APL-2022-00181

To Be Argued By: Robert S. Rosborough IV
Time Requested: 15 Minutes

Court of Appeals
of the
State of New York

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-Appellants,

-against-

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

Respondents/Defendants-Respondents.

BRIEF FOR PETITIONERS/PLAINTIFFS-APPELLANTS

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Appellate Division, Third Department Appeal No. 534406
Albany County Index No. 906129-21

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of this Court's rules, Petitioner/Plaintiff-Appellant United Jewish Community of Blooming Grove, Inc. hereby states that it does not have any parents, subsidiaries, or affiliates.

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Petitioners/Plaintiffs-Appellants United Jewish Community of Blooming Grove, Inc., Joel Stern, and Yitzchok Ekstein, and their children (collectively, "Petitioners" or "UJC") respectfully submit this brief in support of their appeal from the Opinion and Order of the Supreme Court, Appellate Division, Third Department (Clark, J.P., Pritzker, Colangelo, Ceresia, and McShan, JJ.), dated and entered June 2, 2022, which reversed the order and judgment of Supreme Court, Albany County dated November 18, 2021, denied UJC's motion for summary judgment, granted Respondent State Education Department's cross motion for summary judgment, 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 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."

JURISDICTIONAL STATEMENT

This Court has jurisdiction over this appeal pursuant to CPLR 5602(a)(1)(i), because this Court granted leave to appeal from the Appellate Division order, which finally disposed of all issues in this proceeding within the meaning of the New York Constitution. The Appellate Division order reversed the Supreme Court judgment, denied UJC's motion for summary judgment, granted SED's cross motion for summary judgment, declared that the District is not required to transport nonpublic school students on days when its public schools are closed, and declared that SED's transportation guidance and District policies were valid. The Appellate Division order, therefore, finally disposed of all of UJC's claims in their entirety.

QUESTIONS PRESENTED

1. Does Education Law § 3635(1)(a) grant all nonpublic school students who reside within central school districts the same right to transportation to and from school every day their nonpublic schools are open for instruction, as is provided to public school students across New York State, including on days during the normal school year and normal school week that are not legal or statutory holidays but the public schools nevertheless choose to close?

The Appellate Division erroneously held that section 3635(1)(a) does not grant nonpublic school students equal transportation rights to those provided to their public school counterparts. Rather, the Appellate Division held that central school districts may deny transportation to nonpublic school students on days when the public schools choose to be closed, even though the students' nonpublic schools are open.

This issue has been raised and preserved at R5-R9, R57-R67, R79-R80, and R767-R768 of the Record on Appeal, and at pages 21-43 of UJC's Appellate Division brief.

2. If Education Law § 3635(1)(a) does not require central school districts to provide transportation to nonpublic school students on days that are not legal or statutory holidays but central school districts choose to be closed, even though the nonpublic schools are open, as the Appellate Division held, does section 3635(1)(a) violate the nonpublic school students' right to equal protection of the law under the New York Constitution because they are denied equal transportation rights to those guaranteed to public school students—transportation to and from school on every day their schools are open for instruction during the normal school year and normal school week?

The Appellate Division order erroneously held that Respondents provided a rational basis for section 3635(1)(a) denying nonpublic school students equal transportation rights because to do so would be administratively and financially burdensome, notwithstanding that the District already contracts with a private transportation company to provide these same transportation services to nonpublic school students on days the public schools are open, thus minimizing any additional administrative burden providing the same transportation routes on days when the District chooses to close, and the Legislature made the

intentional choice in the statute to place the financial burden of transportation on the public school districts.

This issue has been raised and preserved at R9-R10, R83-R84, R768 of the Record on Appeal, and at pages 44-50 of UJC's Appellate Division brief.

3. Did SED exceed its statutory authority under Education Law § 3635(1)(a) and violate 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?

The Appellate Division erroneously held that SED's guidance authorizing central school districts to deny transportation to nonpublic school students on days when the public schools are closed does not violate section 3635(1)(a) or the State Administrative Procedure Act.

This issue has been raised and preserved at R10, R80-R83, R768 of the Record on Appeal, and at pages 50-54 of UJC's Appellate Division brief.

PRELIMINARY STATEMENT

Before 1939, New York's nonpublic school students had to find their own way to get to and from their schools. While New York's public school students were provided transportation on every school day, the New York Constitution forbid direct aid to religious schools, and this Court held that that provision foreclosed the public schools from providing transportation to nonpublic school students that attended religious schools.

The People of this State did not stand for such inequality. In response to this Court's holding, the voters amended the New York Constitution to allow the Legislature to guarantee equal transportation for all of New York's children. In 1939, the Legislature mandated that public school districts "*shall*" provide transportation "for *all the children* residing within the school district to and from the school they legally attend" (L 1939, ch 465, § 5 [emphasis added]). The Legislature's intent was clear: after nonpublic school students were denied transportation merely because they attended religious schools, all students in New York were to be guaranteed the same transportation "to and from the school they legally attend," public or nonpublic. And for the last 80-plus

years, those words guaranteeing equal transportation to *all the children* in New York have remained the same.

Transportation to and from school remains today an essential part of a child's education. For many of the approximately 360,000 nonpublic school students across New York,[1] busing provided by the public school district is the only way they can get to their schools. Many parents' work schedules prevent them from bringing their children to and from school each day. Many other parents have only one car that they have to take to get to and from work. Some have no car at all. Still others have children of different ages attending nonpublic schools in different locations, so it is impossible to get each child to or from school at the same time. Indeed, as the Legislature has long recognized, "the right to attend a nonpublic school is *meaningless* if the pupil has no way of getting to and from school" (Bill Jacket, L 1974, ch 755, at 9 [emphasis added]).

The transportation the Legislature has mandated public school districts provide to nonpublic school students is intended to fix these

[1] This data was taken from NYSED.gov, Information and Reporting Services https://www.p12.nysed.gov/irs/statistics/nonpublic/home.html (last accessed July 17, 2023), of which this Court can take judicial notice.

problems outside of large metropolitan areas. Under Education Law § 3635(1)(a), which still uses the same words that the Legislature adopted in 1939, the Legislature has mandated that central school districts outside of New York's cities "*shall*" provide transportation "for *all* the children residing within the school district" from kindergarten through 12th grade, within certain distances from their schools. All the children means all the children, regardless of whether they attend the public or nonpublic schools. Parity between public and nonpublic school students is precisely what the Legislature sought to achieve, after nonpublic school students had been denied transportation to and from school for so long before 1939. Yet, in practice, Respondents' transportation policies still today continue to deny nonpublic school students the same transportation rights that are granted to their public school counterparts, in contravention of section 3635(1)(a)'s mandate.

While public school students receive transportation to and from school every day that their schools are in session during the school year, nonpublic school students do not. They are only provided transportation when the public schools are open. That inequality is what the Appellate Division erroneously concluded was "sufficient" under section

3635(1)(a). 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 the transportation they are required to receive under section 3635(1)(a) on the many days when the public schools are closed, but the nonpublic schools remain open. For example, in the Village of Kiryas Joel, the Hasidic Jewish religious schools that the student Petitioners attend 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. Yet, the District refuses to provide transportation on those days merely because it chooses to be closed.

Education Law § 3635(1)(a) 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 only merely when it is convenient for a school district to do so. Because public school students receive transportation every day their schools are open for instruction during the normal school week and school year, section 3635(1)(a) guarantees nonpublic school students the same. Any other construction would

imperil the statute's constitutionality, because it would deny nonpublic school students equal protection of the laws, a result this Court's precedent teaches should be avoided.

This Court should construe section 3635(1)(a) to serve its remedial purpose—to provide equal transportation to nonpublic school students to and from school—and should therefore reverse the Appellate Division's interpretation that would allow Respondents to continue to perpetuate the structural inequity that the Legislature sought to eliminate when it first adopted the transportation mandate in 1939. Indeed, failure to do so would leave New York's nonpublic school students questioning whether a public school bus will arrive at their door each school day, or whether they and their parents will be left scrambling to find a different way to and from school on days their public school district chooses to be closed. This Court should not permit New York's nonpublic school students to continue to be relegated to second class citizens under section 3635(1)(a)'s transportation mandate.

STATUTORY BACKGROUND

To understand the issues and procedural history in this case, it is important first to grasp the statutory context in which it arises. Under

Education Law § 3635, the Legislature has created two very different school transportation regimes for city and non-city central school districts. For central school districts, the Legislature has expressly mandated that the schools provide nonpublic school students with transportation to and from their nonpublic schools. For city school districts, on the other hand, the Legislature has authorized, but does not require, city school districts to provide transportation to and from nonpublic schools. The Legislature has only chosen to impose certain transportation requirements on city school districts if they first voluntarily elect to provide nonpublic school students with transportation.

The Appellate Division order confused these two distinct transportation regimes, and improperly used a 1985 legislative amendment that applied only to the New York City School District to limit the scope of the mandatory transportation that central school districts must provide. This Court should correct that mistake, and reaffirm the Legislature's purposeful choice to provide equal transportation to *all the children* in New York, public and nonpublic school students alike.

A. The Transportation Mandate for Central School Districts

Education Law § 3635(1)(a) currently provides that "[s]ufficient transportation facilities (including the operation and maintenance of motor vehicles) *shall be provided*" by all central school districts "for all the children residing within the school district to and from the school they legally attend." Those words are clear and have remained largely unchanged since their adoption in 1939. The Legislature guaranteed that nonpublic school students residing within the boundaries of a central school district would have transportation, provided by that district, "to and from school" on each day that their nonpublic schools are open for instruction, just like the district must provide to public school students.

When the mandatory statutory language and legislative history is viewed as a whole, the Legislature's intent to guarantee equal transportation for nonpublic school students outside New York's cities 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 section 3635(1)(a)'s equal transportation guarantee, it did so expressly, including by

imposing distance limitations or requiring parents to make a formal request each year for transportation to and from their children's nonpublic schools. Because the Legislature has not expressly limited central school districts' obligation to provide transportation to and from nonpublic schools on days when they choose to close, the Appellate Division erroneously read such a limitation into the statute.

1. New York's First Transportation Guarantee and the Constitutional Challenge.

Before 1936, New York did not allow public school districts to provide transportation to nonpublic religious school students. The New York Constitution, at the time, prohibited the use of 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). Because transportation to and from religious schools was considered direct aid, it was forbidden.

In 1936, the Legislature amended 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). It did so to ensure that all students, public and nonpublic alike, would receive the same transportation to and from school. For example, as one Catholic priest argued in support of the amendment:

> Transportation to parochial school children on the regular school busses is not requested as a charity or a favor or a class legislation, but in equity and justice for taxes paid. Catholics have saved for the State of New York millions of dollars by their parochial school system. This, of course, was and is their own affair. But, when both branches of the legislature unanimously accorded the children of Catholics transportation on the regular school busses, supported by tax money paid in part by the Catholic citizens, they accorded to the children of Catholics what was due to them in equity, fair play and ordinary justice

(Ltr from Province of the Immaculate Conception to Gov. of State of N.Y., Bill Jacket, L 1936, ch 541, at 8).

Indeed, SED itself construed the law to require equal transportation for nonpublic school students using substantially similar facilities (e.g., buses or other vehicles) to those provided to public school students:

> [C]hildren attending private or parochial schools are entitled to receive transportation at the expense of the school district in accordance with the same rules and regulations as are now in effect for transportation in the public school system. Where

> transportation is furnished for children attending private schools, the facilities furnished must be substantially on a par with those provided for attending public schools

(Mem from State Educ. Dept. to Gov., Bill Jacket, L 1936, ch 541, at 32). And the Governor approved the bill guaranteeing equal transportation for public and nonpublic students, when the voters chose to provide it, because, in his view, the provisions were "fair, just and reasonable to school children, parents and taxpayers alike" (Governor's Mem approving L 1936, ch 541, Bill Jacket, at 83).

Shortly after the 1936 Law was adopted, however, a group of plaintiffs challenged its constitutionality, arguing that it authorized "the use of public funds for the transportation of pupils to and from private schools or schools wholly or in part under the control or direction of any religious denomination or in which denominational tenets or doctrines are taught" (*Judd v Board of Educ.*, 278 NY 200, 205 [1938]). Although a credible argument was made that the 1936 Law granted aid to the students and not the parochial schools, this Court struck down the 1936 Law in a 4-3 opinion, holding that it violated the constitutional prohibition on aid to religious schools (*see id.* at 217; *but see id.* at 220-221 [Crane, Ch J, dissenting] ["Recognizing the right of

the children to be sent to [religious] schools, and enjoining upon them the duty of regular attendance, the Legislature gave the authorities power, in a proper case, to assist the children in getting to their school."]).

2. The Constitutional Amendment and Equal Transportation Mandate.

The people of this State were undeterred in their pursuit of equal transportation rights for children attending nonpublic schools. Following this Court's holding in *Judd*, the voters amended the Constitution and allowed 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 firmly fixed the State policy, first pursued in 1936, that transportation must be provided equally to all students in New York to and from any school, including nonpublic and religious schools.

Implementing the constitutional amendment in 1939, the Legislature decided against conditioning equal transportation on the prior approval of school district voters, as had the 1936 version of the law. Rather, the Legislature *mandated* that school districts provide nonpublic school students with equal transportation "when deemed

necessary, irrespective of the will of the taxpayers" (Bill Jacket, L 1939, ch 465, at 3). Specifically, the 1939 statutory language provided:

> 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]).[2]

Since 1939, the Legislature has clarified the scope of Education Law § 3635 numerous times, but the mandatory language of the transportation guarantee has remained largely unchanged. And, notably, the Legislature has never limited the transportation mandate only to days when the public schools choose to be open. Thus, for more than 80 years, the statute's language has guaranteed all children in New York, public and nonpublic alike, transportation to and from their

[2] 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). The Governor rejected that concern and signed the bill over NYSSBA's objection.

schools of choice.

3. When the Legislature Has Limited the Equal Transportation Guarantee, It Has Done So Expressly.

Whenever the Legislature sought to limit the broad transportation rights provided under Education Law § 3635(1)(a), it has done so expressly. For example, in 1960, the Legislature limited the scope of the transportation mandate to students who reside within a certain mileage of the school district because the statute did not previously "spell out the minimum and maximum limits of transportation" and the Legislature sought to incorporate into the law the distance limits that the Commissioner of Education had used over the first 20 years of the law's application (*see* Bill Jacket, L 1960, ch 1074, at 211; *see* L 1960, ch 1074, § 1 ["1960 Amendment"]). In approving that limitation, the Governor specifically acknowledged that the "law requires that children attending private schools be afforded transportation on a parity with public school pupils" (Governor's Memorandum approving L 1960, ch 1074, Bill Jacket, at 224-225). Indeed, transportation "for all the children in the State regardless of the school which their parents have selected for them to attend [is] a basic right which the Legislature and the people have provided in New York" (Bill Jacket, L 1960, ch 1074, at

215).

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 and (2) parochial school students only had the right to transportation to the nearest parochial school of a particular denomination (see L 1961, ch 959, § 1).

Notably, although the Legislature has amended section 3635(1)(a) many times since it was adopted in 1939, the Legislature has never added any language that permits central school districts to refuse to provide the mandatory transportation for nonpublic school students to and from their nonpublic schools on days when the public schools choose to be closed (*see* Education Law § 3635[1][a]).[3] 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

[3] 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).

(*Patrolmen's Benevolent Assn. of City of N.Y. v City of New York*, 41 NY2d 205, 208-209 [1976]; *see also e.g. Matter of Diegelman v City of Buffalo*, 28 NY3d 231, 237 [2016] ["we may not create a limitation that the Legislature did not enact" (internal quotation marks and alteration omitted)]; *Hernandez v State of New York*, 173 AD3d 105, 112 [3d Dept 2019]).

Since 1961, the Legislature has largely chosen to narrow the express limits that it previously placed on the equal transportation guarantee to solidify nonpublic school students' rights to transportation. For example, in 1974, the Legislature increased 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 believed 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" (Bill Jacket, L 1974, ch 755, at 9 [emphasis added]). The Legislature similarly required central school districts to designate central pickup points for nonpublic school

students, and to transport students from those pickup points to their nonpublic schools, even if the students lived too far from the nonpublic schools to qualify for direct transportation to their nonpublic schools (*see* L 1981, ch 960; Bill Jacket, L 1981, ch 960; L 1990, ch 718, § 1).

The Legislature also amended section 3635(1)(a) to eliminate concerns that some of the prior limitations were discriminatory. For example, in 1978, the Legislature eliminated the 1961 clause restricting parochial school students' transportation to the nearest available parochial schools of their denomination, after concerns were raised that that restriction discriminatorily limited parents' freedom to choose a parochial school for their children (L 1978, ch 453; Bill Jacket, L 1978, ch 453). The Legislature also eliminated a central 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).

4. The Legislature Also Carefully Explained When the Equal Transportation Guarantee Does Not Apply.

The Legislature has also specified expressly when the transportation mandate does not apply, but rather when central school

districts have the option to provide transportation with voter approval. For example, the Legislature authorized central 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). When the Legislature chose to provide central school districts with these options, however, it made clear that the transportation mandate did not apply in those circumstances.

B. City School Districts are Exempt from the Equal Transportation Guarantee That Applies to Central School Districts.

Since 1961, the Legislature has consistently treated city school districts, especially the New York City School District, differently than it has treated central school districts. Although the 1939 Law's equal transportation guarantee, by its language, applied to all school districts, that soon became unworkable for city school districts.

In 1961, therefore, the Legislature amended the law to clarify that Education Law § 3635(1) does not require city school districts to provide transportation to all students. Rather, the Legislature adopted a different transportation scheme for city school districts that gave cities the option, but does not require them, to provide transportation to nonpublic school students (*see* L 1961, ch 959, § 1; 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"]). For city school districts, the law then provided:

> 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 1961, ch 959, § 1).

This language now appears in Education Law § 3635(1)(c) and continues to exempt city school districts from the central school district transportation mandate (*see* Education Law § 3635[1][c]). It is only when city school districts voluntarily choose to provide transportation to nonpublic school students that they must do so equally to all children

"in like circumstances" (*id.*). Thus, while central school districts have been required to provide transportation to nonpublic school students for the last 80-plus years, city school districts are not subject to the same mandate.

For those city school districts that choose to provide the optional transportation to nonpublic school students, the Legislature has repeatedly expanded the limited obligation to offer transportation "equally to all such children in like circumstances" (*id.*). For example, in 1979, after the City of Rochester voted to eliminate transportation for nonpublic school students outside of the city limits, the Legislature required city school districts with a population between 250,000 and 300,000 (i.e., Rochester) to provide transportation in accordance with the grade and distance requirements of Education Law § 3635(1), including transportation outside of the city limits (L 1979, ch 0670). Similarly, the Legislature later required small city school districts (populations of 125,000 or less) to comply with the mileage limitations set forth in section 3635(1), unless the boards of the city school districts set alternative mileage limitations within a certain window of time (L 1996, ch 171, § 20). Thus, the Legislature gave these city school

districts a choice: (1) elect not to provide transportation to nonpublic school students, as permitted under section 3635(1)(c), or (2) elect to provide transportation and comply with the specific requirements of Education Law § 3635(1).

The New York City School District was given a similar choice. In 1985, the Legislature added a new subsection to Education Law § 3635 that required the New York City School District, which had chosen to provide transportation to nonpublic school students, to "provide transportation to nonpublic schools for a maximum of five alternative days on which the public schools are scheduled to be closed[,]" that were agreed to in advance, and were limited to specifically enumerated holidays (Bill Jacket, L 1985, ch 906, at 008; *see* L 1985, ch 906 [the "1985 Amendment"]).[4]

As with the laws for Rochester and small city school districts, this requirement was necessary because the New York City School District was not otherwise required to provide *any* transportation to nonpublic

[4] The enumerated days and number of days have both been altered by subsequent amendments (*see* L 1996, ch 474, §§ 91, 92 [expanding the list of days]; L 1997, ch 34, § 1 [expanding the obligation in any year in which the first or last day of Passover and Easter Sunday are separated by more than seven days, from five days to ten days of transportation]; L 2005, ch 424, § 1 [again expanding the list of days]).

school students. Thus, the 1979, 1985, and 1996 amendments to Education Law § 3635 all merely defined the city school districts' obligations to offer transportation "equally to all such children in like circumstances" when they voluntarily elected to do so (Education Law § 3635[1][c]). Most notably, these amendments had absolutely no impact on the text of Education Law § 3635(1), which applies to central school districts, and did not in any way alter central school districts' mandatory obligations to provide transportation to nonpublic school students.

STATEMENT 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 (R89). 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 (R89, R94). 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 and from their nonpublic schools at the District's

expense (R89, R94).

Generally, throughout the school year, the District transports Petitioners' children to and from their nonpublic schools, as required under the Education Law, but only on days when the District is open for instruction (R89, R95). That is the case even though the District does not provide the transportation using its own buses and employees, but rather contracts with a private transportation company to provide the services (R189-R191).

The District has repeatedly denied Petitioners' requests to provide transportation on the non-holiday days the District is closed, even after Petitioners informed the District that its mandatory, statutory transportation obligation continues on those days (R103-R105, R119-R120).

A. Supreme Court Properly Declared That Central School Districts are Obligated to Provide Transportation to Nonpublic School Students on All Days When Their Nonpublic Schools are Open for Instruction.

UJC was therefore forced to commence this proceeding seeking, among other things, that the Court declare that Education Law § 3635(1)(a) 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 (R70-R87). After filing suit, 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 (R4-R5, R121-R125, R179-R307). Respondents separately cross-moved to dismiss the Petition (R323).

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) (R308-R321).[5] In a separate order entered September 10, 2021, Supreme Court denied Respondents' cross motions to dismiss (R322-R325). Respondents thereafter answered the Petition (R326-R336 [District's answer]; R337-R349 [SED's answer]). Following joinder of issue, Petitioners moved for summary judgment on their claims for declaratory relief and a permanent injunction (R771-R774).

[5] The preliminary injunction was automatically stayed upon Respondents' service of notices of appeal (*see* CPLR 5519[a][1]), and the Appellate Division denied UJC's motion to vacate the automatic stay (*see Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. School Dist.*, 2021 NY Slip Op 75834[U] [3d Dept Dec. 8, 2021]).

The District opposed the motion (R775-R787), and SED cross-moved for summary judgment (R860-R861).

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 of whether the public schools are open," and (4) granted a permanent injunction compelling the District to do so (R53-R69). Respondents appealed the November 18, 2021 Supreme Court judgment (R14-R15, R33-R34).

B. The Appellate Division Erroneously Reversed the Supreme Court Judgment.

In an Opinion and Order entered June 2, 2022, the Appellate Division, Third Department (Clark, J.P., Pritzker, Colangelo, Ceresia, and McShan, JJ.) reversed the Supreme Court judgment, holding that Education Law § 3635(1)(a) permits, but does not require, school districts outside New York City to transport nonpublic school students to and from school on days when the public schools are closed (*see*

Matter of United Jewish Community of Blooming Grove, Inc. v Washingtonville Cent. School Dist., 207 AD3d 9, 12-15 [3d Dept 2022]). The Appellate Division, noting that "the parties conflicting interpretations . . . [are] at least arguably persuasive, with both sides claiming that their interpretation treats all children equitably," reasoned that section 3635's text was ambiguous because it did not specify "*when* [the] transportation must be provided" and, thus, resorted to its analysis of legislative history to derive the Legislature's intent (*see id.* at 12-13). Rather than viewing the legislative history of section 3635(1)(a) in its entirety, however, the Appellate Division focused only on the 1985 Amendment to the New York City School District's optional transportation regime (*see id.* at 13). In that amendment, the Legislature limited the number of days when nonpublic schools in New York City could choose transportation on days when the public schools were closed, but rejected any such limitation for the transportation provided by central school districts.

The Appellate Division misconstrued this amendment to conclude that because the Legislature was providing additional transportation to these New York City nonpublic school students that was not already

provided, the same must be true for nonpublic school students outside of New York City. Although the Appellate Division was correct that more transportation rights were being provided for nonpublic school students in New York City, because no transportation was guaranteed for New York City nonpublic school students under the statute, the Appellate Division mistakenly applied this same logic to students residing within central school districts outside of New York City. Those nonpublic school students already had their right to transportation guaranteed in the 1939 Law. The Appellate Division's reliance on the 1985 Amendment that added section 3635(2-a) improperly skewed its interpretation of section 3635(1)(a), which is what guarantees equal transportation for nonpublic school students residing within central school districts.

The Appellate Division also based its interpretation on (1) bills that the Legislature never passed and (2) the Legislature's inactivity in the face of SED's incorrect interpretation of the section 3635(1)(a) transportation guarantee, even though there was no evidence that the Legislature was aware of this interpretation. This Court has held, however, that legislative inactivity is "inherently ambiguous and

affords the most dubious foundation for drawing positive inferences" (*Roberts v Tishman Speyer Properties, L.P.*, 13 NY3d 270, 287 [2009] [internal quotation marks omitted]).

Based only upon that dubious foundation, the Appellate Division declared that the central school districts are not required to transport nonpublic school students to and from their nonpublic schools on days when the public schools are closed, and that SED's Transportation Rules and the District's policies were valid. Thus, according to the Appellate Division, school districts outside New York City are permitted, but not required, to transport nonpublic school students on days when public schools are closed (*United Jewish Community of Blooming Grove, Inc.*, 207 AD3d at 16-17).

The Appellate Division also rejected UJC's equal protection challenge to section 3635(1)(a) because, "assuming, without deciding, that SED's guidance treats nonpublic and public school students differently, SED has articulated a rational basis for it—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" (*id.* at 16).

This Court granted leave to appeal from the June 2, 2022 Appellate Division order (R1).

ARGUMENT

POINT I

EDUCATION LAW § 3635(1)(A) REQUIRES CENTRAL SCHOOL DISTRICTS OUTSIDE OF NEW YORK CITY TO PROVIDE TRANSPORTATION TO NONPUBLIC SCHOOL STUDENTS TO AND FROM SCHOOL ON ALL DAYS DURING THE NORMAL SCHOOL WEEK AND YEAR THAT THEIR NONPUBLIC SCHOOLS ARE OPEN FOR INSTRUCTION

For the approximately 360,000 nonpublic school students throughout New York, the Legislature intended that Education Law § 3635(1)(a) would guarantee them transportation to and from school every day their nonpublic schools are open. The Appellate Division's interpretation, however, undermines that guarantee and turns what should have been equal transportation for *all* students, regardless of the school they attend, into favored and disfavored transportation classes. Under the Appellate Division's interpretation of section 3635(1)(a), while public school students receive transportation to and from 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.

This Court should reverse the Appellate Division order and decide this issue in accord with Education Law § 3635(1)(a)'s plain meaning and broad remedial purpose. The Legislature intended to grant nonpublic school students, who were not guaranteed any transportation at all before the statute was adopted in 1939, the same rights to transportation to and from school every day their schools are open that New York's public school students receive.

A. The Appellate Division Order Misconstrues the Plain Language of Education Law § 3635(1)(a).

When interpreting a statute, this Court's analysis must begin, and in this case can end, with the plain language of the statute (*see Bank of Am., N.A. v Kessler*, 39 NY3d 317, 324 [2023] ["In interpreting any statute, our goal is to give force to the intent of the legislature and we therefore begin with the plain text—the clearest indicator of legislative intent" (internal quotation marks omitted)]; *ACE Sec. Corp. v DB Structured Products, Inc.*, 38 NY3d 643, 651 [2022]; *Matter of Theroux v Reilly*, 1 NY3d 232, 239 [2003]). Where, as here, the language chosen is unambiguous, the plain meaning of the words used must control (*see Kessler*, 39 NY3d at 324; *Jones v Bill*, 10 NY3d 550, 554 [2008]; *Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 583

[1998]).

The Court should apply 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" (*Tompkins v Hunter*, 149 NY 117, 123 [1896]). 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" (*People v Carroll*, 3 NY2d 686, 689 [1958]; *see Harkenrider v Hochul*, 38 NY3d 494, 509 [2022]). Moreover, a statute "must be construed as a whole and its various sections must be considered together and with reference to each other" (*Colon v Martin*, 35 NY3d 75, 78 [2020] [internal quotation marks, ellipses and citations omitted]; *see Matter of Town of Southampton v New York State Dept. of Envtl. Conservation*, 39 NY3d 201, 209 [2023]).

Here, the plain meaning of section 3635(1)(a) is clear and demonstrates the legislative intent for the statute. 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).

The statute clearly provides that a central school district "*shall*" provide transportation for "*all* the children" who live within the central school district, attend grades kindergarten through twelve, and attend a school within the applicable mileage restrictions (*id.* [emphasis added]). Section 3635(1)(a) does not differentiate between nonpublic and public school students, and the Legislature's choice to use the broad and expansive term "all the children," "without qualification or restriction, was a deliberate one" (*Hernandez*, 173 AD3d at 112). Section 3635(1)(a) unambiguously provides that "all the children" shall be given transportation "to and from the school they legally attend" (Education Law § 3635[1][a]).

The words "to and from the school they legally attend" in the statute not only provides the "where," as the Appellate Division held, it also provides the "when." Since nonpublic school students were not receiving any transportation to their nonpublic schools before the 1939 statute, because this Court held that the NY Constitution at the time forbid it (*see Judd*, 278 NY at 217), the Legislature's reasonable understanding was that the 1939 statute would guarantee nonpublic school students the transportation to and from school that they were not at that time receiving. Indeed, throughout the many amendments to section 3635 over its history, the Legislature explained that "the right to attend a nonpublic school is *meaningless* if the pupil has no way of getting to and from school" (Bill Jacket, L 1974, ch 755, at 9 [emphasis added]). The Legislature, therefore, was not intending to guarantee nonpublic school students transportation "to and from school" only on *some* of their school days; it was intending to guarantee transportation to and from school on *all* of their school days, to ensure that their right to attend a nonpublic school would not be rendered "meaningless" (*id.*).

Respondents acknowledge that there are many days throughout the school year that nonpublic school students do not receive

transportation to and from school, as the statute requires, merely because public school districts choose to be closed on days when it is not required that they do so (R105). That violates the very guarantee of transportation to and from school that the Legislature always intended to grant to nonpublic school students, to ensure equal transportation is provided in New York to "*all the children* residing within the school district" (Education Law § 3635[1][a] [emphasis added]).

The only express exception to that equal transportation guarantee is that the Legislature provided that central school districts cannot operate or provide transportation on certain legal holidays (*see id.* § 3604[8] ["No school shall be in session on a Saturday or a legal holiday, except general election day, Washington's birthday and Lincoln's birthday"]). Thus, even if the public schools choose to be closed on days that are not legal holidays, transportation must still be provided to nonpublic school students to and from their schools.

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. Indeed, equality is what was intended (Governor's Memorandum approving L 1960, ch 1074, Bill Jacket, at 224-225 [noting that the "law requires that children attending private schools be afforded transportation on a *parity* with public school pupils" (emphasis added)]; Merriam-Webster.com Dictionary, parity [defined as "the quality or state of being equal or equivalent"] [https://www.merriam-webster.com/dictionary/parity]; *see also e.g. Matter of Richard K. v Petrone*, 31 AD3d 181, 183-84 [2d Dept 2006] ["Section 912 of the Education Law clearly requires that, upon request and notwithstanding any inconsistent provision of law, school boards provide resident pupils attending nonpublic schools within their districts with 'all of the health and welfare services' they provide to their public school students. Moreover, those services must be provided to students attending a nonpublic school in essentially the same manner and to the same extent as they are offered to students in the school district's public schools."]). But that is not how the Appellate Division read the statute.

The Appellate Division's conclusion that section 3635(1)(a) is ambiguous because it does not specify "when" the transportation must

be provided disregards the principles of statutory construction that this Court has announced. The Legislature did not need to specifically provide that that transportation must run from the first day of school to the last, or specify that the nonpublic school students are still entitled to transportation to and from school on non-holiday days when the public schools choose to be closed, to guarantee that nonpublic school students receive the same transportation that public school students receive. Indeed, the Appellate Division's interpretation improperly creates an exception to the plain language of the statute's transportation mandate for days the central school districts choose to close that the Legislature has never adopted (*see Commonwealth of the N. Mariana Is. v Canadian Imperial Bank of Commerce*, 21 NY3d 55, 62 [2013] [a court "cannot read into the statute that which was specifically omitted by the legislature"]; *see also 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)]).

Here, the Legislature adopted a statute that expressly, clearly, and unambiguously mandates that "all the children" shall be given transportation "to and from the school they legally attend" (Education Law § 3635[1][a]). How specifically that mandate is implemented (i.e., what time the children are picked up, whether there is a single pickup or drop off point, and in what kinds of transportation facilities) is up to the central school district. Public schools cannot be permitted, however, to violate the Legislature's transportation mandate by refusing to provide transportation to nonpublic school students, as it did here, simply because it chooses not to open on days when it is not statutorily required to be closed. This Court should therefore reverse the Appellate Division's determination and confirm that the plain language of Education Law § 3635(1)(a) guarantees all nonpublic school students across this state transportation to and from school every day their nonpublic schools are open for instruction.

B. The Appellate Division Overlooked the History Underlying the Initial Adoption of the Transportation Mandate in 1939 and the Remedial Purpose of the Statute.

Because the language of section 3635(1)(a) already provided for

who, what, where, and when nonpublic school students must be transported to and from school, the Appellate Division did not need to look behind the plain meaning of those words 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]). Even reviewing the complete legislative history of the statute, however, should have led the Appellate Division to adopt a construction of section 3635(1)(a) that safeguards the Legislature's intent to guarantee nonpublic school students transportation to and from school every day their schools are open. Rather, the Appellate Division's interpretation relied on pieces of legislative history that simply do not apply to the transportation mandate for central school districts outside of New York City and improperly distorted the Legislature's true intent.

1. The Legislature Intended to Guarantee Nonpublic School Students Equal Transportation To and From Their Schools.

As explained in more detail in the *Statutory Background* section, the statutory history shows that the Legislature intended to guarantee equal transportation for nonpublic school students on days when their schools are in session during the regular school week and school year. The legislative history underlying Education Law § 3635(1)(a) confirms that the Legislature has always intended a broad remedial guarantee ensuring that nonpublic school students will have a way to and from school each and every day their schools are open for instruction.

Education Law § 3635(1)(a) was adopted as a remedial statute to change the prior law that denied any transportation to religious nonpublic school students and to implement the constitutional amendment that allowed the Legislature to "provide for the transportation of children to and from any school or institution of learning" (NY Const art XI, § 3). As a remedial statute, the Appellate Division should have construed section 3635(1)(a) "broadly" to effectuate its purpose—to provide equal transportation to all students in New York (*see Matter of Scanlan v Buffalo Pub. School Sys.*, 90 NY2d

662, 676 [1997] ["Remedial statutes, of course, should be construed broadly so as to effectuate their purpose"]; *see also Kessler*, 39 NY3d at 326; *Diegelman*, 28 NY3d at 240). It failed to do so.

The subsequent amendments to Education Law § 3635 also shed light on the statute's broad guarantee. Since 1939, whenever the Legislature sought to limit the transportation rights provided to nonpublic school students outside of New York City, it did so expressly. For example, in 1960, the Legislature limited the scope of the transportation mandate for central school districts to students who reside within a certain mileage of the school district (L 1960, ch 1074, § 1). In 1961, the Legislature further limited the mandate by clarifying that (1) door-to-door transportation from a student's home to a nonpublic school was not required, (2) parochial school students only had the right to transportation to the nearest parochial school of their particular denomination, and (3) city school districts were not required to provide any transportation to students (*see* L 1961, ch 959, § 1).

The Legislature's decision to exclude city school districts from the mandatory transportation that central school districts outside of New York City must provide is critical for the analysis here (*see* 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"]). As demonstrated above, the Legislature has, since 1961, treated transportation for nonpublic school students within New York's cities very differently than for students in New York's suburbs and rural areas, where alternative means of transportation are not always readily available. Out of this necessity, the Legislature's different statutory schemes—mandating transportation outside of New York's cities, but making it optional in city school districts—make complete sense. The Appellate Division's interpretation erroneously failed to give effect to that purposeful distinction, and thus contravened the Legislature's intent.

Indeed, throughout the many times that the Legislature amended section 3635(1) since it was adopted in 1939, the Legislature has *never added any language* that permits central 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]). That legislative omission can only be viewed as

intentional (*see Patrolmen's Benevolent Assn. of City of N.Y.*, 41 NY2d at 208-209; *see also e.g. Matter of Matzell v Annucci*, 183 AD3d 1, 6 [3d Dept 2020]; *Hernandez*, 173 AD3d at 112). And, most notably, that is precisely what the Legislature did for the New York City School District, but never did for central school districts outside of New York City. The Appellate Division failed to give proper consideration to the remedial nature of the statute and its intention to adopt a broad transportation guarantee, which is supported by the Legislature's choice to place *only express limitations* upon the mandatory rights of nonpublic school students to transportation to and from school under section 3635(1)(a).

2. The Appellate Division Incorrectly Interpreted the 1985 Amendment That Applied Only to Transportation in the New York City School District.

The Appellate Division's interpretation erroneously focused on the 1985 Amendment that applies only to the optional transportation that the New York City School Districts has chosen to provide voluntarily. The 1985 Amendment, however, cannot be read to alter the Legislature's broad intention when it adopted the mandatory transportation obligation for central school districts under section

3635(1)(a), an entirely different transportation scheme (*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"]; *see also Kuzmich v 50 Murray St. Acquisition LLC*, 34 NY3d 84, 94 [2019] ["We decline defendants' invitation to construe the legislature's silence in one statutory scheme to override its clear intent, as plainly expressed, in another"]).

In 1985, the Legislature amended Education Law § 3635 to add a new subsection (2-a), which required the New York City School District to "provide transportation to nonpublic schools for a maximum of five alternative days on which the public schools are scheduled to be closed," if it decided to provide any transportation at all (Bill Jacket, L 1985, ch 906, at 8; *see* L 1985, ch 906). 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 District, however, and does not apply to central school districts, like the District here. And, notably, the 1985 Amendment did not change the text of section 3635(1)(a), or otherwise alter the mandatory obligations of central school districts outside of New York City to provide transportation to nonpublic school students.

The Appellate Division concluded that the reason for this revision was to "expand the number of required transportation days, and not to limit a previously unrestricted transportation obligation" and imported that same intent to the central school district transportation mandate under section 3635(1)(a) (*United Jewish Community of Blooming Grove, Inc.*, 207 AD3d at 13). That makes sense for the New York City School District because, before the 1985 Amendment, it was not obligated to provide any transportation to nonpublic school students, but was only doing so voluntarily (*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" (emphasis added)]). Thus, adding alternate days of transportation for nonpublic school students in New York City was an expansion of rights, rather than a limitation.

Central school districts, in contrast, were already obligated to provide transportation for nonpublic school students under section 3635(1)(a). Had the Legislature adopted a similar provision for central school districts in 1985 (one was initially proposed but was eliminated from the 1985 bill that was ultimately passed), that would have significantly *limited* the existing transportation mandate (*see Statutory Background*, *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"]). But the Legislature rejected any such limit, and declined to adopt the same provision that was adopted for the New York City School District.

In fact, the 1985 Amendment bill initially proposed to allow nonpublic schools outside of New York City to designate only two days (rather than all school days that are not legal holidays) when they would have transportation when the public schools are closed (R143-144). That portion of the bill, however, was eliminated before the Legislature passed the provisions applying to the New York City School District (R156). Because the Legislature has always intended that nonpublic school students outside of New York's cities be guaranteed the same transportation as students attending public schools, the Legislature's 1985 rejection of the two-alternate-day transportation limit can only be viewed as a reaffirmation of the Legislature's prior intent that nonpublic school students should receive equal transportation to and from school each day that their schools are open for instruction. The Appellate Division's reasoning overlooks this important distinction.

Even if, as Respondents have previously argued, the 1985 Amendment bill somehow could be viewed as an expansion of nonpublic school students' transportation rights, the Legislature could have easily concluded that no language addressing the central school districts'

transportation obligation was needed. The existing language already requires those school districts to provide transportation on the non-holiday days when nonpublic schools are open but the public school districts choose to be closed.

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 New York City School District is closed (*see* L 1996, ch 474, §§ 91, 92; L 1997, ch 34, § 1; L 2005, ch 424, § 1). None of those amendments, however, apply to central school districts or otherwise affect the mandatory transportation required under section 3635(1)(a). Thus, the Appellate Division erroneously relied on the 1985 Amendment to drastically limit the extent of the Legislature's mandatory transportation guarantee under section 3635(1)(a).

3. The Appellate Division Also Erroneously Held that the Legislature Acquiesced to SED's Interpretation.

The Appellate Division's further conclusion that the Legislature has not intervened, by way of any statutory amendment, to correct

SED's longstanding interpretation of Education Law § 3635, and thus must have acquiesced in it is, similarly mistaken (*see United Jewish Community of Blooming Grove, Inc.*, 207 AD3d at 14-15).

As this Court has explained, "[l]egislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences" (*see Clark v Cuomo*, 66 NY2d 185, 190-191 [1985] [quotation marks omitted]). Indeed, this Court has repeatedly held that legislative acquiescence should not be inferred from mere legislative inaction, unless it can be shown that the Legislature knew about the interpretation to which it was agreeing (*see Roberts*, 13 NY3d at 287 [declining to infer that "the Legislature's inactivity in the face of DHCR's interpretation of the statute constitutes its acquiescence thereto" because "at the time the Legislature most recently considered the statute, there is no indication that the specific question presented here—that DHCR's interpretation is improper and conflicts with the plain language of the statute—had been brought to the Legislature's attention"]).

No such evidence exists here. None of the proposed but unpassed bills on which the Appellate Division and Respondents relied

specifically references SED's interpretation of section 3635(1)(a) (*see e.g. Matter of Leadingage New York, Inc. v Shah*, 153 AD3d 10, 23 [3d Dept 2017] [refusing to consider "unsuccessful bills" as evidence of legislative intent], *affd* 32 NY3d 249 [2018]). The only evidence of SED's flawed interpretation can be found in a transportation handbook and buried on SED's website (R752-753). And no evidence exists in the record that these were raised with the Legislature at any time. Thus, as this Court has held, the Appellate Division should not have simply assumed that the Legislature knew about SED's interpretation and acquiesced to it, without any explicit evidence showing that that was actually the case.

C. Supreme Court's Interpretation Does Not Lead to Unreasonable Results.

The Appellate Division order not only misconstrues the legislative history underlying the transportation mandate, it also erroneously concluded that the language Supreme Court used in granting declaratory relief "would lead to unreasonable results. To be sure, the Legislature could not have intended to require school districts 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" (*United Jewish Community of Blooming Grove, Inc.*, 207 AD3d at 15).

Indeed, that is not what the Legislature intended. The Legislature already provided for some of those concerns expressly, and the guarantee of parity resolves the rest. As noted, Education Law § 3604(8) already ensures that public schools need not provide transportation on "a Saturday or a legal holiday, except general election day, Washington's birthday and Lincoln's birthday." And public school students do not receive transportation on Sundays or over the summer, or when schools must close due to unsafe weather conditions. So, the section 3635(1)(a) guarantee of *equal* transportation for nonpublic school students would not grant *more* rights than are afforded to public school students.

Petitioners have never requested anything more than what the public school students receive—transportation to and from their nonpublic schools every day during the normal school week and normal school year that they are open for instruction (R119-R120). Interpreting section 3635(1)(a) as the equal transportation guarantee that

Legislature intended it to be, therefore, would not lead to any absurd or unreasonable results.

The Appellate Division order, adopting SED's reading of the transportation mandate, in contrast, leads to significantly inequitable and unreasonable results statewide. 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 (R119-R120, R182, R280-R281). 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 (R189-R191), on different instructional days based on the differences in the nonpublic schools' calendars. The only change would be that the private transportation company would be required to run the routes on different school days. That is not an additional burden on the District.

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 all the parents across this state 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."]). The Legislature has specifically provided that the District, through State aid and the taxes levied on its taxpayers, including Petitioners (R184, R282), must bear the costs to provide transportation to all school children. Any additional financial burden on the District, therefore, is not a basis upon which to disregard the plain language construction of section 3635(1)(a) (*see Scanlan*, 90 NY2d at 677 [rejecting "significant fiscal implications" as a basis to choose a different construction of the statute]).

The Appellate Division's interpretation of the statute has allowed SED's unequal two-tiered system of transportation to continue, even though it denies nonpublic school students the same rights that are guaranteed to public school students, in violation of the Legislature's intent. For public school students, the bus comes to bring them to and

from school every day. For nonpublic school students, however, they are denied transportation whenever the public schools choose to be closed, even on days that are not legal holidays, leaving their parents burdened with finding them a different way to school.

That is not what the Legislature intended when it adopted the transportation mandate in 1939, and it is certainly not what this Court should permit to continue more than 80 years later, especially when SED's interpretation would threaten the statute's constitutionality (*see Town of Southampton*, 39 NY3d at 211 ["A statute . . . should be construed in such a manner as to uphold its constitutionality" (internal quotation marks omitted)]; *National Assn. of Ind. Insurers v State of New York*, 89 NY2d 950, 952 [1997] ["this Court is required to avoid interpreting it in a way that would render it unconstitutional if such a construction can be avoided" (internal quotation marks, brackets and citations omitted)]; *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"]). This Court should therefore reverse the Appellate Division order that denies hundreds of thousands of nonpublic school students and their families

from all corners of New York the equal transportation to and from school that the Legislature intended.

POINT II

THE APPELLATE DIVISION'S INTERPRETATION OF SECTION 3635(1)(A) DENIES NONPUBLIC SCHOOL STUDENTS EQUAL PROTECTION OF THE LAWS UNDER THE NEW YORK CONSTITUTION

Even if the Appellate Division's interpretation of section 3635(1)(a) were to prevail, the unequal two-tiered system of transportation that denies nonpublic school students transportation to and from school every day that their nonpublic schools are open, which is guaranteed to public school students, violates nonpublic school students' right to equal protection of the laws under the New York Constitution. The Appellate Division concluded that it did not, because public school districts might face additional administrative and financial burdens (R9-R10). This Court should reverse the Appellate Division order and hold that those minimal burdens, which the Legislature already accounted for in the statute, do not provide a rational basis for the transportation disparity.

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 this Court 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" (*Esler v Walters*, 56 NY2d 306, 313-314 [1982]).

Education Law § 3635(1)(a) "mandates the provision of transportation to public and nonpublic school students alike" (*Cook v Griffin*, 47 AD2d 23, 27 [4th Dept 1975]). Additionally, section 3635(1)(a) (1) states that transportation "shall be provided for *all* the 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][a] [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 in parity with as public school students (*see* Governor's Memorandum approving L 1960, ch 1074, Bill Jacket, at 224-225). 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 Guidance 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 (R109, R116). Contrary to the Appellate Division's conclusion, no rational basis exists 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 justification that the Appellate Division adopted for the disparity—that additional transportation would be financially and

logistically burdensome—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).

Furthermore, under section 3635(1)(a), central school districts are unquestionably required to provide transportation to nonpublic school students when the public schools are open. To do so, central school districts have already designated the pickup and drop off points, created and communicated the bus routes, and ensured that they have buses and drivers (whether owned and employed by the district or contracted for with private bus companies) to provide the transportation for

nonpublic school students. What then is the additional administrative burden of arranging for those same services to be provided on different days during the school year when the public schools choose to close, but the nonpublic schools remain open?

For those like the District, which contracts with a private transportation company to provide the student Petitioners with transportation, the burden is simply agreeing with the bus company at the beginning of the year on the specific dates that nonpublic school transportation must be provided under the parties' contract. That is no additional administrative burden at all, because the bus company is presumably willing and able to provide transportation services on the dates the District chooses. According to the Appellate Division, however, that minimal burden was enough to justify denying all nonpublic school students in the District equal transportation rights.

For central school districts that employ their own buses and drivers for the transportation of nonpublic school students, the initial administrative burden may be greater than it is for the District, but it is still minimal compared to the deprivation of the students' equal rights. Although a central school district initially may be required to

negotiate with the union that represents its drivers to take on the additional work, ensure that it has buses available, and pay a little more each year, that is exactly what the Legislature contemplated when it enacted the mandate requiring the schools to provide "[s]ufficient transportation facilities (including the operation and maintenance of motor vehicles)" for the transportation and to take on the costs of doing so (Education Law § 3635[1][a]).

For the taxpaying parents of nonpublic school students, that is often the only benefit that they get for their school taxes each year (R184, R282, R289-R290, R296-R297, R303-R304). In that balance, it is not rational for a district's mere temporary administrative inconvenience to justify the deprivation of nonpublic school students' equal rights. Thus, should the Respondents' and the Appellate Division's interpretation of section 3635(1)(a) prevail, the statute should be declared unconstitutional insofar as it denies nonpublic school students equal transportation to and from every day that their schools are open for instruction.

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 argued that its Transportation Rules (R109) 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 choose to be closed. Rather, SED 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 should have been 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. Matter of New York Statewide Coalition of Hispanic Chambers of Commerce v New York City Dept. of Health & Mental Hygiene*, 23 NY3d 681, 699 [2014]; *Matter of Stevens v New York State Div. of Criminal Justice Servs.*, 206 AD3d 88, 105 [1st Dept 2022]; *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]; *see also Garcia v New York City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 610 [2018]).

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)(a) 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, Town of Hempstead 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 the State Administrative Procedure Act 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 also argued that, because the Transportation Rules are not a rule but an "interpretive statement," SED was not required to follow the

procedural rulemaking process under the State Administrative Procedure Act ("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, this Court has 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, Appellants respectfully request that this Court (1) reverse the Appellate Division order, (2) declare that Education Law § 3635(1)(a) requires central school districts to provide nonpublic school students with transportation to and from school every day when their nonpublic schools are open for instruction, or alternatively declare section 3635(1)(a) and SED's Transportation Rules unconstitutional and invalid, (3) compel Respondent Washingtonville

Central School District to provide Petitioners with the transportation required by the statute, and (4) award them such other relief as this Court shall deem just, proper, or equitable.

Dated: July 17, 2023
Albany, New York

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CERTIFICATION PURSUANT TO 22 NYCRR § 500.13(C)(1)

Pursuant to section 500.13(c)(1) of this Court's Rules (22 NYCRR § 500.13[c][1]), I hereby certify that this brief complies with the word count requirement of section 500.13(c)(1) because the total number of words in this brief, exclusive of the statement of the status of related litigation, the corporate disclosure statement, the table of contents, the table of cases and authorities, the statement of questions presented, and any addendum containing material required by subsection 500.1(h) of this Court's Rules is 13,437.

Dated: July 17, 2023

Robert S. Rosborough IV