

August 28, 2019

Dr. Christina Coughlin
New York Education Department, SORIS
89 Washington Avenue, Room 1075 EBA
Albany, NY 12234
seregcomments@nysed.gov

Dear Dr. Coughlin,

I write to you on behalf of the Union of Orthodox Jewish Congregations of America (“Orthodox Union”), the nation’s largest Orthodox Jewish synagogue organization. The Orthodox Union represents nearly 1000 congregations across the United States, including 141 congregations in the State of New York. In this capacity, I raise below serious concerns with the New York State Education Department’s (“NYSED”) proposed regulations addressing Substantial Equivalent Instruction for Nonpublic School Students.

New York State law requires that non-public schools provide instruction that is “substantially equivalent to the instruction given to minors” in public schools. *See* N.Y. EDUC. LAW § 3204(2)(i). But in its zeal to implement new regulations, the NYSED threatens to define and police substantial equivalence in a manner that will not only undermine the pursuit of substantial equivalency, but will also single out dual-curriculum Jewish day schools for unfair treatment. The American Orthodox Jewish community remains unequivocally dedicated to educational quality as one of its core commitments. However, the NYSED’s proposed regulations fail to advance that objective; ultimately, these proposed regulations are not only legally problematic, but represent bad policy for our shared objective of ensuring that nonpublic school students receive a quality education.

I. Orthodox Jewish Commitment to Education as a Core Value

While all our members share a broad religious affiliation, they are far from monolithic when it comes to matters of faith, family and politics. And yet, that diversity notwithstanding, no issue unites our constituency more than the importance of education. Over eighty percent of Orthodox Jews in the United States have at least one child enrolled in a Jewish day school. *See A Portrait of American Orthodox Jews*, PEW RESEARCH CTR., <https://www.pewforum.org/2015/08/26/a-portrait-of-american-orthodox-jews/> (Aug. 26, 2015). Indeed, providing a sustainable and affordable Jewish education ranks, according to one recent survey, as the “most serious” challenge facing American

Modern Orthodox Judaism. NISHMA RESEARCH, *Nishma Research Profile of American Modern Orthodox Jews* 75 (Sept. 28, 2017), <http://nishmaresearch.com/assets/pdf/Report%20-%20Nishma%20Research%20Profile%20of%20American%20Modern%20Orthodox%20Jews%2009-27-17.pdf>.

That Jewish education would unite our constituents like no other issue is far from surprising. Transmitting Jewish values through education is one of the central and timeless imperatives captured in Judaism's most sacred texts. Thus, not only does the Bible instruct Jews to remain dedicated and steadfast to the constant pursuit of study and learning—"This book of the Torah shall not leave your mouth; you shall meditate therein day and night" (*Joshua* 1:8)—but it also commands Jews to seize all opportunities to transmit our amassed knowledge and central values to each subsequent generation—"And you shall teach them to your sons and speak of them when you sit in your house, and when you walk on the way, and when you lie down and when you rise up." (*Deuteronomy* 6:7).

These communal priorities now manifest themselves in an extraordinary Jewish day school network around the United States, which—as of 2013—included over 850 schools and over a quarter of a million enrolled students. Over 150,000 of those students were enrolled in New York Jewish day schools—an increase of approximately 45% over the preceding fifteen years. See Marvin Schick, *A Census of Jewish Day Schools in the United States, 2013-2014*, AVI CHAI 2, 31 (2014), <https://avichai.org/wp-content/uploads/2014/10/Census-2013-14.pdf> (last visited Aug. 19, 2019). Indeed, it is because of this dedication to—and investment in—education that the Orthodox Union has partnered with state officials around the United States, including in New York, to support Jewish (and all nonpublic) schools through programs that improve the quality of education. Most recently, that has included the successful adoption of New York State Education Law § 3037, which helps support STEM instruction in nonpublic schools and thereby improves the quality of STEM education across New York State.

II. Jewish Education and Identity Through Dual-Curriculum Integration

This commitment to the flourishing of high-quality Jewish education is also why the Orthodox Union has serious concerns about the NYSED's newly proposed regulations for Substantially Equivalent Instruction for Nonpublic School Students.

For nearly a century, Jewish day schools have served as the American Orthodox Jewish community's "critical setting for the transmission" of Jewish values. See Jack Wertheimer, *Jewish Education in the United States: Recent Trends and Issues*, 99 AM. JEWISH Y. B. 3, 17 (1999). The central feature of Jewish day schools is their dual curriculum; under such a system, the school day is divided between Jewish studies (e.g. Bible and Talmud) and general studies (e.g. math, science, and English language arts). See *Westchester Day Sch. v. Mamaroneck*, 417 F.Supp.2d 477, 497 (S.D.N.Y. 2006) (summarizing expert testimony explaining that "for modern Orthodox Jews, enrolling their children in a dual-curriculum Jewish day school is 'virtually mandatory'" (internal citation omitted)).

Given the range of theological and ideological perspectives within the Orthodox Jewish community, different Jewish educational institutions implement this dual-curriculum methodology in different

ways. Notwithstanding these variations, for many Jewish educational institutions, these areas of study are not intended to live in isolation; to the contrary, “Jewish all-day schools have widely aspired to the curriculum integration of Jewish and general studies.” Alex D.M. Pomson, *Knowledge That Doesn’t Just Sit There: Considering a Reconception of the Curriculum Integration of Jewish and General Studies*, 96 REL. EDUC. 528, 528 (2001).¹ The drive for integration derives from a theology of Judaism as “world-redeeming.” See Aharon Lichtenstein, *A Consideration of Synthesis from a Torah Point of View*, THE COMMENTATOR (Apr. 27, 1961), <https://yucommentator.org/2018/01/archives-april-27-1961-volume-26-issue-10-consideration-synthesis-torah-point-view/>. Thus, Jewish pedagogy incorporates “both secular and religious studies” in order to “establish[] a rich education as the basis of a rich life” in which “[t]he final word is with integration and harmony.” *Id.*

It is precisely because of this core aspiration for curricular integration that the newly proposed regulations threaten to render unfair evaluations of Jewish day schools. As described below, both in terms of their substantive educational requirements and method of program evaluation—the ‘what’ and the ‘how’ of the proposed substantial equivalence regime—the proposed regulations fail to provide a neutral and equitable framework for applying statutory requirements to Jewish educational institutions.

III. The Proposed Regulations Incorporate Requirements Well-Beyond What is Necessary for Substantial Equivalence

For over 125 years, New York Education Law has required that students in nonpublic schools receive instruction that is substantially equivalent to public school instruction. See Act of May 12, 1894, ch. 671, 1894 N.Y. Laws 1683, §3; N.Y. EDUC. LAW § 3204(2)(i). However, the touchstone of applying the substantial equivalence standard has been a judicially-recognized “flexibility.” Indeed, the importance of this flexibility stems precisely from the issues at stake in the current regulations: “[t]he ‘substantially equivalent’ standard is flexible enough to allow local school officials sufficient lee-way to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue.” *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988).

Indeed, the regulations themselves recognize the importance of flexibility, noting that “substantial equivalency reviews and determinations should be conducted in a flexible and inclusive manner.” But while the proposed regulations pay lip service to flexibility, the terms of the regulations impose a set of rigid hourly requirements on a variety of subjects. While those requirements include vital subjects, such as mathematics, science, and English language arts, they also include useful—but less essential subjects—such as visual arts, music, and library and information skills. The proposed regulations provide no meaningful exceptions to these requirements, indicating that failure to satisfy

¹ The method and manner of curricular integration continues to be one of the most discussed and debated topics in the broader field of Jewish education. See Stan Peerless, *Digest of Literature on Curriculum Integration*, LOOKSTEIN CTR. JEWISH EDUC., <https://www.lookstein.org/curriculum-integration-introduction/> (last visited Aug. 16, 2019). For more recent discussion, see Moshe Krakowski, *Developing and Transmitting Religious Identity: Curriculum and Pedagogy in Modern Orthodox Jewish Schools*, 37 CONTEMPORARY JEWRY 433 (2017); David Stein, *Compartmentalization and Synthesis in Modern Orthodox Jewish Education*, THE LEHRHAUS (May 6, 2019), <https://www.thelehrhaus.com/commentary/compartmentalization-and-synthesis-in-modern-orthodox-jewish-education/>.

the entire curricular checklist will lead to a finding that a school is not substantially equivalent. And, according to the guidelines, any student attending a school that has failed to satisfy the program checklist will be deemed a truant—a determination that will lead inexorably to the school's closure.

Abandoning New York's historical commitment to flexibility in assessing substantial equivalence is deeply problematic for Jewish day schools for three related reasons.

First, the regulations incorporate requirements that are simply insufficiently vital given the proposed remedy under the guidelines. To threaten a school with closure for failing to provide instruction in, for example, visual arts, music, or library and information skills is draconian, particularly where a school has made such a decision in order to provide appropriate hours towards religious instruction.

To be sure, this is not to say that these subjects lack value—far from it. But given the state's commitment to religious freedom, the notion that a school would be forced to close on account of making a constitutionally protected curricular decision to prioritize religion over visual arts is a bridge too far. Any substantial equivalence regime ought to have far more curricular flexibility.

Second, the proposed regulations do not provide for a holistic assessment of the totality of the school's educational program, demanding instead that evaluators determine whether or not the curriculum conforms to a rigid checklist of requirements. This is particularly problematic for dual-curriculum Jewish day schools because various learning objectives typically associated with general studies education—such as language arts or social studies—are often pursued under the Jewish studies umbrella. To be sure, the proposed regulations do recognize this curricular method for some subjects—such as library and information skills and career development and occupational studies—which “may be incorporated or integrated into other subjects.” But the fact that the guidelines recognize this possibility, but fail to extend the same logic across the curriculum, only highlights the problem presented to many Jewish day schools. This is yet another instance where the proposed regulations unfortunately have discarded New York's historical commitment to flexibility in assessing substantial equivalence.

Third, the proposed regulations fail to expressly incorporate educational outcomes into the substantial equivalency inquiry. Instead, they appear to focus solely on curricular inputs. This unwillingness to create an evaluation framework that considers *both* curricular inputs and educational outcomes is not only methodologically unsound, but presents a particular threat to appropriate evaluation of dual-curriculum Jewish day schools. Precisely because educational outcomes are pursued in many such schools across a dual-curriculum—both under general studies and Jewish studies—outcomes assessment presents a natural method to determine whether the educational objectives of the substantial equivalency mandate are being met.

To be crystal clear, incorporating outcomes is not an attempt to water down the substantial equivalence inquiry. But if the goal of the regulations is to “ensure that all students receive the education to which they are entitled under the law,” then the failure to incorporate outcomes into the

assessment calculus is deeply problematic. And for dual-curriculum Jewish day schools—schools that leverage both curricular inputs *and* educational outcomes in order to provide a substantially equivalent education—the proposed regulations’ failure to employ multiple pedagogical indicators threatens to undermine, as opposed to enhance, educational achievement.

In sum, the proposed regulations’ abandonment of meaningful flexibility in implementing substantial equivalency standards raises serious concerns. Lack of flexibility ultimately demands (1) adherence to overbroad curricular requirements; (2) compliance with rigid curricular checklists; and (3) imposition of narrow methodological inquiry into substantial equivalence. In so doing, the regulations obscure the ultimate purpose of the state’s regulation of nonpublic schools, which is to “prepare [students] for participation in American political and economic processes as well as to ‘nurture and develop [their] human potential.’” *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (internal citations omitted).

It is precisely because of this ultimate objective—the nurturing and development of human potential—that the statute, by its very terms, demands instruction that is *substantially* equivalent, not instruction that is identical. That is why the touchstone of flexibility—one that accounts for both inputs and outputs oriented to achieve the core objectives of the substantial equivalency regime—is so essential to appropriate regulation. For this reason, the proposed regulations, with all their gratuitous rigidity, strike a blow to the very purpose of New York’s statutory scheme.

As a start, the NYSED should modify the proposed regulations by codifying a far more flexible framework such as the following:

“Because the goal of substantial equivalency is to prepare students for participation in American political and economic processes as well as to nurture and develop their human potential, any substantial equivalency consideration should reflect a holistic assessment of the following three factors: (a) whether the instructional program of a nonpublic school incorporates instruction in essential educational subjects; (b) whether the nonpublic school’s instructional program, taken as a whole, provides academically rigorous instruction that develops critical thinking skills in the school’s students; and (c) whether the nonpublic school’s instructional program achieves demonstrable educational outcomes.”

Molding the regulations around such a framework would require, of course, other changes as well as further clarifications. But building the substantive requirements of the regulations—the ‘what’ of the regulations—on a foundation that took curricular inputs, academic rigor and educational outcomes all into account as part of a balanced and holistic analysis would serve the students of New York State far better.

Ironically, the proposed regulations’ rigid approach to assessment of educational achievement runs counter to recent statements from the New York Board of Regents, which will now consider using capstone projects and student portfolios as evidence of educational readiness. See Philissa Cramer, *It’s Time to Start ‘Hard Work of Rethinking’ Regents Exams, New York’s Top Education Policymaker Says*, CHALKBEAT (May 16, 2019), <https://chalkbeat.org/posts/ny/2019/05/16/its-time-to-start-hard->

[work-of-rethinking-regents-exams-new-yorks-top-education-policymaker-says/](https://dailygazette.com/article/2019/03/11/state-education-chancellor-eyes-change-in-h-s-diploma-requirements); Zachary Matson, *State Education Chancellor Eyes Change in H.S. Diploma Requirements*, DAILY GAZETTE (Mar. 11, 2019), <https://dailygazette.com/article/2019/03/11/state-education-chancellor-eyes-change-in-h-s-diploma-requirements>. This kind of flexibility in assessment being explored by the New York Board of Regents runs counter to the rigidity entrenched in the newly proposed substantial equivalency regulations.

It is for these reasons that, in their current form, the Orthodox Union believes that the substantive requirements of the proposed regulations—the ‘what’ of the regulations—are more likely to impede, rather than to facilitate, educational progress. And given the Orthodox Union’s commitment to educational progress, the regulations therefore represent an unacceptable step backwards.

IV. The Proposed Regulations Police Substantial Equivalence in a Manner Likely to Lead to the Unfair Treatment of Dual-Curriculum Jewish Day Schools

The Orthodox Union does not simply object to the substantive requirements of the proposed regulations. It is also extremely concerned that using Local School Authorities (LSAs) to implement this new evaluation process—the ‘how’ of the proposed substantial equivalence regulatory regime—will not lead to a fair and neutral evaluation of dual-curriculum Jewish day schools.

It is worth noting, at the outset, that the delegation of authority to LSAs to “render determinations regarding substantial equivalence” is legally problematic. The relevant statutes do not vest authority to render substantial equivalence determinations in the LSAs. *See* N.Y. EDUC. LAW §3204; N.Y. EDUC. LAW §3210. And without a statutory mandate, the entire process of evaluation appears to lack the requisite legal authority. *See generally* N.Y. CONST. art. III, § 1 (“The legislative power of this state shall be vested in the senate and assembly”); N.Y. CONST. art. V, § 3 (“[T]he legislature may from time to time assign by law new powers and functions to departments, officers, boards, commissions or executive offices of the governor, and increase, modify or diminish their powers and functions.”).

But the foundational problems with vesting assessment authority in LSAs goes well beyond these legalities. Instead of leveraging the centralized expertise and authority within the NYSED, the proposed regulations dole out responsibility for substantial equivalency review to local authorities. And by deputizing reviewers from various LSAs, the proposed regulations fail to provide meaningful safeguards as to whether all reviewers will have the expertise and familiarity necessary to assess substantial equivalency in a manner that is fair, neutral and uniformly applied.

This is not to say that the regulations are blind to these challenges; to the contrary, the regulations note that the five core principles “essential” to the substantial equivalency reviews are “objective, mindful, sensitive, respectful, and consistent.” Moreover, the regulations “recommend” that reviews be conducted by “a team of at least two individuals, including individuals with expertise in instruction and the ability to communicate well with the nonpublic

school community.” But these recommendations provide little solace without more concrete procedures to ensure that core principles become grounded in reality and do not remain mere ethereal aspirations. At bottom, the proposed regulations must answer how the new substantial equivalency regime will ensure that reviews of nonpublic schools will, in fact, comport with these principles.

These concerns are particularly acute with respect to dual-curriculum Jewish day schools. The substantive challenges of accurately evaluating such schools have been detailed above. But the process adopted by the proposed regulations further exacerbate these problems given the not-so subtle messages from the NYSED that these proposed substantial equivalency regulations were issued, at least in part, in response to complaints about purportedly underperforming Jewish schools. See *Part 130 Substantial Equivalency Regulatory Flexibility Analysis*, N.Y. STATE EDUC. DEP’T OFFICE OF COUNSEL, <http://www.counsel.nysed.gov/rules/indices-fulltext/2019/062> (last visited Aug. 16, 2019). These allegations against a small number of Jewish schools are likely to further bias the evaluation process, cementing negative associations with Jewish education in the minds of local evaluators. Under such circumstances and without concrete safeguards, at least some evaluators may very well neglect to consider the legitimate learning objectives achieved in the Jewish studies portion of dual-curriculum Jewish day schools.

This is not to say that the state should avoid evaluating substantial equivalency; instead, given the stakes and sensitivities of the inquiry, any meaningful regulations should identify alternative entities to LSAs for conducting the reviews.

For example, the NYSED might consider conducting the reviews itself. By centralizing substantial equivalency assessments, the regulations might avoid the significant challenges that come with implementing safeguards and ensuring expertise among the range of local evaluators. Alternatively, the regulations might identify—or otherwise permit—private accreditors capable of conducting these reviews in a manner that leverages the educational expertise within already existent infrastructure.

What is clear is that the proposed regulations fail to provide meaningful safeguards to ensure that the ‘how’ of the new substantial equivalency regime—that is, the implementation of the new rules—comports with the essential core principles necessary to successfully achieve its stated objectives.

V. Conclusion

There can be no doubt that “education is perhaps the most important function of state and local governments.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). But if experience is any guide, fanatical pursuit of such a goal, “without check or guidance,” tends more towards promoting “unfair discrimination or other arbitrary action,” *Packer Collegiate Inst. v. Univ. of the State of N.Y.*, 81 N.E.2d 80, 82 (N.Y. 1948) (internal quotation marks and citation omitted), than promoting “the

importance of education in our democracy.” *Campaign for Fiscal Equity, Inc. v. State*, 801 N.E.2d 326, 327 (N.Y. 2003).

As is often the case, history provides a ready guide for navigating the regulation of religious schools. In 1971, the Orthodox Union joined numerous organizations from across the Jewish denominational spectrum in filing an *amicus* brief before the Supreme Court in *Wisconsin v. Yoder*. Urging the Court to protect the Amish’s right to provide their children with a traditional religious education, the brief stated as follows:

American Jewry has a strong interest in universal secular education for children. Some of the *amici* maintain and support Jewish day schools throughout the country in which children may receive their secular education from pre-kindergarten through secondary school in combination with their religious studies. All the *amici* strongly support the American public school system and deem it one of America's greatest contributions to civilization.

All the *amici*, however, also have a strong interest in religious freedom and in a religiously and culturally pluralistic America.

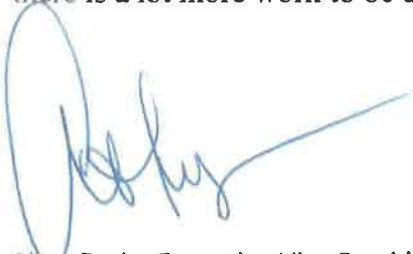
Accordingly, the brief emphasized our constitutional commitment to the importance of protecting smaller religious groups with counter-cultural religious commitments: “The purpose of a Bill of Rights is to protect minorities The smaller the minority, the more likely it is to need judicial protection. . . .” Brief for the Synagogue Council of America and Its Constituents et al., as Amici Curiae, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (No. 70-110), 1971 WL 126412, at *2. These concerns were echoed by yet another Orthodox Jewish organization, that pressed the importance of protecting minority religious communities and their right to pursue reasonable educational objectives: “We believe that it is important, at this time in the nation’s history, that this Court reaffirm that principle [of religious liberty] and thereby stem an alarming and ever-increasing tide of private and governmental hostility to, and discrimination against, religious nonconformists.” Brief for the National Jewish Commission on Law & Public Affairs as Amicus Curiae, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (No. 70-110), 1971 WL 126414, at *2.

The Court ultimately seized the opportunity to provide that protection, ending its opinion with the following words of wisdom:

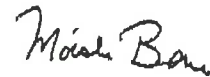
Nothing we hold is intended to undermine the general applicability of the State’s compulsory school-attendance statutes or to limit the power of the State to promulgate reasonable standards that, while not impairing the free exercise of religion, provide for continuing agricultural vocational education under parental and church guidance by the Old Order Amish or others similarly situated. The States have had a long history of amicable and effective relationships with church-sponsored schools, and there is no basis for assuming that, in this related context, reasonable standards cannot be established concerning the content of the continuing vocational education of Amish children under parental guidance,

provided always that state regulations are not inconsistent with what we have said in this opinion.

Wisconsin v. Yoder, 406 U.S. 205, 236 (1972). Those words ring as true today as they did in 1972. With enhanced flexibility and appropriate safeguards, the state can ensure that the children of New York attending nonpublic schools receive a “substantially equivalent” education. But to achieve that outcome will require the state to make concrete improvements to the proposed regulations so that its purported commitment to principles like flexibility, sensitivity, respect, and objectivity become more than aspirational lip service. Education, in the end, is intended to “prepare [students] for participation in American political and economic processes as well as to ‘nurture and develop [their] human potential.’” *Blackwelder v. Safnauer*, 689 F. Supp. 106, 135 (N.D.N.Y. 1988) (internal citations omitted). If these guidelines are going to facilitate that goal, there is a lot more work to be done.



Allen Fagin, Executive Vice President



Moishe Bane, President