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COURT OF APPEALS

STATE OF NEW YORK

UNITED JEWISH COMMUNITY OF BLOOMING
GROVE,

Appellant,

-against-

NO. 62

WASHINGTONVILLE CSD,

Respondents.

20 Eagle Street
Albany, New York
May 15, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Number 62, United Jewish Community of Blooming Grove v.
3 Washingtonville Central School District.

4 MR. ROSBOROUGH: Good afternoon, and may it
5 please the court. Robert Rosborough with Whiteman Osterman
6 & Hanna for the appellants. I'd like to reserve three
7 minutes, if I might.

8 CHIEF JUDGE WILSON: Yes.

9 MR. ROSBOROUGH: For hundreds of thousands of
10 nonpublic school students across the state, including the
11 Orthodox Jewish students who are at issue in this case, in
12 particular, the legislature's guarantee of equal
13 transportation has been lost. For public school students
14 outside of New York cities, they receive transportation to
15 and from their schools each and every day, safe
16 transportation, reliable transportation.

17 New York mandates that nonpublic school students
18 also attend school each and every day to ensure that
19 they're getting a substantially equivalent education - - -

20 JUDGE RIVERA: Why is it that the law requires,
21 whenever the public school students are being transferred,
22 those who are not in public schools are also being
23 transferred?

24 MR. ROSBOROUGH: Be - - -

25 JUDGE RIVERA: And that's it. That's the

1 equality. That's the sufficient transportation you've
2 offered.

3 MR. ROSBOROUGH: Because - - - well, because two
4 reasons, Judge.

5 JUDGE RIVERA: Uh-huh.

6 MR. ROSBOROUGH: First is sufficient in the
7 language of the statute qualifies the means that must be
8 provided. There must be sufficient buses, there must be
9 sufficient drivers to provide the mandatory transportation.
10 And second, when the legislature adopted this statute first
11 in 1936, it did so to solve a problem. The problem was
12 that the New York Consti - - -

13 JUDGE RIVERA: Well, but what about the amendment
14 that creates those additional days in the city? Doesn't
15 that sort of - - - it strikes me that's a hard hill for you
16 to climb. That seems to - - -

17 MR. ROSBOROUGH: Well, there's - - -

18 JUDGE RIVERA: - - - resolve the dispute here.

19 MR. ROSBOROUGH: It doesn't - - -

20 JUDGE RIVERA: The legislature would have done
21 the same for outside of New York City, if that was the
22 intent.

23 MR. ROSBOROUGH: It doesn't. And there's a
24 reason why. Starting in 1981, when the legislature amended
25 to add the centralized pick-up portion of the statute,

1 there was an express representation made by the New York
2 State School Boards Association that this transportation
3 outside of the city was being provided on days public
4 schools are closed. That's in the bill jacket. The
5 sponsor to that legislation then responded to that comment
6 and questioned, how is it done on these days that the
7 schools are closed? The public schools are closed, but the
8 transportation still has to be provided. And that informed
9 everything that happened in the early 1980s. From 1981 on,
10 there were a number of bills that were proposed - - -

11 JUDGE TROUTMAN: But why isn't it contrary to
12 your view, when the law was changed for New York City to
13 provide for extra days, and then the schools outside of
14 districts, there was an attempt to make a change, to make a
15 requirement that failed more than once?

16 MR. ROSBOROUGH: Well, because there are two very
17 different systems of transportation that the legislature
18 has enacted, there's one for New York cities, and there's
19 one for the communities outside of New York cities - - -

20 JUDGE HALLIGAN: No, but when - - - when this was
21 initially enacted in - - - I forget, if it was '38 or '39 -
22 - - 1-A, I thought that it applied to everybody. Right.

23 MR. ROSBOROUGH: So it did.

24 JUDGE HALLIGAN: And that's what the text
25 suggests.

1 MR. ROSBOROUGH: Correct.

2 JUDGE HALLIGAN: And then I thought that - - -
3 but correct me if I'm wrong - - - that 1-C was eventually
4 added, which treats city school districts differently,
5 correct?

6 MR. ROSBOROUGH: Correct.

7 JUDGE HALLIGAN: But I take it your argument is
8 that the 1985 amendment applies only to the central school
9 districts; is that correct - - - sorry - - - to the city
10 school districts, right?

11 MR. ROSBOROUGH: Cor - - - well, it only applies
12 in New York City in particular.

13 JUDGE HALLIGAN: Yes - - -

14 MR. ROSBOROUGH: It doesn't apply to the cities
15 which are outside - - -

16 JUDGE HALLIGAN: Yes. Sorry. That's what I
17 meant by city - - -

18 MR. ROSBOROUGH: Correct.

19 JUDGE HALLIGAN: - - - the New York City school
20 districts. But I don't understand how that could help you
21 interpret what the legislature meant when it enacted in 1-A
22 a provision that applies to everybody. Wasn't it
23 understood that the system, at that point, was relatively
24 unitary and there was no differentiation between central
25 and city school districts?

1 MR. ROSBOROUGH: In - - - in 1985 - - -

2 JUDGE HALLIGAN: No, in 1939 - - -

3 MR. ROSBOROUGH: In 1939 - - -

4 JUDGE HALLIGAN: - - - is what I'm asking.

5 MR. ROSBOROUGH: So in 1939, there was an
6 understanding by the city school districts that this
7 obligation did not apply to them.

8 JUDGE HALLIGAN: And where do we find that
9 understanding in the record?

10 MR. ROSBOROUGH: So it's - - - it's in the bill
11 jacket for the 1939 legislation. And there's some - - -
12 there's comments by city school districts from across the
13 state. I saw at least twice where they say the requirement
14 that this budget for this transportation be done, be done
15 in an annual meeting of the district, and there is no
16 annual meeting of the district of the city, so their
17 argument was this didn't apply - - -

18 JUDGE HALLIGAN: Okay. But the language of the
19 statute - - - I think it's fair to say, but tell me if you
20 have a different view - - - doesn't distinguish between
21 city and central school districts.

22 MR. ROSBOROUGH: Correct. And I think that the
23 problem then arose over the twenty years of application
24 before we got to 1960, when the mileage restrictions were
25 imposed, that in 1960, the governor only approved that

1 legislation because of his understanding that it would be
2 amended to exempt the cities because of the problems that
3 they had seen over the first twenty years since the - - -

4 JUDGE GARCIA: I read that history as the city
5 schools and some of the sponsors saying it never applied to
6 them, and we're just going to make that clear.

7 MR. ROSBOROUGH: Correct. Correct. And that's -
8 - - that's clear in the AG's statement in support of the
9 bill that's in the bill jacket that this was never meant to
10 apply to New York cities.

11 CHIEF JUDGE WILSON: Well, to any city.

12 MR. ROSBOROUGH: Sorry?

13 CHIEF JUDGE WILSON: No, to any city.

14 MR. ROSBOROUGH: In the city.

15 CHIEF JUDGE WILSON: No, to any city. Including
16 Buffalo, Syracuse, Rochester.

17 MR. ROSBOROUGH: Correct. Correct. Any city.

18 CHIEF JUDGE WILSON: Any city.

19 MR. ROSBOROUGH: To any city. So - - - so really
20 we have three very different transportation regimes. We
21 have one for New York cities, which is just the voluntary.
22 And then New York City has very specific restrictions on
23 what they can do and what they can't do if they choose to
24 provide transportation, because transportation in the city
25 is very different from New York's other cities. So in the

1 beginning, and from 1961 on, we've got these two different
2 transportation regimes.

3 JUDGE HALLIGAN: Is there anything in the record
4 - - - I assume it would be the bill jackets, or maybe it's
5 an SED document - - - that speaks to the practice with
6 respect to the central school districts and whether they
7 were providing transportation on all days in which the
8 public schools were not in session?

9 MR. ROSBOROUGH: So the only thing that I found
10 specifically addressing that in the record - - - or in the
11 bill jackets - - -

12 JUDGE HALLIGAN: Uh-huh.

13 MR. ROSBOROUGH: - - - is in the 1981 bill jacket
14 for that centralized pickup point.

15 JUDGE HALLIGAN: Uh-huh.

16 MR. ROSBOROUGH: That is a New York State School
17 Boards Association letter that specifically says their
18 concern with that provision was, well, we're going to have
19 to keep our buildings open to make sure that this
20 centralized place that the pe - - - that nonpublic school
21 students can come will work. But they specifically told -
22 - - and then the sponsor of that legislation responded that
23 those services are generally being provided throughout New
24 York on days that the public schools are closed.

25 JUDGE GARCIA: So counsel, your reading of 1-A is

1 that everyone other than city school districts is required
2 to provide this equal transportation.

3 MR. ROSBOROUGH: That's correct.

4 JUDGE GARCIA: But isn't there a problem with the
5 later attempt to amend 2-A where they were going to include
6 noncity school districts and they took it out?

7 MR. ROSBOROUGH: Well, so in the - - - in the
8 1999 and 2001 amendments that the respondents have pointed
9 to, the - - - why that was taken out is very ambiguous.
10 First of all, the language - - -

11 JUDGE GARCIA: I don't care - - - let's put aside
12 why it was taken out, but why was it included in the
13 beginning? Because if you're reading of 1-A is correct,
14 you don't need it. They already have to do this.

15 MR. ROSBOROUGH: Well, and I think that may have
16 been the reason it was taken out. But that's - - -

17 JUDGE GARCIA: But there were all these letters
18 and - - - in the file saying, this will place an incredible
19 burden on us that we don't have, and this will break our
20 budget, and this will - - -

21 MR. ROSBOROUGH: And that has been the posi - - -
22 the consistent position of the school district - - -

23 JUDGE GARCIA: But that's why they took the
24 provision out, is the natural reading of that because they
25 didn't want that to happen.

1 MR. ROSBOROUGH: Well, and I think the
2 legislature has provided for that in the statute. In the
3 statute, the legislature says that this transportation is
4 an ordinary charge upon the district, and ninety percent of
5 that charge comes from state aid. The other ten percent
6 comes from the parents who pay taxes to the school district
7 - - -

8 JUDGE HALLIGAN: Under your reading, I take it -
9 - - and I know this is not the case - - - but under your
10 reading, the nonpublic schools could decide, for example,
11 to hold classes all summer long during the three months
12 that the public schools are not sitting. And if you're
13 reading is correct, the districts would have to provide
14 transportation, correct - - -

15 MR. ROSBOROUGH: That's not correct. What - - -

16 JUDGE HALLIGAN: Well, what is it in the law that
17 would make that not true?

18 MR. ROSBOROUGH: The equal transportation
19 requirement in the law is what makes that not true.

20 JUDGE HALLIGAN: Then why doesn't that answer the
21 question of whether it has to be provided on - - - it
22 sounds to me that you're saying, as long as there's a
23 relatively small number of days on which the nonpublic
24 schools are operating and the public schools are not, that
25 transportation is required, but why would that not then

1 include, for example, the whole summer? I don't understand
2 what the limiting principle would be.

3 MR. ROSBOROUGH: Well the limiting principle is,
4 as these legislative amendments have been discussed - - -
5 and including in the - - - the legislative debate that was
6 cited in the SEDs compendium - - - there's a specific
7 question of, wouldn't this amendment allow transportation
8 during the summer in all of this? And the sponsor at that
9 time specifically said, no, this is during the normal
10 school year, September to June, normal school week, Monday
11 to Friday - - -

12 JUDGE GARCIA: But where is that in - - - it's
13 not anywhere in the statute - - -

14 JUDGE CANNATARO: But that's - - - is that a
15 statutory frame - - -

16 JUDGE GARCIA: I thought, in fact, these
17 petitioners asked for two weeks in the summer.

18 MR. ROSBOROUGH: No. No. So there were - - -
19 there were two days at the beginning of August when there
20 were superintendent conference days. Our understanding,
21 the public schools were open that transferred - - - that
22 the nonpublic schools had started their calendar, the last
23 two days of August, the 30th and 31st on previous - - -

24 JUDGE CANNATARO: Counsel, can I ask that same
25 question in a slightly different way? Let's just say the

1 normal school year is 180 days long, and the nonpublic
2 schools, including the ones that you represent, decided
3 we're going - - - our schools are going to be open the
4 other 180 days of the year when the public schools are not
5 open. That's equal. It's still a school year. It's ju -
6 - - they're just allocated differently in terms of days.

7 What is it in the current constitutional or
8 statutory framework that would preclude, under your reading
9 of the statute, a nonpublic school from making that
10 decision?

11 MR. ROSBOROUGH: Because that is not the
12 transportation during the normal school year and normal
13 school week that's provided both - - -

14 JUDGE CANNATARO: But what is it's mentioned
15 normal school year? I don't see anything that - - -

16 MR. ROSBOROUGH: Oh, it's because it's to - - -
17 to and from school that they legally attend. And legally,
18 attendance is - - - is understood in - - -

19 JUDGE CANNATARO: It's illegal to open a school
20 in the summer?

21 MR. ROSBOROUGH: For the transportation purposes
22 in this statute, the legal attendance in the schools are -
23 - - is during the normal September to - - - or September to
24 June - - -

25 JUDGE GARCIA: But that's really seems to go to

1 Judge Rivera's original point. Then why isn't it equal
2 just on days the public schools are open. If you're going
3 to tie it to the school year, they're open.

4 MR. ROSBOROUGH: Because what the districts are
5 relieved of are is providing these transportation on the
6 different days of transportation that the religious schools
7 and the secular-nonpublic schools are closed. They're - -
8 -

9 JUDGE GARCIA: But I don't see then how you draw
10 the line then if they want to open in the summer and it's
11 less - - - it's 180 days that those schools are open.

12 MR. ROSBOROUGH: What - - -

13 JUDGE GARCIA: Why are you taking the equal to
14 mean the school year, but not the days?

15 MR. ROSBOROUGH: The - - - I think that the
16 distinction here is that because the public schools are
17 providing transportation during those times to the public
18 school students, if it's different instructional days - - -
19 within about the 180 days that is required to - - - for
20 children to attend school, then the obligation would
21 provide the equality - - -

22 JUDGE HALLIGAN: I understand that might be
23 reasonable to say that, but I don't see where in the
24 statute that is laid out.

25 MR. ROSBOROUGH: So it - - - and it may not be

1 expressly there for the - - - but the understanding of what
2 the purpose of this statute was in the beginning was to
3 ensure that students who are not getting transportation
4 because of the fact that they went to a religious school
5 would then be provided a safe and reliable means of
6 transportation to ensure that they can satisfy the
7 obligation that New York puts on all students, regardless
8 of whether they go to public schools or nonpublic schools,
9 to have an education that is substantially equivalent to
10 the public school students.

11 So to satisfy that obligation, the legislature
12 chose to provide this transportation, and that was the
13 remedial purpose that they tried to fix.

14 I see my light is on. I will reserve my few
15 minutes. Thank you.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. KIERNAN: May it please the court. Beezly
18 Kiernan for the State Education Department. State Ed has
19 long interpreted Section 3635 as requiring central school
20 districts to transport nonpublic school kids only on days
21 when the public schools are in session - - -

22 JUDGE RIVERA: Do we have to defer to that
23 interpretation? Isn't this a question of the statute?

24 MR. KIERNAN: There's no need for the court to
25 defer to State Ed's interpretation of the statute. State

1 Ed's interpretation is consistent with the long-standing
2 practical construction of the statute, and the court should
3 defer to that. And the legislature has acquiesced to that
4 - - -

5 JUDGE RIVERA: Well, I'm sorry. Whose practical
6 construction?

7 MR. KIERNAN: The practical - - -

8 JUDGE RIVERA: I thought you're - - - I thought
9 you're saying it's yours.

10 MR. KIERNAN: It - - - well, State Ed adopted the
11 practical construction given to the statute by the central
12 school districts. As early as the 1980s, it was very clear
13 that central schools - - -

14 JUDGE RIVERA: I thought it was your guidance to
15 them.

16 MR. KIERNAN: I'm not aware of any specific State
17 Ed guidance before 1992, which we do include in the record,
18 but I'm not aware of anything before that. It was just the
19 settled construction. School districts were not
20 transporting nonpublic school kids on days when the public
21 schools were closed.

22 JUDGE TROUTMAN: Does the statute specifically
23 say that they must provide transportation when the schools
24 are not in session or when they are in session?

25 MR. KIERNAN: No, Your Honor. The statute - - -

1 the text of subdivision 1-A, applicable to central school
2 districts, it's ambiguous because it does not direct
3 central school districts when to provide transportation.

4 But in context, the structure and history of the
5 statute dispel that ambiguity. And the fact that
6 subdivision 2-A of the statute expressly directs New York
7 City to provide five days of transportation when the nonpu
8 - - - when the public schools are closed, shows that the
9 legislature knows how to impose this kind of obligation,
10 and it has done so expressly.

11 JUDGE HALLIGAN: So where does the record tell us
12 - - - I think I asked your adversary this question. So
13 where does the record tell us what the practice was with
14 respect to central school districts? You said that the
15 practice was that they were not transporting students on
16 days in which the public schools were not in session. So
17 where do we find that?

18 MR. KIERNAN: The bill jacket, which is in the
19 record for the - - -

20 JUDGE HALLIGAN: For the - - - for the nine - - -

21 MR. KIERNAN: - - - for the 1985 - - -

22 JUDGE HALLIGAN: Uh-huh.

23 MR. KIERNAN: - - - but that's the best support I
24 have. For example, the - - - a letter from the New York
25 State School Boards Association - - - this is on pages 161

1 to 162 of the record - - - they note the burdens that
2 school districts would have to bear if they transported
3 nonpublic school kids on days when the public schools were
4 closed. It cites specifically Guilderland Central School
5 District - - -

6 JUDGE HALLIGAN: Uh-huh.

7 MR. KIERNAN: - - - which transported kids to
8 thirty-three different nonpublic schools at the time. And
9 even a limited two-day requirement of transportation when
10 the public schools were closed would have been burdensome
11 on Guilderland.

12 And so the legislature deliberately omitted this
13 requirement that central school districts provide
14 transportation on even a limited number of days when the
15 public schools were closed. As the Appellate Division
16 explained, the legislature thereby manifested its intent
17 not to require central school districts - - -

18 CHIEF JUDGE WILSON: So the bill jacket doesn't
19 exactly say this, but is it fair to infer that part of the
20 reason that the legislature exceeded to doing this in New
21 York City is that the co - - - it essentially was no cost,
22 because students were largely getting cards, allowing them
23 to have passes on public transportation?

24 MR. KIERNAN: My understanding from - - - from
25 the bill jacket is that New York City was actually

1 providing subway tokens on days when the public schools
2 were closed, and the question was whether New York City was
3 going to have to provide bus transportation, which it
4 ordinarily provided, I think, to elementary school kids at
5 the time, on days when the public schools were closed. So
6 it was a significant burden, even on New York City. And
7 the legislature chose to impose that burden and to expand
8 transportation for nonpublic school children in New York
9 City. It chose not to do so - - -

10 JUDGE RIVERA: But not for every day, right?

11 MR. KIERNAN: Right - - -

12 JUDGE RIVERA: It's not every day that a
13 nonpublic school was open when a public school was not.

14 MR. KIERNAN: Yes, at the time, in 1985, it was
15 just five days, and the legislature spelled out which days
16 the nonpublic schools - - -

17 JUDGE RIVERA: Uh-huh.

18 MR. KIERNAN: - - - could choose.

19 JUDGE RIVERA: Uh-huh.

20 MR. KIERNAN: In contrast, petitioners now are
21 asking for a much broader obligation imposed on central
22 school districts.

23 JUDGE HALLIGAN: So how - - - how about that? I
24 take it your adversary's position is that there's some
25 limitation that - - - that is constrained to the months,

1 more or less, that the public schools are in session. If
2 we were to agree with your adversary's construction of the
3 statute, do you think there's some limitation on that
4 obligation, or could they, in fact - - - the nonpublic
5 schools, in fact, for example, decide to, as I believe
6 Judge Cannataro asked, hold classes on the inverse 180
7 days.

8 MR. KIERNAN: Petitioners below asked for
9 transportation whenever nonpublic schools are open. That's
10 - - -

11 JUDGE HALLIGAN: But what's your reading of the
12 statute and the legislative history? Is there some
13 limitation that lies there or no?

14 MR. KIERNAN: I'm not aware of any explicit
15 limitation on when school districts may transport nonpublic
16 school students. I think a number of provisions in the
17 education law imply that there's a normal school year
18 between September and June. That's obviously been the
19 practice for many decades.

20 JUDGE HALLIGAN: Uh-huh.

21 MR. KIERNAN: But I don't think there's any
22 explicit limitation on when nonpublic school can offer - -
23 -

24 JUDGE CANNATARO: There are some limitations
25 about the days - - - I'm sorry. There are some limitations

1 about the days that schools can be open though, right?
2 Federal holidays, I think maybe Saturdays. Those are
3 exempted as school days, right?

4 MR. KIERNAN: That's right. Section 3604,
5 subdivision 8, limits the number of days when schools can
6 be in session. Holidays, for example. Whether that
7 applies to nonpublic schools, I think that's a - - - that's
8 a fair question. The way Supreme Court - - -

9 JUDGE CANNATARO: Is that an open question?

10 MR. KIERNAN: It - - - in practice, if a
11 nonpublic school opens on Christmas, I don't think State Ed
12 would do anything about it. There's no direct regulation
13 of nonpublic schools in that sense.

14 JUDGE CANNATARO: But I assume you would argue
15 they're not required to provide transportation on Christmas
16 Day.

17 MR. KIERNAN: Of course. Of course.

18 JUDGE CANNATARO: The central school district.

19 MR. KIERNAN: Right. Central school districts,
20 because of the legislature's acquiescence in this long-
21 standing practical construction. In 1985, the legislature
22 demonstrated its awareness that central school districts
23 were not providing transportation on these days, and it
24 rejected an attempt to impose even a narrow obligation to
25 transport on two days. And the legislature has rejected

1 several other bills through the years that would have
2 required trans - - - the con - - -

3 JUDGE RIVERA: Do you have a sense of this cost?
4 I mean, Washingtonville gave approximation of what it would
5 cost. What would be the cost - - - across the state, if -
6 - - if you have some sense of those numbers?

7 MR. KIERNAN: I - - - even for Washingtonville,
8 it would be a significant amount, I believe, - - -

9 JUDGE RIVERA: Yes, I saw that.

10 MR. KIERNAN: - - - of 14,000 is in the record,
11 per day - - -

12 JUDGE RIVERA: 14,000 plus, yes, per day.

13 MR. KIERNAN: Across the State, it could be
14 millions of dollars. And it's not just the cost, it's also
15 the administrative - - -

16 JUDGE RIVERA: Uh-huh.

17 MR. KIERNAN: - - - burdens, especially for rural
18 and suburban school districts that are transporting kids
19 with their own buses to a lot of different nonpublic
20 schools. They might have central pick-up points, which
21 have to be public-school properties, public schools
22 themselves. If a nonpublic school chooses to be open on
23 days when the public schools are closed, that's
24 dramatically expanding the kinds of services that school
25 districts - - -

1 JUDGE CANNATARO: Would there be any issues with
2 your contractors who provi - - - well, not your con - - -
3 the school district's contractors who provide the
4 transportation services? Or are they, to the best of your
5 knowledge, willing to transport whatever they're needed, as
6 long as they're paid?

7 MR. KIERNAN: It would certainly require
8 negotiation with contractors, with unions. It would be a -
9 - - an incredible administrative burden. And petitioners
10 just have no basis in the text for this kind of request.

11 JUDGE RIVERA: Let's get back to this question of
12 - - - of cost, even though you don't necessarily know the
13 numbers. It is a 90/10 breakdown. State assistance,
14 ninety percent. Ten is the bill that's footed - - - let me
15 put it that way - - -

16 MR. KIERNAN: That's right.

17 JUDGE RIVERA: - - - by the district. And it's
18 not just the parents, correct? It's all the taxpayers in
19 the district.

20 MR. KIERNAN: It's all the taxpayers in the
21 district - - -

22 JUDGE RIVERA: It's everyone, not just the
23 parents. Okay. Thank you.

24 MR. KIERNAN: That's correct, Your Honor.

25 There's also no limiting principle to

1 petitioner's request. I understand that petitioner schools
2 are seeking transportation only on twenty days, which is
3 itself a lot of days. But there's no limit to petitioner's
4 interpretation of the statute. Petitioner's interpretation
5 is directly contrary to the statute's long standing
6 practical construction that the legislature has
7 demonstrated its awareness of, and it would impose an
8 unbounded obligation on central school districts when the
9 legislature deliberately rejected even a narrower
10 obligation in 1985.

11 State Ed's interpretation, by contrast, reflects
12 the long-standing practical construction. It's consistent
13 with the legislature's own view of the statute, and it
14 doesn't read into the statute an obligation that the
15 legislature deliberately omitted.

16 Unless there are any further questions, I urge
17 the court to affirm the decision below.

18 CHIEF JUDGE WILSON: Thank you.

19 MR. KIERNAN: Thank you.

20 MR. RUSHFIELD: May please the court. My name is
21 Mark Rushfield. I'm the attorney for the Washingtonville
22 Central School District. I don't think I need to repeat
23 the various arguments you've heard from the SED. I just
24 want to raise a couple of points in my few minutes.

25 Counsel for the appellant's argument, and you've

1 heard some of it here today, is that there's somehow
 2 ingrained in this process a normal school year, a normal
 3 school day, a normal school week. But what's normal for
 4 public schools, we know what that is, is not normal for the
 5 schools that the appellant's children are attending. It
 6 wouldn't be normal for lots of other kinds of schools.

7 A Muslim madrasah, which could add academic
 8 courses, they would be open year-round because that's how
 9 they operate. And under the appellant's interpretation of
 10 the statute, which, as we've all noted, has no lim - - -
 11 would have no limitations. There's no normal school year.
 12 There's no limitations on the number of days. There's no
 13 limits - - -

14 JUDGE CANNATARO: I don't want to argue for your
 15 adversary, but wouldn't the argument against that be that
 16 that's not equal? A 365-day school year is in no way equal
 17 to the transportation being provided to public school
 18 students.

19 MR. RUSHFIELD: No. But the statute doesn't use
 20 the word equal, doesn't use the word normal. There is no
 21 standard in that statute. It's simply what - - - in terms
 22 of the argument that the appellant really has to make based
 23 on what language is there - - - it's - - - if you have to -
 24 - - if you are going to a school on a day that that school
 25 is o - - - to - - - that religious or any private school is



1 open, the school district must provide transportation.

2 JUDGE SINGAS: Well, why isn't that a definition
3 of sufficient? The kid - - - the kids need to get to
4 school. The school is open. You're required to give
5 sufficient transportation.

6 MR. RUSHFIELD: Well, it - - - I guess, if you
7 had to give sufficient transportation - - - if sufficient
8 transportation means every day a private school is open,
9 and that can be not only 180 days, including the summer,
10 but year-round twelve months out of the year, then you
11 would be right. But that's not what - - - the statute
12 doesn't really say that.

13 JUDGE RIVERA: What if it's just swaps of the
14 days.

15 MR. RUSHFIELD: I'm sorry?

16 JUDGE RIVERA: What if it's just a swap of the
17 day? It's - - - it's always capped, let's say, with the
18 180 school - - - days per school term? They can't exceed
19 that. They can't - - - they can't ask for 365 days.

20 MR. RUSHFIELD: Why not? Under the statute they
21 can. As long as - - -

22 JUDGE RIVERA: That was the inter - - - I'm
23 saying, the interpretation of sufficient transportation.

24 MR. RUSHFIELD: But it doesn't - - - as long as -
25 - -

1 JUDGE RIVERA: That it's one-for-one day. The
 2 fact that the public schools may be closed on Christmas
 3 Day, but some religious schools do not - - - do not
 4 recognize that as a religious holiday, so they are going to
 5 have school that day, but they have a different religious
 6 holiday when they are going to be closed.

7 MR. RUSHFIELD: Well, of course the pro - - -

8 JUDGE RIVERA: But it never exceeds the 180.

9 MR. RUSHFIELD: Of course, the problem that
 10 arises in such a ci - - -

11 JUDGE RIVERA: I'm sorry, what?

12 MR. RUSHFIELD: The problem that arises in such a
 13 circumstance, for example, goes to the issue again of cost
 14 - - -

15 JUDGE RIVERA: Uh-huh.

16 MR. RUSHFIELD: - - - because as you knew from
 17 the records, it would b - - -e at this point, it would
 18 probably be at least \$300,000 a year for Washingtonville.
 19 But that doesn't include the fact that they use - - -

20 JUDGE RIVERA: I'm sorry. To do what, twenty
 21 days - - - just the twenty days?

22 MR. RUSHFIELD: That's just the - - - well, yes,
 23 just for the twenty days.

24 JUDGE RIVERA: Thank you.

25 MR. RUSHFIELD: But that doesn't include the fact



1 that you're going to have higher - - - if the
2 Washingtonville contracts it out, they don't do it in
3 house. But if you're - - - if you're making bus drivers
4 and matrons on a bus have - - - have to work on Christmas -
5 - -

6 JUDGE RIVERA: Uh-huh. Yeah.

7 MR. RUSHFIELD: - - - you're going to be paying
8 overtime costs. You're not going to be paying - - - you're
9 paying premium costs for travel. You can be paying premium
10 costs toward that bus company having to be open that day.
11 So the impact can be not only upon a school district, but
12 of course, statewide it's going to be really significant.

13 CHIEF JUDGE WILSON: Do you know whether
14 Washington - - -

15 MR. RUSHFIELD: A school could - - -

16 CHIEF JUDGE WILSON: Do you know whether
17 Washingtonville has ever transported nonpublic school
18 students on public school holidays? Has it ever done that?

19 MR. RUSHFIELD: From as far as I know, the answer
20 is no. They have - - - certainly since the - - - the SED
21 guidelines, because there was also a district policy that
22 followed those guidelines, which is in the record. It says
23 they basically - - - they transport only on days that the
24 public schools are open. Period. End of story. They can
25 - - - as we all know, they can actually - - - a district

1 can agree to do more. The question is, is it mandated?
2 And I suggest that it's not mandated. It makes no sense
3 for it to be mandated, not only for the various reasons
4 that the court has it - - - itself noted.

5 And my lights gone off. Thank you for your time.

6 CHIEF JUDGE WILSON: Thank you.

7 MR. ROSBOROUGH: Three points, if I might. The
8 first is that you have to read the statutory mandatory
9 obligation here that was adopted back in the 1930s in light
10 of what it was changing. The legislature specifically
11 said, and this court quoted in Judd against the Board of
12 Education, "That the purpose of this transportation was to
13 ensure that the children who reside so remote from the
14 schoolhouse in their school district, that they not be
15 practically deprived of school advantages during any
16 portion of the school year." That's in Judd, quoting
17 directly from the leg - - -

18 JUDGE GARCIA: And that's the statute we declared
19 was unconstitutional in Judd.

20 MR. ROSBOROUGH: It was. But the purpose of the
21 1939 law conferred in the bill jacket was to readopt what
22 had then been determined to be constitutional by the People
23 of the State - - -

24 JUDGE GARCIA: It did adopt the exact same
25 statute though, right?

1 MR. ROSBOROUGH: It adopted a statute that is
 2 virtually identical. All it did was change the purposes
 3 and make it mandatory. So the purpose was still contained,
 4 that remote obligation. And then to ensure that this was
 5 done for the best interests of the children.

6 The children needed safe and reliable
 7 transportation at that time, and that's what's being
 8 requested on the different instructional days. These are
 9 not additional instructional days. These are different
 10 ones. My client's Orthodox Jewish schools close on twenty
 11 religious holidays that the public schools are open. They
 12 ask them for twenty different days of instruction when
 13 their schools are open and the others are closed.

14 With respect to the 1985 amendment, the
 15 difference there is the voluntary versus involuntary
 16 legislative scheme that the legislature created for
 17 transportation. In New York cities, it is completely
 18 voluntary to provide transportation. They have to choose
 19 to do it. And if they choose to do it, then they have to
 20 provide these five additional days of transportation that -
 21 - - in - - - in New York City in particular. That was in
 22 addition, the two rights that the children did not have at
 23 that time.

24 For central school districts, it's different.
 25 This statute says it has been a - - -

1 JUDGE GARCIA: If they choose to do it, they have
2 to do it equally, right? That's under C, I think, isn't
3 it?

4 MR. ROSBOROUGH: Correct. In like circumstances,
5 is the language that the legislature chose for that. The
6 standard for central school districts outside of New York
7 City's is different. This is mandatory - - -

8 JUDGE GARCIA: But doesn't that indicate the
9 legislature didn't think equally meant that?

10 MR. ROSBOROUGH: It - - -

11 JUDGE GARCIA: C says equally, right? The
12 language is - - -

13 MR. ROSBOROUGH: Well, it says in like
14 circumstances. And the legislative history, including the
15 governor's approvals of a number of different amendments
16 through this, is parity was what was intended.

17 JUDGE GARCIA: Such transportation shall be
18 offered equally to all such children. So equally is in C.
19 And clearly when they used equally, they didn't mean on
20 these other days because they had to do 2-A to include
21 those days, right?

22 MR. ROSBOROUGH: Well, so for the - - - for the
23 purposes of that, they wanted to ensure that equal meant
24 the transportation means to get there.

25 JUDGE GARCIA: So equal may not mean on days the

1 schools are open because it didn't mean that in C, right?

2 MR. ROSBOROUGH: Well, but that - - - and that's
3 where the difference between the two legislative schemes
4 come in. The legislature has chosen to treat these two
5 different classes of pupils differently. In the cities,
6 there is available transportation through mass transit that
7 can otherwise be used. In New York central school
8 districts and rural areas, that is not the case. That is
9 not available. And so this transportation was made
10 mandatory to ensure that the students have a safe, reliable
11 way to get - - -

12 JUDGE RIVERA: It does seem a bit odd, does it
13 not, given the millions in costs, given the administrative
14 burden, that - - - that you would have some express
15 statement in the legislation to clarify this? This debate
16 has gone on for some time.

17 MR. ROSBOROUGH: It - - - it's gone on for eighty
18 years. And every time the debate is - - - the school
19 districts states - - -

20 JUDGE RIVERA: I'm saying, one would think during
21 that amendment process that if the legislature meant what
22 you - - - what you argue it means, that we would have
23 crystal-clear language on that - - -

24 MR. ROSBOROUGH: I - - -

25 JUDGE RIVERA: - - - given - - - given the

1 consequences of your interpretation.

2 MR. ROSBOROUGH: That certainly would have been
3 preferable, but I don't think it's necessary when you look
4 at the original purpose of this statute. The original
5 purpose of this statute, the remedial purpose of this
6 statute, was to fix a problem. And that problem was that
7 these students were not getting transportation to their
8 schools, and their education was suffering as a result.
9 The legislature wanted to provide the means to nonpublic
10 school students to ensure - - -

11 JUDGE RIVERA: Because they weren't getting
12 transportation at all?

13 MR. ROSBOROUGH: They weren't getting - - - yes.
14 Correct.

15 JUDGE RIVERA: Right. So now they get
16 transportation when the public schools are open, just like
17 public school kids. They're treated just like a public
18 school child.

19 MR. ROSBOROUGH: But that's not like every public
20 school child, because every public school child gets
21 transportation to and from school every day their school is
22 open. The nonpublic school children do not. My clients in
23 particular are denied twenty days of transportation and
24 that's a full month of school, when you look at days of the
25 week, that these children do not have a way to and from

1 school. That's the problem that the legislature was
2 intending to fix, and it did it through a mandatory
3 obligation.

4 JUDGE RIVERA: Well, that sounds very persuasive.
5 Except then we're back to the problem that that means that
6 your clients can redefine the school year, right?

7 MR. ROSBOROUGH: But it - - - and I don't think
8 that's true because of equality is what's required and
9 sufficient doesn't mean all the time. Sufficient is during
10 the normal school week and during the normal school year,
11 Monday to Friday - - -

12 JUDGE RIVERA: So then what - - - what if a
13 school has thirty religious holidays - - - forty, fifty,
14 sixty that are different?

15 MR. ROSBOROUGH: If they fall - - - what the
16 legislature has decided is if they fall within the normal
17 school year - - -

18 JUDGE RIVERA: But the school that's not not
19 public, but it is not religious either, right. It's a
20 secular nonpublic school.

21 MR. ROSBOROUGH: Sure. In that case, if those
22 days fall within September to June, then the public schools
23 have an obligation to provide that transportation - - -

24 JUDGE RIVERA: Including on Saturday and Sunday?

25 MR. ROSBOROUGH: No, because under 3604 of the

1 education law, the public schools are not allowed to
2 provide transportation on those days.

3 And actually, 3604 provides one additional point
4 that I think I should mention. There is a provision at the
5 end of it that says superintendents' days can be held in
6 August, but you don't have to provide transportation
7 because it doesn't change your transportation obligations
8 in August to provide that transportation - - -

9 JUDGE RIVERA: Uh-huh.

10 MR. ROSBOROUGH: - - - even though the public
11 schools are open. That phrase has no meaning at all if it
12 doesn't - - - the legislature wasn't also recognizing that
13 during school day - - - or conference days, when the public
14 schools are closed and the public school students do not
15 get transportation, that nonpublic transportation is still
16 being provided because otherwise that clarifying language
17 would not have been necessary at all. 3604 says that.

18 And it - - - what it shows is the legislature had
19 an understanding and it has an understanding since 1981,
20 when the New York State School Boards Association told it
21 that public schools were transporting these students on
22 days that public schools were closed, and that informed all
23 of the legislative history after it. And every attempted
24 limitation on that has been rejected.

25 CHIEF JUDGE WILSON: Thank you.

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MR. ROSBOROUGH: Thank you.

(Court is adjourned)



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C E R T I F I C A T I O N

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of United Jewish Community of Blooming Grove v. Washingtonville CSD, No. 62 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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