Legal Analysis

Is NYSED's Definition Of Substantial Equivalence Constitutional?

By Rabbi Michael J. Broyde

The law and the Constitution are clear: States, including New York, are entitled to make sure private schools provide instruction that is "substantially equivalent to the instruction given" in public schools. This law is also a fine idea. No one wants to live in a society in which children grow up without an education.

But, as the United States Supreme Court ruled in 1972 in *Wisconsin v. Yoder*, "Courts must move with great circumspection in performing the sensitive and delicate task of weighing a State's legitimate social concern when faced with religious claims for exemption from generally applicable educational requirements."

New York has consistently operated without that sensitivity in recent years, and its attitude has created many problems for the yeshiva system, the Catholic school system and many other private schools. New York State's first attempt to regulate private schools was struck down as an administrative violation of New York States Administrative Procedure Act (SAPA), but it seems likely that the state can (and will) reissue the regulations in a form that complies with the Act.

Credit: Google Maps

So what will the future bring and what is the best way forward?

The answer is neither simple nor obvious, but the reason for the difficulty is clear. New York State Education Department's (NYSED) New Substantial Equivalency Regulations will likely cause profound problems to every Jewish day school that seeks to spend important hours teaching Torah topics. If NYSED understands "substantial equivalence" to be a rigid formulaic application tied to learning every single thing that is part of the public school curriculum – identical education, rather than substantial equivalence – then NYSED will never approve any dual curriculum educational program.

All Jewish day schools must provide less than the public schools do in some areas, at least in terms of time, and NYSED will not be able to fairly determine what are the positive educational values provided by the school that are not part of the general public school curriculum. This is true whether the portion of the dual curriculum that supplements the secular education focuses on Torah, dance, French culture or Catholic theology.

It is exactly for that reason that many schools – excellent private schools, with agendas that have nothing to do with Jewish education, as well as many Catholic Schools – have joined the bandwagon opposing these regulations.

Indeed, at some level, the portion of our Torah community that is providing their students with almost no secular education are hoping – dare one say praying – that New York State continues down the path of constitutional overreach, by seeking to regulate the details of dual curriculum yeshiva education in a way that almost insures that the propsedproposed regulations fail to pass constitutional muster and are deemed violations of the First Amendment.

The more the state regulates in a way that lacks "sufficient leeway to accommodate the special requirements of diverse religious groups without sacrificing the vital state interests at issue" (in the famous formulation of the District Court in *Blackwelder v. Safnauer*), the more likely it is that these regulations will be deemed unconstitutional.

But what would happen if New York State comes to its legal and political senses and provides reasonable regulations that are actually designed to regulate the real core of the problem: a small number of Jewish schools genuinely do not provide any secular education of value to their students? These schools – sometimes estimated at less than 12, sometime estimated as many as 25 – are in for a rough ride and are in a difficult situation.

If that were to happen, the dual-curriculum schools that seek to provide both a competent secular and a competent Torah education would likely be found – if good sense prevails – by NYSED to be "functionally equivalent" because their secular education is close enough to a public school education.

And those few schools in the chassidic community that provide no real secular education would have a much harder time in that moderate regulatory framework. Because these schools teach zero English and math, or, in some cases, teach virtually no English nor math, they do not provide what can reasonably be called substantially equivalent education, no matter how loosely defined. Therefore, they would be forced to litigate this matter on a much higher constitutional level to seek a more global exemption from the state regulation.

One suspects that the path to victory for these schools would run directly through *Wisconsin v. Yoder*, in which the United States Supreme Court did in fact exempt the Old Order Amish from the obligations of high school and allowed the teens to work on a farm instead.

To get such an exemption, the Supreme Court highlighted five factors about the Old Amish community.

1. They are a self-sufficient segment of American society.

2. They are sincere in their religious beliefs.

3. Their beliefs tightly interrelate with their mode of life.

The State's enforcement of the education law will destroy their way of life.

The community has adequate alternative informal education, such that the State's overall interests in preventing poverty and dependency are addressed.

No one would reasonably argue that these chassidic communities have failed to satisfy factors 2, 3 and 4. Factors 1 and 5 will be the focus of this *Yoder* litigation. No one is certain who will win in this litigation, and, in truth, the economic data might very well determine which side would prevail. Furthermore, even if these yeshivas win their case, NYSED might deny these schools further economic assistance, profoundly exacerbating the economic difficulties in what is already an economically challenged community.

In short, the path forward is not difficult for the yeshivas that provide a dual curriculum education sufficiently similar in crucial areas to that provided by average public schools. On the other hand, the path forward is a long and hard trek for the yeshivas that make not even the pretense of providing a secular education. They would be well-served negotiating a solution, maybe even one that provides access to secular education for their students.

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