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

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In the Matter of

UNITED JEWISH COMMUNITY OF BLOOMING GROVE, INC. et al.,

Petitioners-Plaintiffs-Respondents,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules and for Declaratory Relief Pursuant to Section 3001 of the Civil Practice Law and Rules

-against-

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

Respondents-Defendants-Appellants.
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Appellate Division
Docket No. 534406

Albany County Index
No. 906129-21

AFFIRMATION IN OPPOSITION TO MOTION FOR REARGUMENT AND IN ALTERNATIVE FOR PERMISSION TO APPEAL TO COURT OF APPEALS

MARK C. RUSHFIELD, ESQ. hereby affirms under penalty of perjury:

1. I am the attorney for the Respondent-Defendant-Appellant Washingtonville Central School District ("District") in this proceeding/action by the Petitioners-Plaintiffs-Respondents ("Petitioners") and, as such, am fully familiar with the facts and proceedings heretofore had herein.

2. I submit this Affirmation in opposition to the Respondent's motion for reargument as concerns this Court's June 2, 2022 Opinion and Order, by which the Court reversed the judgment below and "declared that respondent Washingtonville Central School District is not required to transport nonpublic school students on days when its public schools are closed; and it is declared that the State Education Department's transportation guidance, to

the effect that school districts outside New York City are permitted, but not required, to transport nonpublic school students on days when public schools are closed, is valid."

3. I further submit this affirmation in opposition to the Petitioners' alternative motion that this Court grant the Petitioners leave to appeal this Court's June 2, 2022 Opinion and Order to the Court of Appeals.

4. The Court's June 2, 2022 Opinion and Order was a unanimous decision by the Court.

5. The Petitioners' Affirmation in support of their motion simply constitutes a repeat of the Petitioners' argument on the very questions previously unanimously decided by this Court in its June 2, 2022 Opinion and Order, and as such, the Petitioner's motion for reargument should be denied. *Fosdick v. Hempstead*, 126 N.Y. 651, 652-653 (1891); *Foley v. Roche*, 68 A.D.2d 558, 567 (1st Dept. 1979).

6. The Petitioners' application to this Court for a grant of leave to appeal to the Court of Appeals should also be denied for the reasons set forth below.

7. The Petitioners do not provide the Court with a question to be certified for review by the Court of Appeals.

8. This Court's decision in its June 2, 2022 Opinion and Order, while the first and only appellate court decision on the statutory interpretation issue regarding Education Law § 3635(1)(a) raised by the Petitioners, is nonetheless fully consistent with the interpretive guidance issued by the New York State Department of Education ("SED") and the decisions of the New York Commissioner of Education, each rendered over the preceding decades, to the effect that Education Law § 3635(1)(a) does not mandate school districts throughout the State of New York to provide resident nonpublic school students with transportation on days on which the school districts' public schools are not in session.

9. The deference owed by this Court to those determinations is well established. *Ward v. Nyquist*, 43 N.Y.2d 57, 63 (1977) (noting that the Court's reasoning was consistent with the interpretation applied by the Commissioner and "the construction given statutes by the agency responsible for their administration should not be lightly set aside"). See also *Lezette v. Board of Education*, 35 N.Y.2d 272, 281 (1974) ("It is a cardinal principle of construction that, "[in] case of doubt, or ambiguity, in the law it is a well-known rule that the practical construction that has been given to a law by those charged with the duty of enforcing it, as well as those for whose benefit it was passed, takes on almost the force of judicial interpretation.") and *Matter of Board of Educ. of the Minisink Valley Cent. Sch. Dist. v. Elia*, 170 A.D.3d 1472, 1473-1474 (3d Dept. 2019) ("Deference is therefore afforded to the Commissioner's determination where, as here, it is based upon her expertise in applying an ambiguous statutory and regulatory framework.").

10. It is submitted that there was nothing particularly novel or new about this Court's interpretation and application of Education Law § 3635(1)(a) through its June 2, 2022 Opinion and Order. The only thing novel in this case was the Petitioners' temerity in challenging SED's and the Commissioner of Education's interpretation of Education Law § 3635(1)(a), each of which had been operational, uniformly honored in that application by school districts throughout the State of New York and unchallenged settled law from the inception of that statute. Further, as this Court recognized, SED's and the Commissioner of Education's decades-long interpretation of Education Law § 3635(1)(a) was the only interpretation consistent with the legislative history of Education Law § 3635.

11. Finally, this Court's interpretation of Education Law § 3635(1)(a) as set forth in its June 2, 2022 Opinion and Order is the only interpretation consistent with Education Law

§ 3604(8), which provides that while a school district may elect to schedule its superintendent's conference days, i.e., days on which there is no public school student attendance, in the last two weeks of August, "such scheduling shall not alter the obligation of the school district to provide transportation to students in non-public elementary and secondary schools," a proviso that would be superfluous if, as Petitioners argue, Education Law § 3635(1) mandates that whenever a non-public school is in session but the public schools are not in session, the public school district in which the non-public school student resides must provide the student with publicly funded transportation to the non-public school the student attends. It is well established that a statute should be construed to avoid rendering any of its provisions superfluous. *Kimmel v. State of New York*, 29 N.Y.3d 386, 393 (2017).

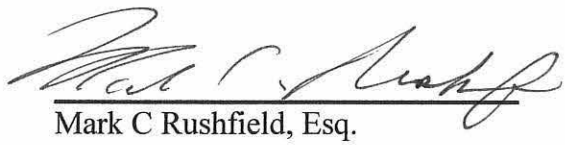
12. There is no administrative or appellate court ruling concerning Education Law § 3635(1)(a) contrary to that rendered by this Court in its June 2, 2022 Opinion and Order, and the only contrary trial court ruling was the judgment reversed by this Court through its June 2, 2022 Opinion and Order.

13. It is submitted that there is, consequently, nothing warranting this Court granting the Petitioners' leave to appeal to the Court of Appeals from this Court's June 2, 2022 Opinion and Order.

14. I affirm that the foregoing statements are true. I am aware that if they are willfully false, I am subject to punishment.

WHEREFORE, it is respectfully requested that the Court deny the motion of the Petitioners-Plaintiffs-Respondents for reargument or, in the alternative, for this Court to grant them leave to appeal to the Court of Appeals from this Court's June 2, 2022 Opinion and Order in all respects and grant the District such other and further relief as the Court may deem just and proper.

Dated: July 1, 2022



Mark C Rushfield, Esq.

CERTIFICATE OF COMPLIANCE

I, Mark C. Rushfield, Esq., attorney of record for the District Defendant, do hereby certify that the foregoing affirmation complies with the Length-of-Papers limitation as set forth in Uniform Civil Rules Section 202.8-b. The total number of words in the foregoing affirmation is 1,043.

Dated: July 1, 2022

Mark C. Rushfield, Esq.