SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

In the Matter of

PARENTS FOR EDUCATIONAL AND RELIGIOUS LIBERTY IN SCHOOLS; AGUDATH ISRAEL OF AMERICA; TORAH UMESORAH; MESIVTA YESHIVA RABBI CHAIM BERLIN; YESHIVA TORAH VODAATH; MESIVTHA TIFERETH JERUSALEM; RABBI JACOB JOSEPH SCHOOL; YESHIVA CH'SAN SOFER – THE SOLOMON KLUGER SCHOOL; SARAH ROTTENSREICH; DAVID HAMMER; ABRAHAM KAHAN; RAPHAEL AHRON KNOPFLER; and ISAAC OSTREICHER,

Petitioners,

For a Declaratory Judgment and a Judgment Pursuant to Article 78 of the Civil Practice Act and Rules

-against-

BETTY ROSA, as Chancellor of the Board of Regents of the State of New York; and MARYELLEN ELIA, as Commissioner of the New York State Education Department,

Respondents.

MEMORANDUM OF LAW IN SUPPORT OF PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

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Petitioners Parents for Educational and Religious Liberty in Schools ("PEARLS"), Agudath Israel of America, and Torah Umesorah (the "Association Petitioners"); Yeshiva Rabbi Chaim Berlin, Yeshiva Torah Vodaath, Mesivtha Tifereth Jerusalem, Rabbi Jacob Joseph School, and Yeshiva Ch'san Sofer – The Solomon Kluger School (the "Yeshiva Petitioners"); and Sarah Rottensreich, David Hammer, Abraham Kahan, Raphael Ahron Knopfler, and Isaac Ostreicher (the "Parent Petitioners") (collectively, "Petitioners") respectfully submit this Memorandum of Law in support of their motion for a Preliminary Injunction.

PRELIMINARY STATEMENT

On November 20, 2018, the New York State Education Department ("NYSED") published on its website a document titled "Substantial Equivalency Review and Determination Process" (the "New Guidelines"). The New Guidelines, which are embodied in a series of documents all published the same day, imposed a comprehensive new licensing regime on all private schools in New York State, including the yeshivas operated, utilized or supported by Petitioners.

The New Guidelines, if not enjoined, would radically restructure the relationship between New York State and its private, religious schools. The New Guidelines impose rigid, statewide standards on private, religious schools, including hundreds of pages of "Learning Standards," and mandatory course offerings with required hours of instruction. The New Guidelines also direct local school authorities to review and evaluate every aspect of each private school's educational offerings, from curriculum, textbooks, and lessons plans (that is, what religious schools teach and how they teach it); to teacher qualifications, hiring policies, training, and evaluations (that is, who the religious schools hire and, how they supervise, evaluate and train them); and student testing and remediation (that is, how the schools evaluate, counsel and seek to improve their students' performance.) Private schools that fail to conform to the demands of NYSED and local school

districts are to be closed. Children who attempt to attend such schools are to be deemed truant, and their parents subject to fines and imprisonment.

NYSED has thus arrogated to itself and local school boards the power to determine the content of the education to be provided at the Petitioners' and other religious schools, and the process by which that education is delivered. A school's failure to conform to NYSED's hundreds of pages of "Learning Standards," to accede to local school districts views of how those Learning Standards should be presented, or to acquiesce to a regulator's views, of which personnel should be hired or of how poor student performance should be remediated, would subject it to potential closure. Schools that do not offer the precise courses, in the precise sequence, for the precise number of hours demanded by NYSED would be deemed deficient.

NYSED asserts that the "substantial equivalence" provision of the State's compulsory education law provides it with the necessary authority to issue the New Guidelines. This provision requires that parents provide their children with instruction that is "substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides." N.Y. Educ. Law § 3204(2). This "substantially equivalent" provision has been a part of the State's compulsory education law since 1894. In the intervening 125 years, NYSED never has suggested that the "substantial equivalence" provision authorizes it to impose a *de facto* licensure regime over private schools. To the contrary, until noon on November 20, 2018, NYSED's published guidance conceded that "the substantial equivalence" did not provide regulators "with any direct authority over private schools."

Yet with the press of a button, the New Guidelines appeared on NYSED's website and established a new licensing regime that imposes mandatory state standards on private schools; empowers local officials with effectively unlimited power to review, evaluate, and pass judgment

on every aspect of private school education; and requires private school to comply with these requirements, as interpreted by regulators, or be closed.

NYSED's attempt to impose the New Guidelines must be enjoined. As an initial matter, Petitioners are likely to prevail on the merits of their claims challenging NYSED's New Guidelines. *First*, the New York Court of Appeals already has held that NYSED may not license private schools absent specific legislation that *both* authorizes licensure *and* details the precise standards that NYSED is to apply. *Packer Collegiate Institute v. Univ. of State of N.Y.*, 298 N.Y. 184, 194 (1948). The "substantial equivalence" provision on which NYSED relies does not meet either of the requirements of *Packer Collegiate*.

Second, substantial equivalence is a flexible standard that is intended to vary from school district to school district. It does not authorize NYSED to create a rigid, statewide standard, or impose the detailed, invasive local reviews that the New Guidelines require of every school.

Third, the New Guidelines, with their mandatory licensing procedures, statewide standards, and invasive local reviews are the quintessential "rule," subject to notice-and-comment rulemaking under the State Administrative Procedure Act ("SAPA"). NYSED was not authorized to adopt and publish them by press release.

Fourth, the New Guidelines impose substantial burdens on Petitioners ability to provide a religious education to their children and students. As such, they are inconsistent with the holdings and limitations of such seminal cases as *Pierce v. Society of Sisters*, and *Wisconsin v. Yoder*. The New Guidelines therefore violate Petitioners' substantive due process rights, free exercise rights and free speech rights.

For each of these reasons, Petitioners are likely to succeed on the merits. Petitioners also will suffer irreparable harm if they are coerced by the State to alter their religious instruction to

conform to the New Guidelines. By contrast, NYSED will suffer little or no harm if the *status quo ante* is restored, and the balance between private, religious schools and the State is restored to where it has rested for at least the past 125 years.

Accordingly, and for the additional reasons described below, Petitioners respectfully request that the Court enter an injunction prohibiting the NYSED from implementing or enforcing its New Guidelines.

FACTS

A. The New Guidelines

On November 20, 2018, the NYSED issued its New Guidelines, which were amended in part on December 21, 2018.[1] These New Guidelines establish (1) a mandatory procedure for licensing every private school in New York State; (2) mandatory, rigid statewide curricular and scheduling requirements for every private school in New York State; (3) an intrusive inspection by local school districts into every facet of each private school's operations; and (4) a requirement that private schools deemed deficient by the local school districts must alter their educational offerings or face closure.

[1] The New Guidelines are contained in a series of documents NYSED published on its website that govern the licensing process adopted by the NYSED. The Substantial Equivalency Review and Determination Process consists of seven documents, which are identified on the NYSED's website as the "Substantial Equivalency Guidance" (Verified Petition, Exhibit B); the "Substantial Equivalency PowerPoint Presentation" (Verified Petition, Exhibit C); the "Local School Authority Review Toolkit" (Verified Petition, Exhibit D); the "Nonpublic School Self-Study Toolkit" (Verified Petition, Exhibit E); the "Commissioner's Determination Elementary and Middle School Review Toolkit" (Verified Petition, Exhibit F); the "Commissioner's Determination High School Review Toolkit" (Verified Petition, Exhibit G); and "Frequently Asked Questions on the Substantial Equivalency Guidance" (Verified Petition, Exhibit H). *See* New York State Education Department, Substantial Equivalency, available at http://www.nysed.gov/nonpublic-schools/substantial-equivalency (last visited Jan. 31, 2018).

1. The New Guidelines Create A Mandatory Licensure Procedure

The New Guidelines establish formal processes for evaluating each private school in New York State in order to determine whether it complies with the New Guidelines and thus may continue to operate.

Under the New Guidelines it is "the responsibility of the local school board (or the Chancellor in the case of nonpublic schools located in New York City) . . . to determine whether a substantially equivalent education is being provided in religious or independent schools." Verified Petition, Exhibit B, p. 1. For all religious or independent schools, the New Guidelines mandate that "local school officials" – *i.e.*, the "superintendent who serves as the chief executive officer of the district and the educational system or a designee" – must perform the initial substantial equivalence inspections and reviews. Verified Petition, Exhibit B, pp. 1-2, 10.

The New Guidelines establish a mandatory timeline by which local school officials must conduct their equivalency inspections and reviews. Under the New Guidelines, local school officials "*will* begin to conduct substantial equivalence reviews on behalf of their school boards using the updated process during the 2018-2019 school year." Verified Petition, Exhibit B, p. 3 (emphasis added). The New Guidelines further require that "[a]ll religious and independent schools *will* be visited as part of the process and initial reviews for all nonpublic schools" and that all such reviews "shall be completed by the end of the 2020-2021 school year." Verified Petition, Exhibit B, p. 3 (emphasis added). After the initial inspection and review, local school officials "*should* plan to re-visit the religious and independent schools in their district on a five-year cycle" and, between visits, "*should* keep informed of important information, such as changes in leadership, curriculum, school building locations, grade level served, etc." Verified Petition, Exhibit B, p. 3 (emphasis added).

2. The New Guidelines Impose Mandatory And Rigid Statewide Standards

The mandatory reviews are designed to evaluate whether religious and independent schools are meeting new mandatory and rigid statewide standards.

The New Guidelines incorporate the Regents Learning Standards. For each grade, the New Guidelines require that students "shall receive instruction that is designed to facilitate their attainment of [or "to achieve"] the State Learning Standards." Verified Petition, Exhibit D, P. 11. The Regents Learning Standards run into hundreds of pages and describe in detail the materials that all *public school* students are expected to learn in each grade. The Yeshivas would be permitted to provide a religious education, but only after providing a replica of the full-scale public-school education. Topics addressed by the standards include the evolution of species, comparative religion, and cultural relativity.

The Learning Standards are accompanied by the NYSED Frameworks. NYSED considers these Frameworks as the basis for instruction in the State. The Frameworks include requirements that students be instructed in the rise and impact of belief systems, including their similarities and differences in core beliefs, ethical codes, practices, and social relationships. They require students to "identify the place of origin, compare and contrast the core beliefs and practices, and explore the sacred texts and ethical codes for Hinduism, Buddhism, Judaism, Christianity, Islam, Confucianism, and Daoism." N.Y. State Dep't of Educ., *New York State Grades 9-12*, Social Studies Framework at § 9.2a, *available at* http://www.nysed.gov/surriculum-instruction/k-12-social-studies-framework (last visited Mar. 12, 2019).

The New Guidelines also require private schools to offer specified courses, including courses not required by statute, to satisfy the substantial equivalence provision. Verified Petition, Exhibit E, pp. 13-14. For grades 7 and 8, the New Guidelines require private schools to devote a

minimum of 17.5 hours of instructional time each week to these mandated courses. *Id*. The New Guidelines require local school districts to evaluate and determine whether each private school satisfies these mandatory curricular requirements.

3. The New Guidelines Establish Mandatory, Highly-Invasive Reviews And Evaluations Without Providing Any Performance Metrics

In addition to the rigid and specific statewide requirements imposed by the New Guidelines, the New Guidelines direct local school superintendents and school boards to inspect and evaluate in great detail every aspect of each private school's educational offerings.

In making its determinations, the local school officials are expected to review evidence such as:

- The qualifications of the its teachers, including its policy for teacher hiring and hiring standards and qualifications, evidence that its instructional staff have qualifications consistent with its hiring policy, its policy for teacher and staff evaluations, and its policy and schedule for teacher and staff training and professional development.

  Verified Petition, Exhibit E, p. 6; Exhibit F, p. 7; and Exhibit G, p. 6.

- The courses and subjects to be taught and corresponding curricula for each grade level in the school, as well as a description of the curriculum; representative samples of daily, weekly, monthly, and yearly schedules; the framework for teaching and learning in required subjects; sample lesson plans; a list of textbooks or other instructional resources; evidence of textbook / resource use in curriculum and lesson plans.

  Verified Petition, Exhibit E, pp. 3-5; Exhibit F, pp. 4-10; and Exhibit G, pp. 5-9.

- The academic progress of students attending the school in the form of a list of the standardized tests it administers in each grade, data on its students' standardized test scores, its other assessments for progress monitoring, its goals for student achievement and its educational program, its process for administering assessments and analyzing data, its graduation rates (if applicable), and its plan for improving academic outcomes.

  Verified Petition, Exhibit B, p. 9; Exhibit F, p. 11; and Exhibit G, p. 10.

Thus, the New Guidelines authorize and empower a local school superintendent and local school board to review a private school's methodology for teaching, among other things, mandatory courses in evolution, comparative religion, family values, and cultural values. They

authorize and empower a local school superintendent and local school board to evaluate the schools' lesson plans for these courses; the qualifications, training and supervision of the teachers who teach these materials; and the students' performance and remediation in learning these materials.

4. The New Guidelines Require Private Schools To Conform To Regulators' Demands Or Be Closed

As described above, each of the Yeshivas (and other private schools) are subject to a mandatory review and evaluation from the superintendent of the local school district. Even if a local superintendent has found a private school to be in compliance with the New Guidelines, the school must still obtain an affirmative vote from the local board of education. Verified Petition, Exhibit B, pp.6-7.

In the event that "local school officials have concerns about the substantial equivalence of the instruction provided by the religious or independent school," then the local officials can demand changes under the threat of closure. Verified Petition, Exhibit B, p. 6. As the New Guidelines assert, the district and school "should work collaboratively to develop a clear plan and timeline, including benchmarks and targets, for attaining substantial equivalency in an amount of time that is reasonable given the concerns identified in the [local officials'] review." *Id.*

Upon completion of the remediation process, if the local school board is not satisfied, local school officials must close the private school. Children who continue to remain enrolled at a non-compliant school would be deemed truant and their parents would be subject to fines and imprisonment. Verified Petition, Exhibit B, p. 7-9.

B. Petitioners

The five Petitioner Yeshivas are Orthodox Jewish schools founded in New York more than one hundred years ago. They have been operating continuously since shortly after the "substantial

equivalence" provision first appeared in the Education Law in 1894. Since that time, they have collectively produced tens of thousands of graduates who have participated successfully in New York and American society. Their graduates have succeeded in every professional field and are highly functioning and contributing members of New York and American society. They also have contributed to the rejuvenation of Orthodox Jewish life and practice in New York and beyond. Compliance with the New Guidelines would require each Petitioner Yeshiva to revise its curriculum significantly and to alter its emphasis on Jewish Studies.

The Association Petitioners are not-for-profit organizations whose members and missions are deeply affected by the New Guidelines. Torah Umesorah: National Society for Hebrew Day Schools has as its mission to ensure that every child in the schools it services "receives the highest standards of Torah education, along with the skills to lead a successful life and become a productive member of society." Its membership consists of over 675 day-schools and yeshivas with a total student enrollment of over 200,000 students. Agudath Israel of America is a membership organization at the forefront of advocacy on behalf Orthodox Jewish interests and rights, perhaps most significantly on behalf of the broad Orthodox Jewish school community. Thousands of its members send their children to yeshivas that are affected by the New Guidelines. Parents for Educational and Religious Liberty in Schools ("PEARLS") is a non-profit organization whose mission is to protect the fundamental right of parents to choose a yeshiva education for their children, and to facilitate the preparation and implementation of a uniform secular studies curriculum that is both Common Core compliant and culturally sensitive to the values of yeshiva students. The New Guidelines would have substantial adverse effects on the mission of the Petitioner Associations and their members.

The Parent Petitioners are parents of students who attend private, religious schools in New York State. Parent Petitioners choose yeshiva education for their children to fulfill the Biblical injunction that "You shall place these words of Mine upon your heart and upon your soul . . . and you shall teach them to your children to speak in them." Deuteronomy 11:18-19. This follows the example of Abraham, about whom it is written, "I have known him because he commands his sons and his household after him, that they should keep the way of the Lord." Genesis 18:19. The New Guidelines will have a substantial and adverse impact on the religious education their children receive.

ARGUMENT

I. Petitioners Are Entitled To Injunctive Relief

Article 78 authorizes a court to stay enforcement of New York State agency action. C.P.L.R. § 7805. In determining whether to issue a stay under CPLR 7805, courts apply the same three-part test used to assess a motion for a preliminary injunction. *Melvin v. Union Coll.*, 195 A.D.2d 447, 448 (2d Dep't 1993).

Accordingly, a stay must be granted if Petitioners show: (1) they are likely to succeed on the merits of their challenge to the New Guidelines; (2) they will suffer irreparable harm if an injunction does not issue; and (3) the balance of the equities favors granting an injunction. *See id.* A petition raising "novel issues of first impression" and "substantial principles of constitutional law" constitutes "precisely the situation in which a preliminary injunction should be granted to hold the parties in *status quo* while the legal issues are determined in a deliberate and judicious manner." *Tucker v. Toia*, 54 A.D.2d 322 (4th Dep't 1976). As shown below, Petitioners raise such a challenge and easily meet this standard.

A. Petitioners Are Likely To Succeed On The Merits On Each Of Their Four Separate But Related Challenges To NYSED's New Guidelines

To demonstrate a likelihood of success on the merits, Petitioners need only make a *prima facie* showing of a reasonable probability of success on any of their claims. *See Weissman v. Kubasek*, 112 A.D.2d 1086, 1086 (2d Dep't 1985). Here, Petitioners are likely to succeed on each of their claims.

1. NYSED Exceeded Its Lawful Authority By Creating A Licensing System For Private Schools

The New Guidelines require that each private school must pass a mandatory review by State and/or local regulators, or be closed. The New Guidelines therefore impose a licensing requirement on private schools. *See Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 595 (2011) ("A license is a right or permission granted in accordance with law ... to engage in some business or occupation, to do some act, or to engage in some transaction which but for such license would be unlawful")(citation and quotation marks omitted).

The New York Court of Appeals has previously held that NYSED may not impose a licensing requirement on private schools unless the Legislature has specifically authorized such a licensing program and has provided specific guidance to NYSED on the exact terms that would govern such licensure. *Packer Collegiate Inst. v. Univ. of State of N.Y.*, 298 N.Y. 184, 189 (1948).

Packer Collegiate, 298 N.Y. at 192, involved a State law that required NYSED to license private schools, but that did not specify the standards NYSED should apply. Despite the Legislature's specific delegation of authority to NYSED, the Court of Appeals struck down the statute. As the Court explained:

> it would be intolerable for the Legislature to hand over to any official or group of officials an unlimited, unrestrained, undefined power to make such regulations . . . and to grant or refuse licenses to such schools, depending on their compliance with such regulations.

With the New Guidelines, however, NYSED has created a comprehensive licensing program for religious and independent schools, but without any grant of authority from the Legislature. To the contrary, the Education Law specifically exempts K-12 schools (including the Petitioner Yeshivas) from the licensure requirements imposed on certain other educational institutions (such as for-profit English as a Second Language schools and High School Equivalence Exam schools). N.Y. Educ. Law § 5001(2)(b). The New Guidelines therefore exceed NYSED's authority under *Packer Collegiate.*

The New Guidelines are in conflict not only with the Court of Appeals opinion in *Packer Collegiate,* but also with NYSED's own guidance and practices. In its public guidance concerning the substantial equivalence standard, NYSED previously has acknowledged that regulators possess no direct regulatory authority over private schools. As the guidance provided:

> [T]he board's responsibility is to the children living in the district; it has no direct authority over a nonpublic school. (*Id.*)

Verified Petition, Exhibit A, p. 1.

Consistent with this interpretation, NYSED previously has provided only for voluntary licensure or registration regimes for private and independent schools. *See, e.g.*, N.Y. Comp. Codes R. & Regs. tit. 8, § 100.2 ("Nonpublic schools may be, and public elementary, intermediate, middle, junior high, and high schools shall be, registered by the Board of Regents . . . .").

In the absence of any legislative authority, NYSED's creation of a comprehensive licensing regime that governs every religious and independent school in the State must be struck down as in excess of its authority. *Packer Collegiate,* 298 N.Y. at 189 ("The Legislature must set bounds to the field, and must formulate the standards which shall govern the exercise of discretion within the field"). *See also Boreali v. Axelrod,* 130 A.D.2d 107, 114 (3d Dep't 1987) (striking down anti-smoking regulation because they "effectively usurped the prerogative of the Legislature to

establish State policy in direct contravention of the separation of powers doctrine," despite broad legislative grant of authority). *Cf. Hodgkins v. Cent. Sch. Dist. No. 1 of Towns of Conklin*, 355 N.Y.S.2d 932, 938 (Sup. Ct. Broome Cty. 1974) (Board of Regents' and Commissioner's "rule-making authority does not, of course, encompass the right to enact regulations in conflict with a statute or at odds with a clearly defined statutory policy").

Moreover, pursuant to the doctrine of constitutional avoidance, New York courts interpret statutes whenever reasonably possible in a manner that avoids serious constitutional questions. *See Beach v. Shanley*, 62 N.Y.2d 241, 254 (1984) ("Courts should not decide constitutional questions when a case can be disposed of on a nonconstitutional ground."); *People v. Grasso*, 54 A.D.3d 180, 183 (1st Dep't 2008) (noting the "obligation to construe a statute whenever reasonably possible so as to avoid serious constitutional questions"). And as explained below, interpreting any provision of the Education Law to authorize the NYSED to impose the New Guidelines presents serious constitutional questions.

For these reasons, Petitioners are likely to prevail on their claim that the New Guidelines were issued in excess of NYSED's authority.

2. The New Guidelines Are Inconsistent With The Substantial Equivalence Provision On Which It Relies

The New Guidelines also are inconsistent with the statutory "substantial equivalence" provision on which they rely. More specifically the New Guidelines are inconsistent with the substantial equivalence because: (1) they improperly impose a rigid, statewide set of learning standards, curriculum requirements, and course and hour requirements; and (2) they improperly impose comprehensive, invasive local school district reviews that are inconsistent with the substantial equivalence provision.

a. The New Guidelines Impose Rigid, Statewide Standards That Are Inconsistent With The Substantial Equivalence Requirement

The plain language of the compulsory education law creates a flexible standard that is intended to vary from school district to school district. Education Law § 3204 in fact provides that children attending private schools must receive instruction that is:

> substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

By its plain terms, the substantial equivalence standard is a flexible standard that varies from district to district.

Courts interpreting Section 3204 have long recognized that it creates a "flexible," "comparative" standard – rather than a "singular statewide standard" – and that it thus allows for "variations from district to district." *Blackwelder v. Safnauer*, 689 F. Supp. 106, 126-27, 135 (N.D.N.Y. 1988); *see also In re Kilroy*, 467 N.Y.S.2d 318, 320 (Fam. Ct. Cayuga Cty. 1983); *In re Falk*, 441 N.Y.S.2d 785, 789 (Fam. Ct. Lewis Cty. 1981). The *Blackwelder* court held, in fact, that the flexibility inherent in the substantial equivalence standard is essential to avoiding a violation of parents' rights under the Free Exercise Clause of the United States Constitution:

> The "substantially equivalent" standard is flexible enough to allow local school officials sufficient leeway to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue. There may be cases in which the manner the state enforces the mandate of § 3204 unnecessarily infringes the free exercise rights of particular parents, but the mere possibility that such cases might arise is not enough to invalidate § 3204 on its face.

Blackwelder, 689 F. Supp. at 135.

Consistent with that approach, the NYSED has created and approved numerous paths to satisfy the substantial equivalence standard that do not mirror the local public-school instruction but in fact deviate substantially from it:

- **Homebound instruction.** The NYSED has issued regulations for "homebound" instruction – *i.e.*, instruction when a pupil is unable to attend school due to medical reasons. Under the regulations, homebound elementary school students are only required to have five hours of instruction per week, and homebound high school students are only required to have ten hours of instruction per week. *See* N.Y. Comp. Codes R. & Regs. tit. 8, § 175.21.

- **City-As-School Instruction.** The New York State Department of Education allows some schools to provide only two days of instruction per week, so long as students spend three days a week interning at local businesses. *See* Melia Robinson, *Students at this alternative NYC high schools get jobs, not grades.* BUSINESS INSIDER (Mar. 25, 2015). http://www.businessinsider.com/what-its-like-to-attend-alternative-high-school-2015-3.

- **Part-time, Evening and Parental Schools.** Section 3204(3) provides a series of looser standards for part-time day schools ("such subjects as will enlarge the civic and vocational intelligence and skill"); evening schools ("at least speaking, writing and reading English") and parental schools ("vocational training and for instruction in other subjects appropriate to the minor's age and attainments").

By contrast, the New Guidelines impose statewide mandates on private schools. Under the New Guidelines, schools must provide instruction necessary to achieve NYSED's Learning Standards, which constitute hundreds of pages of detailed requirements. They must provide specified courses in particular grades, for a specified number of hours each week. Local school districts are required to evaluate the private schools' teachers, instruction and performance based on whether they satisfy the NYSED's Statewide Learning Standards. *See, e.g.*, Verified Petition, Exhibit D, p. 5 (adequacy of instruction based on whether "[i]nstruction is provided in required subjects, consistent with the NYS learning standards, as defined by Part 100 of the Commissioner's Regulations"); Verified Petition, Exhibit D, p. 11 ("During grades one through four, all students shall receive instruction that is designed to facilitate their attainment of the State elementary learning standards").

Because the New Guidelines create rigid, statewide standards of instruction, they are inconsistent with the plain language of Section 3204. Petitioners therefore are likely to prevail on

their claim that the New Guidelines are in excess of authority, are based on an error of law, are arbitrary or capricious and constitute an abuse of discretion.

b. The New Guidelines Impose Intrusive Local Reviews That Are Inconsistent With The Substantial Equivalence Provision

Under New York law, "a parent need not avail himself of formal educational facilities for a child in order to satisfy the requirements of the law, it being sufficient that a systematic course of study be undertaken at home and that the parent render qualified quality instruction." *In re Foster*, 330 N.Y.S.2d 8, 12 (Fam. Ct. Kings Cty. 1972) (finding substantial equivalency standard satisfied where children read and performed math at or above grade level, attended home instruction and completed homework). The substantial equivalence standard is thus general and flexible, it allows for a high-level evaluation of effectiveness, but it does not permit an intrusive evaluation, or one focused on methodology. *Blackwelder*, 689 F. Supp. at 135 (substantial equivalence standard "is flexible enough to allow local school officials sufficient leeway to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue.")

The New Guidelines, however, require local school districts to impose an inflexible, intrusive review process on each private school in New York State. While the New Guidelines play lip-service to substantial equivalence, they require and empower local school districts to review and evaluate virtually every aspect of private schools' operations, based on formal regulatory criteria developed by the educational bureaucracy. In order to evaluate teacher competency, for example, the New Guidelines anticipate review of the private schools' hiring standards and of teachers' qualifications, as well as teacher/staff evaluation policies, and policies and schedules for training and professional development. The same types of intrusive reviews are contemplated for private schools' curriculum and student testing and remediation programs.

With these requirements, NYSED is imposing, its own bureaucratic view of the single method of providing a sufficient quality education. The detailed, intrusive evaluations contemplated by the New Guidelines are inconsistent with the plain language of Section 3204. Petitioners therefore are likely to prevail on their claim that the New Guidelines are in excess of authority, are based on an error of law, are arbitrary or capricious and constitute an abuse of discretion.

3. The NYSED Failed To Follow The Procedural Requirements That Apply To Rule-Making Under The State Administrative Procedure Act

The New Guidelines also must also be rejected because NYSED failed to comply with the procedural requirements that apply to rulemaking.

Under the State Administrative Procedure Act ("SAPA"), "[p]rior to the adoption of a rule, an agency shall submit a notice of proposed rule-making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." N.Y. A.P.A. Law § 202(1)(a). The notice of proposed rulemaking must "cite the statutory authority, including particular sections and subdivisions, under which the rule is proposed for adoption." *Id.* at § 202(f)(i). The agency must consider "utilizing approaches which are designed to avoid . . . overly burdensome impacts of the rule upon persons . . . directly impacted by it." *Id.* at § 202-a. The agency also must issue a regulatory impact statement which must include, among other things, statutory authority, needs and benefits, costs, and local government mandates. *Id.* at § 202-a(3).

SAPA defines a "rule" subject to notice-and-comment rulemaking as a statement of "general applicability that implements or applies law," or a statement of "the procedure or practice requirements of an agency." N.Y. A.P.A. Law § 102(2)(a). The New York Court of Appeals has interpreted this definition to mean that a rule is "a fixed, general principle to be applied by an

administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers," *Roman Catholic Diocese of Albany v. New York State Dep't of Health*, 66 N.Y.2d 948, 951 (1985), or a "general course of operation to be effective for the future," *People v. Cull*, 10 N.Y.2d 123, 127 (1961). *See also Alca Indus., Inc. v. Delaney*, 92 N.Y.2d 775, 778 (1999) ("Rulemaking, in other words, sets standards that substantially alter or, in fact, can determine the result of future agency adjudications."); *Connell v. Regan*, 114 A.D.2d 273, 275 (3d Dep't 1986) ("Where agency determinations are based solely on a firm, rigid, unqualified standard or policy, a quasi-legislative norm or prescription is established that carves out a course of conduct for the future.").

The New Guidelines unequivocally constitute "rules" that are subject to SAPA. They require private schools to submit to regular, mandatory reviews by local school districts. They require local boards to hold regular votes on whether private schools may stay open. They establish the standards on which such votes will be based. They create rigid, state-wide procedures and standards and describe the process by which local education officials are required to perform their review and evaluation. The New Guidelines thus clearly are a "rule" as that term is defined in the SAPA.

Indeed, NYSED previously engaged in notice-and-comment rulemaking when it issued regulations seeking to interpret Section 3204's substantial equivalence provision. *See* N.Y. Comp. Codes R. & Regs. tit. 8, 100.10; *see also* Notice of Revised Rule Making: Requirements for Conferral of a College Degree and Home Instruction, N.Y.S. Register, Rule Making Activities at 19 (July 14, 2004), *available at* https://docs.dos.ny.gov/info/register/2004/july14/toc.htm (asserting that NYSED "has statutory authority to establish in regulation requirements . . . for the education of students of compulsory school age").

The New York City Department of Education ("DOE") also has demonstrated its belief that the New Guidelines constitute regulations. In February 2019, the DOE posted two new job openings on its website for positions as Executive Director for Substantial Equivalency and Senior Director of Operations for Substantial Equivalency. Each of the postings described the New Guidelines as "regulations." *See* Verified Petition, Exhibit J-K.

Because NYSED failed to follow any of the requirements of SAPA in issuing the New Guidelines, they are in excess of authority, are based on an error of law, are arbitrary or capricious, constitute an abuse of discretion and should be deemed invalid and unenforceable.

4. NYSED's New Guidelines Violate The Parent Petitioners' Rights Under The United States Constitution And The New York Constitution

a. The New Guidelines Violate Parent Petitioners' Rights To Due Process

The New Guidelines violate the Parent Petitioners' due process rights to control the education of their children. Under the Due Process Clause, no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV. The New York Constitution provides similar, if not greater, due process protections. *See* N.Y. CONST. art. I, § 6.

In assessing whether a government regulation infringes a substantive due process right, courts first inquire whether it restricts the exercise of a fundamental right, one that is "deeply rooted in this Nation's history and tradition. *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

"The liberty interest at issue in this case – the interest of parents in the care, custody and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by" the United States Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The Supreme Court has repeatedly held that due process affords parents a fundamental, protected right to control the upbringing and the education of their children. In *Meyer v. Nebraska*, 262 U.S. 390 (1923),

the Court invalidated a statute that banned the teaching of certain foreign languages to young children in public and private schools. The Court recognized that, among the fundamental liberties protected by the Due Process Clause is the right of a parent "to give his children education suitable to their station in life." *Id.* at 399-400. The Court held that the law improperly infringed upon the "power of parents to control the education of their own" and violated the Due Process Clause because it was "without reasonable relation to any end within the competency of the state." *Id.*

Similarly, in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), the Supreme Court struck down a statute that compelled parents to send their children to public school. Citing *Meyer*, the Court concluded that the statute "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control." *Id.* at 534-35. The Court observed that the government lacks the authority "to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." *Id.* at 535.

In *Farrington v. Tokushige*, 273 U.S. 284 (1927), the Supreme Court invalidated a federal law governing private foreign language schools in the territory of Hawaii that prescribed, among other things, the subjects of study and the text books used in all foreign language schools. *Id.* at 290, 294. The Court held that due process invalidates laws that "would deprive parents of fair opportunity to procure for their children instruction which they think important and we cannot say is harmful," reasoning that a parent "has the right to direct the education of his own child without unreasonable restrictions." *Id.* at 298.

The Supreme Court has referenced these cases repeatedly in recognizing parents' constitutional right to direct the education of their children. For example, in *Norwood v. Harrison*,

413 U.S. 455 (1973), the Court cited *Pierce* as holding that "a State's role in the education of its citizens must yield to the right of parents to provide an equivalent education for their children in a privately operated school of the parents' choice." *Id.* at 461; *Zelman v. Simmons*, 536 U.S. 639, 680 n.5 (2002) (Thomas, J., concurring) ("This Court has held that parents have the fundamental liberty to choose how and in what manner to educate their children."); *Washington v. Glucksburg*, 521 U.S. 702, 720 (1997) ("[T]he 'liberty' specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children."); *Wisconsin v. Yoder*, 406 U.S. 205, 213-14, 232 (1972) (highlighting that the "primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition" and "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . .").

The New Guidelines unduly burden Parent Petitioners' constitutionally-protected interest in sending their children to private religious schools that inculcate students with educational instruction consistent with Parent Petitioners' religious values and beliefs. The New Guidelines impose various impediments to Parent Petitioners' freedom to direct the education of their children. Most notably, the New Guidelines compel private schools to teach certain subjects, for a prescribed amount of time, pursuant to the NYSED Learning Standards, with teachers reviewed and approved by local school districts.

This would require schools chosen by Petitioner Parents to modify their curriculum, alter their emphasis on Jewish studies, and diminish their utilization of Jewish texts. Taken together,

the New Guidelines compel yeshivas to sacrifice religious instruction that is central to their mission and is the primary reason Parent Petitioners chose those schools to educate their children.

The New Guidelines cannot survive constitutional scrutiny. NYSED does not have a legitimate interest in imposing comprehensive regulations requiring yeshivas to teach particular secular courses to their students for a prescribed amount of time, pursuant to hundreds of pages of Learning Standards. Accordingly, the New Guidelines must be rejected because they violate the Parent Petitioners due process rights to control the upbringing and education of their children.

b. The New Guidelines Unconstitutionally Burden Petitioners' Rights To The Free Exercise Of Religion

The New Guidelines also violate Petitioners' Free Exercise rights under the State and Federal Constitution because they inhibit the religious instruction provided by religious schools.

The First Amendment provides that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." U.S. CONST. amend. I. By virtue of the Fourteenth Amendment, the Free Exercise Clause is binding on the States. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). The New York Constitution provides similar, if not greater, protections. *See* N.Y. CONST. art. I, § 3.

Parent Petitioners have the constitutionally-protected right to freely exercise their religious beliefs and practices by providing a religious upbringing for their children. Those rights were the basis for the United States Supreme Court's decision in *Wisconsin v. Yoder*. In *Yoder*, the Court held that a law that compelled school attendance beyond the eighth grade was invalid under the Free Exercise Clause as applied to Amish objectors who claimed that formal education beyond the eighth grade violated their central religious beliefs. 406 U.S. at 209, 234-35.

Significantly, the Court reasoned that the Biblical injunction to "be not conformed to this world" was "fundamental to the Amish faith" and "pervades and determines [the Amish] entire

way of life," noting the "interrelationship of belief with [the Amish] mode of life, the vital role that belief and daily conduct play in the continued survival of Old Order Amish communities and their religious organization." *Id.* at 216, 235. The Court concluded that compulsory high school education would "substantially interfer[e] with the religious development of the Amish child and his integration into the way of life of the Amish faith community" and thus was incompatible with the plaintiffs' free exercise rights and parental liberty interests. *Id.* at 218.

The yeshiva education system is similarly indispensable to the continuity and growth of the Jewish community in New York and around the country. The yeshiva education system is the primary vehicle for imparting Jewish ethical and moral obligations to children, as well as teaching Jewish cultural identity, traditions, and history. In short, yeshivas are central to the maintenance and vitality of the Orthodox Jewish and Chasidic community.

The New Guidelines impose burdensome regulation that hamper and inhibit the free exercise of religion as expressed by Petitioners. It requires the sacrifice of religious instruction that is critical to the mission and purpose of yeshivas, and in that way "substantially interfer[es] with the religious development of the [Jewish] child and his integration into the way of life of the [Orthodox Jewish and Chasidic] faith community at the crucial adolescent stage of development." *Yoder*, 406 U.S. at 218. Consequently, the New Guidelines "contravene[] the basic religious tenants and practice of the [Orthodox Jewish and Chasidic] faith." *Id.*

Accordingly, the New Guidelines must be rejected because they violate Petitioners' rights to the free exercise of religion.

c. The New Guidelines Violate Parent Petitioners' Hybrid Rights To Direct The Religious Education Of Their Children

The New Guidelines also run roughshod over Parent Petitioners' hybrid rights to direct the religious upbringing and education of their children.

The First and Fourteenth Amendments (and their New York Constitution analogues) provide Parent Petitioners with a hybrid right to control the religious education of their children. In *Yoder* and *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990), the United States Supreme Court recognized that a parent's hybrid right to provide for and choose the religious education for his children is afforded heightened constitutional protection. In *Smith*, the Supreme Court reasoned that "[t]he only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections." *Smith*, 494 U.S. at 881.

The *Smith* Court identified the "right of parents . . . to direct the education of their children" as an example of such a right afforded heightened protection and cited *Yoder* for that proposition. As explained above, the *Yoder* plaintiffs objected to the State's compulsory education law for children after the eighth grade, contending that the law burdened their freedom to direct the religious upbringing of their children pursuant to the Amish religion and way of life. 406 U.S. at 209. The Supreme Court applied strict scrutiny in reviewing the constitutionality of the law, reasoning that "when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." *Id.* at 233.

The New Guidelines infringe upon the Parent Petitioners' hybrid rights to control the religious upbringing and education of their children. As set forth above, the New Guidelines impose a series of rigid requirements that compel yeshivas to sacrifice religious instruction critical to the fulfillment of the religious mission sought by parents for their children.

The New Guidelines fail strict scrutiny. The regulations are not narrowly tailored to achieve a compelling State interest. New York State does not have a compelling interest in mandating that parochial schools provide instruction in the list of courses mandated by the State, for the prescribed length of time required by the State, in the manner dictated by the State.

The New Guidelines are certainly not narrowly tailored such that no less restrictive means exists to effectuate the State's interest. NYSED certainly cannot establish that less burdensome alternatives are not available. Indeed, the State and its private schools have existed with a less burdensome alternative for at least the last one hundred and twenty five years, since the substantial equivalence provision was inserted into the Education Law.

Courts have found similar State laws to violate parents' rights to control the religious education of their children. *See, e.g.*, *People v. DeJonge*, 501 N.W.2d 127, 134-41 (Mich. 1993) (holding that a certification requirement violated the Free Exercise Clause as applied to families whose religion prohibited the use of certified instructors in the home schooling of their children, reasoning that the law burdened their religious belief that the "word of God commands them to educate their children without state certification" and failed strict scrutiny because no evidence existed that the requirement was essential to the State's claimed interest of ensuring that all children receive an adequate education); *State v. Whisner*, 351 N.E.2d 750, 761, 765-66 (Ohio 1976) (applying strict scrutiny in holding that minimum educational standards were unconstitutional as applied to parents of children who attended a parochial elementary school, reasoning that the regulations unduly burdened the free exercise of religion "by requiring a set amount of time to be devoted to subjects which, by their very nature, may not easily lend themselves to the teaching of religious principles (*e.g.*, mathematics)").

Accordingly, the New Guidelines are invalid because they violate Petitioners' hybrid constitutional rights to direct the religious education of their children.

d. The New Guidelines Infringe Upon Petitioners' Right To Free Speech

The First Amendment to the United States Constitution restricts the States from unlawfully compelling speech and from impairing the right to free speech. The New York Constitution provides similar, if not greater, protections. N.Y. CONST. art. I, § 8.

"'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002)). "At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994). Laws that act as a deterrent to and chill free speech, even where not directly prohibiting the exercise of free speech, are subject to constitutional scrutiny. *Bd. of Cty. Commr's v. Umbehr*, 518 U.S. 668, 674 (1996). Both compelled speech and restricted speech are afforded identical constitutional protection. *Riley v. Nat'l Frd'n of Blind*, 487 U.S. 781, 796-97 (1988).

The New Guidelines unlawfully compel certain speech and restrict other speech, in violation of Petitioners' free speech rights. In particular, the New Guidelines' course requirements burden free speech rights by compelling Yeshivas to deliver certain particular lessons chosen by NYSED, and by mandating that those lessons be delivered for a specified length of time and adhere to a specific format embodied in the State's Learning Standards.

The New Guidelines also burden free speech by effectively restricting the amount of religious instruction that Yeshivas can provide and students can receive. This is achieved via the

course and hour mandates, which together with the Learning Standards will effectively crowd out Jewish Studies instruction. Regulations imposing restrictions on the material that private schools can teach their children constitute a violation of the schools' and students' rights to free speech. *See, e.g., Asociacion de Educacion Privada de Puerto Rico, Inc. v. Garcia-Padilla*, 490 F.3d 1, 12-13, 27-31 (1st Cir. 2007) (holding that a regulation imposing restrictions on when private schools could require their students to use a particular textbook abridged the schools' freedom of speech, reasoning that the regulation interfered with the "teaching of substantive information" and the "development of effective curricula and lesson plans.").

By compelling secular speech and restricting religious speech, the New Guidelines constitute a content-based abridgment of speech and are presumptively invalid. *See R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992). As a content-based regulation of speech, the New Guidelines are subject to strict scrutiny and will be tolerated only upon a showing that they are narrowly tailored to a compelling State interest. *Turner Broad Sys.*, 512 U.S. at 642.

As discussed above, NYSED cannot demonstrate that the New Guidelines are narrowly tailored or that there is no less burdensome alternative that exists. For those reasons, the New Guidelines are invalid because they constitute an unlawful abridgement of Petitioners' rights to the freedom of speech.

B. Petitioners Will Suffer Irreparable Harm If An Injunction Is Not Issued

Petitioners will suffer irreparable harm if NYSED is permitted to implement and enforce its New Guidelines.

First, the New Guidelines mandate that Petitioners alter the nature and content of the instruction they provide. This will frustrate the religious mission sought out by the parents from the Yeshivas they choose for their children. This will cause serious and lasting harm to the schools. That alone is sufficient to establish irreparable harm. *See Albany Med. Coll. v. Lobel*, 296 A.D.2d

701, 703 (3d Dep't 2002) (affirming grant of preliminary injunction where plaintiff would lose customers and revenues due to defendant's conduct); *Konishi v. Lin*, 88 A.D.2d 905 (2d Dep't 1982) (preliminary injunction appropriate due to irreparable injury from damage to reputation); *Wegman v. Altieri*, 57 N.Y.S.3d 677 (Sup. Ct. Monroe Cty. 2015) (concluding that irreparable harm existed when there was a "risk for loss of confidence and goodwill").

Second, if Yeshiva Petitioners resist the New Guidelines and are found noncompliant, they will be subject to the penalties established by the New Guidelines that may require students to transfer to other schools. Even temporary closure pending a resolution with local school districts will cause irreparable harms to Yeshivas' religious mission, as well as lasting harm to their reputation. *See Cmty. Charter Sch. v. Bd. of the Univ. of the State of N.Y.*, 2013 N.Y. Misc. LEXIS 6790, at *37-38 (Sup. Ct. Erie Cty. June 18, 2013) (irreparable harm where the Board of Regents' decision purportedly violating the State Administration Procedure Act would result in closure of school and require parents of children who attend school to transfer their children to other schools); *Waldman v. United Talmudical Acad.*, 147 Misc. 2d 529, 532 (N.Y. Sup. Ct. Orange Cty. 1990) (granting preliminary injunction in Article 78 proceeding, reasoning that children would suffer irreparable harm if they were subject to expulsion and "not permitted to complete the school year").

Courts routinely conclude that an educational institution's threatened loss of accreditation constitutes irreparable harm. *See, e.g.*, *Faith Int'l Adoptions v. Pompeo*, 345 F. Supp. 3d 1314, 1334 (W.D. Wash. 2018) (concluding that an adoption entity's loss of accreditation that likely would lead to its closure constituted irreparable harm, reasoning that "[t]here is no harm more irreparable than going out of existence"); *Hampton Univ. v. Accreditation Coun. for Pharm. Educ.*, 611 F. Supp. 2d 557, 565 (E.D. Va. 2009) ("The potential irreparable harm to the School if [the accreditation agency] withdraws its accreditation is obvious and considerable."); *Dillard Univ. v.*

Lexington Ins. Co., 466 F. Supp. 2d 723, 728 (E.D. La. 2006) (irreparable injury where challenged conduct would cause university to cease operations, and "run the risk of losing its accreditation, its reputations, and its students and facility").

Third, the New Guidelines will, if implemented and enforced, violate Petitioners' constitutional rights and thus cause irreparable harm. Courts presume irreparable harm for the purposes of a preliminary injunction motion where there exists a threatened violation of constitutional rights. *See Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) (recognizing a "presumption of irreparable injury that flows from a violation of constitutional rights"); *Airbnb, Inc. v. City of N.Y.*, 2019 U.S. Dist. LEXIS 755, at *69 (S.D.N.Y. Jan. 3, 2019) ("Because the threatened, continuous violation of a constitutional right constitutes irreparable harm for purposes of a preliminary injunction motion, plaintiffs have carried their burden of showing that they likely will suffer irreparable harm."); 11A Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d § 2948.1 ("When an alleged deprivation of a constitutional right is involved . . . most courts hold that no further showing of irreparable injury is necessary.").

The impending irreparable harm is particularly evident here, as the New Guidelines threaten to eviscerate Petitioners' free exercise of religion guaranteed by the First Amendment (and its New York constitution analogue). "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.); *LeBlanc-Sternberg v. Fletcher*, 67 F.3d 412, 426 (2d Cir. 1995) (same); *Uhlfelder v. Weinshall*, 10 Misc. 3d 151, 157 (N.Y. Sup. Ct. N.Y. Cty. 2005) ("[V]iolations of First Amendment rights are commonly considered de facto irreparable injuries.").

Compelled compliance with the New Guidelines would require Petitioners to sacrifice the provision of constitutionally-protected religious education. No amount of money damages can

undo or otherwise compensate Petitioners for the loss of their constitutional rights -- to provide their children and their students with the religious instruction they desire. Petitioners thus unquestionably would suffer irreparable harm in the absence of a preliminary injunction.

Accordingly, the Court should enter an injunction prohibiting NYSED from implementing and enforcing its New Guidelines.

C. The Balance Of The Equities Favors Granting The Requested Injunction

The balance of the equities also favors granting the requested injunction. When balancing the equities, a court looks to the relative prejudice to each party accruing from a grant or a denial of the requested relief. *STS Steel, Inc. v. Maxon Alco Holdings, LLC*, 123 A.D.3d 1260, 1262 (3d Dep't 2014). Here, as demonstrated above, Petitioners will suffer substantial and irreparable harms if the requested injunction is not issued.

NYSED will suffer little or no harm at all from a delay in implementation. The New Guidelines provide local schools districts with several years to conduct the reviews and evaluations required by the New Guidelines. They have purportedly been years in the making. They alter a status quo that has been place since at least 1894. NYSED will therefore suffer no prejudice if the *status quo* is maintained, and an injunction is issued. The balance of the equities plainly favors granting the requested injunction.

CONCLUSION

For the reasons set forth above, Petitioners respectfully request that this Court enter a preliminary injunction prohibiting NYSED from implementing or enforcing its New Guidelines.

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Respectfully submitted,

s/ Avi Schick

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