A.D. No. 534406

State of New York
Court of Appeals

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,

Appellants,

v.

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

Respondents.

MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO APPEAL

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Dated: October 11, 2022

Supreme Court, Albany County – Index No. 906129-21

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PRELIMINARY STATEMENT

Education Law § 3635 requires that central school districts provide "[s]ufficient transportation facilities" for resident school children to and from their schools. Under the State Education Department (SED)'s longstanding interpretation of that statute, central school districts must provide transportation for nonpublic school students when the public schools are open, while schools districts may, but are not required, to provide such transportation on days when public schools are closed. The Appellate Division, Third Department upheld that interpretation in a unanimous opinion and order entered June 2, 2022. Petitioners now move for leave to appeal.

The motion should be denied. Petitioners present no question worthy of this Court's review. The Third Department correctly interpreted Education Law § 3635 in light of statutory text and history. And petitioners point to no authority supporting their interpretation of the statute, under which central school districts would be required to transport nonpublic school students whenever the nonpublic schools choose to be open. Petitioners' equal protection challenge to the statute likewise fails. Thus, the Court should deny leave to appeal.

BACKGROUND

Petitioners reside in Washingtonville Central School District (Washingtonville) and send their children to nearby nonpublic schools. They filed this hybrid C.P.L.R. article 78 proceeding and declaratory judgment action seeking to set aside SED's interpretation of Education Law § 3635. According to petitioners, this law requires central school districts—including Washingtonville—to transport nonpublic school children whenever their nonpublic schools choose to be open. Alternatively, petitioners argue that such transportation is required by the New York State Constitution's Equal Protection Clause.

Petitioners' interpretation of Education Law § 3635 runs counter to longstanding practice and SED guidance. 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 the public schools are open. This construction is consistent with SED's guidance for at least the past 30 years, as well as decisions by the Commissioner of Education. Nevertheless, Supreme Court, Albany County (Lynch, J.), granted the petition, annulled SED's guidance, and

directed Washingtonville to provide transportation to all nonpublic school students on all days that their nonpublic schools are open for instruction.

The Third Department reversed. The 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.

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].) And 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.) Moreover, 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.)

The Third Department further rejected petitioners' interpretation of Education Law § 3635 "because it would lead to unreasonable results." (Opinion and Order at 6.) Under petitioners' 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.)

Finally, the Third Department rejected petitioners' alternative argument that Education Law § 3635, as interpreted by SED, violates equal protection. As the court noted, § 3635 "does not create a suspect

classification." (Opinion and Order at 7.) And SED articulated a rational basis for treating public and nonpublic schools differently: "the financial and administrative burdens that would be imposed upon school districts if they were required to transport nonpublic school students on days when public schools are closed." (Opinion and Order at 7-8.)

The Third Department denied petitioners' motion for reargument or, alternatively, leave to appeal. This motion followed.

ARGUMENT

THE MOTION PRESENTS NO QUESTION WORTHY OF LEAVE

The Third Department correctly upheld SED's longstanding interpretation of Education Law § 3635. Under that interpretation, central school districts may—but are not required to—provide transportation for resident nonpublic school students on days when the district's public schools are closed. Petitioners' challenge to the Third Department's decision raises no recurring question of public importance, nor any question that implicates a conflict of decisions among the departments of the Appellate Division or with prior decisions of this Court. *See* 22 N.Y.C.R.R. § 500.22(b)(4). Thus, the Court should deny the motion for leave.

First, petitioners argue that the text of Education Law § 3635 unambiguously requires central school districts to transport nonpublic school children whenever their nonpublic schools choose to be open. (Mot. at 32-37.) But no such requirement exists on the face of the statute. As the Third Department observed, the text is "silent as to when transportation must occur." (Opinion and Order at 4.) 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 34 [quoting Education Law § 3635(1)(a)]), that language addresses *where*, not *when*, transportation must be provided.

The Third Department further correctly held that SED's interpretation of Education Law § 3635 is "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. Petitioners contend that "equality is what was intended" (Mot. at 36), 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 § 3635 suggests that school districts have the concomitant obligation to provide transportation services *whenever* nonpublic schools choose to be open.

Second, petitioners challenge the Third Department's extensive review of the statute's history. (Mot. at 37-50.) Yet petitioners cite no authority from the statute's 80-year history supporting their interpretation. Rather, as the Third Department correctly held (Opinion and Order at 6), that history conclusively supports SED's interpretation of the statute.

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. Nothing in the legislative history supports petitioners' claim (Mot. at 43-45) that the Legislature thereby rejected a *limitation* on the number of alternative days central school districts must transport nonpublic school students.

Rather, as the Third Department 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]).

Thus, in 1985, the Legislature "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.) And the Legislature has made the same choice—rejecting bills that would have mandated transportation for nonpublic school students on certain days when public schools are closed—in 1981, 1983, 1999, and 2001. *See* 1981 N.Y. Senate Bill S68; 1983 N.Y. Senate Bill S4989; 1999 N.Y. Assembly Bill A7382C; 2001 N.Y. Assembly Bill A150. Clearly the Legislature has long been aware that school districts, in accordance with SED's interpretation of Education Law § 3635, do not provide transportation whenever nonpublic schools are open. And the

Legislature has repeatedly considered, and rejected, attempts to override this longstanding interpretation. This legislative history strongly suggests the Legislature's approval of SED's construction of the statute. *See Greater N.Y. Taxi Ass'n v. New York City Taxi & Limousine Comm'n*, 25 N.Y.3d 600, 612 (2015); *Engle v. Talarico*, 33 N.Y.2d 237, 242 (1973).

Bereft of authority supporting their interpretation of the statute, petitioners turn to the argument that Education Law § 3635 is a remedial statute, and therefore should be broadly construed. (Mot. at 38-39.) But that argument was not made to the Third Department and is not preserved for this Court's review. *See Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355, 359 (2003). Nor can petitioners 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. Neither text, nor history, nor statutory purpose requires anything more.

Third, petitioners argue that Education Law § 3635, as interpreted by SED, violates the New York State Constitution's Equal Protection

Clause. (Mot. at 51-56.) Because § 3635 creates no suspect classification, it is subject only to the rational basis test, which it readily satisfies. As the Third Department held (Opinion and Order at 7-8), there is a rational basis for requiring school districts to transport nonpublic school children only on days when its public schools are open: transportation on days when public schools are closed would impose financial and administrative burdens on school districts. Petitioners are not constitutionally entitled to transportation services beyond what § 3635 already provides.

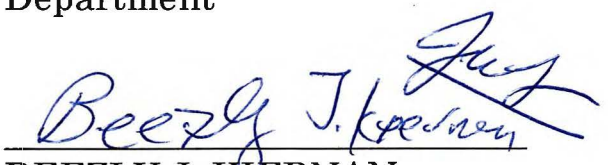
CONCLUSION

The motion for leave should be denied.

Dated: Albany, New York
October 11, 2022

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for State Education Department

By: 
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AFFIRMATION OF COMPLIANCE

Pursuant to the Rules of Practice of the New York Court of Appeals (22 N.Y.C.R.R.) § 500.13(c)(1), Beezly J. Kiernan, an attorney in the Office of the Attorney General of the State of New York, hereby affirms that according to the word count feature of the word processing program used to prepare this brief, the brief contains 1,761 words, which complies with the limitations stated in § 500.13(c)(1).

Beezly J. Kiernan

BEEZLY J. KIERNAN p

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OF THE STATE OF NEW YORK

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Third Dept. AD No. 534406

STATE OF NEW YORK
COUNTY OF ALBANY ss:
CITY OF ALBANY

WILLIAM SPORTMAN being duly sworn says:

I am over eighteen years of age and an employee in the office of the Attorney General of the State of New York, attorney for the **Respondent State Education Department**, herein.

On the **11th** day of **October, 2022** I served the annexed **Memorandum in Opposition to Motion for Leave to Appeal** on the attorneys named below, by depositing 1 copy thereof, properly enclosed in a sealed, postpaid wrapper, in the letter box of the Capitol Station post office in the City of Albany, New York, a depository under the exclusive care and custody of the United States Postal Service, directed to the said attorneys at the addresses within the State respectively theretofore designated by them for that purpose as follows:

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Sworn to before me this
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NOTARY PUBLIC

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Commission Expires April 2, 2024