

Council for American Private Education

CAPE outlook

Voice of America's private schools

Court Strikes Down New York "Substantial Equivalency" Guidelines

On April 17, New York State Supreme Court Judge Christina Ryba struck down the New York State Education Department's (NYSED) "substantial equivalency" guidance as being in violation of the State Administrative Procedures Act (SAPA). This decision renders the substantial equivalency guidance issued on November 20, 2018 null and void and puts on ice, for now, a frontal attack on private school autonomy.

Background

As previously reported on in *Outlook*, NYSED issued guidelines late last year under which public school officials would inspect private schools to determine whether the education being provided is satisfactory. That stunning development generated massive pushback in the private school community and ultimately led to the filing of several lawsuits. In March of this year, the New York State Association of Independent Schools (NYSAIS) filed suit against the department over the guidelines, followed shortly after by Agudath Israel of America and the New York State Council of Catholic School Superintendents.

Judge Says "No"

The lawsuits filed against the guidelines raised constitutional arguments as well as procedural. In the end, Justice Ryba's decision did not reach the constitutional arguments but rather turned on process. According to her decision, the New York Constitution and New York state law require that certain procedures be followed for the implementation of "rules and regulations," whereas agencies have more freedom to bypass those procedures when merely issuing "explanatory" statements.

The organizations filings suit argued that the guidelines promulgated by NYSED are not merely interpretive but are indeed rules, and in fact constitute "an entirely new inspection regime." The state contended otherwise, claiming that the guidelines merely interpret existing statute.

Justice Ryba sided with the private school groups. Contrary to the state's claim that the guidance does not "command, order, require, or dictate," Justice Ryba laid out the ways that the guidelines put forward mandatory instructions.



"The court finds that the mandatory language dictating when the reviews will begin coupled with the language that insists that 'all' schools will be visited as part of the process constitute clear rules and are not merely 'interpretive statements which in themselves have no legal effect but are merely explanatory.' Therefore the court finds that the new guidelines are 'rules' that were not implemented in compliance with the SAPA and are hereby nullified."

Reaction

According to Jim Cultrara, Co-Chairman of the New York State CAPE, "The NYS Council of Catholic School Superintendents is very pleased that the

court struck down the State Education Department's plan to have public schools evaluate private schools. We've prided ourselves on going above and beyond state academic standards. Parents have always chosen our schools because of that rigor and they can remain confident in the strength of our schools going forward."

NYSAIS Executive Director Mark Lauria said, "At its core, NYSAIS filed, and won, its legal action against the New York State Education Department to preserve the fundamental independence of established independent schools. The approved NYSED regulations created a massive, unfunded, bureaucratic review process that delegated oversight authority for 1800 non-public schools to 340 local public school Superintendents and Boards of Education. Specifically, these regulations required local public school officials to approve the curriculum and the qualifications of the teaching staff in every New York non-public school. When implemented, these regulations would have left our schools susceptible to bias, conflicts of interest, and local politicking. This was a bridge too far."

David Zwiebel, Executive Vice President of Agudath Israel, also hailed the court's ruling: "Strict enforcement of the new regulations would have wreaked havoc in many if not most yeshivos in New York. There is nothing more important to the yeshiva community than the independence of our educational institutions. Today's ruling preserves that independence, and will allow parents to continue sending their children to yeshivos secure in the knowledge that fundamental chinuch-related decisions will be in the hands of yeshiva leaders rather than government bureaucrats."

According to multiple media reports, an NYSED spokeswoman indicated that the department is considering its next steps.



CAPE member organizations:

- Agudath Israel of America
- American Montessori Society
- Association Montessori International—USA
- Association of Christian Schools International
- Association of Christian Teachers and Schools
- Association of Waldorf Schools of N.A.
- Christian Schools International
- Council of Islamic Schools in North America
- Council on Educational Standards and Accountability
- Evangelical Lutheran Church in America
- Friends Council on Education
- Islamic Schools League of America
- Jesuit Schools Network
- Lutheran Church—Missouri Synod
- National Association of Episcopal Schools
- National Association of Independent Schools
- National Catholic Educational Association
- National Christian School Association
- Office for Lasallian Education
- Oral Roberts University Educational Fellowship
- Seventh-day Adventist Board of Education
- United States Conference of Catholic Bishops
- Wisconsin Evangelical Lutheran Synod Schools

Affiliated State Organizations
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Florida, Tennessee Pass Choice Legislation

Two states passed significant school choice bills designed to give low-income families the opportunity to send their children to private schools they might not otherwise be able to afford.

Florida

The Florida Legislature has approved legislation creating the Family Empowerment Scholarship (FES) program, which Governor Ron DeSantis is expected to sign. The program would allow up to 18,000 students to receive vouchers to attend private schools in the first year of the program, with room for growth in future years.

The scholarships would be publicly funded by the state and would be equal to 95% of the state contribution to school districts per student. Families making up to 300% of the federal poverty level would be eligible to participate, however those with lower incomes would be prioritized.

The impetus for the program arose out of the waiting list for the Florida Tax Credit Scholarship program (FTC). Despite being one of the largest school choice programs in the country, the FTC has a waiting list of 13,000 students. Earlier in the year, Governor DeSantis called for the Legislature to pass new legislation that would meet the educational needs of families on the waiting list.

The new legislation also brings to fruition a goal that has been pursued by school choice advocates in Florida since Jeb Bush was governor. The former governor was on the floor of the Florida House of Representatives when the final vote was tallied and tweeted, “Incredible day in Tallahassee to witness the passage of historic legislation that will usher in greater educational freedom for Florida families.”

A 2006 decision by the Florida Supreme Court struck down a voucher program signed into law by Governor Bush in 1999. However, in the intervening years, that decision has come under heavy criticism, and this year Governor DeSantis appointed three new justices to Florida high court. School choice advocates are hopeful that the new program will survive a court challenge.



Tennessee

Tennessee’s state legislature has approved legislation creating an education savings account (ESA) program. Eligible students will be able to use on average \$7,300 in public funds for private school tuition and other education expenses such as textbooks, tutoring, and online classes.

While Tennessee already has an ESA program for special needs students, the new program will be open to all students from low-income families, though, crucially, only in Shelby and Davidson counties (Memphis and Nashville). Five-thousand students will be allowed to participate in the program’s first year, with that number increasing to 15,000 by year five. Students in the program will be required to take the state assessment on English and math.

Tennessee Governor Bill Lee, who made school choice a priority in his first year in office, tweeted his support, describing the bill as an “ESA bill that provides more choices for more students and families. This is an important day and I look forward to signing this bill into law.”

According to the Beacon Center of Tennessee, “Governor Lee’s top legislative priority gives thousands of children their first real opportunity to select the educational setting that best fits their needs and confirms school choice is here to stay in Tennessee.”

Shaka Mitchell, Tennessee State Director of the American Federation for Children, said in a statement, “Today’s vote marks a historic victory for students in Tennessee. Members of the House and Senate voted to open doors for children who have been trapped in failing schools for far too long. They voted to rightly give families choice when it comes to their child’s education. They voted to set children on a path to success.”

In April, U.S. Secretary of Education Betsy DeVos visited Tennessee and led a roundtable discussion on school choice at the state Capitol in Nashville with Governor Lee. According to the Department of Education, Secretary DeVos said, “I’m pleased to see education leaders in Tennessee willing to act boldly on behalf of their students. Governor Lee is passionate about improving education outcomes and is working hard to introduce creative changes to the current system.”

In The States

Pennsylvania

The speaker of the Pennsylvania House of Representatives has introduced legislation expanding the state's Educational Improvement Tax Credit Program by \$100 million. If passed, that would nearly double what is already one of the nation's larger school choice programs. The legislation would also allow for future growth through the inclusion of an "escalator" clause, which would raise the program cap in future years if 90 percent of the credits are claimed. Additionally, the bill would raise the income limits in the hopes of increasing the ability of middle-income families to participate in the program. Approximately 34,000 scholarships were awarded under the program in 2016-17, however, according to the Commonwealth Foundation, as many as 26,000 applications had to be declined because of program caps.

Iowa

In the closing days of its session, the Iowa Legislature raised the cap on the state's tax credit scholarship program from \$13 million to \$15 million. According to the American Federation for Children, "this will result in scholarships for nearly 1,800 more students, allowing them to attend a school of their family's choice."



Arkansas

State lawmakers in Arkansas declined to approve school choice legislation for the second consecutive legislative session. A tax credit scholarship program for children from low income families was passed by the Arkansas Senate but was voted down in the House Education Committee. A proposed pilot program that would have consisted of five-hundred voucher scholarships for students from low income families in Pulaski County (which includes the capital city of Little Rock) also went down to defeat, despite Governor Asa Hutchinson's strong support. In a press release, Governor Hutchinson said that "Every student deserves the opportunity to reach his or her potential." Opposition was intense, and then

some, with one legislator comparing the bill to the horrific Tuskegee experiments.

Louisiana

In April, the Louisiana Federation for Children released the results of its annual Parental Satisfaction Survey gauging parent attitudes towards the Louisiana Scholarship Program, a voucher program serving students from low-income families. According to the survey, "92.5 percent of parents are very satisfied or satisfied with their child's current scholarship school. 96.7 percent of parents are happy with their child's academic progress at his/her scholarship school. 99.2 percent of parents say their child feels safe in his/her scholarship school. 99.1 percent of parents say they and their children feel welcome at their child's current scholarship school." 6,928 students are receiving scholarships, with an average voucher value of approximately \$6,000. While parental satisfaction appears high, school choice advocates have nonetheless expressed concerns that the state has imposed heavy regulations on the program that have discouraged private schools from participating.

Oklahoma

The Oklahoma House of Representatives declined to vote on legislation passed by the Senate raising the cap on the state's Equal Opportunity Scholarship Act, a tax credit scholarship program serving low-income children. The legislation, sponsored by Senator Dave Rader (Tulsa), sought to address the fact that the amount of private funds donated under the program had exceeded the cap on the tax credits. By raising the income cap, program supporters hoped to increase access to the program. The bill would have increased the annual cap to \$20 million from \$5 million, with half of those funds being available for public school programs.

Kansas

The Kansas Legislature has passed a bill that includes language restoring the original intent of the Tax Credit for Low Income Students Scholarship Program. Under the program, only students (and incoming kindergarteners) from low performing public schools have been eligible to receive scholarships for use at private schools. However, past changes to the program unintentionally jeopardized the ability of elementary age students to receive scholarships. The new legislation corrects the program rules and clarifies that low-income students from the lowest performing one-hundred elementary schools in the state are eligible for scholarships.

Secretary DeVos in Kentucky

In April, Secretary of Education Betsy DeVos visited Lexington, Kentucky for a roundtable discussion with Governor Matt Bevin, Commissioner of Education Wayne Lewis, and families, educators, and elected officials. The conversation centered around school choice and how the proposed [Education Freedom Scholarships](#) could help increase the educational options parents have in the Bluegrass State.

After the event, according to a USDE release, the Secretary said, "I am encouraged to see leaders like Gov. Bevin and Commissioner Lewis working to expand education opportunities in their state. They are dedicated to rethinking education and improving outcomes for all students."

"During our roundtable, we received great feedback on our Education Freedom Scholarships proposal," Secretary DeVos added. "If passed, Kentucky could receive up to \$72 million for scholarships for students. These funds could be used for a myriad of opportunities, including access to apprenticeship programs, summer and afterschool education programs, or transportation to and out of district public schools. The sky is truly the limit as leaders here in Kentucky assess their students' needs and how best to utilize this additional money to meet those needs."

Governor Bevin stated, "We are grateful to Secretary DeVos for her visit to Kentucky today and for her strong advocacy for education reform nationwide. In the Commonwealth, we are striving to equip every single child with the best possible opportunity to succeed, and we appreciate the U.S. Department of Education's partnership in this vital endeavor."

Commissioner Lewis added, "If passed by Congress, Education Freedom Scholarships could be used to advance the Kentucky Department of Education's priorities, namely increasing participation in high-quality, early-learning experiences and increasing student access to dual credit coursework and career and technical education courses and programs."

CAPE notes

★ The Center for the Advancement of Christian Education (CACE) and the Christian Education Charitable Trust (Maclellan Foundation) are excited to welcome interested parties to Washington D.C. on June 19-21 to engage in conversation around policy, law, and faith-based schools. An excellent lineup of speakers and respondents will challenge attendees to think about how they can continue the national conversation, as well as the local conversation, around the role of faith-based schools. The conference is fully supported by CACE and the Maclellan Foundation, so consider attending the conference at the Museum of the Bible. You can register at: www.engage.eventbrite.com or contact Dr. Timothy Van Soelen at Tim.VanSoelen@cace.org for more information.

★ It seems this will be an eventful summer in the nation's capital for dialogue about faith-based education. July 23-25, the Religious Freedom Center of the Freedom Forum Institute will be hosting a conference of its own titled "Religious Studies and Independent Schools: A Summer Institute." Scheduled sessions include "Introduction to the First Amendment in K-12 education," "Navigating a religiously diverse classroom," and "Facilitating difficult conversations through civil dialogue." For more information or to register, visit: https://www.religiousfreedomcenter.org/event/summer-religious-studies-institute/?instance_id=152.

★ In April, President Trump signed the "Recognizing Achievement in Classified School Employees Act." The new law directs the secretary of education to establish the Recognizing Inspiring School Employees (RISE) Award Program, recognizing excellence exhibited by classified school employees. Classified school employees are described as those providing "essential services, such as transportation, facilities maintenance and operations, food service, safety, and health care," to students in prekindergarten through high school. CAPE worked with congressional staff to ensure that employees at nonprofit entities would be included, meaning that service personnel at private schools will be eligible for the award.

★ Last month's *Outlook* covered President Trump's budget proposal for federal education programs, which included a recommendation to zero out funding for Title II-A of the Elementary and Secondary Education Act (ESEA) and Title IV-A's Student Support and Academic Enrichment Grants (SSAEG). The appropriations subcommittee that is responsible for passing the House of Representative's version of the annual education spending bill emphatically rejected those recommendations from the White House, voting instead to substantially increase funding for those programs over last year's levels. This is just the beginning of the appropriations process, with full committee action still ahead, to be followed by debate on the House floor. Meanwhile, Senate appropriators will have their say as well.

★ On April 10, the Department of Education (USDE) issued a "Parent and Educator Guide to School Climate Resources." According to USDE, the guide "is intended to provide parents, teachers, administrators, and other interested parties with a general understanding of school climate, school climate improvement activities, and the availability of additional resources." Its issuance was recommended by the Federal Commission on School Safety, which was formed following the horrific shooting at Marjory Stoneman Douglas High School in Parkland, Florida in February 2018. The guide can be downloaded here: https://www2.ed.gov/policy/elsec/leg/essa/essaguidetoschoolclimate041019.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=>.

★ The U.S. Securities and Exchange Commission defines a "529 plan" as "a tax-advantaged savings plan designed to encourage saving for future education costs." As is well known by now, 529 plans were expanded in 2017 to allow families to use funds from those accounts for K-12 expenses, whereas previously they had been limited to higher education expenses. Legislation is now under consideration in Congress that would potentially expand 529 uses further, including for apprenticeships and up to \$10,000 of qualified student loan repayments. The legislation was approved unanimously by the House Ways and Means Committee and has the support of the committee's lead Democrat and Republican. (Not a misprint: Republicans and Democrats agreed on something.)