

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

V.D., individually and on behalf of J.M.D. and N.M.D., minor children; T.S., individually and on behalf of C.S., a minor child; S.K., individually and on behalf of A.K., a minor child; P.E.T. and H.T., individually and on behalf of D.T., a minor child; and B.C., individually and on behalf of D.C., a minor child,

Plaintiffs,

vs.

STATE OF NEW YORK; ANDREW M. CUOMO, GOVERNOR (in his official capacity); LETITIA JAMES, ATTORNEY GENERAL (in her official capacity); NEW YORK STATE EDUCATION DEPARTMENT; MARYELLEN ELIA, COMMISSIONER OF NEW YORK STATE EDUCATION DEPARTMENT (in her official capacity); and ELIZABETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER OF NEW YORK STATE EDUCATION DEPARTMENT (in her official capacity),

Defendants.

Case No. 2:19-cv-4306

**VERIFIED COMPLAINT FOR
DECLARATORY, INJUNCTIVE
AND OTHER RELIEF**

**VERIFIED COMPLAINT FOR
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Plaintiffs, by and through their undersigned counsel, Bouer Law, LLC, file this Complaint against Defendants, the State of New York, Governor Andrew M. Cuomo, Attorney General Letitia James, the New York State Education Department, MaryEllen Eila, Commissioner of the New York State Education Department, and Elizabeth Berlin, Executive Deputy Commissioner of the New York

State Education Department (collectively, “Defendants”), seeking preliminary and permanent injunctive relief, and declaratory relief, and state as follows:

I. INTRODUCTION

1. This matter involves an amendment to a New York statute, which excludes disabled children from attending all schools as of September 2019, despite the fact that such exclusion violates the very core of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.* (“IDEA”).

2. Based on a June 13, 2019 amendment to New York Public Health Law § 2164, the State of New York immediately repealed its longstanding religious exemption to New York State’s immunization requirements (the “Repeal”) and wholesale and with no exception or discretion to schools and districts, barred children – including children with disabilities – from attending all school in New York unless they have all state mandated immunizations or obtain a medical exemption.

3. As set forth more fully below, in enacting the Repeal, the Legislature and Governor, contrary to their obligations as representatives of the State required to ensure the public trust, failed to consider and comply with IDEA mandates under federal law, critical input from key stakeholders, and the lack of evidence of public emergency and necessity for the Repeal given the safeguards to public health already in the law.

4. The Repeal requires schools and districts, without any discretion, to bar disabled children from school, despite their having Individualized Education Programs (“IEPs”) in place and the IDEA’s mandate that such children have: 1) a right to access their federally protected right to a free and appropriate education (“FAPE”), including educational and related services, in the least restrictive environment; and b) entitlement to notice, significant due process procedures, and

other rights when changes in IDEA placements are even proposed, and certainly when they are, as here, entirely retracted.

5. As a result of the State's heedless action, children with disabilities who had religious exemptions before the Repeal will be deprived in September of FAPE in the least restrictive environment and meaningful access to educational and related services to meet their individual needs as agreed to by schools/districts and required under the IDEA. Under the IDEA, these children need to be in school with peers and trained professionals and able to socialize and communicate with their peers, teachers and staff in a classroom environment, in order to make progress and prevent regression as is required under IDEA.

6. However, because of the State's imprudent actions, in September at the start of school, disabled children in New York will be relegated to their homes without access to their federally-protected school services, placements, and programming guaranteed to them under the IEPs.

7. The Repeal has created a tremendous hardship for New York children with IEPs. As a result of the Repeal, families of some children already have already been excluded from summer services guaranteed by their IEPs, which is only a harbinger of things to come as to the subject matter of this complaint, which is that the majority of families of all children with IEPs impacted by the Repeal, including Plaintiffs, will be barred entirely in September 2019 from attending any school or receiving the educational and related services guaranteed them under their IEPs pursuant to IDEA.

8. As demonstrated below, the Repeal will force families to either move from the state or consider unworkable homeschooling options, which are not even remotely comparable to the requirements of children's IEPs. Such families do not have the money, training, and expertise to

effectively provide the specialized educational and related services required by their disabled children – they simply could never even come close to duplicating their children’s IEP programs at home. And even if they had the money or were reimbursed by districts, they are barred from enrolling their children in comparable private placements under the Repeal.

9. Additionally, come the fall, as demonstrated by the below, families impacted by the Repeal will inevitably suffer emotionally and financially, with parents unable to work because they need to stay home and care for their children. Parents and siblings will also suffer the negative effects of the Repeal given their inability to address the needs of New York’s disabled. Let’s not forget the effect on New York’s disabled children themselves who will suffer most of all, given the lack of progress, regression, and increased negative behaviors resulting from their exclusion. And they will continue to suffer as a result of their exclusion from school notwithstanding IDEA protections to the contrary, absent this Court’s immediate intervention.

10. Plaintiffs’ children have disabilities and/or learning challenges, including Down Syndrome, Autism Spectrum Disorder, Speech or Language Impairments, and others. Their children’s rights to educational and related services and accommodations are protected by federal law prohibiting discrimination against children with disabilities and ensuring them access to education and related services and supports in the least restrictive environment under the IDEA. Those same children also had valid religious exemptions to vaccination mandates, accepted by their schools/districts prior to June 13, 2019 when the Repeal went into effect.

11. Under the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2), the IDEA, which is a federal law, takes precedence over and preempts the New York State law. The Repeal inexorably conflicts with federal law by denying disabled students the federally mandated benefits of an education and related services as well as notice, due process, and other rights under

the IDEA because it provides no exception for children with rights under IDEA and does not recognize the conflict between its draconian measures and the IDEA. In fact, in enacting the Repeal without due deliberation and public hearing, New York's lawmakers missed a critical exception in a California law – upon which they claimed to base the Repeal – that applied to children with IEPs – an exception which recognizes that given the scope of federal law protections under the IDEA and the Supremacy clause, schools are not permitted to exclude disabled children with IEPs and deprive them of their rights under the IDEA even if they have not received all state mandated vaccinations. *See* Calif. Health & Saf. Code § 120335(h). New York's failure to include such an exception in the Repeal is fatal to its viability as a law.

12. Under the Repeal, schools and districts are forced to summarily deprive disabled children of FAPE in the least restrictive environment, without notice, due process, or other rights required under the IDEA. *See, e.g.*, 34 C.F.R. § 300.503 and Part E, generally (Procedural Safeguards Due Process Procedures for Parents and Children).

13. In fact, as set forth more fully below, if Plaintiffs' children and similar children are, contrary to IDEA, barred under the Repeal from school in September, they will suffer significant regressions, behaviors, failure to progress in skills and learning, and irreparable harm.

14. As set forth more fully below, this matter is emergent and clearly meets the standards for preliminary injunctive relief. Not only is the Repeal in conflict with and preempted by federal law, indicating a likelihood of success,¹ but as a result of the Repeal, among other things: (1) Plaintiffs here have suffered and continue to suffer irreparable injury, as described above and in detail below; (2) remedies at law, such as monetary damages, cannot compensate these families

¹ Additionally, Plaintiffs aver that the lower sufficiently serious question going to the merits/hardships balance favoring Plaintiffs standard applies but Plaintiffs are able to meet both this standard and the higher standard requiring likelihood of success.

for their children's injuries, only a ruling by this Court will allow schools and districts to honor IEPs, protect their rights under IDEA, and allow New York's disabled children entry to school in September; (3) the balance of hardships favors Plaintiffs, whose children are being denied federally protected educational and related benefits and substantial rights under IDEA. Defendants face no similar hardship. There currently is no public health crisis (and never was) supporting the need for drastic measures such as the Repeal when less drastic means, such as temporary exclusion in the event of an outbreak, have long been available under New York law to ensure the public safety and these measures can be implemented in compliance with the IDEA, as recognized by the U.S. Department of Education; and (4) the public interest in providing educational benefits to children with disabilities as described by Congress in enacting IDEA, as shown below, favors protecting the rights of these children and enjoining an unnecessary, ill-conceived state law that violates IDEA.

15. Thus, Plaintiffs respectfully request that Defendants be enjoined both temporarily and permanently from excluding Plaintiffs and other children in this State with IEPs from schools and ask this Court to declare the Repeal in violation of and in conflict with federal law and therefore unenforceable as to students protected by IDEA.

II. JURISDICTION AND VENUE

16. Plaintiffs bring this action pursuant to, *inter alia*, the Article VI, Clause 2 of the United States Constitution (the Supremacy Clause), the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*, 28 U.S.C. § 2201, and Rule 65 of the Federal Rules of Civil Procedure.

17. Jurisdiction is predicated on 28 U.S.C. § 1331 because this matter involves federal questions.

18. Venue is proper in this Court under 28 U.S.C. § 1391(b) because the acts and omissions that gave rise to the claims of Plaintiffs V.D., P.E.T., H.T., and B.C., claims occurred, at least in part, in this judicial district, Plaintiffs V.D., P.E.T., H.T., and B.C., reside within this judicial District, and at least one Defendant resides in the District.

19. If successful, the Plaintiffs are entitled to expenses, costs, and attorneys' fees under 20 U.S.C. § 1400, *et seq.*

III. THE PARTIES

20. Plaintiffs are all parents of children with disabilities whose rights to education are protected by federal law under the IDEA and who had religious exemptions allowing them to attend schools in the State of New York prior to the Repeal.

21. Plaintiff V.D. brings this action individually and on behalf of her children J.M.D. and N.M.D., both age 5. J.M.D. and N.M.D. are diagnosed with Down Syndrome. She brings this action because due to the Repeal, J.M.D. and N.M.D. will be barred from receiving educational and related services when school resumes on September 5, 2019, despite their protected rights, including the right to FAPE in the least restrictive environment, under the IDEA. To demonstrate the harm caused by the Repeal to J.M.D. and N.M.D. if they are excluded from school in September 2019 because of the Repeal, we refer this Court to the following:

22. Both children suffer from behaviors requiring interventions, such that their IEP program requires development of behavior intervention plans, which plans were to have been implemented this summer but cannot be because the children are excluded from school. J.M.D. and N.M.D. are both non-verbal and also have significant deficits in their communication and socialization skills which make it critical that they attend school where they can receive appropriate

services and opportunities to socialize and communicate with peers and others in a social setting with trained teachers and providers.

23. Because of the Repeal, J.M.D. and N.M.D. were barred from receiving educational and related services determined to be appropriate for them under the IDEA. Both children had valid religious exemptions under New York law prior to the Repeal, based on the family's genuine and sincere religious beliefs, which were accepted by their district, the Connetquot Central School District. Each child has an IEP and is classified as a preschool student with a disability, and has a federally protected right to a FAPE in the least restrictive environment. The services mandated on their IEPs include summer services, with educational, behavioral, therapeutic and social/emotional goals. In September, these children will continue to miss critically important educational and therapeutic interventions because of the Repeal.

24. J.M.D.'s IEP includes the following services: a class with 8 students, 1 teacher and 1 assistant (8:1+1); speech therapy (individually three times a week and in a group of three children once a week); occupational therapy (individually once a week and in a group of three once a week); individual physical therapy once a week; and counseling in a group of three children once a week.

25. N.M.D.'s IEP includes the following services: a class with 8 students, 1 teacher and 1 assistant (8:1+1); speech therapy (individually twice a week and in a group of three children once a week); occupational therapy (individually once a week and in a group of three once a week); individual physical therapy once a week; and counseling in a group of three children once a week.

26. J.M.D. and N.M.D. should have begun summer extended school year ("ESY") services on July 1, 2019 but, due to the Repeal, their district banned them from attending school and also has refused to provide them with home services. Their summer services are critically important to J.M.D. and N.M.D. and their parents, as the children's progress this summer was to

serve as the basis by which the district would further individualize their kindergarten placements and services for fall. Additionally, in order to address their behaviors, the district had performed a functional behavior assessment of both children and developed a behavioral intervention plan for each that was to be implemented this summer, but was not because they have been excluded from school.

27. Because of the Repeal, J.M.D. and N.M.D. will be deprived of their education programs when school begins again in September. Excluding J.M.D. and N.M.D. from school in September, not only deprives them of access to special education and related services mandated by their IEPs, it also deprives them of the behavior intervention plan they were promised, as well as critical socialization and communication opportunities with peers, teachers and staff with appropriate supports which is an integral part of their educational program agreed to by the District and mandated under the IDEA.

28. Moreover, J.M.D. and N.M.D. enjoy school and are clearly upset that they are not able to attend their program and learn and socialize with their peers. When the school bus was sent one day in error, both saw it from a window, began trying to change from their pajamas to clothes to go to school, excitedly shouting word approximations for “bus,” and were emotionally distraught for hours when the bus left without them.

29. J.M.D. and N.M.D. had been making progress in the school environment. Now both have suffered behavioral regressions since being barred from school. For example, one of the children is losing previously mastered toileting skills, both are engaging in self-injurious behaviors, and one of them bit a relative (behavior that is very out of character) since being excluded from school.

30. Because the children require significant, constant oversight and care, their mother

now cannot work. V.D. works in a creative field where career-advancing opportunities are difficult to come by, and she will likely be forced to forgo at least two upcoming important opportunities which would significantly further her career, and provide the family with necessary income. Given the care her children need, V.D. does not have time to explore additional opportunities and could not commit to these opportunities because of the uncertainty of J.M.D.'s and N.M.D.'s educational placement. V.D.'s family relies on her income to help support the family. Additionally, V.D.'s spouse's employment requires extensive travel so he cannot provide any substantial and consistent educational or any other support at home given his lack of availability, especially since he cannot put his job at risk because the family has been forced to rely only on his income.

31. V.D. has had to resign from a leadership position at a non-profit that provides support groups and other services for families of children with Down Syndrome. She has also learned recently that she has a potentially serious health issue but she had to delay scheduling an appointment with a specialist because of the unsettled issues of J.M.D.'s and N.M.D.'s school placements and needing someone to care for her children during an appointment because they would be too disruptive to accompany her to such an environment.

32. V.D.'s family cannot afford to pay privately for the educational services or a private placement for their children in September to approximate the requirements mandated on J.M.D.'s and N.M.D.'s IEPs. Nor can the family place the children privately, both because of the cost and, even if reimbursed by the district, because no school in New York State will accept them due to the Repeal. Additionally, even if they could find providers for the children's intensive education services at home, such services would not even be remotely comparable to the education and related services they should be receiving in school under their IEPs which require peer and teacher/staff interaction and expertise that cannot be approximated in a home setting.

33. Because of the Repeal, J.M.D. and N.M.D. will be barred from receiving educational and related services when school resumes in September 2019, despite their protected rights under the IDEA, including the right to FAPE in the least restrictive environment. Should V.D.'s children be barred from attending school in September because of the Repeal, the children will have no viable educational options and the family may have to consider leaving New York, which would present significant hardship financially, personally and professionally, as the family has deep ties to New York State.

34. T.S. brings this action individually and on behalf of her child C.S., who is 13 years old and diagnosed with severe Autism Spectrum Disorder ("ASD"). Because of the Repeal, C.S. will be barred from receiving educational and related services when school resumes on September 5, 2019, despite C.S.'s protected rights, including the right to FAPE in the least restrictive environment, under the IDEA. To demonstrate the harm caused by the Repeal to C.S. if this child is excluded from school in September 2019, we refer this Court to the following:

35. C.S. is non-verbal and has significant cognitive delays. C.S. requires a highly structured environment with visual teaching because he learns best through visual presentation of information rather than, for example, verbal presentation. As a result, under IDEA, C.S. is approved to attend the STRIVE Program, an acronym for Structured Teaching Reinforced In a Visual Environment, a highly specialized Board of Cooperative Educational Services ("BOCES") program through Orange-Ulster BOCES for visual learners through an out of district placement approved by the family's home district. The program is designed for students on the autism spectrum to help build skills and promote independence. The program provides an appropriate highly structured learning setting incorporating visual strategies for learners who learn best through visual presentation of materials. The program assists students in building skills in areas

including academics, language/communications, social skills, sensory issues, and others. This program cannot be mimicked at home and, because of the Repeal, when, in September, C.S. is barred from school, C.S. will be deprived of significant educational and related services and the opportunity to continue to develop much needed social and communicative skills in a structured environment with peers and trained staff.

36. Because of the Repeal, during a part of the summer, C.S. was barred from receiving educational and related services determined to be appropriate for C.S. under the IDEA at the STRIVE program. C.S. has a valid religious exemption based on the family's genuine and sincere religious beliefs, accepted by the district, the Florida Union Free School District. C.S. also has an IEP and a federally protected right to FAPE in the least restrictive environment. The services provided on C.S.'s IEP include summer programming during the months of July and August in a school setting with educational, therapeutic and social/emotional goals to prevent regression.

37. C.S. began his summer services on July 8, 2019. However, shortly after C.S. arrived at school that first day, C.S.'s mother, T.S. received a call from the school informing her that C.S. had been "quarantined" (as if he were infectious and contagious, which he is not) and that she had to pick C.S. up immediately, due to the religious exemption repeal. Because of the Repeal, C.S. will be barred in September 2019 from receiving educational and related services mandated and determined to be appropriate for C.S. under the IDEA.

38. While T.S. requested home services from the district for her child when C.S. was excluded from the ESY program, the district refused to provide C.S. home services, which in no way shape or form could approximate the program mandated by C.S.'s IEP. Moreover, even if they could afford to do so (which they cannot), or if the district reimbursed them, C.S.'s family cannot place C.S. in a private school for the September school year, because no school in the state

will accept C.S. due to the Repeal.

39. C.S. was making progress in the STRIVE program. When he was barred from school, C.S. began to show behavioral regression, including loss of toileting skills. He struggled while excluded from school, without the routine required in his IEP, which is vital to C.S. For example, T.S. took C.S. to a medical facility on July 16, 2019 for what is a routine blood test for most people. Despite staff and T.S. attempting to control C.S., C.S. – who is a large and strong child – injured T.S. so severely that she had to seek treatment at an emergency room having suffered a painful injury to her sternum that will take weeks to heal.

40. Among other things, while C.S. was out of school, C.S., who is non-verbal, did not have access to an assistive communicative device which allowed C.S. to communicate simple commands and answers with the teachers, therapists, and staff at school. The lack of this device further isolated C.S. and caused frustration to C.S. because of communication limitations. In September, he will continue to suffer such frustration. Because of C.S.'s significant communication challenges due to ASD, this child's IEP requires regular and professionally facilitated opportunities to communicate or interact with peers, which is a critically important part of C.S.'s placement. If excluded from school in September per the Repeal, C.S. will be deprived of these opportunities as required by this child's IEP.

41. C.S.'s IEP includes the following: special class of six students, one teacher and two assistants (6:1+2); individual occupational therapy twice a week; and individual speech therapy three times a week.

42. C.S. requires constant observation and cannot be left alone. T.S. works from home but has not able to do so consistently, because C.S. was at home with her this summer for a significant period of time when C.S. should have been in school. During such times, it was

difficult, and often impossible, for her to do any work. T.S.'s spouse currently is not employed in his field but is seeking employment in his field and working in another field to earn income. Come September, the family cannot afford to pay privately for the education and services mandated by C.S.'s IEP or a private placement, and even if reimbursed by the district, such a placement would not be available given the Repeal's absolute bar from any school setting for children like C.S. Homeschooling is not remotely comparable to C.S.'s program under C.S.'s IEP nor is it a realistic option for this family given C.S.'s significant needs and the fact that neither T.S. nor her husband has training in special education or the various therapeutic interventions mandated by C.S.'s IEP.

43. Because of the Repeal, in September C.S.'s school district will have absolutely no choice but to bar this child from attending school notwithstanding this child's rights under the IDEA. As a result, in September, C.S. will have absolutely no viable educational options notwithstanding this child's rights under the IDEA, and this child's family also may now have to consider leaving New York, which would present significant hardship.

44. S.K. brings this action individually and on behalf of her child A.K., who is 10 years old and diagnosed with severe ASD. Because of the Repeal, A.K. will be barred from receiving educational and related services when school resumes in September 2019, despite A.K.'s protected rights, including the right to FAPE in the least restrictive environment, under the IDEA. To demonstrate the harm caused by the Repeal to A.K. if this child is excluded from school in September 2019, we refer this Court to the following:

45. A.K. is non-verbal and has significant delays in cognitive function. A.K. attends a specialized program where teachers and staff are aware and trained to address A.K.'s significant needs and to make school a safe and productive environment for A.K. A.K.'s program provides a structured environment in which A.K. is provided opportunities facilitated by trained staff to

develop, among other things, social/communicative skills and life skills as well to receive therapeutic supports while in a school setting and to interact with peers, teachers, therapists and staff. A.K.'s speech therapist is using assistive technology to allow A.K. to communicate more effectively. Because of the Repeal, A.K. will be barred in September 2019 from receiving educational and related services mandated and determined to be appropriate for A.K. under the IDEA.

46. A.K. had a valid religious exemption based on the family's genuine and sincere religious beliefs, accepted by the district and A.K.'s out of district school placement at a BOCES program approved by Sackets Harbor, the family's home district. A.K.'s BOCES program is in the Indian River Central School District. A.K. also has an IEP and has a federally protected right to a free and appropriate public education in the least restrictive environment. The services provided on A.K.'s IEP include ESY during the months of July and August in a school setting with educational, therapeutic and social/emotional goals.

47. A.K.'s IEP includes the following: a special class in a 12:1+3:1 setting, which includes an individual aide for A.K.; adaptive physical education in a group three times per week; and individual speech therapy once a week. A.K. should have begun ESY services on July 8, 2019 but due to the repeal A.K. was barred from school.

48. This summer, the district informed A.K.'s mother, S.K. that A.K. could not attend school and refused S.K.'s request for home services, which, in any event, were inadequate to substitute for A.K.'s IEP mandated services.

49. A.K. was excluded from school for part of A.K.'s summer program. When barred from ESY, A.K. began showing behavioral regression, including failure to progress in toileting skills. Prior to the Repeal, A.K. was making progress in the out of district placement. A.K. requires

constant observation and cannot be left alone. S.K., who is retired from serving in the U.S. Army, and her spouse, who is currently an Army reservist, run their own business. While A.K. was barred from school, it was difficult, and often impossible, for S.K. to assist in the running of the family business, assistance on which the business relied. This situation will continue when, in September, A.K. is barred from school by the district because of the Repeal, despite the fact that A.K. is a child with rights protected under the IDEA.

50. The family cannot afford to pay privately for the services mandated by A.K.'s IEP or a private school placement, and even if they could find providers/placement for those intensive services and were reimbursed for the costs, no school, public or private, in New York will accept A.K. because of the Repeal. Homeschooling is also not a realistic option for this family given A.K.'s substantial needs and the fact that neither S.K. nor her husband is trained as a special educator or therapist in order to provide appropriate interventions for A.K. A.K. also has four siblings (L.K., age 15; S.K., age 9; K.K., age 8, and M.K., age 3) and A.K.'s ban from school has put a tremendous strain on the entire family. Nor is moving an option for this family any time in the near future because of their established business in New York. Due to the Repeal, in September A.K.'s school district will have absolutely no choice but to bar this child from attending school. As a result, A.K. will have absolutely no viable educational options notwithstanding this child's rights under the IDEA.

51. P.E.T. and H.T. bring this action individually and on behalf of their child D.T. who is 5 years old and diagnosed with a speech or language impairment. Because of the Repeal, D.T.'s school will have no choice but to bar this child from receiving educational and related services when school resumes on September 5, 2019 despite D.T.'s protected rights, including the right to FAPE in the least restrictive environment, under the IDEA. Speech language services are critical

for D.T.'s continued progress. School provides a structured environment with the opportunity not only for therapeutic and educational programs directed to D.T.'s individual needs but also the opportunity to interact with peers, including non-IEP students, and teachers in school for pragmatic language development.

52. D.T. had a valid religious exemption based on the family's genuine and sincere religious beliefs, which District 26 in New York City received in April 2019. D.T. also has an IEP and has a federally protected right to a free and appropriate public education in the least restrictive environment.

53. D.T.'s IEP includes the following: placement in an integrated co-teaching class; occupational therapy twice a week, once in an individual setting and once in a group setting; speech therapy twice a week, once in an individual setting and once in a group (three children) setting); and physical therapy twice a week in an individual setting. The services mandated on D.T.'s IEP should begin in September 2019 but P.E.T. and H.T. already have been advised that, due to the religious exemption repeal, D.T. will not be permitted to attend school in September.

54. While D.T. has a speech or language impairment, D.T. is a social child. Because this child's school will have no choice but to exclude D.T. from school in September, D.T. will be deprived of educational and therapeutic services and social and communication opportunities with other children in a school setting, as well as spontaneous interactions required by this child's IEP, the deprivation of which will be detrimental to D.T.'s ability to progress and to prevent regression.

55. P.E.T. and H.T. both work full-time outside the home and H.T.'s employment requires extensive travel. P.E.T. and H.T. cannot homeschool D.T. due to their full-time employment and lack of expertise, nor would not be able to pay privately for the services mandated

by D.T.'s IEP and, even if reimbursed by the district, another comparable private school would not accept D.T., in any event, due to the Repeal.

56. Due to the Repeal, in September D.T.'s school district will have absolutely no choice but to bar this child from attending school. As a result, D.T. will have absolutely no viable educational options notwithstanding this child's rights under the IDEA. Their family will be forced to consider moving to another state so their child can receive schooling and services under an IEP, which would cause both emotional and financial strain on them as they have deep family ties to New York.

57. B.C. brings this action individually and on behalf of her child D.C., who is five years old and diagnosed with a speech and language delay. Because of the Repeal, D.C. will be barred from receiving educational and related services when school resumes in September 2019 despite D.C.'s protected rights, including the right to FAPE in the least restrictive environment, under the IDEA. D.C. requires speech language services for D.C.'s continued progress. Pursuant to this child's IEP, school provides a structured environment for D.C. with the opportunity not only for therapeutic and educational programs directed to D.C.'s individual needs but also the opportunity to interact with peers, including non-IEP students, and teachers in school, which is critical for pragmatic language development.

58. D.C. had a valid religious exemption based on the family's genuine and sincere religious beliefs, which was approved by D.C.'s district. D.C. also has an IEP and has a federally protected right to a FAPE in the least restrictive environment.

59. D.C.'s IEP includes the following: placement in an integrated co-teaching class; occupational therapy twice a week in a group of two students; speech therapy twice a week in a group (three children) setting and once a week individually. The services mandated on D.C.'s IEP should begin in September 2019 but D.C.'s mother, B.C. already has been told that, due to the Repeal, D.C. will be barred from school in September.

60. While D.C. has a speech or language impairment, D.C is a social child. Because this child's school will have no choice but to exclude D.C. from school in September, D.C will be deprived of educational and therapeutic services and social and communication opportunities with other children in a school setting, as well as spontaneous interactions required by this child's IEP, the deprivation of which will be detrimental to D.C.'s ability to progress and to prevent regression.

61. B.C. and her family would not be able to pay privately for the services mandated by D.C.'s IEP, even if they could find providers for those services. D.C.'s family also cannot place D.C. in a private school both because of the cost and, even if reimbursed, because no New York school, public or private, can accept D.C. because of the Repeal. Nor could B.C. or her spouse homeschool D.C. They are not trained special educators nor do they have the training in speech or occupational therapy to adequately address D.C.'s needs, as recognized by D.C.'s IEP. Further, B.C. and her husband own and operate a small local business. B.C.'s inability to work for their business, as she has been, providing bookkeeping and related functions for that business, if she must remain at home with D.C., will detrimentally impact the family's income, making it even more difficult, if not impossible, to provide any services, however, inadequate, to D.C. Due to their family business, this family cannot move from New York even though, under the Repeal, in September D.C.'s school district will have absolutely no choice but to bar this child from attending school. As a result, in September D.C. will have absolutely no viable educational options

notwithstanding this child's rights under the IDEA.

62. Defendant the State of New York The State of New York (the "State"), is a municipal corporation, incorporated in the State of New York, and resides in all municipalities of New York State. The causes of action in this case arise in, among other places, Suffolk County, Queens County, Kings County, the City of Albany, Albany County, Jefferson County, and Orange County. The State is governed by a Governor (Defendant Andrew M. Cuomo) has a bi-cameral legislature (the Assembly and the Senate). On June 13, 2019, both chambers of the New York State Legislature enacted legislation revoking New York State's long-standing religious exemption to vaccinations. The Legislature quickly sent the legislation to Governor Cuomo, who promptly signed the Repeal into law the same day.

63. Defendant Governor Andrew M. Cuomo signed the challenged repeal of the religious exemption into law on June 13, 2019. The Governor's principal offices are located at: Governor of New York State, NYS State Capitol Building, Albany, NY 12224.

64. Defendant Letitia James is the New York State Attorney General. The Attorney General has principal offices located at: Office of the Attorney General The Capitol, Albany, NY 12224-0341 as well as offices at other locations throughout the State.

65. Defendant the New York State Education Department ("SED") is the Department of New York State that, *inter alia*, is obligated to ensure that schools in the State comply with IDEA and state education laws, and, as a result, among other things, issues guidance documents, to effectuate this obligation. In particular, the Office of Special Education of the SED provides oversight of the implementation of federal and State laws and policy for students with disabilities and "provide[s] general supervision and monitoring of all public and private schools serving New York State preschool and school-age students with disabilities"

<http://www.p12.nysed.gov/specialed/>. SED's principal address is New York State Education Building, 89 Washington Avenue, Albany, New York 12234. SED has issued guidance, including guidance to schools and school districts dated June 14, 2019, June 18, 2019, and July 18, 2019 with respect to implementation of the Repeal.

66. Defendant MaryEllen Elia is the current SED Commissioner and her principal business address is New York State Education Building, 89 Washington Avenue, Albany, New York 12234.

67. Defendant Elizabeth Berlin is the current SED Executive Deputy Commissioner of SED and, as of September 1, 2019, will assume the position of Acting Commissioner of SED. Her principal business address is New York State Education Building, 89 Washington Avenue, Albany, New York 12234.

IV. APPLICABLE LEGAL AND FACTUAL ANALYSIS

A. The Supremacy Clause of the United States Constitution

68. The Supremacy Clause to the United States Constitution states:

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

U.S. Constitution, Art. VI, Clause 2.

B. The IDEA

69. The IDEA protects students who qualify for Special Education. There are thirteen categories of disability that qualify a student for IDEA's protections: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities,

orthopedic impairment, other health impairments, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment.

70. Congress enacted the Education for All Handicapped Children Act, the predecessor to the IDEA, in 1975. The law was enacted to address the tremendous crisis in educating children with disabilities. At that time:

congressional studies revealed that better than half of the Nation's 8 million disabled children were not receiving appropriate educational services. 1400(b)(3). Indeed, one out of every eight of these children was excluded from the public school system altogether, 1400(b)(4); many others were simply "warehoused" in special classes or were neglectfully shepherded through the system until they were old enough to drop out. *See* H. R. Rep. No. 94-332, p. 2 (1975). Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the Act, the educational needs of 82 percent of all children with emotional disabilities went unmet. *See* S. Rep. No. 94-168, p. 8 (1975) (hereinafter S. Rep.).

Honig v. Doe, 484 U.S. 305, 309 (1988); *see also Forest Grove v. T.A.*, 557 U.S. 230, 239 (2009) (law intended to “ensure that all children with disabilities are provided FAPE, which emphasizes special education and related services designed to meet their unique needs [and] to assure that the rights of [such] children and their parents or guardians are protected.”); 20 U.S.C. §1400(d)(1)(A).

71. Congress minced no words as to the necessity of IDEA’s predecessor statute to provide children with disabilities the “full equality of opportunity.” 20 U.S.C. § 1400(2)(B).

72. The 1975 Act was revised and renamed the Individual with Disabilities Education Act in 1990.

73. Among the main purposes of the IDEA are:

to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; [and] ... to ensure that the rights of children with disabilities and parents of such children are protected.

20 U.S.C. § 1400(d)(1)(A)-(B). In short, the IDEA and its predecessor statute sought to immediately halt the exclusion and marginalization of children with disabilities and provide them access to education – a fundamental right of which many of them had been deprived.

74. Pursuant to IDEA regulations, children’s FAPE, including related services, should be provided in the least restrictive environment. In this regard, states, school districts and schools must ensure that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A).

75. FAPE is defined as:

special education and related services that—

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9); *see also* 34 C.F.R. § 300.17 (FAPE defined as “special education and related services that: (a) are provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the [State Educational Agency], including the requirements of this part; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with an individualized

education program (IEP) that meets the requirements of §§ 300.320 through 300.324.”).

76. Related services are defined to include: “transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.” 20 U.S.C. § 1401(26)(A).

77. Under IDEA, in order to be eligible for federal funding, states must ensure that they provide FAPE to all children with disabilities ages 3-21, including those who are medically fragile, or have medical exemptions, and cannot attend school because of a public health crisis, or those who have been suspended or expelled from school. *See, e.g.*, 20 U.S.C. § 1412(a)(1)(A) (regarding suspended or expelled students); <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-measles-201503.pdf> (OCR guidance); <https://www2.ed.gov/policy/speced/guid/idea/h1n1-idea-qa.pdf> (OSEP guidance). Thus, because New York accepts federal funding assistance, it must provide eligible students with educational and related services and the attendant procedural safeguards consistent with the IDEA and has no discretion in providing the protections guaranteed by IDEA.

78. Each child eligible for school-aged services requires an IEP, which is highly individualized to meet a child’s specific needs and sets out, among other things, the child’s current

academic and functional performance, how the child’s disability affects his or her progress or involvement in a general education setting, establishes measurable academic and functional goals, describes the program designed and to be implemented to reach those goals, and “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child.” *See* 20 U.S.C. § 1414(d)(1)(A); *see also* 20 U.S.C. § 1401(14); *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 526 (3d Cir. 1995). (The IEP is “the package of special educational and related services designed to meet the unique needs of the disabled child.”). Further, “[t]he ‘special education and related services must be provided in the least restrictive setting consistent with a child’s needs.’” *E.S. ex rel. B.S. v. Katonah–Lewisboro Sch. Dist.*, 487 Fed. Appx. 619, 621 (2d Cir. 2012) (citation omitted). An IEP must also be “reasonably calculated to enable a child to make progress appropriate in light of his circumstances” and prevent regression. *Endrew F. v. Douglas County Sch. Dist.*, 580 U.S. ___, 137 S. Ct. 988, 1001–02 (2017); *E.F. v. New York Dep’t of Educ.*, 2013 WL 4495976, *1 (E.D.N.Y. 2013) (stating an IEP has to be reasonably calculated for a child to receive educational benefits) (citations omitted); *see also* 34 C.F.R. § 300.106(a)(1) (“Each public agency must ensure that extended school year services are available as necessary to provide FAPE...”); <http://www.p12.nysed.gov/specialed/publications/policy/esyqa.htm> (ESY required for eligible children to, among other things, ensure progress and prevent regression).

79. The IDEA provides multiple procedural safeguards for families and children covered by the IDEA to ensure that eligible students receive FAPE in the least restrictive environment and other rights. *See, e.g.*, 34 C.F.R. § 300.503 and Part E, generally (Procedural Safeguards Due Process Procedures for Parents and Children).

80. In particular, a school district cannot stop providing educational and related services to a child or change a child's placement under IDEA without proper notice and an opportunity by parents and children to object to the cessation of services by utilizing a system of administrative due process, which can include a hearing or mediation. *Id.* Procedural requirements include for instance: the requirement that the Child Study Team ("CST"), participate in the development of IEPs with parents (*R.M. on Behalf of T.S.*, No. 2013, 2014 WL 1847277, at 14, 18 (EFPS Apr. 28, 2014)); requirements that schools provide the parents of a child with disabilities with written notice if it proposes to initiate or change the child's IEP (*see* 20 U.S.C. § 1415(b)(3)); the right to due process in the event of a change in placement or changes in the IEP; and the right to "stay put," which requires schools to maintain then-current educational placement pending all legal proceedings. The "stay-put" requirement is mandatory: The Supreme Court has stated that the provision is "unequivocal" and represents "a clear directive." *See Honig v. Doe*, 484 U.S. 305, 322 (1988). Thus, in this regard, the IDEA creates an absolute rule favoring retaining the *status quo* absent a demonstration that, unless a student's placement is changed, the student faces substantial likelihood of self-harm or harm to others. *See Drinker v. Colonial School District*, 78 F.3d 859 (3d Cir. 1996); *Zvi v. Ambach*, 694 F.2d 904 (2d Cir. 1982); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78 (3d Cir. 1996)). Moreover, under the "Child Find" provision of the IDEA, states have an affirmative duty to locate, identify, and evaluate students with disabilities residing in their respective states, regardless of where and whether they are enrolled in a public school district. 20 U.S.C. § 1412(a)(3).

81. The IDEA is clear that state public agencies must provide services to the extent necessary to enable a child to appropriately participate in the general curriculum and appropriately advance toward achieving the goals in the child's IEP regardless of whether they cannot attend

school for any number of reasons. *See, e.g.*, 71 Fed. Reg. 46,717 (2006). Similarly, if a child has a vaccine exemption for medical reasons, the state can exclude that child temporarily from school to protect him or her, but must still comply with the child's IEP and its IDEA obligations. According to the U.S. Department of Education's Office of Civil Rights: "During such absences, the school must ensure that the student continues to receive a free appropriate public education (FAPE) and may need to convene the student's IEP team . . . to determine how to do so." <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-measles-201503.pdf>. Even when a child with a disability is removed from his or her current placement for disciplinary reasons (a change in placement exceeding 10 consecutive school days) districts must, *inter alia*, continue to provide that child with educational services as provided in 34 CFR 300.101(a) so as to enable the child to continue to participate in the general education curriculum, and progress toward meeting the goals set out in the child's IEP. 34 CFR 300.530(d)(1).

82. Pursuant to the IDEA, 20 U.S.C. § 1403(a): "A State shall not be immune under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this chapter."

**C. The Religious Exemption and Public Health
Protections Have Coexisted Successfully for Decades**

83. Until the repeal was signed, New York Public Health Law § 2164, setting forth New York State immunization requirements for children, provided that: "This section shall not apply to children whose parent, parents, or guardian holds genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school." N.Y. Public Health Law § 2164(9) (repealed).

84. Since 1963 and until June 13, 2019 – more than 50 years – New York recognized a religious exemption to immunization requirements and has long balanced exemptions to immunization requirements and public health concerns through laws and regulations, described below.

85. Plaintiffs, like others in New York State, are parents who hold a genuine and sincere religious belief against vaccinating their child[ren] and they do not vaccinate their child[ren] based upon that belief. Plaintiffs properly submitted their requests for religious exemptions, which were accepted by their schools and districts. Notably, in New York State, such approval is not automatic. Many districts rigorously review applications and reject the majority of exemption applications.

86. Prior to June 13, 2019, approximately 0.05% to 1% of students in New York State attended school with a religious exemption to immunization requirements. *See, e.g.*, <https://www.cdc.gov/vaccines/imz-managers/coverage/schoolvaxview/data-reports/exemptions-dashboard/2017-18.html>.

87. Prior to June 13, 2019, New York State allowed certain enumerated authorities, in the interest of the public health, to exclude students holding exemptions from a school after another student attending that school presented with a case of a vaccine-targeted illness if the exempted student either was not vaccinated for the infection at issue or could not show proof of immunity to that infection (for certain infections). *See, e.g.*, 10 NYCRR § 66-1.10. Exclusion of these children was limited to a reasonable time period following identification of the infected student and passing of the relevant health concern.

88. This limited exclusion was a reasonable use of state police power to address the spread of potentially infectious illness within a school. However, New York did not allow authorities to exclude from school students with immunization exemptions based upon generic

and/or unsubstantiated public health concerns. Such temporary measures are permitted under the IDEA as long as “[d]uring such absences, the school [] ensure[s] that the student continues to receive” FAPE. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-measles-201503.pdf> (U.S. Department of Education guidance on children unable to attend school during outbreak for medical reasons); *see also* <https://www2.ed.gov/policy/speced/guid/idea/h1n1-idea-qa.pdf> (guidance from U.S. Department of Education concerning H1N1 outbreaks and schools’ obligations to educate students with disabilities who cannot attend school).

89. Additionally, New York State – among its measures available to prevent spread of a communicable disease – allows county health commissioners and the State Commissioner of Health to isolate or quarantine infected individuals and to seal off and clean locations frequented by them. *See, e.g.*, N.Y. Public Health Law § 2100.

D. Repeal of the New York State Religious Exemption

90. In response to measles cases reported in New York City and Rockland County, *see* below, in January 2019 bills were proposed in both chambers of the legislature for a blanket repeal of the religious exemption with no exceptions and with immediate application to many students, particularly those receiving year-round special education services protected by IDEA. As referenced by the CDC, these measles outbreaks effected a miniscule portion of the population, and have not been shown to be linked to children in a school setting, let alone children with IEPs. Rather, they were linked to international travelers. *See* <https://www.cdc.gov/measles/cases-outbreaks.html>.

91. Yet, Defendants justified the Repeal claiming it would “protect the health of all New Yorkers, particularly our children” (<https://www.nysenate.gov/legislation/bills/2019/s2994>) and, specifically, that it was necessary to address recent reported measles cases.

(<https://www.nysenate.gov/legislation/bills/2019/s2994/amendment/original;>

<https://www.nysenate.gov/legislation/bills/2019/s2994>). The State's rationale wrongly mischaracterized children who were not fully vaccinated in accordance with State mandates as constantly contagious and dangerous vectors of infections.

92. Despite the hype by the State and the media, the measles affected a vanishingly small percentage of the population. From September 2018 to the current day, approximately 0.0076% of the New York City population and only approximately 0.086% of the Rockland County population were impacted by this purported measles emergency.

https://www.google.com/publicdata/explore?ds=kf7tgg1uo9ude_&met_y=population&idim=county:36087:36071&hl=en&dl=en; <http://rocklandgov.com/departments/health/measles-information/>; <https://www1.nyc.gov/site/planning/planning-level/nyc-population/current-future-populations.page>; <https://www1.nyc.gov/site/doh/health/health-topics/measles.page>.

93. The Legislature's own failure to act on the proposed Repeal for months after its introduction shows that there was not a real health emergency. Instead, the federal and New York governmental sources cited above bely the purported need for more restrictive measures than were already set forth in New York's immunization law. In fact, in the Spring prior to the Repeal's enactment, reported cases of measles in New York City dropped precipitously and had almost completely disappeared by the date of enactment on June 13, 2019. *See* <https://www1.nyc.gov/site/doh/health/health-topics/measles.page> (22 cases in June and 4 cases in July 2019).

94. Moreover, as indicated above, prior to the Repeal, New York State long had in place adequate measures to prevent the spread of communicable diseases, whether vaccine-targeted or not, with these measures co-existing successfully with the religious exemption (and

they are consistent with IDEA guidance issued by the federal government). Yet, neither the State nor any county or municipality used these available measures appropriately – particularly quarantine or isolation of those actually infected as allowed under the law – to address the purported measles issue.

95. Upon information and belief, neither the Assembly nor the Senate, nor the Health or other committees of either chamber, engaged in any fact-finding – let alone rigorous fact finding and input from stakeholders – to support this sweeping legislation. The legislative history does not reflect any consideration or exploration of important questions relating to the necessity of the measures proposed by the Repeal such as whether the narrowly tailored measures of exclusion, quarantine, and isolation were sufficient to respond to an outbreak like the measles; nor did the legislature, upon information and belief, even consider whether this broad Repeal ran afoul of federal laws such as IDEA, which protect students with disabilities. The United States Department of Education’s Office of Civil Rights (“OCR”) and Office of Special Education Programs (“OSEP”) have weighed in on this issue as well, noting that students with disabilities excluded for extended periods of time because of public health emergencies are still entitled to FAPE and other rights under the IDEA. <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-measles-201503.pdf> (OCR guidance discussing medically-related exclusions with respect to measles); <https://www2.ed.gov/policy/speced/guid/idea/h1n1-idea-qa.pdf> (OSEP guidance regarding exclusions to protect the health of children during H1N1 outbreaks and the obligation to provide FAPE).

96. Upon information and belief, the Legislature also did not consider, for example, the impact on children, families, schools, and the State Education Department of the Repeal, which mandated the immediate exclusion of children who had a right to receive federally-protected

special education and related services; the potential costs to districts and schools from their being forced to entirely bar such children from their ever returning to a school setting, especially when for most children any home service could not even remotely approximate their guaranteed school programs. Upon information and belief, nor did the legislature consider how the Repeal would affect the excluded students and their families who will suffer from loss of progress, regression, behaviors, and other harm as a result of the Repeal.

97. Instead, the Repeal, with respect to students with disabilities, summarily requires schools to deny FAPE in the least restrictive setting to students with disabilities who are protected by the IDEA and pulls the placement from each of these children, denying them notice, due process and other rights, as well as their education and related service programs developed and mandated under IDEA. Thus, the Repeal is in direct conflict with Federal law and must yield to the IDEA.

98. In fact, having sat on the bill for months and with the curtain falling on the 2019 legislative session, the Legislature rushed the bill through committee to floor vote in one day. Neither chamber of the Legislature held a single public hearing on the removal of the religious exemption. Governor Cuomo signed the Repeal the same day it rocketed through the Legislature. The language of the bill clearly states “This act shall take effect immediately.” As a result, school districts throughout the state have and will continue to bar students with religious exemptions under the impression, upon information and belief, that they have no choice, such that all of Plaintiffs’ children will be barred from attending school in September 2019, notwithstanding the IDEA’s mandates to the contrary.

99. New York is the only state of the three states (California (2015, eff. 2016 with phased-in compliance over several years), Maine (2019, eff. 2021), and New York (2019)) to recently remove non-medical exemptions to immunization to do so with no “phase in period” or

extended period prior to requiring compliance. Moreover, of these states, New York is the only state to not exempt children with IEPs from immunization requirements so that those children can access their federally guaranteed right to FAPE in the least restrictive environment. Instead, New York's law is being implemented on an untenable schedule with no reasonable protections, notice, or processes built in to protect students with disabilities and their federal rights under the IDEA. Rather than honoring the IDEA, including its "stay put" provision which requires IDEA-protected students to remain in their placements when changes to their placement are even merely proposed, New York immediately banned these students from school entirely.

100. The New York Legislature purported to model the Repeal on California's 2015 legislation repealing that state's personal belief exemption, stating in the bill's justification: "[f]or guidance in dealing with this epidemic, we need only look to California" <https://www.nysenate.gov/legislation/bills/2019/s2994>. However, the legislators do not appear to have studied well the California legislation, which contains safeguards not found in New York's Repeal, including a year between signing and when the law required compliance with respect to the first phase of students (Cal. Health & Safety Code § 120335(g)(3)) and, importantly, an exemption from barring children from school who have IEPs pursuant to the IDEA. (Cal. Health & Saf. Code § 120335(h)).

101. With respect to protecting the rights of children with IEPs, California recognized that children protected by IDEA had to continue to receive services regardless of vaccination status and amended the bill while still in the legislature to reflect that important recognition. A June 9, 2015 bill analysis from the California Assembly Health Committee clearly stated that:

Special education students must have access to services. As previously discussed, under federal and state law disabled children are guaranteed the right to a free, appropriate public education, including [any] necessary services for a child to benefit from his or her education. An amendment

should be taken to clarify that students with an IEP will still have access to special education related services as directed by their IEP.

http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-

[0300/sb_277_cfa_20150617_130902_asm_comm.html](http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150617_130902_asm_comm.html), at 29. Thereafter, the California bill was amended before passage to create an exemption for children with IEPs, stating:

This section does not prohibit a pupil who qualifies for an individualized education program, pursuant to federal law and Section 56026 of the Education Code, from accessing any special education and related services required by his or her individualized education program.

Cal. Health & Safety Code § 120335(h); *see also*

<http://legislature.maine.gov/bills/getPDF.asp?paper=HP0586&item=5&snum=129> (Maine).

102. The Repeal requires schools and administrators to permanently bar from all public and private schools and daycares any child between ages two months and eighteen years who, absent a physician-provided medical exemption from immunization requirements, is not fully vaccinated according to New York State mandates.

103. Thus, the State of New York, in enacting the Repeal, has made an end run around the right to FAPE, notice, due process, stay put, and other rights under the IDEA by effectively eliminating such rights and mandating schools and administrators to exclude children if not in compliance with the Repeal. In fact, in its hasty enactment, the Repeal fails to take IDEA into account at all. Instead, schools and districts are left with no discretion under the Repeal, except to bar children with IEPs and deny them their rights and protections required by IDEA, even though the state of New York is obligated to ensure that schools/districts comply with IDEA. That obligation to comply with IDEA applies to New York, regardless of whether the student is in school, placed on home instruction, not enrolled as a student in the district, unable to attend because of a public safety issue, suspended for behavioral reasons, out of school for medical

reasons or cannot attend because of a public health crisis, or the student not having all state mandated vaccinations. Timely access to the guarantees of IDEA, including but not limited to, appropriate and accessible instructional materials is an inherent component of a public agency's obligation to ensure that FAPE is available for children with disabilities and that children with disabilities participate in the general curriculum as specified in their IEPs. 71 Fed. Reg. 46,618 (2006). The Repeal abjectly fails to consider the IDEA and the states obligation thereunder in direct contravention of federal law.

104. Among those most immediately harmed by this law are children who require special education, related services (such as speech therapy, occupational therapy, physical therapy, and counseling, for example), and/or accommodations in their classrooms, schools, or other placements. These children are protected by federal law, including IDEA, and are entitled to FAPE in the least restrictive environment so they can benefit from and access their education and the IDEA also provides these children and their families with significant notice, due process, and other rights. IDEA, however: (a) does not require children to be vaccinated in order to access their federally protected rights to FAPE in the least restrictive environment; and it (b) does not permit permanent exclusion and deprivation of the benefit of an education and educational and related services in the least restricted environment if children are not fully vaccinated in accordance with, as here, a contrary state law. IDEA also provides for significant due process, notice other rights concerning changing a child's placement and the right for a child to "stay put" in their current placement pending resolution of a dispute. The Repeal abrogates all of these rights in violation of and conflict with the IDEA.

First Claim for Relief Against All Defendants
(Violation of the Individuals with Disabilities Education Act)

105. Plaintiffs incorporate by reference the foregoing paragraphs of this Verified Complaint as though fully set forth herein.

106. The minor children Plaintiffs are qualified individuals with disabilities under IDEA. Plaintiffs V.D., T.S., S.K., P.E.T., H.T., and B.C. all have children with IEPs who are entitled to access those educational and related services as stated in their IEPs pursuant to the IDEA. Each child also had an accepted valid religious exemption prior to the Repeal being enacted.

107. The absolute bar under the Repeal of children who do not comply with state vaccine requirements who are students with disabilities protected by the IDEA is inconsistent and contrary to IDEA which: (a) requires FAPE in the least restrictive environment so that disabled children can benefit from their education; and (b) does not require vaccination as a predicate to receiving services under an IEP, nor does IDEA prohibit unvaccinated or partially vaccinated children from accessing the services to which they are entitled under IDEA.

108. Because of the Repeal, students with disabilities like those named herein cannot access FAPE in the least restrictive environment to which they are entitled under their IEPs and the IDEA. Even where children with IEPs cannot attend school because of a public safety issue where they are medically fragile or have medical exemptions, under the IDEA districts are still required to provide an education and services pursuant to a child's IEP. Yet the Repeal does not take into account this obligation under IDEA nor the fact that, under the law, children with IDEA rights will overwhelmingly be deprived of FAPE even if home services were offered to them, as they need the social and communication benefits of services in a classroom that is appropriately sized and staffed, social, therapeutic, emotional and other supports, various therapies including speech therapy, occupational therapy, physical therapy, and counseling, which may be provided several

times a week, by trained professionals and often in a group setting. Moreover, the law does not take into account the overwhelming harm New York's parents and the most affected of children are suffering because no other in-state placements are available to provide FAPE to these children, whether parents could pay for it or not, and even if reimbursed by the district, because all schools and related institutions in New York are barred under the Repeal from accepting students such as Plaintiffs.

109. Defendants have violated and continue to violate Plaintiffs' rights under the IDEA, 20 U.S.C. § 1400 *et seq.*, by, *inter alia*, enacting and enforcing the Repeal, which on its face conflicts with students' rights to access FAPE in the least restrictive environment under the IDEA. The IDEA contains no requirement that students are fully vaccinated consistent with New York's or any other state's schedule of immunization to attend school or utilize the rights ensured under the IDEA, nor does it give any federally funded entity the option of denying FAPE based on a child's vaccination status.

110. Defendants' action in enacting the Repeal further conflicts with the IDEA's due process requirements by mandating that school districts and schools must exclude students with no notice, procedural due process, or other protections which districts and schools are mandated to provide under the IDEA.

111. Under the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2), the IDEA preempts the Repeal, which is in direct conflict with Federal law.

112. As a result of Defendants' conduct, Plaintiffs have been injured and continue to suffer injury.

Second Claim for Relief Against All Defendants

(Claim for Preliminary and Permanent Injunctive Relief)

113. Plaintiffs incorporate by reference the foregoing paragraphs of this Verified Complaint as though fully set forth herein.

114. Plaintiffs seek injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

115. Injunctive relief is necessary to protect Plaintiffs' rights during and after this litigation.

116. Plaintiffs have no adequate remedy at law unless this Court enters a preliminary injunction and a permanent injunction enjoining Defendants from enforcing the Repeal as to all children, including the Plaintiffs' children, who have IEPs and are protected by IDEA.

117. Plaintiffs have clearly ascertainable rights under the IDEA that are in need of immediate protection, including FAPE in the least restrictive environment, proper notice and all due process and other rights in implementing change to their IEPs and educational placements.

118. Plaintiffs have suffered and will continue to suffer irreparable injury if Defendants are not immediately enjoined from implementing and enforcing the Repeal – a state law that violates IDEA, a federal law. By way of example only, Plaintiffs' and their children's injuries as a result of the Repeal include lack of access to educational and related services that are recognized by IDEA as critically important for students with disabilities and which, with respect to each child's IEP, had been determined to be necessary for that child; loss of income; regression of skills and/or lack of progress caused to Plaintiffs and their children by Plaintiffs' inability to send their children to school.

119. Plaintiffs have a likelihood of success on the merits of their claim and additionally can show sufficiently serious question going to the merits of their claims.

120. Plaintiffs will be irreparably harmed if injunctive relief is denied.

121. The balance of equities weighs in favor of injunctive relief to protect students with disabilities and weighs against Defendants in this matter.

122. Public interest weighs in favor of granting injunctive relief to allow students with disabilities, some of the State's most vulnerable students and those in need of education, to attend school and receive the protections to which they are entitled under the IDEA, a federal law.

123. An actual and judicially cognizable controversy exists between Plaintiffs and Defendants regarding whether the Repeal violates the IDEA. Defendants have enacted this law which requires state agents to enforce it to the detriment of Plaintiffs and their minor children and other children who are also protected by IDEA over the next several weeks and this coming school year in September 2019.

124. Pursuant to Rule 65, Plaintiffs respectfully move for a preliminary injunction:

- a. Pursuant to IDEA, severing from Public Health Law §2164 those amended portions of the law, in particular §2164(7), and restoring the rights of Plaintiffs and all students under former N.Y. Public Health Law §2164, as it existed prior to June 13, 2019;
- b. Or in the alternative, staying the application and enforcement of those amendments to §2164 and related provisions as it applies to children with rights under IDEA, including but not limited to those children with current IEPs or those who might have a right to an IEP or other IDEA rights, while this litigation is pending;

- c. Further requiring Defendants to allow all students with current IEPs or the right to an IEP or other IDEA rights, to notice, due process, and other rights under the IDEA, and requiring Defendants to allow their attendance in their placements beginning in September 2019, until such time as Public Health Law §2164 is amended in compliance with IDEA;
- d. Requiring Defendants to provide appropriate and immediate notice to children's families, school districts, and schools of this Court's Order.

125. Pursuant to Rule 65 and the Court's equitable authority, Plaintiffs respectfully request that the Court grant their request for preliminary and permanent injunctive relief.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully requests that the Court grant judgment for Plaintiffs as follows:

1. Plaintiffs respectfully request that this Court, pursuant to 28 U.S.C. §2201, enter a declaratory judgment stating that: N.Y. Public Health Law §2164 as amended is preempted by the IDEA and therefore the amendments thereto are unenforceable and Defendants must restore the rights of Plaintiffs and all students with IEPs under former N.Y. Public Health Law §2164, as it existed prior to June 13, 2019.

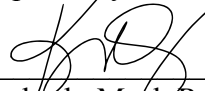
2. Plaintiffs respectfully request that this Court enter a preliminary and permanent injunction order:

- a. Pursuant to IDEA, severing from Public Health Law §2164 those amended portions of the law, in particular §2164(7), and restoring the rights of Plaintiffs and all students under former N.Y. Public Health Law §2164, as it existed prior to June 13, 2019,

- b. Or in the alternative, staying the application and enforcement of those amendments to §2164 and related provisions as it applies to children with rights under IDEA, including but not limited to those children with current IEPs or those who might have a right to an IEP or other IDEA rights, while this litigation is pending;
 - c. Further requiring Defendants to allow all students with current IEPs or the right to an IEP or other IDEA rights, to notice, due process, and other rights under the IDEA, and requiring Defendants to allow their attendance in their placements beginning in September 2019, until such time as Public Health Law §2164 is amended in compliance with IDEA;
 - d. Requiring Defendants to provide appropriate and immediate notice to children's families, school districts, and schools of this Court's Order.
3. Plaintiffs respectfully request costs of suit, including reasonable attorney's fees, and all such other and further relief as the Court deems just and proper.

Dated: July 25, 2019

Respectfully Submitted,



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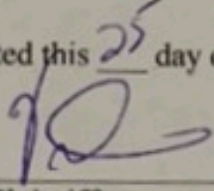
Of Counsel

Attorneys for Plaintiffs

I, V.D., on behalf of myself and my children, J.M.D. and N.M.D. who are minors, verify under oath and under penalty of perjury (28 U.S.C. Sec. 1746) as follows:

1. I am a Plaintiff in the present case, individually and on behalf of my children, J.M.D. and N.M.D., who are minors.
2. I have read the above complaint and its contents in its entirety.
3. As to those matters of which I have personal knowledge, including particularly, those relating directly to me, my children, and my family, the facts stated in the complaint are true and correct. As to all other matters in the complaint, to the best of my knowledge and recollection, those matters stated in the complaint are true and correct.

Executed this 25 day of July, 2019



V.D., Plaintiff

I, T.S. on behalf of myself and my child, C.S. who is a minor, verify under oath and under penalty of perjury (28 U.S.C. Sec. 1746) as follows:

1. I am a Plaintiff in the present case, individually and on behalf of my child, C.S., who is a minor.
2. I have read the above complaint and its contents in its entirety.
3. As to those matters of which I have personal knowledge, including particularly, those relating directly to me, my child, and my family, the facts stated in the complaint are true and correct. As to all other matters in the complaint, to the best of my knowledge and recollection, those matters stated in the complaint are true and correct.

Executed this 25 day of July, 2019



T.S., Plaintiff

I, S.K., on behalf of myself and my child, A.K., who is a minor, verify under oath and under penalty of perjury (28 U.S.C. Sec. 1746) as follows:

1. I am a Plaintiff in the present case, individually and on behalf of my child, A.K., who is a minor.
2. I have read the above complaint and its contents in its entirety.
3. As to those matters of which I have personal knowledge, including particularly, those relating directly to me, my child, and my family, the facts stated in the complaint are true and correct. As to all other matters in the complaint, to the best of my knowledge and recollection, those matters stated in the complaint are true and correct.

Executed this 25 day of July, 2019

S.K.

S.K., Plaintiff

I, P.E.T., on behalf of myself and my child, D.T., who is a minor, verify under oath and under penalty of perjury (28 U.S.C. Sec. 1746) as follows:

1. I am a Plaintiff in the present case, individually and on behalf of my child, D.T., who is a minor.
2. I have read the above complaint and its contents in its entirety.
3. As to those matters of which I have personal knowledge, including particularly, those relating directly to me, my child, and my family, the facts stated in the complaint are true and correct. As to all other matters in the complaint, to the best of my knowledge and recollection, those matters stated in the complaint are true and correct.

Executed this 25th day of July, 2019

P.E.T.
P.E.T., Plaintiff

I, H.T., on behalf of myself and my child, D.T., who is a minor, verify under oath and under penalty of perjury (28 U.S.C. Sec. 1746) as follows:

1. I am a Plaintiff in the present case, individually and on behalf of my child, D.T., who is a minor.
2. I have read the above complaint and its contents in its entirety.
3. As to those matters of which I have personal knowledge, including particularly, those relating directly to me, my child, and my family, the facts stated in the complaint are true and correct. As to all other matters in the complaint, to the best of my knowledge and recollection, those matters stated in the complaint are true and correct.

Executed this 25th day of July, 2019



H.T., Plaintiff

I, B.C., on behalf of myself and my child, D.C., who is a minor, verify under oath and under penalty of perjury (28 U.S.C. Sec. 1746) as follows:

1. I am a Plaintiff in the present case, individually and on behalf of my child, D.C., who is a minor.
2. I have read the above complaint and its contents in its entirety.
3. As to those matters of which I have personal knowledge, including particularly, those relating directly to me, my child, and my family, the facts stated in the complaint are true and correct. As to all other matters in the complaint, to the best of my knowledge and recollection, those matters stated in the complaint are true and correct.

Executed this 25 day of July, 2019

B.C.

B.C., Plaintiff