

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

MATTER OF PARENTS FOR EDUCATIONAL AND
RELIGIOUS LIBERTY IN SCHOOLS,

Appellant,

-against-

NO. 56

YOUNG,

Respondent.

20 Eagle Street
Albany, New York
May 14, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

AVI SCHICK, ESQ.
FAEGRE DRINKER BIDDLE & REATH, LLP
Attorney for Appellant
1177 6th Avenue
41st floor
New York, NY 10036

BEEZLY J. KIERNAN
OFFICE OF THE ATTORNEY GENERAL
Attorney for Respondent
28 Liberty Street
New York, NY 10005

Brandon Deshawn
Official Court Transcriber



1 CHIEF JUDGE WILSON: Last case on today's
2 calendar is Matter of Parents for Educational Religious
3 Liberty in Schools v. Young.

4 Counsel?

5 MR. SCHICK: Thank you, Your Honor. May it
6 please the court. Avi Schick, on behalf of Appellants.
7 And Your Honor, can I please reserve three minutes for
8 rebuttal?

9 CHIEF JUDGE WILSON: Sure.

10 MR. SCHICK: Thank you. The challenged
11 regulation - - -

12 JUDGE RIVERA: So why isn't the case moot?

13 MR. SCHICK: Excuse me?

14 JUDGE RIVERA: Why isn't this appeal moot given
15 the recent legislation?

16 MR. SCHICK: Because the recent legislation does
17 not speak to the issues that are on appeal to the challenge
18 with respect to the enforcement authority that SED gave
19 itself in the regulations. And in fact, Your Honor, there
20 is enforcement that is going on currently. And when I say
21 currently, I don't mean that in the broader sense. I mean
22 that since the enactment of this legislation, parents have
23 received letters from local school authorities pursuant to
24 the regulations and the direct - - -

25 JUDGE RIVERA: Dated after the legislation?



1 MR. SCHICK: Correct. Your Honor. Correct. So
2 parents have received letters, and the letters say, and I
3 quote, "Given that your child will no longer be able to
4 attend the names of school, a decision must be made about
5 which school your child will attend for the 2025/'26 school
6 year, and you must notify the Department of Education of
7 where your child will be enrolled in school. And you need
8 to do that to - - - to Department when - - -"

9 CHIEF JUDGE WILSON: So let me ask you this.
10 Given the new legislation, do you think that the local
11 school authorities have the authority to send those?

12 MR. SCHICK: Your Honor, we didn't think the
13 local school authorities were acting within the appropriate
14 authority to send them before the legislation.

15 CHIEF JUDGE WILSON: But that's not my question,
16 though, right?

17 MR. SCHICK: So - - - so - - -

18 CHIEF JUDGE WILSON: And look, as I read the
19 legislation, correct me if I'm wrong, it gives you at least
20 a three-year window where nothing can be applied to you, at
21 least.

22 MR. SCHICK: So I think, Your Honor, it's a two-
23 year window, but let me step back - - -

24 CHIEF JUDGE WILSON: Yeah.

25 MR. SCHICK: - - - and address what's going on



1 here. So there are two groups of schools about which
2 there's current enforcement. First is a group of schools
3 where the State Education Department has already made a
4 determination of nonequivalence, and therefore, there's
5 enforcement against the parents. And that enforcement, as
6 I said, continues since the legislation. Second, there is
7 a group of schools that had received an initial but not yet
8 final determination of nonequivalence. And again, there is
9 substantial communication and enforcement activity since
10 the legislation has been enacted. And the question of
11 whether - - - of whether the legislation speaks to those
12 two schools - - - those two groups of schools is one in
13 which we've turned to SED to say, listen, if you agree that
14 part 30 regulations are withdrawn or null and void, we
15 obviously don't have to be here today.

16 JUDGE CANNATARO: So it's SED's position that 130
17 is still a good regulation, still entirely enforceable? Is
18 - - - was that the message you got from them?

19 MR. SCHICK: The message certainly was that - - -
20 was that they weren't prepared to say it's to the contrary,
21 yes, Your Honor. And that's the message that schools have
22 gotten. Schools have to - - -

23 JUDGE RIVERA: But isn't that a different record
24 that has to be developed in light of the legislation, not
25 in the appeal before us?

1 MR. SCHICK: I don't think so. Again, Your
2 Honor, if one looks at - - - you know, first of all, if one
3 looks at the legislation, you know, I don't think it at all
4 lines up with the mootness cases that - - - you know, that
5 this court has seen.

6 JUDGE HALLIGAN: But is it your position that SED
7 can proceed with the enforcement actions that you're
8 describing under the new legislation?

9 MR. SCHICK: I guess, Your Honor, it's our
10 position that, as long as they're enforcing, all I have is
11 a defense.

12 JUDGE HALLIGAN: Well, I - - - I - - -

13 MR. SCHICK: Right? It's not moot.

14 JUDGE HALLIGAN: - - - I'm not sure that's
15 responsive to the question. Are you arguing that it is
16 permissible or - - - or you think that it is not
17 permissible, and you would press that point?

18 MR. SCHICK: So Your Honor, we would press that
19 point, but even if we prevail on that point, Your Honor, we
20 would not - - - we don't think it's moot for the following
21 reason. The - - - as the - - - Judge Wilson said, there's
22 a pause in the legislation. It's actually, we believe, two
23 years. But a two-year pause on enforcement wouldn't make
24 the case moot, not at all. If one looks at the - - - this
25 court's decision in the *Victoria P. v.*, you know, *Radcliff*

1 case - - -

2 CHIEF JUDGE WILSON: But after - - - let me stop
3 you for a second. After the two years, there's a whole
4 different - - - the statute provides a whole different
5 mechanism for determining whether you could be deemed to be
6 in substantial compliance or not, right?

7 MR. SCHICK: Well, it depends, Your Honor. It
8 provides - - - let me step back. The way the regulations -
9 - - and the answer is, it depends, but let me step back and
10 explain why. The regulations, Your Honor, provide for a
11 regular review - - -

12 CHIEF JUDGE WILSON: I was trying to address the
13 statute first.

14 MR. SCHICK: Okay. Correct. So the legislation
15 says that - - - the legislation broadened the pathways that
16 are available to satisfy substantial equivalence. It
17 absolutely did that, Your Honor. But a school doesn't have
18 to select a pathway, right? The pathway is a way to avoid
19 a local school authority review. And what the statute did
20 is it - - - it broadened the assessment pathway. But I
21 don't think SED takes the position that, you know, they
22 can't do reviews if the school - - - in two years if the
23 school doesn't elect that pathway. And schools may decide
24 the government assessment test or something else, they're
25 not doing it.

1 CHIEF JUDGE WILSON: I'm sorry. Elect which
2 pathway?

3 MR. SCHICK: The new pathway is an assessment
4 pathway.

5 CHIEF JUDGE WILSON: So - - - right. So the
6 school may not - - - well, there's a new pathway that
7 you're - - - right, you're calling an assessment pathway,
8 which is, basically, students take a test year end, right?
9 Or - - -

10 MR. SCHICK: Or a series - - - a series of tests
11 - - -

12 CHIEF JUDGE WILSON: - - - assessment.

13 MR. SCHICK: - - - depending on the grade - - -

14 CHIEF JUDGE WILSON: Yeah.

15 MR. SCHICK: - - - and a series of subjects.

16 CHIEF JUDGE WILSON: Yes. Yes.

17 MR. SCHICK: Yes, Your Honor.

18 CHIEF JUDGE WILSON: Okay.

19 MR. SCHICK: But - - - but - - -

20 CHIEF JUDGE WILSON: But your point is that
21 schools might or might not choose that pathway?

22 MR. SCHICK: Correct. There's a series of
23 pathways. There's accreditation - - -

24 CHIEF JUDGE WILSON: So why is it not then sort
25 of a ripeness problem on a case that hasn't been brought

1 because the statute is new?

2 MR. SCHICK: Well, not, Your Honor, because it's
3 the same regulations. The regulations remain in place, and
4 whether or not enforcement is delayed, I mean, Your Honor,
5 if the - - -

6 CHIEF JUDGE WILSON: But the regulations may
7 never apply to you.

8 MR. SCHICK: Well, Your Honor, they give SED this
9 right. And it's - - - this is in Article 78, right?
10 There's no other opportunity to challenge the regulations
11 in an Article 78, right? It's 120 days after legislation.

12 JUDGE HALLIGAN: Do we know yet how SED will
13 respond in terms of the regulations? I'm sure that they,
14 you know, can address this, but in - - - to the amendments,
15 to the new legislation?

16 MR. SCHICK: Again, Your Honor, it is our
17 understanding that they take the position that enforcement
18 continues. And that's because, you know, we've made
19 inquiries, and we see it in the field.

20 JUDGE CANNATARO: So Counsel - - - but this is a
21 declaratory judgment action, right? And I realize that
22 this isn't the question for you, but I find it very hard to
23 see how the reg 130 continues since it basically describes
24 one method of establishing substantial equivalence, how
25 that could continue to be viable given now that there are

1 multiple statutory methods of establishing substantial
2 equivalence. So what is there for us to declare?

3 MR. SCHICK: So again, Your Honor, if the part
4 130 regulations are withdrawn or declared null and void in
5 some way, we are in perfect agreements. We're in
6 consonance. On the other hand, if what they're saying is,
7 we're not sure about schools that were already declared not
8 equivalent, and we're thinking through what we do about
9 schools that had an initial, not a final determination, and
10 we believe in two years we can enforce against the entire
11 field, then it's an Article 78. And we get our decision.
12 And it didn't - - - I mean, let's think of it this way,
13 Your Honor, right? Two years ago, you know, the court
14 didn't say - - - it wouldn't have been appropriate for the
15 court to say that, you know, the case is not ripe because
16 the enforcement is not here. In fact, if one looks at this
17 court's decision in Stevens case with the DNA registry and
18 a family, you know, tracing through it, right? It was a
19 concern that if the regulations couldn't be challenged now,
20 several years from now, if a crime was committed by an
21 individual and if a family member's DNA was in the
22 registry, they may get caught up in something in the
23 future.

24 JUDGE HALLIGAN: Can I ask you - - -

25 JUDGE RIVERA: But this may not even be the regs.



1 MR. SCHICK: I'm sorry. I - - -

2 JUDGE RIVERA: It may not be the reg in a month.
3 This may not be the reg in a year. It may not be the regs
4 at the end of the pause.

5 MR. SCHICK: Well, Your Honor, the fact that it
6 might not be a reg in year, that's always true. In any
7 case, SED could withdraw its regulations. And frankly,
8 that's exact - - -

9 JUDGE RIVERA: No. But here it's because you
10 have an intervening legislation - - -

11 MR. SCHICK: But Your Honor, they haven't - - -

12 JUDGE RIVERA: - - - that obviously would
13 supersede anything that contradicts - - -

14 MR. SCHICK: But - - -

15 JUDGE RIVERA: - - - and a regulation that
16 contradicts the legislation.

17 MR. SCHICK: But, Your Honor, they haven't - - -
18 they haven't done so. And this court and - - - and - - -

19 JUDGE RIVERA: Well, it just got passed.

20 MR. SCHICK: It got passed a week ago, Your
21 Honor, or it got passed by legislature about week ago, Your
22 Honor. And honestly, in every case with an Article 78, in
23 any case of regulations, right? The courts are clear that
24 we cannot incentivize the agency to sort of delay the day
25 of reckoning or to - - -

1 JUDGE HALLIGAN: Can I ask on a different front?
2 If we were to disagree and take the view that this was
3 moot, what effect, if any, would the Third Department case
4 have down the road whether in two years or in 2032? Would
5 it be appropriately vacated? Or what would we do about
6 that?

7 MR. SCHICK: So again, if - - - if this court
8 held that part 130 is null and void - - -

9 JUDGE HALLIGAN: That's not what I'm asking. I'm
10 saying, if we were to determine that the case presently
11 before us is moot, what effect would the Appellate Division
12 decision have, if any, going forward?

13 MR. SCHICK: So - - - so - - - so - - -

14 JUDGE HALLIGAN: Or would we appropriately
15 consider vacatur coupled with mootness?

16 MR. SCHICK: Correct. So consistent with this
17 court's precedent, right, the Appellate Division decision
18 would be vacated and the - - -

19 JUDGE HALLIGAN: I think there's a choice there.
20 I think one can vacate when it's moot or not. And I'm
21 asking, is there a reason that we would want to consider
22 vacating it, and if so, what would that be? What would the
23 effect be going forward?

24 MR. SCHICK: Well, if it's - - - if it's vacated,
25 then it would have - - - then obviously, it would not have

1 any force and effect.

2 JUDGE HALLIGAN: Yeah. But generally, we
3 consider the question whether vacatur is appropriate or
4 not. And so I'm asking, what would the rationale for
5 vacating it be?

6 MR. SCHICK: It would be that, you know, it
7 didn't get the merits determination from this court and it
8 - - - you know, if allowed to stand and it couldn't be
9 challenged again, it would have a deleterious effect on the
10 schools.

11 JUDGE HALLIGAN: Could it not be challenged
12 again? I guess that's what - - - part of what I'm getting
13 at. So suppose that was the state of play and down the
14 road, you know, whatever happens with the regulations
15 happens. There's the additional pathway set forth in the
16 statute. And there's some question that arises. In your
17 view, would that be binding?

18 MR. SCHICK: Well, one couldn't challenge - - -
19 well, one couldn't bring an Article 78 to challenge the
20 regulation as we - - - as we've done here. So it would be
21 - - -

22 JUDGE HALLIGAN: Presumably a revised regulation,
23 you could, but not this one.

24 MR. SCHICK: If there's a new regulation, Your
25 Honor, but again, we're not there yet.

1 JUDGE CANNATARO: But you do have the pause. So
2 isn't this a - - - isn't that just a completely game
3 changing development in the case?

4 MR. SCHICK: Absolutely not, Your Honor. And - -
5 - and the cases are clear that whether the - - - whether
6 consequence of the regulation will come in six months or in
7 twenty-four months or thirty-six months, that's not a
8 reason to not give a merits decision on Article 78. That's
9 the Stevens decision. There's a number of decisions like
10 that. Because otherwise, you know, agencies can do this
11 all the time. That's absolutely two years is - - - is not
12 a reason to say that there's no case of controversy. Not
13 at all, Your Honor.

14 JUDGE CANNATARO: Fair enough. Just - - -

15 JUDGE HALLIGAN: Can I ask you - - - go ahead.

16 JUDGE CANNATARO: Just one follow-up question.
17 And I hear your argument on 130, and you know, there are
18 issues to be resolved there that might not have to do with
19 you. But with respect to 3204, to the extent that you're
20 seeking any relief there, clearly, that has to be moot now
21 because it's an entirely different statute, right?

22 MR. SCHICK: We - - - we - - - we've challenged
23 the regulation in part 131, Your Honor. We've never
24 challenged the - - -

25 JUDGE CANNATARO: Not the statute. Okay.

1 MR. SCHICK: Not the statute, correct. And if I
 2 can suggest because my friend on the other side is going to
 3 get up here soon enough and may, you know, declare that
 4 they're withdrawn or null and void or something like that
 5 that - - - that, you know, I can - - - let me - - - if I
 6 can turn to the merits because we might not - - -

7 JUDGE HALLIGAN: Can I ask you one - - - one
 8 question - - -

9 MR. SCHICK: Yes.

10 JUDGE HALLIGAN: - - - on the merits - - -

11 MR. SCHICK: Yes, Your Honor.

12 JUDGE HALLIGAN: - - - specifically? There's
 13 some disagreement, it seems to me, between you on the
 14 question of how and whether supplementation is allowed and
 15 whether - - -

16 MR. SCHICK: Correct.

17 JUDGE HALLIGAN: - - - there's a single or
 18 multisource requirement. Okay. So as a practical matter,
 19 if some supplementation was permitted, how would that
 20 actually work for a student at a school? If you have a
 21 school - - - and I understand you have objections to this
 22 as well, but if you have a school where SED determined it
 23 was not substantially equivalent, right? And so the
 24 student had to fulfill the obligation to attend upon
 25 instruction in some other way, would you be taking the home



1 schooling path? Would you do something else? How would it
2 work?

3 MR. SCHICK: Right. So what Supreme Court
4 suggested was just like homeschooling has, you know, an
5 administrative process where the parent interacts - - -

6 JUDGE HALLIGAN: Yes.

7 MR. SCHICK: - - - you know, with the state.

8 JUDGE HALLIGAN: But you would propose to follow
9 that and follow those rules?

10 MR. SCHICK: Certainly, that - - - that's a
11 possibility. I mean, the court also suggested it could be
12 extracurricular activities, but whether or not it's
13 homeschooling or something else, I think the notion that
14 the - - - that Judge Ryba was getting at was that, you
15 know, the parents, certainly, you know, can be obligated to
16 communicate to the state how exactly it is satisfying
17 substantial equivalence, whether it's through home
18 instruction or through extra - - - you know,
19 extracurricular classes or through some tutor or something
20 like that.

21 JUDGE HALLIGAN: And I don't think you're
22 contesting, but tell me if I'm wrong, that there can be a
23 substantial equivalence requirement imposed. I take it
24 you're arguing about how it's - - - how that might be
25 implemented; is that right?

1 MR. SCHICK: Correct. We're not challenging the
2 fact that the State Education Department conducts a review.
3 We're not even challenging that it makes a determination.
4 What we're challenging are the three consequences that flow
5 from that determination, right? First, that parents - - -
6 if the determination is not equivalent, first, that parents
7 must unenroll their children from that school. Second,
8 instruction from that school can't be used to even
9 partially satisfy the compulsory education obligation. And
10 third, a child attending that school can't receive
11 services.

12 JUDGE HALLIGAN: So how would a parent in that
13 situation, if the school is not qualifying as substantially
14 equivalent, how would that parent meet the obligation, just
15 practically speaking?

16 MR. SCHICK: Well, so how would they meet it,
17 Your Honor, or how would they communicate the fact that
18 they've met it? I'm sorry.

19 JUDGE HALLIGAN: No. No. How would they, in
20 fact, meet it?

21 MR. SCHICK: Either through homeschooling or
22 through tutoring or through some extracurricular program.
23 And in fact, the cases - - - and SED, at this point, are -
24 - - are - - - doesn't seem to oppose it. The homeschooling
25 cases, and if this court looks at In re: Myers or In re:

1 Lash, those are two homeschooling cases where there are
2 family court proceedings. And in both those cases, a
3 homeschooling parent supplemented through a variety of
4 activities with this - - - in In re: Lash, it was two
5 separate tutors were also providing instruction to the
6 child, and In re: Myers, in addition to the homeschooling,
7 there was dance classes in one extracurricular academy,
8 music in a third - - - in a second, and art in a third.
9 And the courts are clear that supplementation works - - -

10 JUDGE GARCIA: Counsel, I- - -

11 MR. SCHICK: - - - and that - - -

12 JUDGE GARCIA: I know your light is on, but I
13 have a follow-up to that, going to your third category,
14 receiving services.

15 MR. SCHICK: Yes, Your Honor.

16 JUDGE GARCIA: How does that play in with ability
17 to supplement? Because would the state have the funding
18 obligation to an entity that, on its own, doesn't provide a
19 substantially equivalent education?

20 MR. SCHICK: So I'm glad you raised that, Your
21 Honor. I'd like to address it. The issue of what the
22 state here is calling state aid is really a red herring.
23 It wasn't - - - it's not in the regulations. It wasn't
24 raised at trial court. It wasn't raised before the Third
25 Department. And the reason is that what the state is

1 actually - - - is referring to as state aid are really
2 services to children, right? So if a child - - -

3 JUDGE GARCIA: So for example?

4 MR. SCHICK: But for - - - it could be bus
5 transportation, but more likely it's physical therapy,
6 occupational therapy, speech therapy.

7 JUDGE GARCIA: Let's say bus transportation.
8 Let's stay - - -

9 MR. SCHICK: Sure.

10 JUDGE GARCIA: - - - with that one. So if the
11 institution is not standalone providing a substantially
12 equivalent education, why would the state have to fund
13 bussing?

14 MR. SCHICK: Because the legislature says so.
15 The legislature - - - right? 3635 says not - - - point
16 one, which is where the transportation mandate is contained
17 - - -

18 JUDGE GARCIA: Right.

19 MR. SCHICK: - - - says nothing about substantial
20 equivalence. It says, you know, a child is entitled to
21 that transportation, you know, to the school.

22 JUDGE RIVERA: To go to a school that would meet
23 the education law.

24 MR. SCHICK: No. It says - - - it says the
25 school. It just says the school in - - -

1 JUDGE RIVERA: Well - - -

2 MR. SCHICK: - - - 3635. And - - - and Your
3 Honor, it's important to know that the - - -

4 JUDGE RIVERA: But that's the point, right?
5 Whether or not it can be a school within that meaning, if
6 it is not in furtherance of - - -

7 MR. SCHICK: Well - - -

8 JUDGE RIVERA: - - - the requirement imposed
9 under the law.

10 MR. SCHICK: Well, Your Honor, it's really a
11 little - - - circular, the state's position, but the state
12 actually takes a contrary position - - -

13 JUDGE GARCIA: So what would your definition of a
14 school be?

15 MR. SCHICK: Oh, so that's exactly what I was
16 going to get to, Your Honor. The state has conceded now,
17 and this concession is on page 5 of the last brief its
18 filed. And that's the - - - that was their short brief
19 that they filed on April 25th. It responds to the amicus
20 briefs. And on page 5 of that brief, the state concedes
21 that homeschooling parents can combine sources. They can
22 even - - -

23 JUDGE GARCIA: And do they get bussing?

24 MR. SCHICK: Well, they don't get bussing, but
25 they get all these other services. The other services,

1 home - - - physical therapy - - -

2 JUDGE GARCIA: So what is the definition of
3 school that entitles bussing when you're not a standalone
4 significant - - -

5 MR. SCHICK: So the State Education Department
6 puts out a document called home instruction questions and
7 answers. And it's available online, Your Honor. And
8 question 6 on page 3 says, may groups of parents provide
9 home instruction collectively by engaging the services of a
10 tutor to provide group instruction to their children? And
11 the answer is yes. And then it has a caveat, and it says
12 as follows, parents can do it, but for particular subjects,
13 there's a quote - - - quote for particular subjects, but
14 not for the majority of the home instruction program where
15 groups of parents organize to provide group instruction by
16 a tutor for a majority, but not the entirety - - - for a
17 majority of the instructional program. They are, quote,
18 "operating a religious or independent school." So the
19 court itself terms a group of students who are attending
20 instruction by a tutor hired by their parents in the
21 tutor's basement as a school.

22 JUDGE GARCIA: And they get bussing?

23 MR. SCHICK: The - - - they're not asking for
24 bussing, Your Honor.

25 JUDGE GARCIA: No. But that's my question.



1 MR. SCHICK: But they get services at home.

2 JUDGE GARCIA: What is - - -

3 MR. SCHICK: They get services. It's a school.

4 All - - -

5 JUDGE GARCIA: So what's the difference between
6 that definition of school and a school that qualifies for
7 bus?

8 MR. SCHICK: Your Honor, I thought you asked if
9 they get bussing at home. They don't get bussing at home.

10 JUDGE GARCIA: Let's say the students, they're
11 all going to one home.

12 MR. SCHICK: The majority, yeah. The state - - -

13 JUDGE GARCIA: And why don't they get bussing?

14 MR. SCHICK: SED is calling it a school. 3635(1)
15 says the trigger for bussing is school.

16 JUDGE CANNATARO: So they do get bussing?

17 JUDGE GARCIA: So your position would be they get
18 bussing?

19 MR. SCHICK: It would meet the def - - - it would
20 meet the statutory definition, Your Honor. They certainly
21 get other services at home, physical therapist,
22 occupational therapist, speech therapist, special education
23 services. The state has no problem - - - a local - - -
24 requiring local school districts to provide those services
25 to homeschoolers at their home even though - - -

1 JUDGE RIVERA: That about the - - -

2 MR. SCHICK: - - - they're supplemented.

3 JUDGE RIVERA: That's about the individual need
4 of the student - - -

5 MR. SCHICK: Sorry, Your Honor?

6 JUDGE RIVERA: That's about the individual need
7 of the student, assessed as such.

8 MR. SCHICK: That's exactly right, Your Honor.
9 And in fact, one - - - one - - -

10 JUDGE RIVERA: And bussing to the tutor is not
11 the same as - - - and you're saying you don't get paid for
12 that bussing to an actual facility that has more than a
13 tutor?

14 MR. SCHICK: Your Honor, the - - - there's no
15 doubt that these are schools. Whether a school meets all
16 the elements of substantial equivalence - - -

17 JUDGE RIVERA: Well, it may - - - it may be a
18 school it's whether or not it falls within and satisfies
19 the requirements of the education law.

20 MR. SCHICK: Your Honor, the - - - the - - -
21 there's no statutory provision that they could turn to that
22 either imposes, you know, their definition or ties together
23 bussing with their definition. It just says school. And I
24 - - - I - - -

25 CHIEF JUDGE WILSON: So - - -



1 MR. SCHICK: - - - I want to say, Your Honor,
2 it's - - - if I can get to two other points. The first is,
3 right? You know, the state has taken for itself in these
4 regulations the authority to require parents to unenroll
5 from the school.

6 CHIEF JUDGE WILSON: Okay. That's actually what
7 I wanted to ask you about. Where is that in the
8 regulations? Because I don't read them that way.

9 MR. SCHICK: So it's in the regulation, Your
10 Honor, because - - -

11 CHIEF JUDGE WILSON: No. Where? Where?

12 MR. SCHICK: So it's in two places, Your Honor.

13 CHIEF JUDGE WILSON: Yeah. That are - - - that
14 are - - - that are - - - example, right?

15 MR. SCHICK: It's - - - it's a combination of two
16 places. If one looks at part 130.6 - - -

17 CHIEF JUDGE WILSON: 62 - - -

18 MR. SCHICK: - - - 622.

19 CHIEF JUDGE WILSON: - - - 622, right?

20 MR. SCHICK: Yes, Your Honor.

21 CHIEF JUDGE WILSON: And 138(d)(7)(2), right?

22 MR. SCHICK: Yeah. But - - - okay. Yes.

23 CHIEF JUDGE WILSON: Right? And what it says is,
24 the LSA shall provide a reasonable time frame for parents
25 or persons in parental relationship to enroll their

1 children in different appropriate educational setting
2 consistent with Education Law 3204.

3 MR. SCHICK: Right. Which means they have to
4 leave the school - - -

5 CHIEF JUDGE WILSON: No. No. It - - - no. The
6 command is to the LSA. It says the LSA has to give you
7 time. It doesn't say you have to do it.

8 MR. SCHICK: No, Your Honor. The - - - the L - -
9 - the LSA has to direct the parent to - - - absolutely.
10 The LSA has to direct the parent - - -

11 JUDGE HALLIGAN: That's not what it says.

12 JUDGE CANNATARO: Where does it say it?

13 JUDGE GARCIA: Where does it say that?

14 JUDGE HALLIGAN: Direct to provide a reasonable -
15 - -

16 JUDGE GARCIA: Where does it say that?

17 JUDGE HALLIGAN: - - - time frame.

18 MR. SCHICK: It says they have to enroll - - - if
19 one looks at, Your Honor, 136. - - - 130.6 - - -

20 JUDGE RIVERA: Yeah.

21 MR. SCHICK: - - - (c) (2) - - -

22 JUDGE RIVERA: Yeah.

23 MR. SCHICK: - - - iii - - -

24 JUDGE RIVERA: Yeah.

25 MR. SCHICK: Parents must - - - the - - - the - - -



1 - it says that they have to get a directive to, quote,
2 "Enroll their children in a different appropriate
3 educational setting."

4 JUDGE HALLIGAN: Where do you see the word
5 directive? It says a reasonable time frame.

6 MR. SCHICK: To quote, "Enroll their children - -
7 -

8 JUDGE HALLIGAN: Yes.

9 MR. SCHICK: - - - in a different - - -

10 JUDGE HALLIGAN: - - - but it's not a directive
11 to the parent that they must enroll - - - it's a directive
12 to provide a time frame. Those seem to say - - -

13 JUDGE GARCIA: And to provide services in that
14 time frame, it seems, to me.

15 MR. SCHICK: But Your Honor, as I said, the - - -
16 the - - - there's no question that the way SED interprets
17 this and applies this and enforces it is to parents get
18 letters once there's a determination around equivalence.
19 SED sends letters to the school saying you must inform the
20 parents that they have to find a new educational setting.
21 And then the local school district follows up, and it says,
22 quote - - -

23 JUDGE HALLIGAN: Are there any of those - - -

24 JUDGE CANNATARO: But Counsel - - -

25 JUDGE HALLIGAN: - - - letters in the record?



1 JUDGE CANNATARO: Yeah. Yeah.

2 MR. SCHICK: Excuse me?

3 JUDGE HALLIGAN: Are there any of those letters
4 in the record?

5 MR. SCHICK: Your Honor, the question - - - let's
6 go back to - - - to the principle - - -

7 JUDGE HALLIGAN: I'm just asking if they're in
8 the record or not, the letters.

9 MR. SCHICK: Letters aren't in the record, but
10 we're - - - we're talking about the - - - the status of
11 things. But let's go back, Your Honor, to - - - to - - -
12 to what - - -

13 JUDGE RIVERA: Counsel - - -

14 MR. SCHICK: - - - Judge Ryba said - - -

15 JUDGE CANNATARO: Counsel, hold on a second. If
16 you don't want to answer that question, maybe you can
17 answer this one. Again, this is DJ Article 78, right?

18 MR. SCHICK: Yes.

19 JUDGE CANNATARO: So we have to make a
20 declaration or annul a provision, and we just went through
21 a lot of questioning that seems to suggest that some of the
22 members of this court don't see any requirement that a
23 parent disenroll their child. So what is there for us to
24 annul?

25 MR. SCHICK: Your Honor, the whole point about -



1 - - the whole point about supplementation gets to this
2 point, right? The state determines that this school is no
3 - - - not a school that can satisfy any element of
4 substantial equivalence.

5 CHIEF JUDGE WILSON: No. No. We're not - - -
6 well, is there any element of substantial equivalence you
7 may - - -

8 MR. SCHICK: That's what it says. It says that a
9 school shall no longer be deemed a school which provides
10 compulsory education fulfilling the requirements of Article
11 65.

12 CHIEF JUDGE WILSON: Yeah. That would be all of
13 the requirements, not any of the requirements.

14 MR. SCHICK: It doesn't say - - - no, Your Honor,
15 it doesn't say which provides - - - fulfilling all of the
16 requirements.

17 JUDGE HALLIGAN: It could be - - -

18 MR. SCHICK: It can't fulfill - - -

19 JUDGE HALLIGAN: It could be - - -

20 MR. SCHICK: - - - any of the requirements. And
21 that's the court's - - -

22 JUDGE HALLIGAN: Wait. Wait. If I can. It
23 could be read either way, it seems to me. It could be read
24 to mean all or it could be read to mean any.

25 MR. SCHICK: And what Justice Ryba did below was

1 say, you don't have to unenroll. That's exactly what she
2 said. She said, you don't have to unenroll. You can, in
3 fact, supplement.

4 CHIEF JUDGE WILSON: So perhaps she's right.

5 MR. SCHICK: Right. Except, Your Honor, that the
6 state appealed that, and the Appellate Division reversed
7 it, and specifically - - -

8 JUDGE RIVERA: It doesn't say unenroll.

9 MR. SCHICK: It - - - it - - - it then - - -

10 JUDGE RIVERA: It says - - - excuse me.

11 MR. SCHICK: Yes.

12 JUDGE RIVERA: It says you're not - - - notifying
13 the parents the reason students should be enrolled, right,
14 in a different, appropriate educational setting. That
15 doesn't mean they get to be - - - they have to be
16 unenrolled of where they currently are.

17 MR. SCHICK: Your Honor, if you can't - - -

18 JUDGE RIVERA: You're the one that said they can
19 supplement. If you could supplement, then you can be in
20 both, can you not?

21 MR. SCHICK: And that's what Justice Ryba said.
22 And SED, instead of saying that makes sense, they appealed.
23 And the Third Department said, you cannot supplement - - -
24 explicitly said you cannot supplement. It's too hard to go
25 to a parochial school and do more, and therefore, you

1 cannot supplement. That was the basis of SED's appeal from
 2 Justice Ryba, and that was the clear direct holding of the
 3 Third Department that's on appeal here today. But we
 4 agree, Your Honor, if this court would reinterpret 136 - -
 5 - 130.6 - - -

6 JUDGE RIVERA: Yeah. Because that's the Third
 7 Department reacting to if you were going to have them
 8 enrolled in the school that's found deficient with respect
 9 to the education law for the exact same time period. But
 10 that may not be what the parent does.

11 MR. SCHICK: It doesn't say for the exact same
 12 time period. The Third Department said - - -

13 JUDGE RIVERA: But that was their point. There
 14 would not be any hours left in the week.

15 MR. SCHICK: Your Honor, they said, if you go to
 16 a parochial school that has school day end at 5 o'clock,
 17 you can't supplement on weekends. You can't supplement on
 18 nights, even though the homeschooling regs say a
 19 homeschooling parent can use weekends and nights to provide
 20 instruction. So - - - and you know, parents - - - you
 21 know, beyond that, if we step back for a second, right?
 22 The parents, you know, have a constitutional right to
 23 choose their school, the - - - to direct the education of
 24 their children. The state can't deprive them of that right
 25 by virtue of a regulation, especially when the education



1 law is quite clear about, you know, how it's enforced.
2 This education law has numerous provisions that say, if the
3 - - - if a parent is suspected of not fulfilling her
4 compulsory education obligation by providing instruction
5 that's, you know, elsewhere that's substantially
6 equivalent, there's a family court proceeding. And in a
7 family court, a judge looks at, you know, the totality of
8 the circumstances and has a range of options in front of
9 the court. And the court has, you know, broad authority.
10 There are monetary fines and penalties. There's criminal
11 sanctions, even jail time. And most importantly, for these
12 purposes, as in the case of David A., the court, can, you
13 know, issue an order of unenrollment. That's - - - that's
14 exactly the - - - the legislature dealt with this long ago,
15 and it said, this is how it works. And it's important to
16 note, Education Law 211(f) deals with the State Education
17 Department commissioner's authority to order unenrollment
18 at public schools. And it greatly circumscribes that
19 authority. There has to be a finding of very substandard
20 performance for a large number of years in a row. After
21 the school is performing deficiently for a number of years,
22 they convene a committee, they talk about an improvement
23 plan, they give them more resources, and it takes ten years
24 to do it. And we know that because of the Mulgrew
25 decision, right? At one point, the education commissioner

1 got fed up and said, parents, you can't go to those public
2 schools - - -

3 JUDGE GARCIA: And who sued - - -

4 MR. SCHICK: - - - and lost? What?

5 JUDGE GARCIA: Who sued?

6 MR. SCHICK: The UFT. And they lost. The court
7 said the education commissioner could not tell public
8 school parents that they can't go to a public school that
9 they found to be deficient. And here, Your Honor, you
10 know, it's because of - - - so there's no support or
11 authority in the education law or certainly nothing that
12 would give the state education commissioner, you know,
13 greater rights here, especially, of course, when there are
14 constitutional rights at play. As this court has said in
15 Packer Collegiate, right? Schools - - - nonpublic schools
16 have a constitutional right to exist, and parents have a
17 constitutional right to send children to those schools.

18 CHIEF JUDGE WILSON: Thank you - - -

19 MR. SCHICK: The - - -

20 CHIEF JUDGE WILSON: - - - Counsel. You have
21 your rebuttal.

22 MR. SCHICK: Thank you, Your Honor.

23 MR. KIERNAN: May it please the court. Beezly
24 Kiernan, for Respondents. I'll start with mootness. I
25 actually agree with my opposing counsel that this case is

1 not moot, and I think there are two separate justiciability
2 questions here. First is whether the budget bill displaces
3 the substantial equivalency regulations challenged here.
4 We don't think they do. The second question is whether
5 petitioners still have a personal stake in the outcome of -
6 - - of this litigation because if all petitioner schools,
7 for example, choose this assessment pathway set forth in
8 the budget bill, they may not be subject to a negative
9 determination any time soon. And that's really up to
10 petitioners to demonstrate at this point.

11 CHIEF JUDGE WILSON: Well, they're not subject to
12 anything now; is that right?

13 MR. KIERNAN: That's right. And then that - - -
14 that's why we - - -

15 CHIEF JUDGE WILSON: So what about counsel's
16 assertion that there are ongoing prosecutions?

17 MR. KIERNAN: There have been six schools
18 determined to be not substantially equivalent - - -

19 CHIEF JUDGE WILSON: Yeah.

20 MR. KIERNAN: - - - because they intentionally
21 refuse to cooperate with local school districts in those
22 reviews. If there are other schools - - -

23 CHIEF JUDGE WILSON: And so as to those six, does
24 the statute affect them at all or affect those
25 determinations?

1 MR. KIERNAN: SED's position at this point is
2 that the legislation does not affect those final
3 determinations. And if I can just step back and - - -

4 JUDGE RIVERA: Wouldn't that then be the next
5 case, not this case?

6 MR. KIERNAN: Absolutely. That - - - that - - -
7 that can absolutely be the next case.

8 JUDGE RIVERA: So again, why is this not moot?

9 MR. KIERNAN: Because - - - and I'd like to talk
10 about what the legislation does. It takes the pathways
11 that were already in the regulations. This is Section
12 130.3 of the regulations. That will - - - those
13 regulations allow nonpublic schools to demonstrate
14 substantial equivalency, if they were registered,
15 accredited, if they conducted assessments. All those
16 pathways were already in the regulations. The budget bill
17 puts them in the statute and then elaborates on the
18 accreditation and assessment pathways, creates a phasing
19 period for the assessments pathway. But a school doesn't
20 have to choose one of those pathways. And the bill even
21 makes clear that it doesn't preclude the commissioner from
22 defining alternative criteria for substantial equivalency
23 by rule or regulation. That's the final subparagraph in
24 the budget bill, obviously.

25 CHIEF JUDGE WILSON: An alternative would mean

1 additional or to replace the statutory pathways?

2 MR. KIERNAN: Additional ways to demonstrate
3 substantial equivalence.

4 JUDGE CANNATARO: So you keep the one that you've
5 been previously prosecuting under, but there are other
6 alternatives available to the school, right? I take that
7 to be your argument.

8 MR. KIERNAN: That's right. There have always
9 been these alternative pathways, but if a school didn't
10 choose one of those pathways, then it was subject to review
11 process.

12 JUDGE CANNATARO: Can I just ask you regarding
13 enforcement? And I know you have a lot more you want to
14 say about the scheme - - - the regulatory scheme. But does
15 - - - does the current reg give SED the authority once a
16 fill - - - you know, a lack of substantial equivalence is
17 found to direct or compel disenrollment of students from
18 schools?

19 MR. KIERNAN: No. The regulations don't purport
20 to authorize that kind of order. As Your Honors noted, the
21 relevant provision requires the commissioner and local
22 school authorities to give parents a reasonable time frame
23 to affirmatively enroll their children in a different,
24 appropriate educational setting.

25 JUDGE GARCIA: It seems to me to be tied to

1 funding. You have to continue funding for a reasonable
2 time to the school while these people - - - while the
3 parents find some other arrangement, potentially, right?

4 MR. KIERNAN: That's exactly the purpose, yes.

5 JUDGE GARCIA: What is the authority of the state
6 to stop funding once substantial equivalency determination
7 is made lack of?

8 MR. KIERNAN: Because the legislature has
9 conditioned state aid, state services on a nonpublic school
10 satisfying substantial equivalency.

11 JUDGE GARCIA: Where is that?

12 MR. KIERNAN: So for example, mandated services
13 aid. It's a session law. It's also in - - - at 1131 of
14 the record. It states that nonpublic schools that provide
15 instruction in accordance with Education Law 3204 shall
16 receive this mandated services aid. 3204 is what sets
17 forth - - -

18 CHIEF JUDGE WILSON: But there are also services
19 that are available to children on an individual basis.
20 Let's say a particular child is dyslexic. The state and
21 local district has an obligation to provide services, no?

22 MR. KIERNAN: That's a separate kind of service.
23 Mandated services aid are - - - it's a limited category of
24 money for services that schools have to provide in
25 compliance with - - -

1 JUDGE GARCIA: So other than bussing, what would
2 that be?

3 MR. KIERNAN: So besides bus - - - so there's one
4 statute, 3602-c, which does talk about disability services
5 and gifted and talented programs.

6 JUDGE GARCIA: What other services would be
7 suspended with a noncompliant private school other than
8 bussing?

9 MR. KIERNAN: There's the state aid and the
10 gifted and talented programs, career and occupational
11 services. Under 3602-c, those services are made available
12 to students attending nonpublic schools. And the statute
13 even makes clear that - - -

14 JUDGE CANNATARO: But only compliant nonpublic -
15 - - substantially equivalent nonpublic schools. In other
16 words, you have the authority to discontinue those funding
17 streams if there's a finding of noncompliance?

18 MR. KIERNAN: Well, the statute just says
19 nonpublic schools.

20 CHIEF JUDGE WILSON: And so are those - - - that
21 carrier services, are those provided to parents who are
22 homeschooling their children?

23 MR. KIERNAN: No. And 3602-c actually
24 distinguishes between parents enrolling their children in a
25 home instruction program versus nonpublic schools. It says

1 that, solely for purposes of disability services, children
2 receiving instruction in a home instruction plan shall be
3 deemed students enrolled in a nonpublic school for purpose
4 of the other provision saying that nonpublic schools - - -

5 JUDGE CANNATARO: And Counsel, what about
6 supplementation? We had some argument regarding what
7 Justice Ryba held and what the Appellate Division held.
8 Where does SED stand on the ability of parents who want to
9 continue to have their children attend even a noncompliant
10 private school to supplement their education?

11 MR. KIERNAN: So just to be clear, parents can
12 provide instruction for their children from whatever choice
13 - - - from whatever source they choose, but they do have
14 the responsibility to ensure that their children receive
15 the compulsory education they're entitled to. So the
16 education law offers three avenues for parents to fulfill
17 their obligations. Of course, you can enroll your child in
18 public school, you can enroll your child in a substantially
19 equivalent nonpublic school, or you can enroll your child
20 in a substantially equivalent home instruction program.
21 And the education law authorizes dual enrollment in a few
22 discrete areas. We've already discussed 3602-c, gifted and
23 talented programs, disability services, but otherwise, the
24 education law doesn't contemplate the kind of hybrid
25 education.

1 JUDGE CANNATARO: So there is no enrolling your
2 student in a nonsubstantially equivalent private school and
3 then supplementing that training with tutoring and programs
4 outside the school? That - - - that's - - - your position
5 is that's not allowed?

6 MR. KIERNAN: There's no precedent for that. And
7 we're using enrollment as a part of our - - -

8 JUDGE RIVERA: Why isn't the reverse allowed?
9 You enroll them in a school that's compliant - - - we'll
10 just use that phrase for the moment - - - and you keep them
11 enrolled in the school that the department or the
12 commissioner or LSA have determined is not substantially
13 equivalent because together, it's enough.

14 MR. KIERNAN: There's no precedent for that kind
15 of model.

16 JUDGE CANNATARO: Are there enough hours in the
17 day to do that? Isn't one of the requirements that you be
18 open for a certain number of hours and instructing?

19 MR. KIERNAN: You do have to be instructed a
20 certain amount of time per day, although, the school
21 districts do have a little bit of flexibility, yes.

22 JUDGE HALLIGAN: On the dual enrollment, one of
23 the amici make the argument that allowing dual enrollment
24 only in some circumstances but not here runs into the
25 restrictions the Supreme Court has explained are in place

1 on treating religious activity less favorably than
2 comparable secular activity. So why does this not run a
3 foul of that constraint? The restriction on dual
4 enrollment that you articulated.

5 MR. KIERNAN: The regulations the statute treat
6 all types of schools equally - - -

7 JUDGE HALLIGAN: But I thought you just said,
8 correct me if I'm wrong, the dual enrollment, and I think
9 this is confirmed - - - is permissible in other
10 circumstances, but I thought you said not here.

11 MR. KIERNAN: There is statutory authority in a
12 few discrete areas for - - - for what the statutes call
13 dual enrollment.

14 JUDGE HALLIGAN: Right. And so - - -

15 MR. KIERNAN: But even those statutes, you know,
16 take as a - - - as - - - as a given that you're enrolled in
17 a substantially equivalent nonpublic school or a
18 substantially equivalent exception program.

19 JUDGE CANNATARO: So those exceptions, that's
20 like working children and stuff like that? Is - - - are
21 those the exceptions you're talking about?

22 MR. KIERNAN: No, Your Honor. And the statutes
23 call this dual enrollment. It's not really dual
24 enrollment. You still have to be enrolled in one school,
25 and then you can receive services from another school.

1 JUDGE HALLIGAN: Could the parents keep their
2 children in a nonpublic school that was designated not
3 substantially equivalent and supplement as appropriate
4 through the homeschooling route?

5 MR. KIERNAN: What they absolutely can do is
6 craft a home instruction program. And as part of that home
7 instruction plan, they can certainly rely on classes at a
8 former nonpublic school, absolutely.

9 JUDGE HALLIGAN: What is your - - -

10 JUDGE GARCIA: That school just would not receive
11 services?

12 MR. KIERNAN: Yes.

13 JUDGE GARCIA: Right?

14 MR. KIERNAN: That school wouldn't receive
15 services.

16 JUDGE HALLIGAN: What's your - - -

17 JUDGE RIVERA: Your time is going to start
18 running out. Can I just get back to the mootness because
19 I'm unclear as to - - - given what you said at the
20 beginning when you started out with mootness, what decision
21 we could render that somehow would provide a remedy that
22 survives this new legislation.

23 MR. KIERNAN: So as I mentioned, schools don't
24 have to choose this safe harbor as - - -

25 JUDGE HALLIGAN: Yeah.

1 MR. KIERNAN: - - - the legislation calls it.
2 Schools can say we don't even want to do assessments, or
3 for whatever reason. We just want to be - - - we would
4 rather be subject to the reviews by the commissioner. So
5 those schools would certainly - - -

6 JUDGE HALLIGAN: But do we know that's the case
7 now?

8 JUDGE CANNATARO: Yeah. What is - - -

9 JUDGE HALLIGAN: I mean, that - - -

10 JUDGE CANNATARO: - - - what is this - - -

11 JUDGE HALLIGAN: - - - that question hasn't been
12 presented to them yet, I don't think.

13 MR. KIERNAN: That - - - that's what's difficult,
14 Your Honor. We don't know if any of - - - of petitioners -
15 - - members of Petitioners' organizations, we don't know
16 what they'll do in response.

17 JUDGE RIVERA: But that's the point. Why isn't
18 it moot then? Because we don't know what - - - as I said
19 to you before, that's the next case.

20 JUDGE HALLIGAN: Or not ripe.

21 JUDGE CANNATARO: They have more options now than
22 they did before last week.

23 MR. KIERNAN: They do. And then that goes to the
24 separate - - - the second justiciability question I
25 mentioned. We take the position that the regulations are

1 still in effect, and in that sense, the case is not moot.
2 But to the extent Petitioners - - -

3 JUDGE RIVERA: Well, okay, then there can be a
4 lawsuit about that - - -

5 MR. KIERNAN: Sure.

6 JUDGE RIVERA: - - - given the new legislation.
7 All right. What's the second point about?

8 MR. KIERNAN: To the extent any Petitioner
9 schools, member schools are no longer affected by the
10 regulations - - -

11 JUDGE RIVERA: Yes.

12 MR. KIERNAN: - - - then they wouldn't have a
13 personal stake.

14 CHIEF JUDGE WILSON: So are any of the six
15 schools you mentioned that have been deemed, are the - - -
16 any of those the plaintiffs here?

17 MR. KIERNAN: I don't know, Your Honor.
18 Petitioners have never quite made clear which schools are
19 members of their organizations, and I don't know whether
20 those six are.

21 JUDGE HALLIGAN: And why is it your view that the
22 schools for which there has been some determination made
23 are not affected by the statute at all, including the - - -
24 whatever it is, two or three-year window?

25 MR. KIERNAN: I - - - I - - - this is - - - and

1 State Ed is still digesting this budget bill, which just
2 passed, but I think State Ed's view is they made a final
3 determination that this is no longer a nonpublic school.
4 It's still receiving services during the reasonable time
5 frame, but these determinations were made - - -

6 JUDGE HALLIGAN: Is there any room under the
7 statute, either previously or as amended, to allow a school
8 to remediate in some way after a determination is made?

9 MR. KIERNAN: Not that I can - - - not that I
10 know, Your Honor.

11 JUDGE HALLIGAN: So the window in which there's
12 some consultation back and forth that's contemplated by the
13 prior iteration of the statute, SED would not respond if
14 the school came forward and said, you know, we would like
15 to try this again?

16 MR. KIERNAN: Your Honor, I don't want to - - -
17 I'm not sure what would happen. At least for these six
18 schools, they did have a remedial period. They had a
19 lengthy period to improve.

20 JUDGE HALLIGAN: I understand. I mean - - - I
21 mean - - -

22 MR. KIERNAN: Right.

23 JUDGE HALLIGAN: - - - if there was further - - -

24 JUDGE RIVERA: But they may very well argue
25 there's now this statute, puts them in a different place.

1 And again, that's another lawsuit.

2 MR. KIERNAN: That's a different case.

3 JUDGE RIVERA: Right?

4 MR. KIERNAN: Yes, Your Honor.

5 JUDGE CANNATARO: Can I just ask you, why are
6 those schools, those six, still receiving aid? Is that as
7 a result of some injunction, or is that just by the grace
8 of SED?

9 MR. KIERNAN: No. It's this reasonable time
10 frame language.

11 JUDGE CANNATARO: Oh, so the time to end the aid
12 has not yet - - -

13 MR. KIERNAN: Right.

14 JUDGE CANNATARO: - - - expired?

15 MR. KIERNAN: Right. We are still in that time
16 frame.

17 CHIEF JUDGE WILSON: Because the reasonable time
18 frame is - - - I forgot. It's ninety days?

19 MR. KIERNAN: It's whatever - - - I think it's
20 whatever is reasonable under the - - - under the
21 circumstances. I'm not sure if there's a specific - - - so
22 in this case, these determinations were made in February,
23 March of 2025. Services will continue through this school
24 year, which is about to finish at the end of June, I
25 believe.

1 JUDGE RIVERA: So I'm sorry, these determinations
2 were made post the litigation?

3 MR. KIERNAN: Yes. These - - - yes. Very
4 recently, obviously, well outside the record. But for
5 purposes of mootness, you know, these schools would be
6 affected, I think, by a decision in this case. It's just
7 unclear to us whether they're actually members of the
8 petitioners.

9 CHIEF JUDGE WILSON: And those determinations
10 aren't in the record here?

11 MR. KIERNAN: Right. They're not in the record
12 here.

13 JUDGE RIVERA: But that - - -

14 JUDGE HALLIGAN: And the identity - - -

15 JUDGE RIVERA: But that might all be for naught
16 depending on the new legislation, which has not gone
17 through any process yet, right?

18 MR. KIERNAN: Yeah. There - - - Your Honor,
19 there are - - -

20 JUDGE RIVERA: Litigation process, you haven't
21 reviewed your regulations to see if you need to amend them,
22 correct?

23 MR. KIERNAN: Right. And 130.3 of the
24 regulations that sets forth the pathways, that'll need to
25 be amended for sure.

1 JUDGE RIVERA: That'll need to?

2 MR. KIERNAN: That will need to be amended in
3 light of the budget bill. The other regulations, I think,
4 still stand.

5 JUDGE RIVERA: Which section are you conceding
6 needs to be amended? 130 what?

7 JUDGE CANNATARO: 130.3.

8 MR. KIERNAN: 130.3.

9 JUDGE RIVERA: Thank you.

10 JUDGE HALLIGAN: So just so I'm clear the record
11 doesn't include any documentation I take it because it's
12 recent, you're saying, of the final actions, nor does it
13 reveal the identity of the particular schools; is that
14 right?

15 MR. KIERNAN: That's right. I'm not aware of any
16 indication in the record of those - - -

17 JUDGE HALLIGAN: Thank you.

18 CHIEF JUDGE WILSON: Thank you.

19 MR. KIERNAN: Thank you. Could I just briefly on
20 - - -

21 CHIEF JUDGE WILSON: Yes. If you need a minute,
22 sure.

23 MR. KIERNAN: Yes. On vacatur, vacatur would not
24 be necessary here. This court's general practice is simply
25 to dismiss an appeal that - - -

1 JUDGE HALLIGAN: Although, in some circumstances,
2 we have vacated. For example, Hearst suggests that where
3 there's an immediate consequence, that might be
4 appropriate.

5 MR. KIERNAN: Yes. In a few cases, the court has
6 done so. In Hearst, there was an intervening Court of
7 Appeals decision - - -

8 JUDGE HALLIGAN: Uh-huh.

9 MR. KIERNAN: - - - that post-dated the Appellate
10 Division's decision. So I think for that reason, the court
11 vacated - - -

12 JUDGE HALLIGAN: It's your view that if it was
13 determined to be moot and not vacated, that the aspects of
14 the regulation currently under review that might not be
15 changed could no longer be challenged?

16 MR. KIERNAN: They could certainly be challenged.

17 JUDGE HALLIGAN: By other parties, I assume?

18 MR. KIERNAN: Yes. I mean, this was a
19 declaratory judgment action. You could always bring those
20 claims up again, and especially in an as applied claim.
21 This was a facial case. The court just upheld the
22 regulations on their face.

23 JUDGE RIVERA: But again, you have new
24 legislation, and things may change.

25 MR. KIERNAN: That - - - that's right, Your

1 Honor. So - - - so if Your Honors do find that this case
2 is moot, we urge you to just dismiss the appeal and - - -
3 and not vacate the Third Department's well-reasoned
4 opinion. Thank you very much.

5 CHIEF JUDGE WILSON: Thank you.

6 MR. SCHICK: Thank you, Your Honor. A few - - -
7 a few points. With respect to mootness, you know, what we
8 just heard from SED is that they concede that they're
9 continuing with respect to the six schools. I don't
10 believe they gave an answer with respect to the eighteen
11 schools.

12 CHIEF JUDGE WILSON: Is there - - - do we know
13 what - - - does record show what those six schools are?

14 MR. SCHICK: In terms of the names?

15 CHIEF JUDGE WILSON: Yeah.

16 MR. SCHICK: The record, no, because it - - - it
17 - - - the determinations post-date the filing of the
18 lawsuit.

19 CHIEF JUDGE WILSON: And does the record show us
20 who your member schools are?

21 MR. SCHICK: Yeah. So I think the - - - the
22 record shows, Your Honor, there were three institute - - -
23 there were eight plaintiffs or petitioners altogether,
24 three institutional petitioners. The first is PEARLS, in
25 short, the second is Agudath Israel, and the third is the

1 National Society for Hebrew Day Schools. And I think the
2 record demonstrates that, essentially, all of the Jewish
3 schools in New York are members of one or more of the
4 institutional petitioners. So they're definitely covered.
5 And - - - and in fact, I - - - you know, they are - - -
6 they are among the six schools members of PEARLS, and among
7 the eighteen schools that are - - - that - - - that are
8 members of PEARLS, so absolutely. And as I say, both of
9 those go on. And it's unclear why there would be any
10 difference in how SED treats one or the other. So they
11 conceded about the six schools that they're continuing.
12 They didn't answer about the eighteen schools, but the
13 facts show that they are continuing.

14 And generally, you know, mootness means a
15 threatened injury has been removed. And here, you know,
16 SED says they retain the authority on the challenge part of
17 the regs, and they're going to vigorously defend them. So
18 I think the threat, in any event, hasn't been removed.
19 With respect to combination of sources, so for the first
20 time, the state has conceded that a parent, you know, can
21 combine sources, including a private school parent - - - a
22 parent can supplement. Now, that's contrary to the Third
23 Department. So I think the court would still have to enter
24 something that made clear that that right exists for
25 parents. Otherwise, we just have Mr. Kiernan's word for it

1 today. And Your Honor, I just want to point out - - -

2 JUDGE CANNATARO: Counsel, why do you say it's
3 contrary to the Third Department? I see language in the
4 Third Department decision from the majority saying,
5 contrary to your assertion, loss of status is not
6 equivalent to closure. The institutions may, in fact,
7 continue to operate and provide some form of instruction,
8 and it does not limit the parent's opportunity to enroll
9 their children in any extracurricular instruction or
10 activities that they deem appropriate and helpful. That
11 seems - - - I don't see that as a prohibition. I see that
12 as an endorsement.

13 MR. SCHICK: Your Honor, a couple of things.
14 First of all, extracurricular instruction is not a school,
15 right? A school has a particular meaning. In fact, the
16 statute - - - the Not-For-Profit Law 414, you know,
17 distinguishes between schools and other institutions for
18 educational purposes. And these are indisputably schools.
19 And we're talking about the legislature, you know, set up
20 this process. Again, we're talking about rights that the -
21 - - that - - - that the parents have and that the schools
22 have. And you know, Mr. Kiernan is not, you know, rooting
23 the arguments of - - - about SEDs authority in any act of
24 the legislature. And that is deeply problematic here.
25 That's, in fact, what's wrong with exercising this power.

1 Again, what we know that the legislature has says is that
2 the power he says his commissioner has over private
3 schools, she doesn't have over public schools. And that
4 simply, Your Honor, can't stand. So the case is not moot.

5 I guess I would say, as a final point, Your
6 Honor, that it - - - so if they can combine sources, that's
7 fine. We just needed a determination that says that. The
8 issue of state aid form looks - - - Mr. Kiernan talked
9 about the - - - the local law for mandated services. It
10 doesn't say substantial equivalence. It talks about - - -
11 it does reference 3204 which has new provisions in it,
12 including the number of days they have to offer school and
13 the number of hours during the year there has to be
14 schooling. So there's nothing in that local law in chapter
15 507, as Mr. Kiernan referenced, that has any reference to
16 substantial equivalence. And so we don't think so.

17 And with respect to services, Your Honor, the
18 home services - - - the services that children who are
19 homeschooled receive, you know, go, you know, far beyond,
20 you know, gifted - - - attending gifted classes or remedial
21 classes. They are services that are individual to the
22 child at the place they receive instruction. And that's
23 just the reality. And the state has ignored that, but
24 that's what they're saying. You know, the state still
25 persists in saying that a child who stays in the parochial

1 school the parent chose for them and supplements at home
2 can't get services at the school. And it's important to
3 know, if one looks at the amicus briefs that the parents
4 filed - - -

5 CHIEF JUDGE WILSON: And I'm sorry. And - - -
6 and can't get services at the home either?

7 MR. SCHICK: What?

8 CHIEF JUDGE WILSON: And can't get services at
9 the home?

10 MR. SCHICK: But it - - - it makes more sense to
11 get it in the school setting, Your Honor.

12 CHIEF JUDGE WILSON: Well, that's not what I'm
13 asking, right? So let's take counselor's word that - - -
14 and I think the Appellate Division of their word - - - that
15 you can keep children enrolled in the school even if it's
16 not designated as a school, and you can supplement that
17 with homeschooling and meet the substantial equivalent
18 requirement that way. Take that hypothetical, all right?
19 Is there a reason that you think you couldn't get the
20 services at the home?

21 MR. SCHICK: Well, Your Honor, take the school
22 that is the one attended by the parents who submitted an
23 amicus brief, right? The state concedes the state gave
24 that school review. And they said, your English language
25 arts instruction from K through 8 is good. It's fine. We

1 like it. They said your math instruction from K through 8
2 is good. We like it. They said, your science instruction,
3 we love your STEM classes for the older science grades. We
4 had a problem with 3rd grade science, and we had a problem
5 with, I think, it's 5th grade history. And as a result,
6 they just said, blanket the school is not equivalent. And
7 why, in God's name, would the state have any legitimate
8 policy interest in saying the child can't get services at
9 that school? Child spends the day there because the
10 parents choose it for its religious mission, its religious
11 values. Its instruction of math and lots of science and
12 history is good. It's just punitive. It's because the
13 state is trying to obtain over private schools' authority
14 that the legislature has not given it. It's just a
15 punitive mechanism, Your Honor.

16 The state has an interest in what the kids learn,
17 not where they learn it. And once we acknowledge that
18 there could be a combination of sources, there's absolutely
19 no legitimate reason to start penalizing schools whether
20 it's through using monetary means or through penalizing the
21 parents who choose them by saying where your child spends
22 the day, with his teachers, with her friends, where she
23 learns, where she learns almost everything can't be where
24 she receives resources. Is the state really going to start
25 sending these people to homes on the evenings and on

1 weekends? They're not going to, Your Honor. And more
2 importantly, they don't have the right to withdraw them
3 from the student if the - - - if the student has chosen
4 that school - - - if the parent has chosen that school.

5 Final point, Your Honor, is if this court thinks
6 that somehow there needs to be a greater expansion of the
7 record, we think the appropriate method of doing that would
8 be to remand it to Justice Ryba, who had the case first,
9 and that can be done before Justice Ryba. But it wouldn't
10 be appropriate to moot the case. It wouldn't be
11 appropriate to dismiss the case. It wouldn't be
12 appropriate at this point to start entertaining arguments
13 about justiciability. If - - - we think there's enough
14 there. The state argues it's not moot. The - - - and
15 there - - - there's - - - the way the statute works, right,
16 is not similar at all to any of the mootness cases of this
17 court. In those cases, indisputably, the threatened harm
18 has been removed, or the issue complained about or being
19 adjudicated was removed, whether it was in Hearst with the
20 transcript, or whether it was in Victoria P. because the
21 protective order had expired, or whether it wasn't
22 Rubenstein because his suspension had expired. In all
23 those cases, indisputably, no - - - one's not parsing
24 statutes or asking questions what's going to happen in the
25 future. Indisputably, the harm was removed. And even

1 then, in most of the cases I mentioned, the court said it's
2 not moot because consequences could flow. That's all this
3 court requires in its cases to see if there's a possibility
4 of legitimate consequences that could occur in the future.
5 And there's no doubt that there are. There's twenty-four
6 schools - - -

7 JUDGE RIVERA: What consequences are going to
8 flow? Let's say we agree with the state. You have now a
9 statute that gives you another pathway.

10 MR. SCHICK: I'm sorry, Your Honor. I couldn't
11 hear.

12 JUDGE RIVERA: Let's say that we agreed with the
13 state. We ruled in their favor. Don't you have now a
14 piece of legislation that allows you, nevertheless, to
15 continue to provide educational services and programming to
16 the children?

17 MR. SCHICK: Your Honor, the six schools for
18 their own ideological, constitutional reasons, right?
19 Didn't choose assessment beforehand. There's no reason to
20 think that the schools that refused to choose assessment
21 which got them to the point that we're in now, are going to
22 change just because the state somewhat broadened the
23 assessment pathway. This is a - - -

24 JUDGE RIVERA: It's very hard to make the
25 argument that the education law doesn't allow them to

1 assess.

2 MR. SCHICK: No. No. Assess - - -

3 JUDGE RIVERA: You may disagree - - - you may
4 disagree in the way they enforce their conclusions based on
5 the assessment.

6 MR. SCHICK: Let me correct the misnomer, Your
7 Honor. I apologize.

8 JUDGE RIVERA: Thank you.

9 MR. SCHICK: When I say assessment, assessment is
10 a pathway by which the school administers a state
11 assessment test - - -

12 JUDGE RIVERA: Uh-huh. Okay.

13 MR. SCHICK: - - - and uses that performance in
14 one way or another. So I'm sorry.

15 JUDGE RIVERA: Thank you.

16 MR. SCHICK: And there are schools that had their
17 own ideological constitutional reasons why they say the
18 state can't require us to take their test to demonstrate
19 it. And what everyone thinks about, you know, that view -
20 - -

21 JUDGE RIVERA: Okay. So if that's - - - if
22 that's these six and that has been determined after the
23 commencement of the litigation, they have their options.

24 MR. SCHICK: Your Honor, they had those options
25 before - - - assessment exists in the regulations. What

1 Mr. Kiernan referred to as 130.3 had the same list of
2 pathways that a school could use to avoid a local school
3 authority review. What this - - - what - - - what this
4 legislation does, it takes two of those, the accreditation
5 pathway and the assessment pathway, and it broadens them to
6 some degree. It doesn't - - - it didn't create any new
7 pathway to avoid a review that came earlier. So again - -
8 -

9 JUDGE RIVERA: But it does seem the legislation
10 was heralded by the nonpublic school community as a
11 significant win. It seems to me, you're arguing now that
12 you gained little.

13 MR. SCHICK: Your Honor, that same community, I
14 think, felt very strongly and heralded the problems with
15 the regulations because it gave SED authority it doesn't
16 have - - -

17 JUDGE RIVERA: No. No. But I'm asking you - - -
18 I'm asking you about - - - I'm asking you about the
19 legislation.

20 MR. SCHICK: Your asking about - - -

21 JUDGE RIVERA: The comment is about the
22 legislation.

23 MR. SCHICK: Right. And the question is whether
24 there were press accounts?

25 JUDGE RIVERA: So it seems to me that you are now

1 arguing that it gives very little.

2 MR. SCHICK: I'm - - - I'm not saying it's
3 little.

4 JUDGE RIVERA: You're saying it's almost nothing.

5 MR. SCHICK: I'm saying, Your Honor, it does not
6 remove the threat. If - - - unless, if this court finds
7 that the regulations - - - that the new legislation
8 occupies the field - - -

9 JUDGE RIVERA: I'm saying perhaps a - - -

10 MR. SCHICK: - - - and it - - - and it - - - and
11 - - - and it - - -

12 JUDGE RIVERA: My point in this way in response
13 to you, is, perhaps it has changed the nature of the threat
14 and that that requires future litigation, if anything.

15 MR. SCHICK: Your Honor, the court, you know, I
16 don't think for mootness analysis speculates like that.
17 Again, in - - - in Victoria P., the issue was the order of
18 protection had expired. However, this court was concerned
19 that the individual who was the - - - previously the
20 subject of a long ago expired - - - by then long expired
21 order of protection, might, in the future, commit a crime,
22 and he would be caught committing that crime and be
23 prosecuted. And the judge who is overseeing that in the -
24 - - would learn of the order of protection, and he would be
25 convicted. And in the process of sentencing for that

1 conviction for that crime, but present order of protection
2 would take it into account in some way down the line. The
3 order of protection would take it into account as some
4 factor in sentencing. And based on that potential, the guy
5 has to commit a crime, be arrested, be convicted, and the
6 judge has to hold it - - - have this order of protection
7 against him. The judge said, that makes it not moot. That
8 makes it have legitimate, plausible value from an appellate
9 decision. This case is a lot easier than that one, but
10 again, if this court has any questions about the record or
11 something, the proper approach would be to remand to
12 Justice Ryba. Thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 (Court is adjourned)

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of Parents for Educational and Religious Liberty in Schools v. Young, No. 56 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: May 19, 2025

