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**BY ELECTRONIC MAIL AND CERTIFIED MAIL**

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

October 4, 2018

RE: *Substantial Equivalence in Nonpublic Schools in New York*

Dear Commissioner Elia:

We write in response to the New York City Department of Education’s (“DOE”) letter to the Commissioner regarding the DOE’s investigation into the substantial equivalence of 39 yeshivas in Brooklyn, New York. As you know, the DOE received a complaint in 2015 alleging that 39 yeshivas provided only limited secular education and were failing to meet the “substantial equivalence” standard mandated by state law.<sup>1</sup> After taking three years to investigate, the DOE wrote to the New York State Education Department (“NYSED”) on August 15, 2018 detailing its preliminary findings on the yeshivas to which it could gain access and requesting further guidance from NYSED.<sup>2</sup> The DOE requested clarification because Education Law § 3204, which outlines the instruction required in schools in New York, was amended in April 2018. As far as we know, NYSED has yet to issue updated guidance or any regulations to correspond with the new law, thus halting already-in-progress investigations by school districts and delaying the assessment of the quality of nonpublic school education across the state.

The New York Civil Liberties Union (“NYCLU”) writes to implore NYSED to expediently promulgate regulations and issue clear guidance to the DOE and districts around New York on how to determine substantial equivalence that aligns with the current version of Education Law § 3204.<sup>3</sup> We request that this guidance delineate clear action steps for the inspection of a nonpublic school and its curriculum, address situations in which investigating authorities are denied entry to a nonpublic school in the course of an inspection, and provide for periodic inquiries into the substantial equivalence of nonpublic schools even if complaints have not been directed at such schools. We also request that NYSED clarify its role in the review process. NYSED continues to retain the statutory responsibility to ensure that nonpublic school students in New York State receive an education that is “substantially equivalent” to that received by their public school peers.

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<sup>1</sup> Kate Taylor, *New York city Questions English, Math and Science Taught at Yeshivas*, THE NEW YORK TIMES, July 31, 2015, available at <https://www.nytimes.com/2015/08/01/nyregion/new-york-city-questions-english-math-and-science-taught-at-yeshivas.html?login=email&auth=login-email>.

<sup>2</sup> Richard Carranza, Letter to Commissioner MaryEllen Elia, Re: Substantial Equivalence Inquiry, August 15, 2018, available at <https://www.chalkbeat.org/wp-content/uploads/2018/08/Chancellor-Letter-to-SED-8.15.2018.pdf>.

<sup>3</sup> The version of Education Law § 3204 as amended in April 2018 has been challenged as an unconstitutional violation of the Establishment Clause. See *Young Advocates for Fair Education v. Cuomo, et al.*, Case No. 18 CV 4167, E.D.N.Y. July 23, 2018. The NYCLU does not concede the constitutionality of the current form of the statute.

To amplify and further support our request, we set forth below a discussion of New York Education Law § 3204, its application to home instruction, the administrative deficiencies governing inquiries of nonpublic schools, and a specific set of recommendations and proposals.

### *New York Education Law § 3204*

New York Education Law § 3204 outlines the instruction that is required for all students in New York state, including those attending a “public school or elsewhere.”<sup>4</sup> The law requires that instruction given “elsewhere than at a public school shall be 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,” and that this instruction must be provided by “competent” instructors.<sup>5</sup>

In April 2018, Section 2 of Education Law § 3204 was amended by adding new subsections (ii)-(v) that specify how to consider substantial equivalence in nonpublic schools that are nonprofit corporations, have a bilingual program, and have extended program hours.<sup>6</sup> The amendment also applies to nonpublic high schools that were established to serve the students who have graduated from an elementary school described by section (ii). Under the amended law, NYSED shall consider certain delineated factors in assessing substantial equivalence including whether the curriculum develops students’ critical thinking skills, whether the instruction in mathematics “will prepare pupils to solve real world problems” and instruction in science whereby students “gather, analyze and interpret observable data.”<sup>7</sup> For high school students, NYSED shall consider whether “the curriculum provides academically rigorous instruction that develops critical thinking skills in the school’s students, the outcomes of which, taking into account the entirety of the curriculum, result in a sound basic education.”<sup>8</sup> Finally, the amended law obligates the Commissioner of Education to determine whether schools under this section are providing a “substantially equivalent” education.<sup>9</sup> The evaluation of the substantial equivalence of a nonpublic school was previously undertaken by the local school district within which the nonpublic school is located.<sup>10</sup>

### *Substantial Equivalence Inquiries in Home Instruction*

Many of the inquiries into substantial equivalence under the previous version of the law were made when school districts and family court prosecutors questioned the substantial equivalence of homeschooling programs.<sup>11</sup> In *Blackwelder v. Safnauer*, the Northern District of New York found that in order for parents to meet their burden of establishing the substantial equivalence of a home

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<sup>4</sup> N.Y. Educ. Law § 3204 (1).

<sup>5</sup> N.Y. Educ. Law § 3204 (2).

<sup>6</sup> N.Y. Educ. Law § 3204 (2)(ii) (2018).

<sup>7</sup> *Id.*

<sup>8</sup> N.Y. Educ. Law § 3204 (2)(iii) (2018).

<sup>9</sup> N.Y. Educ. Law § 3204 (2)(v) (2018) (“The commissioner shall be the entity that determines whether nonpublic elementary and secondary schools are in compliance with the academic requirements set forth in paragraphs (ii) and (iii) of this subdivision.”)

<sup>10</sup> See Guidelines for Determining Equivalency of Instruction in Nonpublic Schools, *available at* <http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html>.

<sup>11</sup> *Blackwelder v. Safnauer*, 689 F. Supp. 106 (N.D.N.Y. 1988).

school program within the Cato Meridian Central School District, they needed to submit a “proposed calendar, curriculum, list of textbooks, syllabus and standardized testing schedule (if appropriate) for review by a representative of the school district.”<sup>12</sup> The parent wishing to homeschool their children also had to present information on the “credentials and life and occupational experiences of the instructor or instructors who are to conduct the homeschooling program.”<sup>13</sup> The assessment was also contingent on multiple, scheduled home visits.<sup>14</sup>

Currently, there are explicit Commissioner’s regulations regarding the requirements of home instruction and detailed information about what a local school district will review when considering substantial equivalence.<sup>15</sup> Parents must submit an Individualized Home Instruction Plan (“IHIP”) to the local district for each child who is to be taught at home each year they decide to homeschool their children. This IHIP must contain “a list of the syllabi, curriculum materials, textbooks or a plan of instruction to be used in each of the required subjects,” a schedule for submission of quarterly reports, and the names of individuals who are providing instruction.<sup>16</sup> Children who are homeschooled are also required to take an annual assessment and submit the results to the local school district and children must receive a minimum number of hours of instruction.<sup>17</sup>

### *Substantial Equivalence Inquiries in Nonpublic Schools*

As the school year begins, it is imperative for school districts to have clear guidance on their role in the assessment of substantial equivalence. However, there are no regulations governing a substantial equivalence inquiry in nonpublic schools. NYSED has put out guidance on substantial equivalence, but it appears that these guidelines have not yet been updated since the Commissioner has been granted the power to determine substantial equivalence in certain nonpublic schools. The current iteration of the guidelines requires that the local school district undertake an investigation of an existing nonpublic school if a “serious concern arises about equivalency of instruction.” However, the guidance does not specify what exactly should be reviewed beyond “materials and data” which correspond to the complaint.<sup>18</sup> If the situation cannot be remedied after an iterative process, the superintendent will notify the local school board that the nonpublic school program is not equivalent.<sup>19</sup> This action will trigger a notification to parents that their children will be

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<sup>12</sup> *Blackwelder v. Safnauer*, 689 F. Supp. 106, 113 (N.D.N.Y. 1988).

<sup>13</sup> *Id.* at 113.

<sup>14</sup> *Id.*

<sup>15</sup> 8 NYCRR § 100.10.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Guidelines for Determining Equivalency of Instruction in Nonpublic Schools (III), available at <http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html>. NYSED’s guidance states that the administrator of a new nonpublic school should provide to the superintendent of the district in which the school is located an assurance that the building is safe for children, a list of names of the pupils, a copy of the school calendar, a list of grade levels and total enrollment, and a list of courses and subjects to be taught in each grade level. *See id.* at (I)(A).

<sup>19</sup> *See* Guidelines for Determining Equivalency of Instruction in Nonpublic Schools (I)(B), available at <http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html>.

considered truant if they continue to attend the school, give parents a deadline for transferring their children to a new school, and will set a cutoff date for ending transportation, textbooks, and health services. The large role of the local school district is now unclear, as NYSED is now the final arbiter of substantial equivalence for certain types of nonpublic schools.<sup>20</sup>

Given the dearth of information on what constitutes a substantial equivalence inquiry for nonpublic schools, it appears that the regulations and guidance governing the provision of home instruction in New York State are more restrictive and descriptive than the guidelines for provision of education in nonpublic schools. In addition, the consequences for home schooling parents appear to be much more immediate and severe than those for nonpublic school administrators. If a parent fails to comply with the regulations and guidance, often parents are subject to a finding of educational neglect, which can result in the removal of their children.<sup>21</sup> Yet, half of the yeshivas that are the subject of the DOE's investigation denied access to investigators and have faced no consequences.<sup>22</sup>

*NYSED Should Immediately Promulgate Clear Regulations and Guidance on the Determination of Substantial Equivalence in Nonpublic Schools*

To ensure that all students receive a substantially equivalent education, regardless of whether they are in a new or existing nonpublic school, NYSED should promulgate regulations and guidance to clarify its role, the role of the local school district, and the specific steps that nonpublic schools are required to take in order to prove substantial equivalence.

*First*, NYSED must clarify its role in relation to the local school district now that the Commissioner is required to determine substantial equivalence in certain nonpublic schools. It is unclear whether the previously issued guidelines still apply to nonpublic schools falling outside the scope of the amendment, or what role, if any, the local school district will play in evaluation of nonpublic schools falling within the mandate of Education Law § 3204(2)(ii)-(v).

*Second*, NYSED should outline the specific steps that should be taken to assess substantial equivalence. We recommend: (1) a review of the credentials and language abilities of teaching staff; (2) interviews with teaching staff, students, and parents; (3) a review of assessments and student achievement data; (4) a serious inquiry into curriculum and lesson plans; (5) confirmation of the language of instruction; and (6) a review of the school calendars, attendance data, and projected hours of instruction. A review of these items should be coupled with multiple visits to the schools to view the teaching and learning in action, not just in theory. It is important that teachers, parents, and students give input through these site visits to ensure that the paper

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<sup>20</sup> It is also unclear as to whether the local school districts will still be responsible for undertaking a substantial equivalence for homeschooling students and nonpublic schools that fall outside of the narrow constraints of Education Law § 3204(2)(ii)-(v).

<sup>21</sup> *Matter of Falk*, 441 N.Y.S.2d 785 (Fam. Ct. Lewis Cnty. 1981).

<sup>22</sup> Elizabeth A. Harris, *Half of Yeshivas Under Investigation Denied Entry to Education Officials, City Says*, THE NEW YORK TIMES, August 16, 2018, <https://www.nytimes.com/2018/08/16/nyregion/yeshivas-investigation-new-york.html>.

curriculum is reasonable and appropriate for students, and is actually implemented. This assessment process can be based on NYSED's existing Regulation § 100.10 that governs substantial equivalence in home instruction.<sup>23</sup>

*Third*, NYSED should ensure that the nonpublic school's teachers have access to high-quality professional development to provide for their ongoing development and refinement of pedagogical skills, particularly for any teachers that may be new to teaching secular curriculum or those without teaching certification.

*Fourth*, NYSED should ensure that there are clear consequences for refusal to engage in the substantial equivalence inquiry process. All nonpublic schools should be provided with a reasonable period of time to schedule visits and if they fail to meet this deadline, all transportation, textbooks, and health services should be withdrawn.<sup>24</sup>

*Finally*, while NYSED's guidance regarding newly formed nonpublic schools provides for an automatic mechanism of review, it does not appear that the current guidance requires already-existing nonpublic schools to be reviewed for substantial equivalence unless a formal complaint is made.<sup>25</sup> For example, the 2015 complaint contained allegations regarding 39 yeshivas across New York City. Despite the evidence that many of these schools did not adequately provide secular education, and the existence of many additional yeshivas outside the scope of the complaint, the DOE did not expand its investigation, limiting it to only the 39 named yeshivas. A review process that is contingent on an initial complaint may pose particular challenges for members of insular religious communities that may be hesitant to register a complaint for fear of reprisals or shunning from the community. NYSED should ensure that the review of established nonpublic schools occurs on a regular, periodic basis, as it does for parents who homeschool their children.

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<sup>23</sup> Multiple New York state and federal courts have upheld the requirements of Education Law § 3204 in the face of challenges based on the Free Exercise Clause of the Constitution. *See Blackwelder v. Safnauer*, 689 F. Supp. 106 (N.D.N.Y. 1988) (holding that the homeschooling children would be required to live and work in modern society as adults and therefore it was necessary for them to attain certain minimum education standards); *Application of Auster*, 198 Misc. 1055 (Sup. Ct. King's Cnty, Sept. 27, 1950) (holding that a parent must enroll his child in a school that complies with the minimum requirements under the education law for secular education in order to retain custody of his child), *aff'd sub nom. Auster v. Weberman*, 278 A.D. 656 (2d Dept. 1951), *aff'd*, 302 N.Y. 855, (1951); *People on Complaint of Shapiro v. Dorin*, 99 N.Y.S.2d 830 (N.Y. Dom. Rel. Ct. 1950) (finding that secular education is a "fundamental part of our system of society" and thus sectarian education cannot be constitutionally substituted for secular education.), *aff'd sub nom. People v. Donner*, 103 N.Y.S.2d 757 (2d Dept. 1951), *aff'd*, 302 N.Y. 857 (1951).

<sup>24</sup> Guidelines for Determining Equivalency of Instruction in Nonpublic Schools, available at <http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html>.

<sup>25</sup> NYSED, Manual for New Administrators of Nonpublic Schools, available at <http://www.p12.nysed.gov/nonpub/manualfornewadministratorsofnps/statereqs.html>; see also Guidelines for Determining Equivalency of Instruction in Nonpublic Schools, available at <http://www.p12.nysed.gov/nonpub/guidelinesequivofinstruction.html> ("If, however, a serious concern arises about equivalency of instruction in an established school, the superintendent of schools of the district in which the nonpublic school is located should inform the officials of the nonpublic school that a question has been raised about equivalency of instruction in the school.").

*Conclusion*

It is clear that “without equality of opportunity in education there is no equality among the children of our democratic society.”<sup>26</sup> It is therefore imperative that NYSED act with urgency to ensure that all children attending nonpublic schools in New York State receive a substantially equivalent education to that received in public schools.

We welcome the opportunity to discuss this further with you. Please do not hesitate to contact us with further questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Stefanie D. Coyle'.

Stefanie D. Coyle  
Education Counsel

cc: Lori Genito, Supervisor of Education Programs, State Office of Religious and Independent Schools, NYSED  
Alison Bianchi, General Counsel, NYSED  
Richard Carranza, Chancellor, New York City Department of Education

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<sup>26</sup> *People on Complaint of Shapiro v. Dorin*, 99 N.Y.S.2d 830 (N.Y. Dom. Rel. Ct. 1950), *aff'd sub nom. People v. Donner*, 103 N.Y.S.2d 757 (2d Dept. 1951), *aff'd*, 302 N.Y. 857 (1951).