



Agudath  
Israel  
of America  
אגודת ישראל באמריקה

May 31, 2022

Dr. Betty A. Rosa  
Commissioner

Dr. James N. Baldwin  
Senior Deputy Commissioner for Education Policy

Ms. Christina E. Coughlin  
Assistant Commissioner, SORIS

New York State Education Department  
89 Washington Avenue  
Albany, NY 12234

***Re: Proposed New Substantial Equivalency Regulations***

Dear Commissioner Rosa, Senior Deputy Commissioner Baldwin and Assistant Commissioner Coughlin:

I respectfully submit these comments regarding the proposed new "substantial equivalency" regulations. I do so in my capacity as executive vice president of Agudath Israel of America, a 100-year-old national Orthodox Jewish organization headquartered in New York and with branches and chapters in many states. Among its other activities, Agudath Israel advocates the interests of the yeshiva school community, both here in New York and across the United States.

Throughout my 38-year career at Agudath Israel, I have sat on the New York State Education Commissioner's Nonpublic School Advisory Council, going back to the days of Commissioner Gordon Ambach and consecutively through the ongoing tenure of Commissioner Rosa. I also serve on the Committee of New York City Religious and Independent School Officials, which I currently chair; on the national board of CAPE, the Council for American Private Education; and on the board of PEARLS, Parents for Educational and Religious Liberty in Schools.

### **This Really is That Important!**

As you are surely aware, the Orthodox Jewish community, in unprecedented massive numbers, has used the 60 day comment period to express strong opposition to SED's proposed new regulations regarding substantial equivalency. Yeshivas across the state, the parent bodies and students they service, the alumni they have produced – all have voiced deep concerns about the harmful impact the proposed regulations would have on yeshiva education.

The concerns are well placed. For, despite the fact that these proposed regulations commendably recognize a variety of alternate pathways toward equivalency that for the most part avoid LSA involvement (section 103.3), the reality is that many yeshivas would not fit within any of those alternate pathways and would thus be subject to highly intrusive direct LSA oversight – oversight that would likely require changes in those yeshivas' daily school schedules, would intrude upon their educational and religious autonomy, and would jeopardize their ability to carry out the mission for which they were created.

This concern is heightened by the unfettered power the LSA would have under the regulations to inject its own social perspective in reviewing yeshivas that come under its oversight authority. LSA reviewers may insist that certain sensitive subjects be taught the way government wants them taught, through a secular lens rather than through the school's religious worldview.

What, for example, is a yeshiva to do if it teaches earth science through the prism of creationism, and the LSA insists that the Book of Genesis is not science and must be omitted from the curriculum? Or, to take another example, what if the LSA is in tune with the ideals of contemporary social progressivism and insists that yeshiva students be taught to accept same-sex marriage as a legitimate option? It is fine and good that the proposed regulations caution that LSA equivalency reviews "be informed by, and respectful of, the cultural and religious beliefs" of the school under review (Section 130.10 (d)), but at the end of the day, when push comes to shove, such information and respect may not be enough to prevent an LSA from imposing its "enlightened" perspective on the religious school.

Yeshivas are not the only ones whose rights are threatened by the proposed regulations. Parents who choose such schools for their children, whose fondest dreams and most fervent prayers are that their children grow up to be faithful, knowledgeable, G-d fearing Jews, are in the regulations' crosshairs as well. In the yeshiva community, parents seek out educational settings for their children where basic educational decisions – what courses should be taught, by whom, for how many hours, what their content should include or exclude, how to divide the school day between religious and secular studies – are made by religious leaders and other experts in Jewish education, not by

checklist bearing government functionaries who have no real understanding of the Jewish faith or of the yeshiva community.

### **The Stakes Could Not Be Higher**

At stake are fundamental constitutional freedoms. As the Supreme Court stated 50 years ago in the famous *Yoder* case, upholding the constitutional right of Amish parents not to enroll their children in high school despite Wisconsin's compulsory attendance laws, it is "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 US 205, 302 (1972).

Agudath Israel's mandate is to advocate for the full spectrum of Orthodox Jewish schools. That spectrum is wide, and includes yeshivas that may choose to adopt a hard line regarding LSA oversight, for all the reasons outlined above. For these yeshivas, tweaking the proposed regulations to make them easier to comply with may not move them off their oppositional stance, so long as they perceive LSA oversight as an unacceptable breach of their independence. We will fully support these yeshivas if that is their position. We hope that the Regents will recognize the sincerity of their beliefs and the seriousness of their concerns, and find a way to allow them to exist without intrusive LSA oversight.

We now turn our focus to specific provisions or omissions in the proposed regulations, and respectfully offer for your consideration concrete suggestions on how the regulations might be improved.

### **The Educational Value of Jewish Studies**

Section 130.9 of the proposed regulations lists the various and sundry items an LSA must consider in making a substantial equivalency review: the competency of a school's teachers, the language of instruction, whether the four core subjects are being properly taught, whether a variety of other statutory mandates are being met, and certain other criteria for substantial equivalency reviews. Nowhere, though, is there any reference to consideration of other educational disciplines that may be offered by the school. Those, apparently, count for nothing in evaluating the quality of a school's overall instructional program.

Respectfully, this makes no sense as a matter of sound educational policy. Worse, in practical terms (again, from the perspective of the yeshiva community), it would mean that many outstanding Jewish schools that devote the major part of their school day to Jewish religious studies would likely fall short in a substantial equivalency review unless they make significant changes to their school day schedules. For a yeshiva to be judged on the quality of its educational program without taking into account the many hours its

students are engaged in the study of Chumash (Bible), Mishna, Talmud, the Codes of Jewish Law and the various other sacred Jewish texts, would make a cruel mockery of the review process.

We have had several occasions to share with members of the Board of Regents and SED executive staff Dr. Adina Schick's mapping project, which shows how closely aligned are the typical Jewish studies programs in grades K-6 with "Common Core" or "Next Gen" standards in the broader educational community. Without question, some of what is studied under the banner of religious studies dovetails closely with that which is more typically studied under the banner of traditional subject areas. At a minimum, an equivalency evaluator should be prepared to review, and credit, those aspects of a yeshiva's educational program.

More fundamentally, even those aspects of Jewish religious studies that do not fit neatly into any specific subject area cubbyhole deserve recognition. That is because the study of such texts as the Mishna and the Talmud trains a student how to read carefully, how to think analytically, how to debate intelligently, how to explore deeply, how to articulate precisely, how to imagine creatively – in short, all the things that a sound education is really all about. As Dr. Martin Luther King once famously said, "The function of education is to teach one to think intensively and to think critically. Intelligence plus character – that is the goal of true education."

Measured by that standard, we respectfully submit, the education a student is offered in a yeshiva is substantially equivalent to that which his counterpart is offered in public school – in certain ways, considerably superior. But it will never be seen as such in an equivalency review unless the reviewer knows to look for it. The new regulations should make clear that the reviewer must indeed look for it.

### **Revisiting SED's Interpretation of Education Law 3204 (2)(ii)-(iii)**

On April 12, 2018, Governor Cuomo signed into law an amendment to the Education Law, codified as section 3204 (2)(ii)-(v), which establishes equivalency criteria for nonpublic elementary schools that are non-profit corporations, have a bilingual program and have a lengthy school day (section 3204 (2)(ii)), and for nonpublic high schools that have those same characteristics and serve graduates of those nonpublic elementary schools. (Section 3204 (2)(iii).) For such elementary schools, the focus of an equivalency review is whether the school's curriculum provides academically rigorous instruction that develops students' critical thinking skills, and whether the school teaches the four core subjects of English, mathematics, history and science (as defined in the amendment). For such high schools, the focus of an equivalency review should be whether the outcomes of the school's academically rigorous instruction result in a sound basic education. The 2018 Amendment further provides that the Commissioner is the "entity" responsible for making equivalency determinations for such schools. (Section 3204 (2)(v).)

In a case filed by YAFFED challenging the constitutionality of the 2018 Amendment – a case that was thrown out on the grounds that YAFFED lacked standing – U.S. District Judge Leo Glasser offered insight into the meaning of the 2018 Amendment:

*“Viewed holistically, the effect of the [2018] Amendment was to expand NYSED’s discretion to exempt covered schools from the educational requirements otherwise applicable to private schools under NYSED’s then-existing guidelines. As indicated by the Amendment’s use of open-ended language such as ‘including’ and ‘not limited to,’ the specific educational criteria set forth in the Amendment establish a floor rather than a ceiling. **NYSED could deem schools to be compliant with the Education Law’s substantial equivalence mandate if they meet these minimal requirements.** Alternatively, NYSED could impose learning standards that go above and beyond these statutory requirements, and deem any schools that fall beneath these heightened standards noncompliant with the substantial equivalence mandate – even if the schools provide the basic level of instruction required in the [2018] Amendment itself. **Either is a permissible interpretation of the statute.**”* Young Advocates for Fair Education v. Cuomo, 359 F. Supp. 3d 215, 224 (E.D.N.Y. 2019). [Emphasis added.]

SED, then and now, has embraced the latter interpretation of the statute, treating the schools covered by the 2018 Amendment more stringently than other nonpublic schools. Judge Glasser considered this ironic: *“The great irony, therefore, is that even though YAFFED alleges that the [2018] Amendment was designed to reduce the amount of secular education provided at Hasidic yeshivas, it may have precisely the opposite effect. . . . **By promulgating the Revised Guidelines, the Commissioner has exercised [her] discretion to require covered schools to comply with all of the same curriculum and hour requirements applicable to other private schools, plus the skill sets enumerated in the [2018] Amendment.**”* Id. at 226 [Emphasis added.]

This may indeed be ironic. But it is also devastating. And, frankly, it is nonsensical.

Putting aside the problems with the 2018 Amendment – most unfortunately, the unseemly process leading to its enactment – what it was trying to accomplish was laudable. It sought to strike a balance between the two essential interests at play here: the state’s interest in ensuring that all children receive an education that will equip them to be productive members of society, and the right of parents to direct the education of their children in accordance with the dictates of their faith. To strike that balance, the 2018 Amendment posits that children enrolled in yeshivas, where the lengthy school day and bi-lingual programs testify to a rigorous dual academic program of Jewish and secular studies, must receive education throughout the elementary school years in the four core academic areas of ELA, math, history and science, but should also be allowed to devote long hours of the school day to an intensive program of Jewish studies – something that

can be accomplished only if they are exempt from the prescribed subjects and hours of the non-core secular studies.

Judge Glasser has made it clear that SED has the legal authority to read the 2018 Amendment as an attempt to accommodate the unique needs of yeshivas, rather than as some sort of bizarre punitive mandate that imposes even more stringent secular studies requirements on yeshivas than on all other private schools. We respectfully urge SED to reconsider its position, to make it clear that schools that meet the criteria of Education Law 3204 (2) (ii) - (iii) are governed exclusively by the curricular requirements set forth in that statute.

### **Expanding the Safe Harbor of Registration**

Section 130.3(a) (1) of the proposed regulations states that a registered nonpublic high school, or a “nonpublic school serving grades 1 through 8 that has a registered high school” shall be deemed substantially equivalent. The logic behind this safe harbor would appear to be that a high school that has achieved the status of registration is assumed to be a quality school, and that an affiliated elementary school may be assumed to be a quality school as well. While this is a welcome proposal, it does not go far enough. There are many high quality independent nonpublic elementary schools, not formally affiliated with any high school, whose graduates go on to registered high schools. These independent elementary schools, no less than affiliated elementary schools, demonstrate their high quality through the large percentage of graduates who attend registered high schools.

We respectfully suggest that any unaffiliated nonpublic elementary school that can show that at least 75% of its graduates go on to attend registered high schools should also be deemed substantially equivalent.

### **Expanding the Safe Harbor of Accreditation**

Section 130.3 (a) (3) of the proposed regulations states that a nonpublic school accredited by an SED-approved accrediting body shall be deemed equivalent. This is an attractive option, but unfortunately will not provide much comfort for the yeshiva community, at least not in the short term. That is because there are very few yeshivas in New York State that have pursued accreditation – and in fact very few are accredited. Even if, as a result of this new regulatory safe harbor, yeshivas will now wish to pursue accreditation from an SED-approved accreditation agency that has the capacity to evaluate the religious studies component of the school day, and dozens of yeshivas make hasty application for accreditation, the accreditation process will take long years before it is finally concluded. In the meantime, the yeshiva will be subject to LSA oversight – and all of the attendant concerns outlined above.

We respectfully suggest that the regulations make clear that the SED must approve at least one accreditation agency that has experience with Jewish schools, and that if a school has taken appropriate steps on the path toward accreditation – as evidenced by provisional accreditation or some other appropriate benchmark – it should be deemed substantially equivalent.

### **Limiting the Appeals Process to “Parties”**

Section 130.12 of the proposed regulations states that “Persons considering themselves aggrieved by an LSA’s substantial equivalency determination may file an appeal to the Commissioner . . . pursuant to Education Law sec. 310.” A section 310 appeal is nothing to be trifled with; by statute, the Commissioner is “required to examine and decide” any such appeal. This proposed regulation would effectively invite every malcontent who is unhappy with a school’s positive equivalency determination to appeal such determination to the Commissioner. That cannot be, however, as the underlying statute, section 310, allows for appeal only by “any **party** conceiving himself aggrieved.”

We respectfully suggest that Section 310 be revised to make clear that the authority to appeal rests only with an actual party to the proceeding.

### **With Appreciation**

Before signing off, please permit me to express my most profound gratitude to SED and the Board of Regents for your incredible investment of time and energy on the highly sensitive topic of substantial equivalency. You have participated in meeting after meeting with yeshiva advocates and with other stakeholders. You have gone back to the drawing board numerous times in an effort to get things just right. From our perspective, you’re not quite there yet – but that in no way diminishes our appreciation for all your hard work.

May G-d bless you.

Sincerely,



Rabbi David Zwiebel  
Executive Vice President

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cc: Members of the Board of Regents