CAPE | Council for American Private Education

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May 27, 2022

Dr. Christina Coughlin
Assistant Commissioner
New York State Education Department
89 Washington Avenue
Albany, NY 12234

Re: Substantially Equivalent Instruction for Nonpublic School Students

Dear Dr. Coughlin and Members of the Board of Regents:

I write in my capacity as executive director of CAPE, the Council for American Private Education. CAPE is a coalition of national organizations and state affiliates (including a New York state affiliate) serving private elementary and secondary schools. There are over 34,000 private schools in America. One in four of the nation's schools is a private school. More than five million students attend these schools.

On August 27, 2019, I submitted a letter on behalf of CAPE in opposition to the regulations proposed at that time by the New York State Education Department regarding "Substantial Equivalency" – the statutory mandate that a private school student in New York receive instruction that is "at least 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." NY Education Law 3204(2). Since that time, those proposed regulations were withdrawn, and then replaced approximately two months ago with a new series of proposed regulations governing the same subject.

Studying the new proposed regulations, we note a number of positive changes from the earlier draft. Most notably, while Section 130.2 establishes the general rule that the Local School Authority (LSA) must make substantial equivalency determinations (or, in certain cases, recommendations), Section 130.3 (a) establishes a number of ways through which schools will automatically be deemed substantially equivalent – even without LSA review. Creating these alternative pathways to substantial equivalence is an extremely positive development, for which CAPE commends SED. However, not all schools will be able to fit within any of the Section 130.3 (a) safe harbors. Those schools would then be subject to extensive and intrusive oversight by the LSA. This, we submit, is not acceptable.

Schools subject to LSA review would have to show that they teach precisely the same subjects as those required to be taught in the public schools (Section 130.9 (e,f)), which in turn would require many private schools to totally revamp their school day schedules, in some cases to the point of impinging on the schools' educational mission.

The proposed regulations would empower LSA's to determine the competency of private school teachers (Section 130.9 (a)), notwithstanding that New York does not require private schools to hire only licensed teachers. They would empower LSA's to review – and presumably disapprove – curricular content of religious schools whose worldview may be unpopular. Perhaps most fundamentally, they would empower LSA's to sit in judgment on their private school neighbors, despite the obvious potential conflict of interest where those very same officials may be interested in attracting private school students to their public schools.

In short, if these regulations are adopted, they would represent a serious intrusion upon the autonomy of many of New York's private schools, would inhibit many schools' ability to pursue the educational vision upon which they were founded, and could jeopardize the continued viability of the private school sector. And, as Frank Sinatra might have said, if heavy-handed regulation of private schools can make it here, it can make it anywhere – which is why the concern I articulate here is not only for private schools in New York, but all across the United States.

As the Board of Regents surely understands, parents dig deep into their pockets to educate their children in private schools precisely because they want their children to have an educational experience that is substantially *different* from – not substantially *equivalent* to – the experience they would have in public school. Private schools are established to provide a meaningful alternative to public education. They have historically served as laboratories in which innovative educational approaches have been successfully developed, have promoted social and educational diversity, and have made a major contribution to the American education landscape. But they have been able to do so only because the regulatory environment in which these schools operate have allowed maximum flexibility in designing curriculum, hiring teachers, and setting school day schedules.

Limiting and restricting the independence and flexibility that private schools enjoy would have a severe impact on their ability to provide their students with the education they, their students, and their students' parents want them to have. As stated several years ago in a report by the National Conference of State Legislators, there is concern that "uniform government standards will force all schools, public and private, to teach the same material rather than allow private schools to provide an array of alternative learning environments that offer innovative teaching philosophies and unique school cultures." http://www.ncsl.org/research/education/accountability-in-private-school-choice-programs.aspx

It is important to recall that even without overly prescriptive governmental regulation, private schools are already accountable to those who hold ultimate authority over them: their parent bodies. If parents are dissatisfied with the education their child is receiving in a private school, they are perfectly free to vote with their feet and enroll their child in another school. We do not suggest that government should have no oversight responsibility in the context of private schools. But in exercising such responsibility, government must tread lightly, cognizant of the fact that private schools are accountable first and foremost to their parent bodies. The proposed new regulatory scheme in New York seems oblivious to that reality.

Finally, while CAPE represents virtually the full spectrum of private schools across the United States, and the concerns we have expressed in the preceding paragraphs apply across the board to all manner of private schools, they apply with special force to faith-based private schools. The U.S. Supreme Court has emphasized "the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children." Wisconsin v. Yoder, 406 U.S. 205, 302 (1972). When government regulation interferes with the parental right to guide the religious education of their children, by prescriptively imposing onerous secular studies curriculum requirements that would undermine the ability of private religious schools to provide an appropriate religious education to their students, government undermines the fundamental religious liberty interests of parents and their children.

For these reasons, CAPE respectfully opposes the proposed regulations.

Sincerely,

Michael Schuttloffel
Executive Director