither subject to, nor defeated by the [enactment of paragraph 2-a and its] legislative history" (R.14). In addition, there was "no showing that the legislature's intent in 1985 when it amended [N.Y. Education Law § 3635] to add paragraph 2-a, was the same as the legislative intent at the time paragraph (1)(a) was initially enacted in 1939…" (R. 13).

However, subsequent acts by the Legislature with reference to the same subject may be considered to determine "the legislative intent of an earlier statute or section" (McKinney's Statutes § 223, comments).

As more fully discussed above, the legislative history of paragraph (1)(a) and the historical events that led to its enactment evince a legislative intent to remove a previously existing constitutional barrier to the provision of transportation to nonpublic school students. It was not intended to require that school districts provide transportation to nonpublic school students every day that their nonpublic school is open.

The extensive legislative history of paragraph 2-a reflects the Legislature's intention to authorize and require the transportation of nonpublic school students in New York City for a maximum of five days during which the public schools will be closed. The conferral of that authority constituted the Legislature's response to the need of nonpublic schools in the City for greater flexibility in their scheduling

of session days because of public school closings during which the school district did not provide school bus transportation to nonpublic school students. Significantly, the five days in question were deemed alternative rather than additional so that the school district's aggregate obligation for transportation days remained the same.

The Legislature's enactment of paragraph 2-a occurred over 40 years after the initial enactment of paragraph (1)(a). Thus, the *amicus curiae* respectfully submits that if the court below properly interpreted paragraph (1)(a) to require the transportation of nonpublic school students every day their nonpublic school is open, there would have been no need for the enactment of paragraph 2-a. Along the same line of reasoning, there would have been no reason for the Legislature to ensure that the flexibility provided to school districts to schedule superintendent conference days in August and have those days count toward the required 180 days of session did not alter their obligation to provide transportation to nonpublic and charter school students (N.Y. Educ. Law § 3604 (8)).

The need for separate legislative action that authorizes and requires the transportation of nonpublic school students on days when public schools are closed is further reflected in subsequent amendments to paragraph 2-a enacted in 1997 and their legislative history. Those amendments extended the five days authorized in the initial enactment of paragraph 2-a to up to ten the days in years when the

first or last day of Passover and Easter are separated by more than seven days. They were necessary "to ensure that the New York City school district is legally authorized to provide [such extended] transportation…" (Sponsor's Mem., Bill Jacket. L.1997, Ch. 34).

Contrary to the determination of the court below, the fact that a similar authorization and requirement has not been imposed on school districts outside of New York City only reaffirms that any requirement for the provision of transportation to nonpublic school students when public schools are closed can be effectuated only pursuant to express legislative authority. Otherwise, the 1985 enactment N.Y. Education Law § 3635(2-a) and subsequent amendments thereto would not have been necessary. At that same time, the Legislature considered, and ultimately rejected, a proposal that would have required other school districts outside New York City to transport nonpublic students on days when public schools are closed, albeit for only two days. Thus, the Legislature was well aware that not only New York City but other school districts as well were not required to transport nonpublic school student on days when the public schools were closed.

Finally, the *amicus curiae* respectfully submits that an affirmance of the decision of the court below will have costly operational and staffing repercussions on school districts throughout the state. The transportation of children to and from school does not strictly involve having children in and out of the school bus. It

requires the maintenance of transportation facilities, the establishment of bus routes, the employment of bus drivers and at times school bus aides, and more.

Some school districts contract out the transportation of their students, while others transport children on their own. Unlike in New York City, most do not have a massive public transportation system that they can tap into for the transportation of students. For those who transport students themselves, there will be labor and financial issues associated with work assignments during periods when staff would normally have time off that will need to be resolved through collective negotiations that will undoubtedly involve additional remuneration costs.[1]

For all the foregoing reasons, the decision of the court below should be reversed.

[1] Not considered by the court below or any of the parties are the additional costs that will accrue from the transportation of charter school students who are treated as nonpublic school students for purposes of transportation under N.Y. Education Law § 3635 (N.Y. Educ. Law § 2853(4)(b)). As of February 2, 2022, a total of 408 charter schools have been approved to operate in New York State (http://www.nysed.gov/charter-schools/charter-schools-directory). It is noteworthy that the SUNY Charter Schools Institute, which operates as an agency independent of the New York State Department of Education on charter school related matters, is of the mind as well that school districts are not required to provide transportation when their public schools are closed (SUNY Charter Schools Institute, *Guidance Handbook, A Resource for Applicants Responding to the 2022 SUNY Request for Proposals*, p. 53, Jan. 2022 at: https://www.newyorkcharters.org/wp-content/uploads/2021/06/2022-SUNY-RFP-Guidance-Handbook.pdf).

CONCLUSION

For all the foregoing reasons, this court should reverse the Decision, Order and Judgment of the court below and grant any such further relief as this court may deem appropriate.

Dated: February 3, 2022
Albany, New York

Respectfully Submitted

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PRINTING SPECIFICATIONS STATEMENT

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used as follow:

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, proof of service, printing specification statement, or any authorized addendum containing statutes, rules, regulations, etc., is 3511.