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

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

Petitioners/Plaintiffs-Respondents,

v.

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

Respondents/Defendants-Appellants.

AFFIRMATION IN OPPOSITION TO MOTION FOR REARGUMENT OR LEAVE TO APPEAL

A.D. No. 534406

BEEZLY J. KIERNAN, an attorney admitted to practice before the courts of this State, affirms the following under penalty of perjury:

1. I am an Assistant Solicitor General in the Division of Appeals & Opinions of the office of Letitia James, Attorney General of the State of New York. I represent respondent New York State Education Department (SED) in this appeal. Respondent Washingtonville Central School District (Washingtonville) is separately represented.

2. I submit this affirmation in opposition to petitioners' motion for reargument or, alternatively, leave to appeal the unanimous Opinion and Order of this Court dated June 2, 2022. This Court reversed Supreme Court's

judgment and declared, among other things, that SED's 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." (Opinion and Order at 9.)

3. Petitioners brought this hybrid declaratory judgment action and C.P.L.R. article 78 proceeding seeking to set aside SED's guidance as inconsistent with Education Law § 3635. Section 3635 requires central school districts to provide "[s]ufficient transportation facilities" for resident school children "to and from the school they legally attend." Education Law § 3635(1)(a). According to petitioners, this law requires school districts—including Washingtonville—to transport nonpublic school children whenever their nonpublic schools choose to be open.

4. Petitioners' interpretation of Education Law § 3635 is not mandated by the plain text of the statute, which merely requires "sufficient" transportation for public and nonpublic school children alike. Nor can petitioners point to any authority over the statute's 80-year history supporting their interpretation. Indeed, petitioners' interpretation runs counter to longstanding practice. Central school districts have not regarded § 3635 as requiring transportation for nonpublic school students whenever their nonpublic schools are in session. Rather, school districts have long transported nonpublic school students only on days when their public schools are open.

Legislative history reveals the Legislature's awareness of, and acquiescence in, this practical construction. And this construction is consistent with SED's guidance for at least the past 30 years, as well as decisions by the Commissioner of Education.

5. Nevertheless, Supreme Court granted the petition, annulled SED's guidance, and directed Washingtonville "to provide transportation to all nonpublic school students on all days that the nonpublic schools are open for instruction." (Record [R.] 17.)

6. In reversing Supreme Court's judgment, this Court first observed that the plain language of Education Law § 3635 lacks "any explicit direction as to *when* . . . transportation must be provided." (Opinion and Order at 4.) Because petitioners and respondents both offered "arguably persuasive" interpretations of the statute (Opinion and Order at 4), the Court next turned to legislative history to ascertain legislative intent.

7. In examining legislative history, the Court focused on a 1985 amendment which required the New York City school district "to provide for transportation" to nonpublic schools on five alternative days when those nonpublic schools were open while public schools were closed. Education Law § 3635(2-a). The Court noted that the purpose of this amendment "was to expand the number of required transportation days, and not to limit a previously unrestricted transportation obligation." (Opinion and Order at 5

[citing SED Mem. in Support, Bill Jacket, L. 1985, ch. 902 at 19].) The Court further noted that the Legislature considered, but ultimately omitted, a similar requirement for central school districts, "manifesting its intent not to require central school districts to provide transportation to nonpublic school students on days that public schools are closed." (Opinion and Order at 6.)

8. The Court found other legislative history instructive as well. As the Court noted, the Legislature has considered several bills that would have mandated transportation for nonpublic school children on certain days when public schools were closed, but none have passed. Nor has the Legislature intervened "to correct SED's longstanding interpretation of Education Law § 3635." (Opinion and Order at 6.)

9. Finally, the Court rejected Supreme Court's (and petitioners') interpretation of Education Law § 3635 "not only because it runs afoul of the legislative history, but also because it would lead to unreasonable results." (Opinion and Order at 6.) Under Supreme Court's broad interpretation, the Court explained, school districts could be required "to transport nonpublic school students in the summer, on weekends, on state or federal holidays, or on days when public schools are closed for weather-related or other emergency reasons." (Opinion and Order at 6-7.) "[T]he Legislature could not have intended" such a result. (Opinion and Order at 6.)

10. The Court also rejected petitioners' alternative claims that SED's guidance violates the State Constitution, the State Administrative Procedure Act, and the separation of powers doctrine. Petitioners do not seek reargument or leave to appeal on those grounds.

REARGUMENT IS NOT WARRANTED BECAUSE THE COURT CORRECTLY INTERPRETED EDUCATION LAW § 3635 ACCORDING TO ITS LONGSTANDING PRACTICAL CONSTRUCTION

11. Petitioners' motion presents no basis for an order granting reargument. The Court did not overlook or misapprehend any controlling law, as petitioners contend. (Mot. at 12 [citing C.P.L.R. 2221(d)(2)].) Rather, the Court correctly held both that the text of Education Law § 3635 is ambiguous and that legislative history conclusively supports SED's interpretation of the statute.

A. The Court Correctly Held that Education Law § 3635 Is Vague Insofar as It Does Not State When Transportation Must Be Provided.

12. Petitioners first contend that the Court should not have resorted to legislative history because, in petitioners' view, Education Law § 3635 is unambiguous on its face. (Mot. at 12-17.)

13. As an initial matter, petitioners fail to show that the Court's analysis misapprehended any principles of statutory interpretation. To the contrary, the Court recognized that "the clearest indicator of legislative intent is the statutory text." (Opinion and Order at 3 [quoting *Majewski v Broadalbin-*

Perth Cent. School Dist., 91 N.Y.2d 577, 583 (1998)].) After examining the text and finding it ambiguous, the Court properly resorted to legislative history. *See Matter of Shannon*, 25 N.Y.3d 345, 352 (2015); *People v. Ballman*, 15 N.Y.3d 68, 72 (2010). Petitioners fail to demonstrate that this reasoning misapprehended any statutory interpretation principles. At most, petitioners merely disagree with the Court's application of those principles and seek to relitigate whether the text is ambiguous. But reargument does not provide petitioners with the opportunity to relitigate this previously-decided issue. *See Ahmed v. Pannone*, 116 A.D.3d 802, 805 (2d Dep't 2014), *lv. dismissed*, 25 N.Y.3d 964 (2015).

14. Petitioners' argument is meritless in any event. As the Court explained, the text is "silent as to when transportation must occur." (Opinion and Order at 4.) The statute contains no explicit direction to school districts to transport nonpublic school children "on all days when their nonpublic schools are open for instruction," as petitioners suggest. (Mot. at 15.) And while petitioners assert that timing may be inferred from the requirement that school districts transport resident school children "to and from the school they legally attend" (Mot. at 15 [quoting Education Law § 3635(1)(a)]), that language addresses *where*, not *when*, transportation must be provided.

15. The Court further correctly held that "the parties' conflicting interpretations" are both "at least arguably persuasive." (Opinion and Order

at 4.) Under SED's interpretation, nonpublic school children receive "sufficient transportation"—which is all that is required by the statute—when school districts offer transportation on the same days to public and nonpublic school children alike. "Equality is what was intended," petitioners say (Mot. at 17), and under SED's interpretation, equality is what is offered. Of course, nonpublic schools have the right to open when public schools are closed. But nothing in the text of Education Law § 3635 suggests that school districts have the concomitant obligation to provide transportation services *whenever* nonpublic schools choose to be open.

16. Thus, the Court correctly found that Education Law § 3635 is ambiguous and properly proceeded to examine legislative history.

B. The Court Correctly Held that the History of Education Law § 3635 Supports SED's Longstanding Interpretation.

17. Petitioners next contend that the Court misapprehended statutory interpretation principles in finding that legislative history supports SED's interpretation of Education Law § 3635. (Mot. at 17-25.) Again, however, petitioners merely disagree with the Court's analysis, and thus fail to show any basis for reargument.

18. Petitioners' critique of the Court's legislative history analysis is meritless in any event. Petitioners first argue that Education Law § 3635 is a remedial statute and therefore should be broadly construed. (Mot. at 18, 20.)

Petitioners did not make this argument in their brief on appeal, and cannot do so for the first time in seeking reargument. *See Ahmed*, 116 A.D.3d at 805. Moreover, petitioners fail to show that § 3635 is a remedial statute, *i.e.*, a statute "designed to correct imperfections in prior law[] by . . . giving relief to the aggrieved party." *People v. Dyshawn B.*, 196 A.D.3d 638, 640 (2d Dep't 2021) (citation omitted). Nor can they show that SED's longstanding interpretation of § 3635 "vitiates its [purported] remedial purpose." *Matter of Scanlan v. Buffalo Pub. School Sys.*, 90 N.Y.2d 662, 677 (1997). Under SED's interpretation, school districts are obligated to transport nonpublic school children on the 180 days when the public schools are open.

19. Petitioners also fault the Court for ignoring numerous amendments to Education Law § 3635 that either expanded or restricted the transportation obligation (Mot. at 19), but none of those amendments is germane to the issue here.

20. Instead, the Court properly focused on the Legislature's repeated consideration—and rejection—of bills that would have required central school districts to transport nonpublic school children even when public schools are closed. Most notably, when the Legislature amended Education Law § 3635 in 1985 to require the New York City school district to provide five (or ten, depending on the year) alternative days of transportation, the Legislature considered a similar requirement for central school districts to provide two

alternative days of transportation when public schools are closed. But that provision was omitted from the final bill. As the Court explained, the provision faced strong opposition from "New York State United Teachers and New York State School Boards Association, both of which opined that it would impose significant financial and administrative burdens upon central school districts and interfere with negotiated contracts." (Opinion and Order at 5 [citing Mem. in Opposition, N.Y. State School Bds. Ass'n, Bill Jacket, L. 1985, ch. 902 at 23; Letter in Opposition, N.Y. State United Teachers, Bill Jacket, L. 1985, ch. 902 at 26-27]). The Legislature thus "manifest[ed] its intent not to require central school districts to provide transportation to nonpublic school students on days that public schools are closed." (Opinion and Order at 6.)

21. Petitioners' alternative reading of this 1985 amendment—that by omitting the two-day requirement for districts outside New York City in the final bill, the Legislature rejected a *limitation* on the number of alternative days when central school districts must provide transportation to nonpublic school students (Mot. at 21-22)—ignores the legislative history the Court carefully examined. Likewise, petitioners ignore the probative value of other legislative history, namely the multiple other bills that would have mandated transportation for nonpublic school children on certain days when public schools are closed—none of which passed—and the Legislature's failure to

intervene "to correct SED's longstanding interpretation of Education Law § 3635." (Opinion and Order at 6.)

C. The Court Correctly Held that Petitioners' Interpretation Would Lead to Unreasonable Results.

22. Petitioners' final contention in support of reargument—that the Court misapprehended legal principles in finding that Supreme Court's interpretation of Education Law § 3635 would lead to unreasonable results (Mot. at 25-27)—is similarly meritless. As petitioners themselves recognize, Supreme Court interpreted § 3635 as requiring transportation for nonpublic school children to and from their schools "*without limitation*." (Mot. at 3 [emphasis added]; *see also* R. 17.) Insofar as this interpretation could require transportation over the "summer, on weekends, on state or federal holidays, or on days when public schools are closed for weather-related or other emergency reasons," this Court correctly viewed Supreme Court's interpretation as leading to unreasonable results. (Opinion and Order at 6-7.) *See People ex rel. McCurdy v. Warden, Westchester County Corr. Facility*, 36 N.Y.3d 251, 262 (2020); *Lubonty v. U.S. Bank N.A.*, 34 N.Y.3d 250, 255 (2019).

THIS APPEAL DOES NOT PRESENT ANY LEAVE-WORTHY ISSUES

23. For all the reasons already discussed, petitioners do not present any meritorious issues for the Court of Appeals to address. Nor are the issues otherwise leave-worthy. This Court's decision does not present a conflict with

the prior decisions of the Court of Appeals or any other department of the Appellate Division. Nor does it raise a novel issue of public importance. *See* 22 N.Y.C.R.R. § 500.22(b)(4). Rather, this Court's decision applies settled principles of statutory interpretation to the facts of this case.

24. Moreover, the Court should not grant leave to appeal merely because the relief petitioners seek would significantly disrupt the status quo, as petitioners appear to suggest. (Mot. at 8, 28.) Disruption is to be expected whenever a party challenges a long-settled interpretation of a statute with statewide implications. But when that challenge is meritless—when the challengers can point to no authority whatsoever in support of their alternative interpretation of the statute—there is no basis for granting leave to appeal.

WHEREFORE, this Court should deny petitioners' motion for reargument or, alternatively, for leave to appeal.

Dated: July 7, 2022
Albany, New York

/s/ Beezly J. Kiernan
BEEZLY J. KIERNAN
Assistant Solicitor General

TO: Robert D. Mayberger, Clerk
Supreme Court of the State of New York
Appellate Division, Third Department
Robert D. Abrams Building for Law and Justice
State Street, Room 511
Albany, New York 12223

Robert S. Rosborough, Esq.
Attorney for Petitioners
Whiteman Osterman & Hanna LLP
One Commerce Plaza
Albany, NY 12260

Mark C. Rushfield, Esq.
Attorney for Appellant Washingtonville Central School District
Shaw, Perelson, May & Lambert, LLP
21 Van Wagner Road
Poughkeepsie, New York 12603