No. 22-

IN THE

Supreme Court of the United States

JANE GOE, SR., ON BEHALF OF HERSELF AND HER MINOR CHILD, *et al.*,

Petitioners,

v.

HOWARD ZUCKER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH FOR THE STATE OF NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether families have a fundamental right to a medical exemption in cases where their child's state-licensed physician determines that the child is at risk of serious harm from a state-mandated vaccine.

2. Whether the unconstitutional conditions doctrine prohibits states from conditioning access to school and services on a family's waiver of the right to protect their child from serious harm in accordance with medical advice.

3. Whether *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) permits courts to avoid strictly scrutinizing infringements on well-defined fundamental rights if the case involves public health.

PARTIES TO THE PROCEEDING

Petitioners are the parents of eight children with medical conditions that prevent them from safely taking one or more state-mandated vaccine, and Children's Health Defense, a national not-for-profit children's advocacy organization.

Respondents are the New York State Department of Health ("DOH"), former DOH Commissioner Howard Zucker, M.D., in his official capacity, DOH Director of Immunizations Elizabeth Rausch-Phung, in her official capacity, and individually named school districts and school principals that denied medical exemptions and accommodation to the petitioners' children, sued in their official capacities.

CORPORATE DISCLOSURE

Children's Heath Defense is a non-profit corporation. It has no parent corporation and no stock and no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

U.S. Court of Appeals for the Second Circuit, No. 21-537, *Goe, et al. v. Zucker, et al.,* Judgment entered July 29, 2022; and No. 20-3915, *Doe, et al. v. Zucker, et al.,* Order denying motion entered January 5, 2020.

U.S. District Court for the Southern District of New York, No. 1:20-cv-00840 *Doe, et al. v. Zucker, et al.*, Judgment entered February 17, 2021; and Order entered October 22, 2020.

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The Second Circuit's ruling affirming dismissal is reported at *Goe v. Zucker*, 43 F. 4th 19 (2d Cir. 2022), Pet. App., 1a-33a.

STATEMENT OF JURISDICTION

On July 29, 2022, the Second Circuit affirmed the district court's decision to dismiss the case on the pleadings. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3) and the Second Circuit under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

The United States Constitution amendment XIV § 1 commands:

> "No state * * * shall deprive any person of life, liberty or property without due process of law."

Relevant statutory provisions are printed in the appendix: New York State Public Health Law ("PBH") § 2164, Pet. App., 180a to 186a; and N.Y. Comp. Codes R. & Regs. tit. 10 ("NYCRR"), §§ 66-1.1-1.3(c), Pet. App., 187a to 196a

INTRODUCTION

This case presents an ideal vehicle to resolve a deep and acknowledged conflict on a recurring question of national importance. To wit, where a state-licensed physician certifies that a child is at risk of serious harm or death from a state mandated vaccine, can the state nevertheless override that determination and exclude the child from access to school or services unless they are vaccinated against medical advice?

This Court's decisions in *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) and *Doe v. Bolton*, 410 U.S. 179 (1973) should result in a resounding no. Over a hundred years ago, in *Jacobson,* the Court warned that it would be unconstitutional, as well as "cruel and inhuman in the last degree" to require a person to be vaccinated if they were at risk of serious harm from a vaccine. 197 U.S. 11 at 38-39. Indeed, the inalienable right to protect one's body from harm would brook no other conclusion. The right to self-defense is not just a liberty interest – it derives from the right to life itself, and is so fundamental that it even justifies murder, assault, and other serious crimes. Certainly, it would also encompass the right to decline a vaccine.

Left unanswered by *Jacobson,* was the question of how to decide whether a person is at risk of harm. In *Doe,* this Court answered that open question, carefully balancing

the important rights at stake, and holding that the limit of state involvement in the question of medical necessity is to require that medical exemption determinations be made by a state-licensed physician. 410 U.S. 179 at 199-200. Pursuant to *Doe,* any further state intervention, such as attempting to narrow or predefine the criteria that can be considered by the treating physician or requiring review by the state or a third party, is unconstitutional. *Id.*

This Court already extended the holding in *Doe* to cover all medical determinations, not just those made in the abortion context. *Whalen v. Roe* 429 U.S. 589, 603 (1977). But given the recent landmark decision in *Dobbs v. Jackson Women's Health Org.*, 597 U.S. __ (2022), it is important that the Court clarify the extent to which that decision disturbs long-standing and crucial precedent safeguarding people's rights to medical exemption from otherwise permissible state regulation that may cause them serious harm or death. Indeed, the dissenting opinion in *Dobbs* itself shows the urgent need to clarify this question. The dissent asked, "[m]ust a state law allow abortions when necessary to protect a woman's life and health? And if so, exactly when? How much risk to a woman's life can a State force her to incur, before the Fourteenth Amendment's protection of life kicks in?" *Dobbs*, 597 U.S. __ __ (2022) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting).

Definitive answers to these questions cannot wait, for women or for the thousands of children impacted by this case. This problem is only going to get worse. Last week, the Centers for Disease Control and Prevention ("CDC") added COVID-19 to the childhood vaccine schedule. Under New York's regulation, as applied, no medical exemptions

will be allowed for this vaccine other than in cases where a child had a severe anaphylactic shock reaction shortly after receiving a dose of COVID-19 vaccine or one of its components.[1] But like with the other vaccines, there are many more known potential risks, such as myocarditis,[2] blood clots, hemorrhagic strokes,[3] and other adverse reactions that can and do occur in some people. Doctors must be unshackled so that they can properly protect at-risk children, especially now that an experimental vaccine has been added to the childhood schedule. We cannot keep callously casting medically fragile children and their families out of society if they are unwilling to submit to vaccination against medical advice. Already, New York's restrictive medical exemption policies have resulted in the exclusion of hundreds of medically fragile children from school and essential services since 2019. *Jacobson* never contemplated such harsh penalties. This Court must intervene now to disarm improper application of this

1. *Interim Clinical Considerations for Use of COVID-19 Vaccines,* Centers for Disease Control and Prevention, https://www.cdc.gov/vaccines/covid-19/clinical-considerations/interim-considerations-us.html#contraindications

2. Matthew E. Oster, David K. Shay, and John R. Su, "Myocarditis Cases Reported After mRNA-Based COVID-19 Vaccination in the US from December 2020 to August 2021", *JAMA* 327(4) 331-340 (Jan. 25, 2022), https://jamanetwork.com/journals/jama/fullarticle/2788346

3. Celine Sze Chui, Min Fan, Eric Yuk Fai Wan, Miriam Tim Yin Leung, Edmund Cheung, Vincent Ka Chung Yan, et al. "Thromboembolic events and hemorrhagic stroke after mRNA (BNT162b2) and inactivated (CoronaVac) covid-19 vaccination: A self-controlled case series study" *The Lancet* 2022; 50 101504, https://www.thelancet.com/journals/eclinm/article/PIIS2589-5370(22)00234-6/fulltext

ancient case, reaffirm the applicability of *Doe,* and prevent widespread trauma and harm to innocent children.

STATEMENT OF THE CASE

New York requires all parents residing in the state to ensure that their children are vaccinated in accordance with the schedule set forth in PBH § 2164 (the "State Mandate"). The State Mandate is not limited to parents of school children. It applies to all parents under the plain language of the statute, even if a child does not attend school. PBH § 2164(2). But one consequence of noncompliance is that the child cannot attend any public or private school or daycare in New York state. PBH § 2164(7).

For decades, the State Mandate has provided a straightforward medical exemption. "If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the requirements of this section shall be inapplicable..." PBH § 2164(8) ("statutory medical exemption"). But in 2019, the DOH eviscerated the statutory medical exemption by narrowly predefining what "may be detrimental" to health and deputizing school principals to decide whether treating physicians are compliant with "nationally recognized evidence-based standards of care."

A. 10 NYCRR § 66.1

Two new regulations predefine what may cause harm. NYCRR 66-1.1(l) states: "May be detrimental to the child's health means that a physician has determined that a child has a medical **contraindication or precaution** to a

specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care." NYCRR 66-1.3(c) further narrows this definition of harm, removing the option of precaution and requiring that a medical exemption certification: "contains sufficient information to identify a medical **contraindication** to a specific immunization."

Additionally, the DOH adopted policies deputizing school principals to decide whether a treating physician's decision meets the new regulatory definitions. School principals are entirely unequipped to even understand this standard, leave aside to second-guess whether a treating physician met the standard. *See,* First Amended Complaint ("FAC"), *Doe v. Zucker,* 20-00840, ECF No. 93-2 ¶¶ 343. As a result, hundreds (if not thousands) of disabled children had their medical exemptions revoked or denied and were permanently ejected from accessing any school or services, even online education offered to their peers during the pandemic. *Id.* at ¶ 27.

B. The ACIP Best Practices Guidelines

The Advisory Committee on Immunization Practices ("ACIP") is a CDC committee. Every 3-5 years, they issue updated "Best Practices Guidance" for practitioners ("ACIP Guidance"). The governing ACIP Guidance for Petitioners in this case is from 2014 and is 195 pages long. *Doe v. Zucker,* 20-00840, ECF No. 54-3. It provides a non-exhaustive list of a few known "contraindications" and "precautions" to vaccination, *Id.* at 53-58, along with over a hundred and ninety other pages of sometimes conflicting, sometimes consistent generalized guidance about best practice recommendations related to vaccination. *Id.*

Studies are not cited, and little evidence given to support any recommendation.

Contraindications represent circumstances where a vaccine should never be given. The ACIP Guidance includes tables listing an example or two of a contraindication for each required vaccine. ACIP only lists one example of a contraindication for most vaccines, that is: "Severe allergic reaction (e.g., anaphylaxis) after a previous dose or to a vaccine component." Another contraindication, applying only to live vaccines, is in cases where a child has one of the enumerated known conditions *and* it is proven that they are so severely immunocompromised as a result that they would likely catch the disease from the live vaccines. *Id.* at 53-58.

ACIP separately defines a "precaution" as a "condition in a recipient that might increase the risk for a serious adverse reaction, might cause diagnostic confusion, or might compromise the ability of the vaccine to produce immunity." *Id.* at 51.

Appellants allege that, as applied, the new regulatory definition usurps clinical judgment from treating physicians and dangerously narrows allowable reasons for medical exemptions so that only those conditions listed in the ACIP Guidance contraindication tables are typically accepted as a basis for medical exemption. FAC, *Doe v. Zucker*, 20-00840, ECF No. 93-2 at ¶ 306.

The ACIP Best Practices Guidance *does not* provide an exhaustive list of precautions and contraindications and was never meant to replace clinical judgment or define the limits of valid or necessary medical exemptions.

Id. at ¶¶ 688, 737. The ACIP Guidance was meant to be just that – guidance, not the definition of a medical exemption. Dr. Andrew Kroger, a representative of the ACIP committee and author of the most recent ACIP Guidance emphasized this point in writing to plaintiff Jane Doe: "The ACIP guidelines were never meant to be a population-based concept.…The CDC does not determine medical exemptions. We define contraindications. It is the medical provider's prerogative to determine whether this list of conditions can be broader to define medical exemptions." *Id.* ¶ 283.

The complaint lists hundreds of additional evidence-based reasons not covered by the new regulatory definition that could necessitate a medical exemption to protect a vulnerable child, including (1) over one hundred known adverse-reactions to vaccines routinely compensated as typical vaccine injuries by the United States Government through the Vaccine Injury Compensation Program (2) over two hundred uncovered precautions and known adverse reactions listed in the vaccine manufacturer's own package inserts, and (3) the findings of dozens of Institutes of Medicine Reports, which expressly caution that the evidence reveals subpopulations who have pre-existing susceptibility to serious adverse reactions that would not be easily identified in generalized practice guidelines. *Id.* ¶¶ 308-339. Moreover, peer-reviewed studies come out regularly that provide additional data to guide physicians in making their best clinical judgments about what a particular patient may need. Most of these studies are not considered by ACIP in generating generalized guidance. *Id.* In fact, the ACIP guidance acknowledges that its recommendations were made based on "20 publications, including review articles, observational studies, and

letters to the editor." *Doe v. Zucker,* 20-00840, ECF No. 54-3 at 6.

To the extent that the new definition also allows "other nationally recognized standards of care" beyond ACIP, Petitioners plausibly alleged that neither the DOH nor implementing school districts apply it to expand ACIP in any meaningful way. *Id*. The Complaint alleges that in practice the DOH routinely instructs physicians and reviewing school districts to limit their review to the narrowest possible interpretation of ACIP. *Id*. ¶¶ 333-339.

Petitioners detailed multiple examples where a child's physician submitted exemptions compliant with "other nationally recognized evidence-based standards of care," or even one of the enumerated ACIP "precautions," only to have the exemptions overruled by school principals for not falling into one of the few enumerated ACIP "contraindications." *See, e.g., Id.* at ¶¶ 142-148. Throughout the individual named families' stories, Petitioners pointed to examples of the DOH issuing instruction to schools and physicians to solely assess whether an exemption falls under ACIP, without any reference or examination of "other nationally-recognized standards of care." *Id.* at ¶¶ 92-299.

Petitioners plausibly alleged the new regulatory definition endangers vulnerable children, including these children. *Id.* Clinical guidelines were never meant to be - and cannot safely be substituted for the clinical judgment of a treating physician based on all reliable and relevant available evidence. *Id.* at ¶¶ 338-39. By limiting physicians to the narrow list of conditions identified as "contraindicated" in a generalized clinical guideline,

whole categories of disabled children whose disability prevents them from safely receiving one or more required immunizations are excluded from protection. As a result of these new regulations, these children are being denied medical exemption protection and stripped of basic educational rights and services.

C. Petitioners require medical exemptions

Each Petitioner submitted medical exemptions from one or more New York licensed physician certifying that their child is at risk of serious harm or death from a vaccine. They were arbitrarily denied. Consider for example Jane Boe, who was fifteen at the time this action started in 2019. She has multiple diagnosed autoimmune syndromes and health challenges, including autoimmune encephalitis, which causes progressive neurological injury and attacks the brain. Jane and her siblings have all had severe adverse reactions to vaccines. Jane's eldest brother died of complications from the only vaccine she is missing. Three licensed physicians confirmed that Jane cannot safely take this last non-sterilizing dose of vaccine. The school denied her exemption and kicked her out of school. *Id.* at ¶ 51. The Coe family has lost *two* young children to documented adverse vaccine death, and most members of the father's line have had severe vaccine reactions. The Coe children share a rare genetic mutation and vulnerabilities with their deceased family members and have never been vaccinated on the advice of multiple physicians. *Id.* at 52. The DOH recommended their principals deny them accommodation on the ground that the death of a sibling is not listed in ACIP as a contraindication.

John Foe was an eleven-year-old boy with special needs who suffers from Hirschsprung's Disease, a rare and serious genetic condition. John is so medically fragile and sensitive to chemicals and medications that if he needs to take antibiotics, he must be hospitalized first to treat the cascade of severe reactions that ensue for several days. On the advice of his pediatrician, John's family stopped vaccinating him after he had a severe reaction to a vaccine as a baby. He became severely depressed when he lost his ability to go to school in 2019. School was his joy, and he was beloved by his classmates. He regressed considerably in the years of isolation. *Id.* at 53.

All the Petitioner children have equally compelling stories, and clearly were entitled to a medical exemption. Each was denied and stripped of educational rights. Most of these children have been precluded from attending any school in New York State – private school, or public school, or even a homeschool collective that meets regularly – since 2019. Many have special needs and are being denied essential services. Many became extremely depressed and have dangerously regressed. Some of the children express a desire to kill themselves. Respondents refused to even let these children participate in remote education during the pandemic. They were irreparably harmed. The harm continues each day.

REASONS FOR GRANTING THE WRIT

I. THE QUESTIONS PRESENTED ARE IMPORTANT AND RECURRING.

A. The Court should grant certiorari and clarify whether families have a fundamental right to a medical exemption if a vaccine will likely cause their child serious harm or death.

New York's arbitrary burdens on the statutory medical exemption are inhuman, cruel, and massively harmful to thousands of disabled children. As vaccine mandates explode in the era of COVID, it is vital that this Court clarify whether it is constitutionally permissible to deny medical exemptions to children who are at risk of serious harm or death from a vaccine without any compelling reason or effort to ensure that the decision is not overbroad or arbitrary.

1. The right to protect oneself from bodily harm is not just a fundamental right – it is an inalienable natural right, deeply rooted in our nation's history and tradition.

The lower courts erred in failing to recognize the fundamental nature of the rights at stake in this case. Over a hundred and fifteen years ago, this Court held in *Jacobson*, 197 U.S. 11, that it would be unconstitutional to require compliance with a mandatory vaccination requirement if a person is at risk of harm from the vaccine. *Id.* The *Jacobson* decision balances two competing rights to self-defense – the right of the state to defend its population from harm from communicable disease, and the right of

the individual to protect herself from harm caused by the state's defensive efforts. The Court concluded that a state can compel a person to submit to a vaccine requirement that infringes liberty interests, within reason, but cannot compel a person to submit to a vaccine requirement if she is at risk of serious harm from the vaccine. Public health law scholars acknowledge this principle of harm avoidance as part of the foundational holding of *Jacobson. See*, e.g., LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 126-28 (2d ed. 2008) (pursuant to *Jacobson,* public health regulations require five elements to be constitutional: (1) public health necessity, (2) reasonable means, (3) proportionality, (4) harm avoidance, and (5) fairness).

The *Jacobson* decision substantially predated the application of the Bill of Rights and modern tiers of scrutiny to review of state action. Nonetheless, even in 1905, the Court *de facto* recognized the Fourteenth Amendment's protection of the right to life – specifically the right to a medical exemption if one's life or health was jeopardized by an otherwise permissible vaccine requirement - as a constitutionally protected right subject to rigorous independent judicial scrutiny. *Jacobson,* 197 U.S. 11 at 36-39. This decision laid the foundation for the formation of a hierarchy of rights, and it placed the right to a medical exemption at the top as the most protected right of all, more important, even, than the state's right to self-defense of its community. *Jacobson,* 197 U.S. 11, 27, 36-39.

At its core, the right to a medical exemption derives not just from a liberty interest, but from the inalienable and superior right to life – and the associated right to

defend and preserve one's own life or health from harm. This is the most universally recognized fundamental right - not just under our constitutional system, but in any civilized nation.

The right to protect oneself from harm is a natural right, deeply rooted in our nation's history and tradition. It is considered by scholars as antecedent to the validity of any governmental system. *See, e.g.,* A.J. ASHWORTH, SELF-DEFENCE AND THE RIGHT TO LIFE, 34 Cambridge L.J. 282, 282 (1975). John Locke discussed self-preservation from infringements on the right to one's bodily security as being so fundamental to basic human nature that "no law can oblige a man to abandon it." *Id* (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, Ch II, 6, 1690). In his Commentaries on the Laws of England, William Blackstone described the right to protect one's "life and limb" from harm as "the primary law of nature," holding that it is an "absolute right" which "every man has a right to enjoy." *Id.* (citing 1 W. BLACKSTONE, COMMENTARIES 119).

The right to self-defense is so well-protected that it forms the basis of a general exception to nearly all criminal laws, including laws against murder, assault, weapon possession, and the like. See, e.g., N.Y. PENAL LAW §§ 35.15(2)(a)–(b) (McKinney Supp. 2006); MODEL PENAL CODE § 3.04 cmt. 4(a), at 48 & n.35 (Official Draft and Revised Comments 1985) (as adopted in 1962). Even in cases where a person's attempts to defend himself from serious injury, rape, kidnapping or death will end in the *death* of another person or animal, this right to even lethal self-defense is generally protected. The law also lets people use lethal force to defend others, including

strangers. See MODEL PENAL CODE § 3.05; *see,* also, PAUL H. ROBINSON, CRIMINAL LAW § 133 (1984 & Supp. 2006). How then could it not also encompass the right to opt out of a vaccine requirement?

2. *Doe v. Bolton* answers the question - who decides if a person is at risk of harm and has a right to protect himself with a medical exemption?

The Second Circuit points out that *Jacobson* did not answer an important question– who decides whether a person is sufficiently at risk of harm such that the right to a medical exemption is triggered? Pet. App. A21a.

In *Doe,* 410 U.S. 179, however, this Court thoroughly analyzed and answered this question. *Doe,* 410 U.S. 179, was issued the same day as *Roe v. Wade*, 410 U.S. 113 (1973). These companion cases addressed two very different rights that arise in the abortion context: the liberty interest in choosing abortion, and the self-defense interest in cases where a woman's health or life is endangered by continuation of the pregnancy. *Roe* primarily addressed the former, holding that a woman's liberty interest in abortion could override the state's interest in protecting the fetus initially, but not after viability. 410 U.S. 113. *Doe* addressed the self-defense right, examining limits on state interference in a woman's right to therapeutic abortions, regardless of the date of viability, to safeguard her life or health. 410 U.S. 179. *Doe* holds that the state cannot interfere in the determination of medical need, other than by requiring that such determinations be made by a state-licensed physician: "[i]f a physician is licensed by the State, he is recognized by the State as capable of

exercising acceptable clinical judgment." *Id.* at 200. Two other important limitations are also imposed on state interference.

First, *Doe* holds that a state cannot predefine what may cause harm. Rather, a physician must be able to consider a broad range of factors to clinically determine whether a medical exemption is "necessary." *Id.* at 192. Under this precedent, DOH's requirement that a physician must limit her determination of "what may cause harm" to a narrow interpretation of the recommendations in the ACIP best practices guidelines, or any other predefined criteria beyond best medical judgment, is unlawful. Physicians make medical decisions based on the best available evidence incorporated with their clinical judgment. They can, and certainly should, consider ACIP's recommendations. But they also need to be able to make their decision based on all relevant factors – clinical examination, family history, emerging peer-reviewed evidence, Institutes of Medicine reports, and anything else that responsibly informs a physician's determination about how to safeguard a patient's health. For the safety of the patient, a treating physician's judgment must not be artificially constrained, particularly by a generalized definition that does not encompass many known harms and potential risk factors. Even the author of the ACIP guidelines acknowledges this is true. FAC, *Doe v. Zucker,* 20-00840, ECF No. 93-2 at ¶ 283.

Second, *Doe* held it is unconstitutional to allow third parties (in that case, private and public hospitals) to substantively review a treating physician's medical exemption determination and override it or for the state to require corroborating opinions. 410 U.S. 179 at 192. In

so holding, the Court acknowledged that the admitting hospitals have good reasons to want to independently verify the medical exemption determination before allowing the abortion to proceed at their hospital. But:

> Saying all this, however, does not settle the issue of the constitutional propriety of the committee requirement…The woman's right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it are substantially limited by this statutorily imposed overview."

Id. at 192.

Similarly, in holding that the imposition of a corroboration requirement is unconstitutional, this Court stated:

> The reasons for the presence of the confirmation step in the statute are perhaps apparent, but they are insufficient to withstand constitutional challenge … If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment… It is still true today that '(r)eliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect, that he possesses the requisite qualifications.'

Id. The same reasoning applies with greater force to the challenged policies in the present case. Hospitals have an independent duty of medical care to the patients who

receive surgery at their facilities. It is understandable (though unconstitutional) that they would want to ensure that they are not allowing otherwise unlawful medical procedures to take place by reviewing medical necessity determinations as a condition of admission to their hospital. But schools have no such justification. They are not in the business of making medical decisions for their students and they are not qualified to do so.

New York's policies squarely violate *Doe*. If it is unconstitutional for states to allow public and private hospitals to review and overrule treating physicians about whether a medical exemption is necessary, it is certainly unconstitutional for public and private schools to impose such a condition for admission to school. Similarly, if it is unconstitutional to require a doctor to show that other physicians will corroborate his medical exemption opinion, it is certainly unconstitutional to overrule the treating physician when a consultant or school administrator does not agree with a child's doctor. By enacting Public Health Law § 2164(8), which provides a medical exemption if "*any* physician" licensed in the state certifies that a child's health may be at risk from a vaccine, the New York State Legislature reached the constitutional limit of permissible restriction on medical exemptions. Under *Doe*, further regulation is unconstitutional.

B. The Court should grant certiorari to confirm whether *Dobbs* overrules *Doe* and other important cases defining allowable state intervention in the determination of medical exemptions.

The circuit court disregarded *Doe's* clear precedent, unsure whether this Court's decision in *Dobbs* may have

repealed *Doe*, since the court no longer recognizes a fundamental right to an abortion. Pet. App. 26a.

1. *Doe* and its progeny are still good law.

This Court's recent decision in *Dobbs*, 597 U.S. __ (2022), should not impact *Doe* or the line of self-defense-based holdings decided in the context of abortion. In fact, this Court long-ago already recognized that *Doe's* prohibition on state interference in the doctor patient medical decision-making process applies to all medical decision making not just abortion-related decisions. *Whalen,* 429 U.S. 589.

In *Whalen,* the Supreme Court examined a legal challenge to New York State's regulations requiring DOH collection of data on controlled substance prescriptions. 429 U.S. 589. The Court ultimately held that the collection of data was constitutionally permissible given the safeguards and facts of that case, but it cited *Doe* to stress that that the finding of constitutionality depended on several factors, one being that the state did not propose any interference in a patient's right to receive the prescription medicine in accordance with her physician's best medical judgment: "nor does the State require access to these drugs to be conditioned on the consent of any state official or third party." *Whalen* 429 U.S. 589, 603 (citing for authority *Doe v. Bolton*, 410 U.S. 179 (1973) and affirming the consent and corroboration requirements found unconstitutional in *Doe* in footnote 31).

This Court's recognition that the rights at stake in *Doe* are not derivative of the abortion right, but rather apply to all medical decision-making, is well supported. The right to self-defense is entirely distinct from the

liberty based right to an abortion. Even before the Court articulated the now-overruled fundamental right to an abortion as a liberty interest, courts routinely recognized a constitutional right to a medical exemption in cases where a woman's life or health was at risk. As one pre-*Roe* opinion put it (even while rejecting a constitutional right to nontherapeutic abortions), abortion bans almost universally had exceptions to protect the life of the mother because "self-defense has always been recognized as a justification for homicide." *Steinberg v. Brown*, 321 F. Supp. 741, 747 (N.D. Ohio 1970). Similarly, a 1938 English case held — in reading a "life of the mother" exception into an abortion ban that didn't include such an exception — that, "as in the case of homicide, so also in the case where an unborn child is killed, there may be [a self-defense] justification for the act." *King v. Bourne*, (1938) 1 K.B. 687, 690–91 (C.C.C.); *see also People v. Belous*, 71 Cal. 2d 954, 963, 969 (1969) (noting the right to a medical exemption from abortion restrictions is a separate right). Indeed, this Court has always maintained that separation. The issuance of *Doe* and *Roe* as separate companion cases articulating entirely different rights and standards for therapeutic and non-therapeutic abortions, reflects this Court's recognition of the distinction between these lines of cases.

Ayotte and its progeny exemplify how the right to self-defense in the form of a medical exemption is a separate right from the liberty right to an abortion. *Ayotte,* 546 U.S. at 325. In *Ayotte*, the Court held that the state's compelling interest in notifying parents 48 hours before their minor child has an abortion is sufficient to outweigh the infringements on a young woman's liberty interests in abortion. Thus, the abortion right was not

relevant to the case. However, the Court did not stop there. Instead, it recognized that a young woman's right to a *medical exemption* from the otherwise permissible 48-hour waiting period in cases where her health may be at risk of harm from waiting is a distinct – indeed, far stronger – right than her liberty interest in obtaining an abortion and cannot be infringed despite compelling state interests. *Id* at 328. In *Ayotte,* this Court recognized that even if a few minors were excluded from protection under a state's medical exemption policy, either because their health but not life was at risk, or because physicians failed to issue them a medical exemption because they were unsure if their determinations of medical necessity fit within the arbitrary new definition, the law would be facially unconstitutional: "under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks." *Ayotte*, 546 U.S. 320, 328.

2. Vaccine medical exemptions deserve more protection than those in the abortion context since *lethal* self-defense is not at issue.

To the extent that *Dobbs* impacts the scope of any of the medical exemption cases in the abortion context, it should not similarly narrow the protection here. Self-defense implicates proportionality to some degree. Having an abortion, even for medical reasons, will necessarily result in the death of another person – the unborn child. Even so, a woman should not be required to risk her own life to protect her unborn child's life. While these types of sacrifices might be heroic and beautiful if freely offered, if forced through duress, they usher in unimaginable tyranny.

But either way, forcing families to sacrifice their medically fragile children's lives or health for the greater good is even more unconscionable, given that there is no support in the record that the child's medical exemption creates significant risk of substantial harm to anyone else, leave aside that it would likely cause death. Many of the childhood vaccines, including inter alia meningococcal vaccine, pertussis vaccine and the inactivated polio vaccine, are non-sterilizing vaccines and have no impact on infection and transmission rates. *Doe v. Zucker*, 20-00840, ECF No. 93-2 ¶¶ 393-96. Others, like tetanus vaccine, protect against disease for non-contagious conditions that are not spread human to human. *Id.* at 395. More than one of the Petitioner children is only missing vaccines in these categories. Other vaccines on the list, particularly the live vaccines, may provide more lasting and sterilizing immunity. However, recently vaccinated people replicate and can shed live virus after vaccination. For this reason, cancer patients are often told to stay away from the recently vaccinated. *Id.* at 397. Less than half a percent of children applied for medical exemptions when these regulations went into effect. This number, even if they were all granted, is far too low to impact even the highest herd immunity thresholds.

At best, the argument would be that the child's exemption might slightly increase the chance that the child might catch and then pass on a virus, which could lead to another person who also lacks immunity catching and possibly being harmed by a disease that may have been prevented had the first child taken the vaccine and had the vaccine worked to protect them from getting infected. These hypotheticals are not dangerous enough to override the right to self-defense, which, as discussed

supra attaches even to cases where the exercise of the right certainly results in the death of another party.

C. The Court should grant certiorari to fix rampant, long-entrenched misapplications of the *Jacobson* decision.

The circuit court's other reasons for declining to recognize a fundamental right to a medical exemption were grounded in a fundamental misapplication of *Jacobson*. Like many other courts, the circuit court reads *Jacobson* as a "towering authority" capable of eviscerating constitutional protection in the name of health even in the face of well-defined fundamental rights. That's wrong. *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurring).

1. Multiple fundamental rights are infringed in this case.

In addition to self-defense, at least four other well-established fundamental rights are infringed here: (1) the right to refuse medical treatment, (2) the right to informed consent; (3) the right to make medical decisions in accordance with one's chosen physician's best medical judgment; and (4) parental rights to direct the care and upbringing of children (which expressly encompasses the right to make medical decisions on their behalf). Each of these rights triggers the need for strict scrutiny in this case.

Take, for example, bodily integrity. "No right," in this Court's time-honored view, "is held more sacred, or is more carefully guarded," than "the right of every

individual to the possession and control of his own person." *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Similarly, in *Cruzan v. Director, Missouri Department of Health,* 497 U.S. 261, 278 (1990), this Court recognized that "a person has a constitutionally protected liberty interest in refusing unwanted medical treatment." Indeed, the Court has repeatedly restricted the power of government to interfere with a person's medical decisions, particularly when the state attempts to compel a procedure. See, *e.g.*, *Winston v. Lee*, 470 U.S. 753, 766–767 (1985) (forced surgery); *Rochin v. California*, 342 U.S. 165, 166 (1952) (forced stomach pumping); *Washington v. Harper*, 494 U.S. 210, 229, 236 (1990) (forced administration of antipsychotic drugs); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (forced sterilization).

It is also beyond dispute that parents have a fundamental liberty interest in "directing the care and upbringing of their children." Central to this right is the parents' right to make medical decisions for their children until and unless the parent is found unfit. *See Troxel v. Granville*, 530 U.S. 57, 58 (2000). "Simply because the decision of the parent … involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state. The same characterizations can be made for a tonsillectomy, appendectomy, or other medical procedure … Parents can and must make those judgments." *Parham v. J.R.*, 442 U.S. 584, 604 (1979)

The state cannot infringe parents' rights to make medical decisions for their child because of a difference of medical opinion between the treating physician and the

random school district consultant, a person who has never examined the child and who is therefore inherently less qualified to make critical health decisions. Such a regime is also against the child's best interest. Advised by their physicians, parents are in the best position to determine a course of action to protect their medically fragile child's health, particularly where there are differing medical opinions. Parents of medically fragile children typically spend years working with providers, diving deep into medical literature, and gaining first-hand experience with their child's reactions to various medical interventions and triggers. They love their children and are best equipped to ask the appropriate questions, evaluate, and make the final determination in the child's best interests. There does not even appear to be a rational basis for deputizing school principals to override the medical decisions of parents and treating physicians.

In *Matter of Hoffbauer*, 47 N.Y.2d 648 (1979), New York's highest court held that parents and children have protected constitutional rights to choose a trusted physician and follow the advice of the state licensed physician; pursuant to *Doe*, the state cannot substitute its judgment based on a difference of medical opinion about what is best for the child. *Id.* at 655–56. Parental rights to make final medical determination for their child adhere not only to the parent but to the child as well. "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000).

Here, the circuit court disregarded these rights, holding that states need not credit fundamental rights infringed by vaccine mandates because "no court appears to have ever held…that Jacobson requires strict scrutiny to be applied to immunization mandates" and citing a case from the Eastern District of Arkansas to hold that *Jacobson* allows deviation from recognizing fundamental parental rights in cases of immunization, Pet. App. 22a. Instead, the circuit court held that if a state is not physically forcing a needle into a child's arm, parental rights and other fundamental rights are not implicated, because the parents can homeschool their children and avoid the harm. *Id.* Since the lower court recognizes no "fundamental right" to education, no constitutional scrutiny was applied.

2. The unconstitutional conditions doctrine applies to vaccine cases.

The Court's reasoning violates the unconstitutional conditions doctrine. "[E]ven though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests." *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

It also violates *Jacobson's* proportionality requirement. In the concurring opinion in *Roman Catholic Diocese,* Justice Gorsuch pointed out that the penalty in *Jacobson* was not overly coercive: "Finally, consider the different nature of the restriction. In *Jacobson*, individuals could accept the vaccine, pay the [$5 (about $140 today)] fine, or identify a basis for [medical] exemption. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the [medical exemption] opt-outs available." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020) (Gorsuch, J., concurrence). This point was not disputed by the majority or the dissent. "Tellingly, no Justice disputes these points." *Id.*

Whether a state's total deprivation of access to any public or private school is "settled as not violating fundamental" rights (or not),[4] the deprivation of educational

4. Petitioners do not concede this point. As the Court held in *Plyler v. Doe,* total deprivation of access to school is entitled to at least some vigorous review, particularly given the devastating impact it has on children. Just as excluding vulnerable children of "illegal" aliens from school was found unconstitutional, excluding medically fragile children from all access to education similarly cannot likely even be found to serve a rational purpose. The reasoning is indistinguishable: "[t]hese children can neither affect their parents' conduct nor their own undocumented [or noncompliant vaccination] status. The deprivation of public education is not like the deprivation of some other governmental benefit." *Plyler v. Doe*, 457 U.S. 202, 202–03 (1982). Moreover, the Supreme Court's holdings in *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U. S. 390 (1923) clearly establish that while a state may not be required to provide a free education, the state

rights is certainly far more coercive than requiring a person to pay $140. There can be no serious question that the total deprivation of access to any public or private education causes irreparable and catastrophic injury sufficient to place parents under a state of duress sufficient to trigger the unconstitutional conditions doctrine and negate arguments that it is only an "incidental" burden on the fundamental right.

In *Brown v. Board of Education,* the Supreme Court held that the right to an education is so fundamental to a child's well-being that "in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education." 347 U.S. 483 (1954). Similarly, in *Plyler v. Doe,* 457 U.S. 202 (1982) the Supreme Court held that "The deprivation of public education is not like the deprivation of some other governmental benefit…the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement" *Id.* at 202–03.

The toll is even greater for these medically fragile children, many of whom require special education services that their parents cannot provide at home. Permanently kicking children out of school because their parents do not want to vaccinate them against medical advice is inhuman and can serve only punitive purposes. The state's decision to exclude the children even from online educational opportunities during the pandemic, when everyone was remote learning, illustrates the punitive intent. The only

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cannot dictate to parents what types of education their children can access– particularly if they are paying for the education themselves. *Meyer,* 262 U.S. at 393; *Pierce*, 268 U.S. at 534–35.

possible purpose for this punishment is coercing parents to forego their constitutional rights due to duress. That purpose violates the unconstitutional conditions doctrine.

The option of forced homeschooling does not cure this problem as the lower court breezily claims. This Court already rejected this argument in 1943 when it held that a West Virginia Board of Education requirement that all children participate in the pledge of allegiance was unconstitutional and must be struck down. *W. Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624 (1943). In that case, as here, the penalty imposed for noncompliance was expulsion from school until a child or family was willing to waive their rights and salute the flag. The fact that a family could still educate their child at home and thereby exercise their right was irrelevant to the Supreme Court in striking down the regulation. "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." *Id* at 641.

3. Fundamental rights are still protected in vaccine cases.

Jacobson does not provide any authority for disregarding fundamental rights, particularly in the context of a medical exemption. Jacobson itself requires robust judicial scrutiny in a case where a person is at risk of serious harm from a vaccine. 197 U.S. 11 at 36-39. "We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Id.*

The circuit court's extreme deference reflects a widespread, firmly entrenched misunderstanding of *Jacobson's* reach. During the COVID-19 outbreak, this same misapplication of *Jacobson* became the fountainhead for authorizing wholesale suspensions of constitutional rights. It was used to resolve disputes about religious freedom, gun rights, voting rights, the right to travel and many other rights. Josh Blackman, *The Irrepressible Myth of Jacobson v. Massachusetts,* 70 BUFFALO LAW REVIEW, 113 (2021), https://ssrn.com/abstract=3906452.

Even though this Court attempted to clarify that *Jacobson* "hardly supports cutting the Constitution loose during a pandemic" *Roman Cath. Diocese of Brooklyn*, 141 S. Ct. at 70, considerable entrenched confusion persists in the circuits.

As Professor Blackman eloquently warns, "*Jacobson* was pruned but was not overruled. This precedent still stands 'like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.' In 2020, COVID-19 pulled that trigger. At any moment, *Jacobson* can open another escape hatch from the Constitution during a future crisis. The Supreme Court should restore *Jacobson* to its original meaning and permanently seal that escape hatch. Future disputes should be resolved based on settled law, and not on an irrepressible myth." *Id.* (citing *Korematsu v. United States,* 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).[5]

5. The lower courts also erred by holding that *Zucht v. King*, 260 U.S. 174 (1922) grants schools the right to deputize non-medically trained school principals to overrule treating physicians about whether a child is at risk of harm. Pet. App. 24a. *Zucht* had nothing to do with medical exemptions, or *Jacobson's* harm avoidance principle; it only examined whether liberty interests

II. This case is an ideal vehicle for resolving extremely important issues of national significance.

"Cataclysm." "Inordinate suffering." "Widespread disruption." "Intergenerational loss." These are only a few of the common words and phrases used by experts to describe the impact on children of school interruptions during the pandemic.[6] We are now beginning to see the cumulative effects – "they are particularly devastating for those who faced barriers to education before schools closed, including children with disabilities…"[7] Reports show children's resilience dwindling; some young people share a sense of hopelessness, there is an increase in serious mental health conditions and depression. Experts estimate that many of these children will never recover from the lost learning that occurred during the pandemic. "This could affect a whole generation for the rest of their lives," said Dr. Jack Shonkoff, a pediatrician and director of the Center for the Developing Child at Harvard University. "All kids will be affected. Some will

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could continue to be infringed in cases where it was alleged that the state of emergency for a particular disease had come to an end. That question is grounded in the *state's* showing of necessity for promulgating vaccine mandates. It not only does not conflict with *Doe,* but it is consistent with *Doe.* Just as an individual's personal physician has discretion to decide whether they need protection in the form of a vaccine exemption, the state has discretion in deciding that it needs to protect itself with a vaccine requirement.

6. Elin Martinez, *A Generation of Children Impacted by Covid-19 School Closures,* Human Rights Watch (March 9, 2022, 12 a.m.), https://www.hrw.org/news/2022/03/09/generation-children-impacted-covid-19-school-closures

7. *Ibid.*

get through this and be fine. They will learn from it and grow. But lots of kids are going to be in big trouble."[8]

And those were the children who were allowed to at least attend online and are now back at school. Consider the disabled children in this suit. Most were involuntarily removed from school before the pandemic started. They are still denied access to school and services today. Two years ago, when they sought emergency injunctive relief, many were already regressing, and some were near suicidal. Now there are no words for how bad the situation is.

This case exemplifies the very real injustice that occurs when courts abdicate their responsibility to review constitutional rights out of deference to public health. This is the last chance for the court to intervene on behalf of these children.

But these issues are also nationally significant, as increasing numbers of employers, schools, and state and local governments adopt new vaccine mandates and struggle to determine how to decide whether to grant a medical exemption. Many of these employers are adopting New York's narrow medical exemption to decide whether and how to accommodate their students and employees. This approach will result in the widespread denial of accommodation to thousands of disabled adults and children who are at risk of serious harm.

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8. Liz Szabo, *Rough year: Some kids will never recover from pandemic,* York Dispatch (July 5, 2021, 8:09 p.m.), https://www.yorkdispatch.com/story/news/2021/07/05/pandemic-year-kids-will-never-recover/117373168/

This case presents an ideal vehicle to assess the questions presented and give guidance to the lower courts and state actors. Because this case was resolved on a motion to dismiss, the facts cannot be disputed. The Court need not determine whether these children are at risk of serious harm, a fact that must be credited to them from their well-plead complaint, but rather, what rights they possess, and how these rights should be balanced against state interests.

Widespread misapplication of *Jacobson,* coupled with legitimate questions left open when this Court repealed *Roe* and other abortion cases, have resulted in important open questions that can only be resolved by this Court. In short, the questions at issue are recurring, and this case presents an opportunity for this Court to provide urgently needed guidance to a nation in crisis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: October 27, 2022

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JULY 29, 2022

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

November 9, 2021, Argued;
July 29, 2022, Decided

Docket No. 21-0537-cv

JANE GOE, SR., ON BEHALF OF HERSELF AND HER MINOR CHILD, JANE DOE, ON BEHALF OF HERSELF AND HER MINOR CHILD, JANE BOE, SR., ON BEHALF OF HERSELF AND HER MINOR CHILD, JOHN COE, SR., ON BEHALF OF HIMSELF AND HIS MINOR CHILDREN, JANE COE, SR., ON BEHALF OF HERSELF AND HER MINOR CHILDREN, JOHN FOE, SR., ON BEHALF OF HIMSELF AND HIS MINOR CHILD, JANE LOE, ON BEHALF OF HERSELF AND HER MEDICALLY FRAGILE CHILD, JANE JOE, ON BEHALF OF HERSELF AND HER MEDICALLY FRAGILE CHILD, CHILDREN'S HEALTH DEFENSE,

Plaintiffs-Appellants,

v.

HOWARD ZUCKER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH

Appendix A

FOR THE STATE OF NEW YORK, ELIZABETH RAUSCH-PHUNG, M.D., IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF IMMUNIZATIONS AT THE NEW YORK STATE DEPARTMENT OF HEALTH, NEW YORK STATE DEPARTMENT OF HEALTH, THREE VILLAGE CENTRAL SCHOOL DISTRICT, CHERYL PEDISICH, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, THREE VILLAGE CENTRAL SCHOOL DISTRICT, CORINNE KEANE, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, PAUL J. GELINAS JR. HIGH SCHOOL, THREE VILLAGE CENTRAL SCHOOL DISTRICT, LANSING CENTRAL SCHOOL DISTRICT, CHRIS PETTOGRASSO, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, LANSING CENTRAL SCHOOL DISTRICT, CHRISTINE REBERA, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, LANSING MIDDLE SCHOOL, LANSING CENTRAL SCHOOL DISTRICT, LORRI WHITEMAN, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, LANSING ELEMENTARY SCHOOL, LANSING CENTRAL SCHOOL DISTRICT, PENFIELD CENTRAL SCHOOL DISTRICT, DR. THOMAS PUTNAM, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, PENFIELD CENTRAL SCHOOL DISTRICT, SOUTH HUNTINGTON SCHOOL DISTRICT, DR. DAVID P. BENNARDO, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, SOUTH HUNTINGTON

Appendix A

SCHOOL DISTRICT, BR. DAVID MIGLIORINO, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, ST. ANTHONY'S HIGH SCHOOL, SOUTH HUNTINGTON SCHOOL DISTRICT, ITHACA CITY SCHOOL DISTRICT, DR. LUVELLE BROWN, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, ITHACA CITY SCHOOL DISTRICT, SUSAN ESCHBACH, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, BEVERLY J. MARTIN ELEMENTARY SCHOOL, ITHACA CITY SCHOOL DISTRICT, COXSACKIE-ATHENS SCHOOL DISTRICT, RANDALL SQUIER, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, COXSACKIE-ATHENS SCHOOL DISTRICT, FREYA MERCER, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, COXSACKIE-ATHENS SCHOOL DISTRICT, ALBANY CITY SCHOOL DISTRICT, KAWEEDA G. ADAMS, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, ALBANY CITY SCHOOL DISTRICT, MICHAEL PAOLINO, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, WILLIAM S. HACKETT MIDDLE SCHOOL, ALBANY CITY SCHOOL DISTRICT; AND ALL OTHERS SIMILARLY SITUATED,

Defendants-Appellees,

SHENENDEHOWA CENTRAL SCHOOL DISTRICT, DR. L. OLIVER ROBINSON, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, SHENENDEHOWA CENTRAL SCHOOL DISTRICT,

Appendix A

SEAN GNAT, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, KODA MIDDLE SCHOOL, SHENENDEHOWA CENTRAL SCHOOL DISTRICT, ANDREW HILLS, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, ARONGEN ELEMENTARY SCHOOL, SHENENDEHOWA CENTRAL SCHOOL DISTRICT,

*Defendants.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK.

Before: LEVAL, CABRANES, and CHIN, Circuit Judges.

CHIN, *Circuit Judge*:

Under New York State law, all children must be immunized against certain diseases to be admitted to school or to attend school for more than fourteen days. Prior to June 2019, New York law allowed exemptions from this immunization requirement for both non-medical and medical reasons. That year, following a nationwide measles outbreak, New York State (the "State") repealed the non-medical exemption and adopted new regulations that clarified the requirements for a medical exemption. Specifically, the State narrowed the availability of medical exemptions to cases consistent with guidelines issued by

* The Clerk of the Court is respectfully directed to amend the official caption to conform to the above.

the Advisory Committee on Immunization Practices (the "ACIP" and the "ACIP Guidelines") of the Centers for Disease Control and Prevention (the "CDC")[1] or with other nationally recognized evidence-based standards of care.

Plaintiffs-appellants ("Plaintiffs") are a national not-for-profit children's advocacy organization and several parents, suing on behalf of themselves and their children, whose requests for medical exemptions from the school immunization requirements were largely denied. They brought this action below against defendants-appellees -- the New York State Department of Health (the "Health Department"), Health Department officials, local school districts, and local school district officials (collectively, "Defendants")[2] -- alleging that the new regulations and

1. Members of the ACIP include "health-care providers and public health officials," including "professionals from academic medicine (pediatrics, family practice, and pharmacy); international (Canada), federal, and state public health professionals; and a member from the nongovernmental Immunization Action Coalition." App'x at 445. The ACIP Guidelines were intended to help "clinicians and other health care providers who vaccinate patients in varied settings," *id.* at 442, (1) "assess vaccine benefits and risks," (2) "use recommended administration practices," (3) "understand the most effective strategies for ensuring" high vaccination coverage in the population, and (4) "communicate the importance of vaccination to reduce the effects of vaccine-preventable disease," *id.* at 443.

2. Defendants fall into two groups: first, Howard Zucker (Health Department Commissioner), Elizabeth Rausch-Phung (Director of the Bureau of Immunizations at the Health Department), and the Health Department (collectively, the "State Defendants"), and, second, the school districts, including their individually named school district officials and David Migliorino, a principal at a private

the enforcement thereof violated their rights under the Due Process Clause of the Fourteenth Amendment and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (the "Rehabilitation Act").

The district court granted Defendants' motions to dismiss. We conclude first, as a procedural matter, that the district court properly applied the motion to dismiss standards. We then conclude, as a substantive matter, that neither the new regulations nor the enforcement thereof violated the Due Process Clause or the Rehabilitation Act. Accordingly, the district court's judgment dismissing the action is AFFIRMED.[3]

BACKGROUND

A. Statutory Background

For more than a century, the State has required mandatory immunization for children to attend school. *See* Act of Apr. 16, 1860, ch. 438, 1860 N.Y. Laws 761,

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school within one of the named school districts (collectively, the "School District Defendants").

3. In addition to granting Defendants' motions to dismiss, the district court denied Plaintiffs' motion for leave to amend their complaint as futile. *Doe v. Zucker*, 520 F. Supp. 3d 218, 273 (N.D.N.Y. 2021). Although Plaintiffs' notice of appeal states that they are appealing from, *inter alia*, the denial of their motion for leave to amend their complaint, their briefs on appeal do not address that aspect of the district court's ruling. Moreover, the district court considered the merits based on Plaintiffs' proposed First Amended Complaint (the "FAC"). Hence, the operative complaint is the FAC, and we need not address the district court's denial of the motion for leave to amend.

761-62. Today, all children between the ages of two months and eighteen years must be immunized against a number of diseases to be admitted to school or to attend school for more than fourteen days. *See* N.Y. Pub. Health Law § 2164(7)(a).[4] These diseases include "poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease." *Id.* The fourteen-day period can be extended for students transferring from out-of-state if they show that they are seeking in good faith the required certification or other proof. *Id.*

The State has also permitted exemptions from school immunization requirements for many decades. *See, e.g.*, Act of Apr. 20, 1953, ch. 879, 1953 N.Y. Laws 2141, 2289-90 (providing deferment from school immunization for smallpox based on "medical reasons") (repealed 1968). Until the 2019 amendments, Section 2164 provided two statutory exemptions from its school immunization requirements. *See* Act of Aug. 3, 1966, ch. 994, 1966 N.Y. Laws 3331, 3333. Under the non-medical exemption, a child was not required to be immunized if that child had a parent or guardian who held "genuine and sincere religious beliefs" against immunization. N.Y. Pub. Health Law § 2164(9) (repealed 2019). That changed when the United States --

4. Section 2164(7)(a) provides that "[n]o principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate [showing the requisite immunization] or some other acceptable evidence of the child's immunization against [the specified diseases]."

with the State as an epicenter -- experienced a nationwide measles outbreak between 2018 and 2019.[5] With outbreaks in the State largely concentrated in communities with low immunization rates, the State legislature repealed the availability of the non-medical exemption in June 2019. *See* Act of June 13, 2019, ch. 35, 2019 N.Y. Laws 153, 153-54; App'x at 108 (explaining that "[a]fter California repealed their non-medical exemptions, their vaccination rates improved demonstrably, particularly in schools with the lowest rates of compliance"). Like some other states, the State now only allows medical exemptions from school immunization.[6]

Under the State's present requirements, a child may be exempted from school immunization if "any" state-licensed physician "certifies that such immunization may be detrimental to [the] child's health." N.Y. Pub. Health Law § 2164(8). The request must "contain[] sufficient

5. *See* Sharon Otterman, *New York Confronts Its Worst Measles Outbreak in Decades*, N.Y. Times (Jan. 17, 2019), https://www.nytimes.com/2019/01/17/nyregion/measles-outbreak-jews-nyc.html ("In 2018, New York and New Jersey accounted for more than half the measles cases in the country."); Pam Belluck & Adeel Hassan, *Measles Outbreak Questions and Answers: Everything You Want to Know*, N.Y. Times (Feb. 20, 2019), https://www.nytimes.com/2019/02/20/us/measles-outbreak.html (reporting, in 2019, that "[t]he United States [] experience[d] the worst measles outbreak in decades . . . [with] New York ha[ving] been particularly hard hit, with outbreaks centered in suburban Rockland County and in Brooklyn").

6. *See* Nat'l Conf. State Legislatures, States With Religious and Philosophical Exemptions From School Immunization Requirements (May 25, 2022), https://www.ncsl.org/research/health/school-immunization-exemption-state-laws.aspx (last visited July 27, 2022).

information to identify a medical contraindication to a specific immunization." N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.3(c). School officials enforce these requirements, *see* N.Y. Pub. Health Law § 2164(7)(a), and may require additional supporting information before granting requests for exemptions, *see* N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.3(c). The denial of a medical exemption is appealable to the Commissioner of Education. N.Y. Pub. Health Law § 2164(7)(b).

On August 16, 2019, Commissioner Zucker issued emergency regulations to implement the State's legislative repeal of the non-medical exemption (the "new regulations"). In doing so, the Commissioner explained that these new rules would ensure that the State's immunization requirements conformed to "national immunization recommendations and guidelines." App'x at 138.

The new regulations were adopted on December 31, 2019. They require the use of a medical exemption form approved by the Health Department or the New York City Department of Education, completed and signed by a physician, certifying that "immunization may be detrimental to the child's health." N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.3(c). A completed form must provide "sufficient information to identify a medical contraindication to a specific immunization and specify[] the length of time the immunization is medically contraindicated." *Id.* The new regulations also define the phrase "[m]ay be detrimental to a child's health," as used in section 2164(8) of the New York Public Health Law,

to mean "that a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care." *Id.* § 66-1.1(*l*).

The ACIP Guidelines define a "contraindication" as a "condition[] in a recipient that increases the risk for a serious adverse reaction," App'x at 489, and recommend that a vaccine not be administered when such a contraindication exists. Examples of contraindications include being severely immunocompromised, having an immunodeficiency disease, or suffering a severe allergic reaction after a previous vaccine dose. The ACIP Guidelines separately define a "precaution" as a "condition in a recipient that might increase the risk for a serious adverse reaction, might cause diagnostic confusion, or might compromise the ability of the vaccine to produce immunity." *Id.* at 490. For precautions, the ACIP Guidelines recommend deferring, in lieu of completely foregoing, vaccination. Examples of precautions include experiencing moderate or severe acute illness or a personal or family history of seizures.[7]

B. Factual Background

The following facts, which are assumed to be true, are drawn from the FAC.

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7. In addition, the ACIP Guidelines provide a list of conditions or circumstances that are neither a recognized contraindication nor a precaution, including, for example, mild acute illness, a history of penicillin allergy, or contact with persons who have a chronic illness or altered immunocompetence.

Plaintiffs' medically fragile children suffer from diseases and disabilities that significantly impair their immune systems. Some also have a family history of adverse reactions to vaccines or serious autoimmune diseases. These conditions or circumstances have either prevented them from being vaccinated at all, or from receiving certain vaccines.

Around the start of the 2019 school year, Plaintiffs submitted medical exemption requests, supported by their state-licensed physicians, seeking exemptions from all or some of the school immunization requirements.[8] Most of Plaintiffs' requests were denied. They were told by school officials, for example, that their requests lacked sufficient detail, did not meet ACIP Guidelines criteria, or were submitted on the wrong form. In denying these requests, many school officials relied on the opinion of their school district's physician. Director Rausch-Phung also reviewed some of these requests and recommended their denial.

Some Plaintiffs submitted unsuccessful second, and third requests. Plaintiffs Joe and Doe appealed their medical exemption denials to the Commissioner

8. Some of the conditions that Plaintiffs allege form the basis of these requests include "multiple chronic and serious conditions," an "acute illness" "concerning [the] meningococcal vaccine," a "current state[] of vulnerable health and [] genetic analysis and family history of significant adverse vaccine reactions," being "at substantial risk of having" "severe reactions" to immunization, "a flare up of [] acute autoimmune conditions," an "anaphylactic reaction to [a] hepatitis B vaccine given at birth," and "P.A.N.S./P.A.N.D[.]A.S.," a form of "autoimmune encephalopathy." App'x at 704, 712, 715, 719, 722-23, 726, 732.

of Education. While Joe's appeal was still pending when suit was filed, the denial of Doe's request was affirmed. Plaintiff Foe's son's medical exemption was granted, and he is enrolled in private school. In Plaintiff Goe's case, the school district allowed her daughter to enroll in school while her second medical exemption request was pending.[9] The failure of certain Plaintiffs to comply with the new regulations resulted in their expulsion and in the denial of vital school services and programming.

C. Procedural Background

On July 23, 2020, Plaintiffs commenced this putative class action against Defendants, challenging the new regulations. After Defendants moved to dismiss Plaintiffs' complaint for failure to state a claim,[10] Plaintiffs filed a letter motion for leave to amend the complaint. Plaintiffs included with their motion the FAC, which alleged (1) four constitutional claims for relief based on the Fourteenth Amendment, including for violations of their substantive

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9. Goe's daughter was "set to graduate on July 30, 2020." *Id.* at 725.

10. The day after the State Defendants filed their motion to dismiss, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction to enjoin application of the new regulations and to bar schools from prohibiting enrollment based on the regulations. The district court denied Plaintiffs' motion. On November 13, 2020, Plaintiffs appealed the district court's denial to this Court, filing a motion for emergency injunction pending appeal. This Court denied Plaintiffs' motion on January 6, 2021. Plaintiffs then filed an emergency application for writ of injunction with the Supreme Court on January 25, 2021. The application was denied.

due process rights, their "liberty interest in parenting," their "liberty interest in informed consent," and burdening a minor's right to pursue an education, App'x at 761-66; and (2) two claims for relief under the Rehabilitation Act for discrimination based on the disability status of Plaintiffs' children.

The district court granted Defendants' motions on February 17, 2021. *Zucker*, 520 F. Supp. 3d at 273-74. The district court rejected Plaintiffs' argument that strict scrutiny applied and concluded that the new regulations were reasonably related to the State's public health objectives of maintaining high vaccination rates in schools and ensuring that medical exemptions were issued based on evidence-based guidance. *Id.* at 253, 273. The district court also dismissed the Rehabilitation Act claims, concluding that Plaintiffs had failed to plead plausible claims of disability discrimination. *Id.* at 272-73. Judgment was entered accordingly.

This appeal followed.

DISCUSSION

"We review *de novo* the denial of a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted." *Drimal v. Tai*, 786 F.3d 219, 223 (2d Cir. 2015). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)).

First, we consider whether the district court properly applied the motion to dismiss standard to the FAC. Second, we determine whether the new regulations violate Plaintiffs' constitutional rights under the Fourteenth Amendment. Third, we address whether the regulations violate Plaintiffs' rights under the Rehabilitation Act. We conclude that the district court did not err in granting Defendants' motions to dismiss.

A. The District Court's Reliance on Documents Outside the FAC

Plaintiffs argue that the district court misapplied the Rule 12(b)(6) standards by relying on contested facts contained in exhibits submitted by Defendants in support of their motions to dismiss, as these were documents extrinsic to the FAC. For the reasons explained below, we hold that the district court properly relied on these documents.

The district court took judicial notice of some of the exhibits submitted by Defendants in their motions to dismiss and determined that some exhibits were incorporated by reference into the FAC. *Zucker*, 520 F. Supp. 3d at 228-30. Relevant on appeal, it took judicial notice of: (1) recent legislative history of section 2164 of the New York Public Health Law, (2) the Emergency Regulations dated August 16, 2019, and (3) the Final Regulations adopted December 31, 2019. *Id.* at 229.

Additionally, it determined that the Commissioner of Education's denial of Plaintiff Doe's appeal was incorporated into the FAC, or, in the alternative, it took judicial notice of that decision. *Id.* It also determined that the ACIP Guidelines had been incorporated by reference because they were relied upon by the FAC. *Id.*

Plaintiffs argue that these documents contradict facts alleged in the FAC; therefore, they contend, the district court's reliance on them was improper. For instance, the FAC alleges that unvaccinated children do not present a significant risk to community health. *See* App'x at 761 (alleging that "the risk to the community from" medically fragile children foregoing immunizations is "small enough that there is no compelling reason to narrow the scope of the medical exemption or place these burdens on it"). In contrast, the Emergency Regulations explain, for instance, that "because some individuals have chosen not to receive the [measles] vaccine and to not have their children vaccinated, outbreaks stemming from imported cases have occurred and new cases continue to occur in multiple counties across New York State." *Id.* at 427-28. The FAC also disputes the public health benefits of some vaccines on the school vaccine schedule, which the ACIP Guidelines recommend.

The district court did not err in considering the materials in question. First, as a fundamental matter, courts may take judicial notice of legislative history. *See Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226-27, 79 S. Ct. 274, 3 L. Ed. 2d 257, 17 Alaska 779 (1959). The same is true for administrative record filings such as the

denial of Plaintiff Doe's appeal. *See Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003).

Second, a complaint is considered to include a document "incorporated in it by reference," or "where the complaint relies heavily upon its terms and effect." *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002) (internal quotation marks omitted).

Third, it is true, as Plaintiffs argue, that when a court relies upon extrinsic materials "considered integral to the complaint, it must be clear on the record that no dispute exists regarding the . . . accuracy of the document." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 231 (2d Cir. 2016) (internal quotation marks omitted). While Plaintiffs challenge the accuracy of certain factual findings made by the State in promulgating the regulations (as set forth in the extrinsic materials), they misapprehend the extent of the district court's consideration of those factual findings. To the extent that the district court relied on facts from the extrinsic materials that were in dispute, it did not rule on the factual accuracy of those materials; instead, it cited those materials to explain the decision-making of state authorities. *See, e.g.*, *Zucker*, 520 F. Supp. 3d at 254-56; *cf. Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 285 (2d Cir. 2015) ("[I]t is not the role of the courts to second-guess the wisdom or logic of the State's decision to credit one form of disputed evidence over another.").

We therefore conclude that the district court properly applied the 12(b)(6) motion standards in dismissing the FAC.

B. Constitutional Challenges

We next address Plaintiffs' constitutional claims. Plaintiffs assert both facial and as applied challenges to the new regulations.

As a facial matter, Plaintiffs contend that the new regulations are invalid because they permit school authorities to deny a request for a medical exemption from school immunization requirements even when a state-licensed physician certifies that a child is at risk of serious harm or death from a vaccine. In other words, they contend that because they have a "fundamental right to a medical exemption" from immunization requirements in these circumstances, the State must grant the exemption "without further review or interference" when their physicians certify the need for an exemption. Pls.-Appellants' Br. at 2, 4. For their as applied claims, Plaintiffs allege that the individual school district officials' conduct enforcing the new regulations violated their substantive due process rights.

1. Applicable Law

"'[T]he touchstone of due process is protection of the individual against arbitrary action of government.'" *Leebaert v. Harrington*, 332 F.3d 134, 139 (2d Cir. 2003) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 845, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). To determine whether a government regulation infringes a substantive due process right, we first "determine whether the asserted right is fundamental." *Id.* at 140 (internal

quotation marks omitted). "Rights are fundamental when they are implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Id.* (internal quotation marks omitted). "When the right infringed is fundamental," we apply strict scrutiny, and "the governmental regulation must be narrowly tailored to serve a compelling state interest." *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996) (internal quotation marks omitted). When a "claimed right is not fundamental," we apply rational basis review, and the "governmental regulation need only be reasonably related to a legitimate state objective." *Id.* at 461.

An as applied challenge "requires an analysis of the facts of a particular case to determine whether the application of a statute, even one constitutional on its face, deprived the [plaintiff] to whom it was applied of a protected right." *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 174 (2d Cir. 2006). We use the shocks the conscience test to assess substantive due process challenges to government conduct. *See, e.g.*, *Velez v. Levy*, 401 F.3d 75, 93-94 (2d Cir. 2005) (explaining that the plaintiff must "allege governmental conduct that 'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience'" (quoting *Lewis*, 523 U.S. at 847 n.8)); *Hurd v. Fredenburgh*, 984 F.3d 1075, 1087 (2d Cir.), *cert. denied*, 142 S. Ct. 109, 211 L. Ed. 2d 31 (2021). Accordingly, to determine whether government conduct infringes on a substantive due process right, we first identify the "constitutional right at stake" or the "deprivation of property" interest at issue. *Kaluczky v.*

City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995).[11] If we identify either, we then assess whether the government's alleged conduct shocks the conscience. *See Velez*, 401 F.3d at 93; *Hurd*, 984 F.3d at 1087.

2. Application

a. The Facial Challenge

Two questions are presented by the facial challenge: first, whether a fundamental right is implicated, such that strict scrutiny applies, and, second, once the appropriate level of judicial scrutiny is determined, whether the challenged regulations pass muster.

i. Is a Fundamental Right Implicated?

Plaintiffs contend that the new regulations violate their right to a medical exemption from school immunization requirements, their rights to life and liberty, and the rights of their children to an education. They argue that these rights are fundamental, and that therefore the regulations are subject to strict scrutiny. We are not persuaded, and we conclude that "fundamental rights" are not implicated.

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11. Other circuits require the substantive due process violation of a fundamental right. *See, e.g.*, *Van Orden v. Stringer*, 937 F.3d 1162, 1167 (8th Cir. 2019) ("To prevail on an as-applied substantive due process claim, the [plaintiffs] must show both that the state officials' conduct is conscience-shocking and that it violated a *fundamental right* of the [plaintiffs]." (emphasis added)).

First, Plaintiffs' assertion of rights is overstated. The State is not forcing any child to be vaccinated against her parents' will. *See Phillips v. City of New York*, 775 F.3d 538, 542 n.5 (2d Cir. 2015) (per curiam) (providing that New York's school immunization law does not implicate substantive due process because it does not compel vaccination). Rather, the new regulations continue to *permit* a medical exemption (as required by the statute), and they clarify *when* an exemption is appropriate and specify *how* parents may seek an exemption. By requiring a physician to certify that a child "has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care," N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.1(*l*), the new regulations require requests to comply with evidence-based national standards for the purpose of ensuring that physicians do not recommend medical exemptions in conclusory fashion or for non-medical reasons.[12]

Second, Plaintiffs' argument, at bottom, is that they have a "fundamental right" to obtain a medical exemption based *solely* on the recommendation -- or say-so -- of a child's treating physician. But no court has ever held that there is a right to a medical exemption from immunization

12. We need not decide here whether schoolchildren may have medical conditions that place them at risk of serious harm from a vaccine but that are not covered by the national standards. To the extent that the regulations allow the State to exclude a child from education notwithstanding a condition that places the child at serious risk if vaccinated, if the condition is not recognized by nationally accepted standards, as we conclude below, states are free in the interest of protecting public health to impose such standards on a rational basis.

based solely on the recommendation of a physician. Nor has any court held that such a right is "implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Leebaert*, 332 F.3d at 140 (internal quotation mark omitted). Indeed, in *Jacobson v. Massachusetts*, the Supreme Court explained that medical exemptions from mandatory immunization laws may be limited to cases in which it is "apparent or can be *shown with reasonable certainty*" that the vaccine would be harmful. 197 U.S. 11, 39, 25 S. Ct. 358, 49 L. Ed. 643 (1905) (emphasis added).

Third, the issue, of course, is not whether the Plaintiffs' children have a right to a medical exemption. It is whether they are being deprived of their right to attend school because of the vaccine mandates. But, as the Supreme Court has made clear, there is no fundamental right to an education. S*ee Plyler v. Doe*, 457 U.S. 202, 223, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) ("Nor is education a fundamental right."); *see also Bryant v. N.Y. State Educ. Dep't*, 692 F.3d 202, 217 (2d Cir. 2012) (holding that "[t]he right to public education is not fundamental").[13] While the right to an education is an important right,

13. The Supreme Court has explained that

> [e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation.

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35, 93 S. Ct. 1278, 36 L. Ed. 2d 16 (1973).

it is not a "fundamental right" such as to require strict scrutiny review.

Finally, as we further noted in *Phillips*, "no court appears ever to have held" that "*Jacobson* requires that strict scrutiny be applied to immunization mandates." 775 F.3d at 542 n.5. To be sure, courts have consistently rejected substantive due process challenges to vaccination requirements without applying strict scrutiny. *See, e.g.*, *B.W.C. v. Williams*, 990 F.3d 614, 622 (8th Cir. 2021); *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App'x 348, 355-56 (4th Cir. 2011) (summary order); *Boone v. Boozman*, 217 F. Supp. 2d 938, 956-57 (E.D. Ark. 2002); *cf. Immediato*, 73 F.3d at 461 (recognizing that parents "have a liberty interest, properly cognizable under the Fourteenth Amendment, in the upbringing of their children" but rejecting the argument that this liberty interest was a "fundamental" right and holding that "rational basis review is appropriate" when a "parental right" is "invoked against a state regulation" (internal quotation marks omitted)).

Accordingly, we conclude that the new regulations do not implicate a fundamental right, and that therefore strict scrutiny does not apply.[14]

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14. Plaintiffs rely on *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), *Doe v. Bolton*, 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201 (1973), and their progeny to argue that the new regulations infringe on their fundamental rights to health and life and to rely on the medical judgment of their treating physicians. The Supreme Court, however, recently overruled *Casey*, along with *Roe v. Wade*,

ii. Are the New Regulations Reasonably Related to a Legitimate State Objective?

Instead, we apply rational basis review. The FAC's substantive due process challenges are based principally on two provisions: (1) the new regulations' definition of what "[m]ay be detrimental to the child's health," N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.1(*l*), and (2) the delegation to school officials of the authority to grant a medical exemption based on the new standards, N.Y. Pub. Health Law § 2164(7)(a). We conclude that both provisions are reasonably related to a legitimate state objective.

First, there clearly is a legitimate state objective for both provisions: protecting communities from serious, vaccine-preventable diseases through immunization. *See Phillips*, 775 F.3d at 542 (noting that Supreme Court recognized in *Jacobson* "the State's judgment that mandatory vaccination was in the interest of the

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410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). *Dobbs v. Jackson Women's Health Org.*, 597 U.S. ___, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022). Moreover, to the extent the cases still provide support for the propositions that a state cannot prevent abortions that are necessary to protect the health or life of a woman or hinder the independent medical judgment of a treating physician to recommend an abortion, the cases are distinguishable. Here, the State is not compelling Plaintiffs to vaccinate their children, but merely requiring them to be vaccinated or to obtain a medical exemption from the immunization mandate -- *if* they wish to attend a school in the State. The choice to vaccinate a child remains with the parent and her treating physician. For these same reasons, we also reject Plaintiffs' liberty interest in parenting and liberty interest in informed consent claims.

population as a whole" (citing *Jacobson*, 197 U.S. at 38)); *see also Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922). Significantly, in 2018-2019, there was a measles outbreak in the State that was fueled by low vaccination rates in certain communities. *See* App'x at 139. The Health Department noted this outbreak when it proposed the new regulations:

> There currently exist outbreaks of measles in New York City and in the Counties of Rockland, Orange, and Westchester, and cases have also been identified in the County of Sullivan. Measles is a viral disease transmitted via the airborne route when a person with measles coughs or sneezes. It is one of the most contagious diseases known. . . .
>
> The measles vaccine is very effective and remains the best protection against the disease. . . .
>
> . . . . However, because some individuals have chosen not to receive the vaccine and to not have their children vaccinated, outbreaks stemming from imported cases have occurred and new cases continue to occur in multiple counties across New York State.

Id.

Second, both provisions are reasonably related to furthering the State's interest in protecting communities

against serious disease. After the legislative repeal of the non-medical exemption, the State adopted the new regulations to enforce its school immunization requirements. The new regulations thus sought to conform the State's immunization rules to "national immunization recommendations and guidelines" to curtail state-licensed physicians from issuing medical exemptions for non-medical reasons. *Id.* at 637. There was a real concern that with the elimination of the religious exemption, parents who did not want their children vaccinated would seek a medical exemption even when such an exemption was not warranted. *See id.* at 428 (noting that, "[i]n 2015, the State of California removed non-medical exemptions to school immunization requirements without taking steps to strengthen the rules governing medical exemptions," and that over "the next three years, the use of [those] exemptions to school immunization requirements more than tripled").

The statute at issue here provides that a child may be exempted from immunization if any state-licensed physician certifies that "immunization may be detrimental to [the] child's health," N.Y. Pub. Health Law § 2164(8), and the new regulations define that phrase, specifying the circumstances that warrant a medical exemption. N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.1(*l*). The definition narrows the availability of this exemption to medical contraindications and precautions consistent with either the ACIP Guidelines or "other nationally recognized evidence-based standard of care." *Id.* In other words, exemptions are now only to be granted if they are consistent with evidence-based national standards of

care such as, but not limited to, the ACIP Guidelines.[15] *Cf. Rodriguez v. City of New York*, 72 F.3d 1051, 1062 (2d Cir. 1995) (interpreting New York's involuntary commitment statute as implicitly requiring that a physician's decision "be made in accordance with the standards of the medical profession"). Plainly, the regulations seek to ensure that the risk of harm to a child from vaccination is genuine.

We further conclude that there is a reasonable relationship between the delegation of authority to school districts to review and approve medical exemption requests and protecting communities from serious diseases. New York State law, as it has for decades, delegates to school officials the authority to grant a medical exemption from the State's school immunization requirements. *See* N.Y. Pub. Health Law § 2164(7)(a); N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.3(c). The Supreme Court has held that states may grant school district officials "broad discretion" to apply and enforce health law, including mandatory immunization laws. *See Zucht*, 260 U.S. at 175-76 (rejecting argument that school immunization requirement was unconstitutional because it gave local authorities discretion "to determine when and under what circumstances the requirement shall be enforced"). The new regulations do not undermine this long-standing discretion or any right to a medical

15. Contrary to the FAC's allegations, this definition is not, on its face, arbitrarily narrow. For instance, as the district court noted, one of the permissible medical exemption forms under the new regulations references guidance "described in the vaccine manufacturers' package insert." *Zucker*, 520 F. Supp. 3d at 255 (internal quotation marks omitted); *see also* S. App'x at 96.

exemption. Moreover, if a medical exemption is denied by school authorities, a parent has the right to appeal the denial to the Commissioner of Education or to seek judicial review in state court through an Article 78 proceeding.

Accordingly, we agree with the district court that the new regulations and the State's delegation of enforcement authority to school officials are reasonably related to a legitimate state objective, and that they therefore satisfy rational basis review.[16]

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16. We also reject Plaintiffs' argument that the new regulations violate the unconstitutional conditions doctrine by conditioning receipt of a benefit -- access to education -- on the waiver of a constitutional right. The unconstitutional conditions doctrine provides that the government may not deny a person a benefit "on a basis that infringes his constitutionally protected interests." *All. for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 231 (2d Cir. 2011), *aff'd sub nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), *overruled on other grounds by Rust v. Sullivan*, 500 U.S. 173, 111 S. Ct. 1759, 114 L. Ed. 2d 233 (1991)). That doctrine, in other words, prevents the state from granting and withholding benefits as a stick to coerce recipients of those benefits to engage in certain behavior where, if the state regulated that behavior directly, that regulation would be a constitutional violation. Here, Plaintiffs have failed to plausibly allege that in enacting the challenged regulations, the State has "infringe[d]" upon any "constitutionally protected right[]." *All. for Open Soc'y Int'l, Inc.*, 651 F.3d at 231. The State's decision to narrow the availability of medical exemptions to cases where a "child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care," N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.1(*l*), does not unconstitutionally infringe upon Plaintiffs' substantive due process

b. The As Applied Challenge

In its decision below, the district court carefully reviewed the claims against the School District Defendants, including the individual school district officials, based on their implementation of the new regulations. It concluded that the FAC failed to plausibly allege any substantive due process claims against them. *Zucker*, 520 F. Supp. 3d at 257-66.

We agree that the FAC fails to assert plausible claims against any of the individual school district officials, substantially for the reasons set forth by the district court in its decision below. As the district court concluded, the FAC did not plausibly allege an infringement of a constitutional right or the deprivation of a property interest in education. *Id.* at 258. The district court also correctly concluded that the FAC failed to plausibly allege that the individual school district officials engaged in conduct that was "outrageous," "arbitrary," "irrational," or "conscience shocking." *Id.* at 259, 261-64, 266 (internal quotation marks omitted).

Finally, as the district court correctly concluded that the FAC failed to plausibly allege any underlying constitutional violations, it did not err in dismissing the municipal liability claims against the School District Defendants. *See Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("Because the district court properly

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rights. *See Phillips*, 775 F.3d at 542. The conditional receipt of an education on compliance with the regulation cannot, therefore, be an unconstitutional condition.

found no underlying constitutional violation, its decision not to address the municipal defendants' liability under 0*Monell* [*v. Department of Social Services*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978),] was entirely correct.").

Accordingly, we affirm the dismissal of Plaintiffs' constitutional claims.

C. Rehabilitation Act Claims

Finally, we address whether the district court properly dismissed Plaintiffs' Rehabilitation Act claims, which allege that the new regulations violate the Rehabilitation Act by excluding Plaintiffs' children from school because of their disabilities, that is, because they "cannot safely take one or more of the mandatory vaccines." Pls.-Appellants' Br. at 75.

The Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). As described in their main brief on appeal, Plaintiffs contend that "Defendants adopted discriminatory policies which exclude whole categories of disabled children from the protection of a medical exemption from the vaccine requirements." Pls.-Appellants' Br. at 74-75.

As a threshold matter, the district court dismissed the Rehabilitation Act claims against the individual school district officials in their individual capacity on the basis that the Rehabilitation Act does not provide for individual liability. *See Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir. 2001) ("[N]either Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials."); *see also Perros v. Cnty. of Nassau*, 238 F. Supp. 3d 395, 402 n.3 (E.D.N.Y. 2017) ("[I]t is well-established that there is no individual liability under the ADA or the Rehabilitation Act, whether the individual is sued in their official or individual capacity."). Plaintiffs have not challenged this ruling in their briefs on appeal, and thus we affirm the dismissal of the Rehabilitation Act claims against the individual school district officials.[17]

As to the merits of the Rehabilitation Act claims, "[e]xclusion or discrimination may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation." *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016). While Plaintiffs continue to press all three forms of discrimination in their briefs on appeal, they do so in a wholly conclusory manner. All three forms of claims fail in any event, for the FAC fails to plausibly allege that Plaintiffs' children were excluded from participating in any federally-funded program or activity "solely by reason of her or his disability." 29 U.S.C. § 794(a).

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17. We note also that the FAC dropped the claims against most, but not all, of the individual Defendants in their official capacity.

First, the new regulations apply to all students, and not just to students with disabilities. *See* N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.1(b) (providing that "Child," for purposes of the State's school immunization requirements, "means and includes any person between the ages of two months and 18 years"). Thus, all students must comply with the new regulations, not just disabled students. *See Bryant*, 692 F.3d at 216 (dismissing claims that New York law barring "aversive interventions" in education violates the Rehabilitation Act, noting that "[t]he regulation applies to all students, regardless of disability").

Second, the new regulations do not bar students with disabilities from schools *because* of their disabilities. Children who cannot be safely vaccinated because of their disability will receive a medical exemption and may attend school, so long as they can demonstrate a medical need, based on a national evidence-based standard, for an exemption. Under the new regulations, a state-licensed physician can still certify the need for a medical exemption based on her clinical judgment, and an exemption will be granted if that judgment is based on evidence (and not merely her say-so) and is consistent with a nationally recognized evidence-based standard of care. Again, to the extent there is a disagreement on whether the requirements are met in any particular case, parents can appeal to the Commissioner of Education and seek judicial review in the state court system through an Article 78 proceeding.

Plaintiffs' children here were denied medical exemptions not because of their disabilities, but because

they admittedly failed to comply with the new procedures, which, as we have concluded above, are reasonably related to furthering a legitimate state objective.[18]

Notably, in *D.A.B. v. New York City Department of Education*, the district court rejected claims under, *inter alia*, the Rehabilitation Act. The parents of a child with autism brought suit after they were denied a medical exemption for their child from mandatory vaccination based on a letter from a pediatrician attesting to a "'history of adverse reactions' to vaccinations." *D.A.B. v. N.Y.C. Dep't of Educ.*, 45 F. Supp. 3d 400, 403, 407 (S.D.N.Y. 2014). The New York City Department of Education denied the request because it found "no medical basis for the exemption." *Id.* at 403. The district court concluded that the Rehabilitation Act claim lacked merit because the plaintiffs could not show that the child "was excluded from school 'solely by reason' of his disability." *Id.* at 407 (quoting 29 U.S.C. § 794(a)). It reasoned that school immunization requirements that constitute a "more limited, generally applicable law intended to limit the spread of contagious disease," that allow "the possibility of exemptions," do not discriminate in violation of the Rehabilitation Act. *Id.* We affirmed in a non-precedential summary order, concluding: "for the reasons well stated by the district court, no reasonable juror could conclude

18. As the district court concluded, while "Plaintiffs felt that their serious medical issues compelled them not to comply" with the State's school immunization requirements, Plaintiffs' "exclusion from school ultimately resulted from their decisions not to comply with a condition for school enrollment permissibly set by the state." *Zucker*, 520 F. Supp. 3d at 258-59.

that [the Department] discriminated against [the child] because of his disability." *D.A.B. v. N.Y.C. Dep't of Educ.*, 630 F. App'x 73, 79 (2d Cir. 2015) (summary order).[19]

We therefore conclude that Plaintiffs fail to plausibly allege that they were excluded from school "solely by reason of" their disabilities, and we hold that the district court did not err in dismissing the Rehabilitation Act claims.

CONCLUSION

For the reasons set forth above, the district court's judgment is

AFFIRMED.

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19. Plaintiffs argue that the new regulations unlawfully "narrow medical exemption criteria" and that "children with disabilities that fall outside of the non-exhaustive ACIP contraindications are discriminated against and denied benefits to which they are otherwise entitled." Pls.-Appellants' Reply Br. at 28. We are not persuaded. As discussed above, the definition of what "[m]ay be detrimental to the child's health" is not so narrow as to preclude the use of non-ACIP Guideline recognized contraindications and preconditions. N.Y. Comp. Codes R. & Regs. tit. 10, § 66-1.1(*l*). The definition, on its face, recognizes medical contraindications or precautions consistent with other nationally recognized evidence-based standards of care. *Id.* Thus, a physician may still certify a medical exemption for a contraindication or precaution that is consistent with any nationally recognized evidence-based standard of care.

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED FEBRUARY 17, 2021

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:20-cv-840 (BKS/CFH)

JANE DOE ON BEHALF OF HERSELF AND HER MINOR CHILD; JANE BOE, SR. ON BEHALF OF HERSELF AND HER MINOR CHILD; JOHN COE, SR. AND JANE COE, SR. ON BEHALF OF THEMSELVES AND THEIR MINOR CHILDREN; JOHN FOE, SR. ON BEHALF OF HIMSELF AND HIS MINOR CHILD; JANE GOE, SR. ON BEHALF OF HERSELF AND HER MINOR CHILD; JANE LOE ON BEHALF OF HERSELF AND HER MEDICALLY FRAGILE CHILD; JANE JOE ON BEHALF OF HERSELF AND HER MEDICALLY FRAGILE CHILD; CHILDREN'S HEALTH DEFENSE, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

HOWARD ZUCKER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH FOR THE STATE OF NEW YORK; ELIZABETH RAUSCH-PHUNG, M.D., IN HER OFFICIAL

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CAPACITY AS DIRECTOR OF THE BUREAU OF IMMUNIZATIONS AT THE NEW YORK STATE DEPARTMENT OF HEALTH; THE NEW YORK STATE DEPARTMENT OF HEALTH; THREE VILLAGE CENTRAL SCHOOL DISTRICT; CHERYL PEDISICH, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, THREE VILLAGE CENTRAL SCHOOL DISTRICT; CORINNE KEANE, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL PAUL J. GELINAS JR. HIGH SCHOOL, THREE VILLAGE CENTRAL SCHOOL DISTRICT; LANSING CENTRAL SCHOOL DISTRICT; CHRIS PETTOGRASSO, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, LANSING CENTRAL SCHOOL DISTRICT; CHRISTINE REBERA, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, LANSING MIDDLE SCHOOL, LANSING CENTRAL SCHOOL DISTRICT; LORRI WHITEMAN, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, LANSING ELEMENTARY SCHOOL, LANSING CENTRAL SCHOOL DISTRICT; PENFIELD CENTRAL SCHOOL DISTRICT; DR. THOMAS PUTNAM, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, PENFIELD CENTRAL SCHOOL DISTRICT; SOUTH HUNTINGTON SCHOOL DISTRICT; DR. DAVID P. BENNARDO, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, SOUTH HUNTINGTON SCHOOL DISTRICT; BR. DAVID MIGLIORINO, ACTING IN HIS OFFICIAL CAPACITY AS

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PRINCIPAL, ST. ANTHONY'S HIGH SCHOOL, SOUTH HUNTINGTON SCHOOL DISTRICT; ITHACA CITY SCHOOL DISTRICT; DR. LUVELLE BROWN, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, ITHACA CITY SCHOOL DISTRICT; SUSAN ESCHBACH, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, BEVERLY J. MARTIN ELEMENTARY SCHOOL, ITHACA CITY SCHOOL DISTRICT; COXSACKIE-ATHENS SCHOOL DISTRICT; RANDALL SQUIER, SUPERINTENDENT, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, COXSACKIE-ATHENS SCHOOL DISTRICT; FREYA MERCER, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, COXSACKIE ATHENS HIGH SCHOOL, COXSACKIE-ATHENS SCHOOL DISTRICT; ALBANY CITY SCHOOL DISTRICT; KAWEEDA G. ADAMS, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, ALBANY CITY SCHOOL DISTRICT; MICHAEL PAOLINO, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, WILLIAM S. HACKETT MIDDLE SCHOOL, ALBANY CITY SCHOOL DISTRICT; AND ALL OTHERS SIMILARLY SITUATED,

Defendants.[1]

February 17, 2021, Decided;
February 17, 2021, Filed

1. The Court Clerk is respectfully requested to change the name of Plaintiff Childrens Health Defense on the docket to Children's Health Defense, as it is spelled in the body of the proposed First Amended Complaint. (See, e.g., Dkt. No. 99-2, ¶ 57).

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Hon. Brenda K. Sannes, United States District Judge.

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiffs, seven families on behalf of their minor children who are "medically fragile" with impairments in the functioning of their immune systems, and the Children's Health Defense ("CHD"), filed this proposed class action challenging New York's allegedly burdensome and narrow medical exemptions to mandatory school immunization requirements. (Dkt. No. 1). Plaintiffs allege that Defendants, including the New York State Department of Health ("DOH"), New York Commissioner of Health Howard Zucker, the DOH Director of the Bureau of Immunizations Elizabeth Rausch-Phung, M.D., seven school districts and their administrators (collectively the "School District Defendants"), and the Principal of St. Anthony's High School Brother David Anthony Migliorino, have violated their Fourteenth Amendment substantive due process and equal protection rights, liberty interest in parenting and informed consent, and right to free public education under 42 U.S.C. § 1983, as well as § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). (*Id.*). Presently before the Court are: Defendants' motions to dismiss the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6); a request by the Three Village, South Huntington, and Brother Migliorino Defendants to transfer venue to the Eastern District of New York; and Plaintiffs' motion to amend the Complaint,

(Dkt. Nos. 28, 54, 78, 91, 93).[2] The parties have briefed these motions fully and on January 6, 2021, the Court held oral argument. For the reasons that follow, Defendants' motions to dismiss are granted, the motion to transfer venue is denied as moot, and Plaintiffs' motion to amend is denied.

II. MOTION TO AMEND

With their motion to amend, (Dkt. No. 93), Plaintiffs have submitted a proposed First Amended Complaint. (Dkt. Nos. 93-1, 99-2).[3] Plaintiffs assert that under Rule 15(a)(1)(B), they may file an amended pleading as

2. On August 25, 2020, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction under Federal Rule of Civil Procedure 65, seeking an order restraining the implementation and enforcement of the applicable regulations. (Dkt. No. 41). After briefing and oral argument, the Court denied Plaintiffs' motion. (Dkt. No. 46 (denying motion for temporary restraining order)); *Doe v. Zucker*, No. 20-cv-840, 496 F. Supp. 3d 744, 2020 U.S. Dist. LEXIS 196279, 2020 WL 6196148 (N.D.N.Y. Oct. 22, 2020) (denying motion for preliminary injunction). Plaintiffs appealed the Court's denial of their motion for a preliminary injunction and moved for an emergency injunction pending appeal. *Doe v. Zucker*, No. 20-3915 (2d Cir.). The Second Circuit denied their motion for an emergency injunction, *Doe v. Zucker*, No. 20-3915 (2d Cir. Jan. 6, 2021), and the Supreme Court denied their emergency application for an injunction, *Doe v. Zucker*, No. 20A135 (Sotomayor, Circuit Justice, Jan. 29, 2021). Plaintiffs' appeal of this Court's denial of their motion for a preliminary injunction is pending.

3. The Court has cited to the most recent, revised proposed First Amended Complaint, which updates the originally-filed version by omitting defendants that Plaintiffs have voluntarily dismissed. (Dkt. Nos. 99-2, 104).

to Defendant Migliorino as a matter of course because they filed their motion to amend within 21 days of his motion to dismiss. (Dkt. No. 93, at 1). Plaintiffs seek the Court's leave under Fed. R. Civ. P. 15(a)(2) to file the First Amended Complaint with respect to all other Defendants. (*Id.*). Defendants oppose Plaintiffs' motion to amend in its entirety on the ground that amendment is futile. (Dkt. Nos. 108 to 111).

Federal Rule of Civil Procedure 15(a)(1) provides that: "A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b) . . . whichever is earlier." Plaintiffs filed their proposed First Amended Complaint on October 22, 2020, six days after Defendant Migliorino filed his motion to dismiss, (Dkt. No. 93 (motion to amend filed Qct. 22, 2020); Dkt. No. 91 (Defendant Migliorino's motion to dismiss filed Oct. 16, 2020)), and thus may amend as to Defendant Migliorino as a matter of course. As to the remaining Defendants, however, Plaintiffs "may amend [their] pleading only with the . . . court's leave." Fed. R. Civ. P. 15(a)(2).

In general, leave to amend should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). "Where plaintiffs seek to amend their complaint while a motion to dismiss is pending, a court 'has a variety of ways in which it may deal with the pending motion to dismiss, from denying the motion as moot to considering the merits of the motion in light of the amended complaint.'" *Haag v. MVP Health*

Care, 866 F. Supp. 2d 137, 140 (N.D.N.Y. 2012) (quoting *Roller Bearing Co. of Am., Inc. v. Am. Software, Inc.*, 570 F. Supp. 2d 376, 384 (D. Conn. 2008)); *see also Pettaway v. Nat'l Recovery Sols., LLC*, 955 F.3d 299, 303-04 (2d Cir. 2020) (adopting the rule that "when a plaintiff properly amends her complaint after a defendant has filed a motion to dismiss that is still pending, the district court has the option of either denying the pending motion as moot or evaluating the motion in light of the facts alleged in the amended complaint," explaining that "[t]his is a sound approach that promotes judicial economy by obviating the need for multiple rounds of briefing addressing complaints that are legally insufficient").

Since Defendants have had an opportunity to respond to the proposed amendments, and argue that the amendments are futile, the Court considers the merits of the motions to dismiss in light of the proposed First Amended Complaint. If the claims in the proposed First Amended Complaint cannot survive the motions to dismiss, then Plaintiffs' motion to amend will be denied as futile. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002) ("An amendment to a pleading will be futile if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6).").

III. MATERIALS OUTSIDE THE COMPLAINT

Because Defendants have submitted exhibits in support of their motions to dismiss, (*see generally* Dkt. Nos. 28, 54, 78, 91), before setting forth the facts, the Court

must determine which exhibits, if any, it may consider in deciding their motions. "Generally, consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the complaint itself." *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). However, considering "materials outside the complaint is not entirely foreclosed on a 12(b)(6) motion." *Id.* A complaint "is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)). "Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint." *Id.* (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (internal quotation marks omitted)). Even where a document is deemed "'integral' to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *Id.* (quoting *DiFolco*, 622 F.3d at 111). "It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document." *Id.* (quoting *Faulkner*, 463 F.3d at 134). "This principle is driven by a concern that a plaintiff may lack notice that the material will be considered to resolve factual matters." *Id.* Thus, "if material is not integral to or otherwise incorporated in the complaint, it may not be considered unless the motion to dismiss is converted to a motion for summary judgment and all parties are 'given a reasonable opportunity to present all the material that is pertinent to the motion.'" *Id.* (quoting Fed. R. Civ. P. 12(d)).

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State Defendants' Exhibits 1, 2, and 3 contain the legislative history of New York Public Health Law § 2164. (Dkt. Nos. 28-3 to 28-5). State Defendants' Exhibits 4 and 6 are the Emergency Regulations dated August 16, 2019 and Final Regulations, respectively. (Dkt. No. 28-6, - 8). The legislative history of a bill is, of course, proper ground for judicial notice. *See, e.g., Territory of Alaska v. Am. Can Co.*, 358 U.S. 224, 226, 79 S. Ct. 274, 3 L. Ed. 2d 257, 17 Alaska 779 (1959) (taking judicial notice of the legislative history of bill at issue).

State Defendants' Exhibit 5 is the Center for Disease Control and Prevention's ("CDC") "Best Practices Guidance of the Advisory Committee on Immunization Practices" ("ACIP"). (Dkt. No. 28-7). The proposed First Amended Complaint relies on the contents of the ACIP guidance. (*See, e.g.*, Dkt. No. 99-2, ¶ 11 ("[T]the ACIP guidance is not comprehensive and was never intended to serve as a basis for granting or denying medical exemption. The CDC itself has clearly stated that the ACIP guidance is not meant to replace the clinical judgment of a treating physician."); Dkt. No. 99-2, ¶ 109 ("ACIP's 'catch-up guidance' requires John to receive twenty-four doses of vaccines for ten separate diseases within twelve months.")). The Court therefore considers this document.

State Defendants' Exhibit 7 is the 2013 Infectious Diseases Society of America ("IDSA") "Clinical Practice Guideline for Vaccination of the Immunocompromised Host." (Dkt. No. 28-9). State Defendants' Exhibits 8 and 9 are vaccine recommendations by the American Academy

of Pediatrics ("AAP") and the American Academy of Family Physicians ("AAFP"), respectively. (Dkt. Nos. 28-10, -11). The State Defendants cite these documents as "[e]xamples of other nationally-recognized evidence-based standards of care." (Dkt. No. 28-1, at 9 n.1). As these documents are not referenced in the proposed First Amended Complaint and the State Defendants have cited no legal authority for the Court's reliance on them at this stage, the Court declines to consider Exhibits 7, 8, or 9.

In addition to documents already discussed, the Albany, Ithaca, South Huntington, and Three Village Defendants attach administrative decisions by the Commissioner of Education. (Dkt. Nos. 54-4 to -11). The Albany Defendants appear to rely on these administrative decisions in support of their argument that Plaintiffs must exhaust their administrative remedies by seeking review by the Commissioner before proceeding in federal court. (*See* Dkt. No. 54-14, at 20 (citing administrative decisions as examples of the Commissioner's consideration of medical exemption requests)). One of the Commissioner's decisions—the decision dismissing John Doe's appeal—is described in several paragraphs, and quoted, in the proposed First Amended Complaint. (Dkt. No. 99-2, ¶¶ 117-21; Dkt. No. 54-4).[4] The Court may therefore consider that decision as incorporated into the complaint. Alternatively, the Court may take judicial notice of that decision, as well as the other administrative decisions, "though [the] factual findings may not be taken as true

4. Plaintiffs' counsel acknowledged at oral argument that Dkt. 54-4 is the Commissioner's decision concerning John Doe.

for purposes of the motion to dismiss." *Zynger v. Dep't of Homeland Sec.*, 615 F. Supp. 2d 50, 61 (E.D.N.Y. 2009), *aff'd*, 370 F. App'x 253 (2d Cir. 2010); *see Colon v. Holdridge*, No. 9:13-cv-1546, 2015 U.S. Dist. LEXIS 48528, at *10, 2015 WL 1730240, at *4 (N.D.N.Y. Apr. 14, 2015) ("[T]he court may consider matters of which judicial notice may be taken, such as public filings and administrative decisions") (citing *Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003)).

The Albany Defendants' last exhibit, Exhibit L, is a copy of "the procedures issued by the New York State Department of Health for the review of requests for medical exemptions which can be found at: https://www.health.ny.gov/professionals/doctors/conduct/docs/medical_exemption_review_procedures_for_schools.pdf." (Dkt. No. 54-1, ¶ 15; Dkt. No. 54-13). Exhibit L is dated October 2019. The link to the website leads to procedures dated October 2020. While the documents appear identical, because no party has addressed whether there are differences or which, of the two, the Court should consider, the Court does not consider this document at this stage in the litigation.

The Coxsackie-Athens, Penfield, and Lansing Defendants have submitted an affidavit by Daniel Driffill, Assistant Superintendent for Business of Penfield Central School District, in support of their motion to dismiss. (Dkt. Nos. 78-2 to -3). There is no assertion that the affidavit is integral to the Complaint or proposed First Amended Complaint and the Court declines to treat these Defendants' motion as one for summary judgment.

Accordingly, the Court does not consider the affidavit in determining these Defendants' motion to dismiss. *See Goel v. Bunge, Ltd.*, 820 F.3d 554, 560 (2d Cir. 2016) (observing that if a district court wishes "to take account" of "materials outside the pleadings" that are not integral to the complaint "at the motion-to-dismiss stage" it must treat the motion as one for summary judgment and concluding that the district court erred in relying on, among other things, the plaintiff's affidavit in deciding the defendants' motions to dismiss (citing Fed. R. Civ. P. 12(d))).

Defendant Migliorino filed a declaration in support of his motion to dismiss. (Dkt. No. 91-2). For the same reasons it declined to consider the Driffill affidavit, the Court declines to consider this declaration.

Throughout the proposed First Amended Complaint, Plaintiffs refer to the State-required medical exemption form. (Dkt. No. 99-2, ¶ 267 (comparing the State medical exemption form to the New York City DOH form); *see also id.* ¶¶ 15, 102, 103, 105, 119, 144, 150, 285, 288-89). The Medical Exemption Form is available on New York's DOH website: https://www.health.ny.gov/forms/doh-5077.pdf (last visited Feb. 17, 2021). As it is a governmental form, referred to in the regulations and integral to the pleading in this case, the Court takes judicial notice of it. *See Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) (finding it "clearly proper" to take judicial notice of documents retrieved from official government websites); *see also, e.g., Malin v. XL Cap. Ltd.*, 499 F. Supp. 2d 117, 131-32 (D. Conn. 2007)

("XL's SEC documents, specifically SEC Forms . . . are referenced in the [complaint] and therefore are properly incorporated by reference."), *aff'd*, 312 F. App'x 400 (2d Cir. 2009).

Accordingly, the Court has drawn the facts that follow from the proposed First Amended Complaint, the exhibits incorporated by reference in the proposed First Amended Complaint, and documents of which it is proper to take judicial notice under Fed. R. Evid. 201. (Dkt. No. 25). The Court assumes the truth of, and draws reasonable inferences from, the well-pleaded factual allegations. *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011).

IV. FACTS

A. New York's Mandatory Vaccination Law

New York Public Health Law § 2164 (the "mandatory vaccination law" or "mandatory vaccination requirement") requires children aged two months to eighteen years to be immunized from certain diseases before they can attend "any public, private or parochial . . . kindergarten, elementary, intermediate or secondary school." N.Y. Pub. Health Law § 2164(1)(a). The mandatory vaccination law requires children to be immunized against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease. N.Y. Pub. Health Law § 2164(7). A child may not attend school in excess of fourteen

days without documentation showing that the child was immunized or is in the process of complying with the immunization series. N.Y. Pub. Health Law § 2164(7); 10 N.Y.C.R.R. § 66-1.3(a), (b).

The mandatory vaccination law initially contained two exemptions: a medical exemption requiring a physician's certification that the physician had determined that the vaccination may be detrimental to the child's health, N.Y. Pub. Health Law § 2164(8); and a non-medical exemption that required a statement by the parent or guardian indicating that they objected to vaccination on religious grounds, N.Y. Pub. Health Law § 2164(9), *repealed by* L.2019, c. 35, § 1, eff. June 13, 2019. In 2019, the New York Legislature repealed the religious exemption after finding that "[o]utbreaks in New York have been the primary driver" of the United States' "worst outbreak of measles since 1994," with 810 of the 880 cases confirmed nationwide in 2019. (Dkt. No. 28-3, at 6 (Sponsor Memo, S2994A)). The Legislature further found that:

> According to the Centers for Disease Control, sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles. According to State data from 2013-2014, there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity.

> This bill would repeal exemptions currently found in the law for children whose parents have non-medical objections to immunizations.

2019 New York Assembly Bill No. 2371, New York Two Hundred Forty-Second Legislative Session (May 22, 2019).

On August 16, 2019, following the repeal of the religious exemption, the New York Commissioner of Health issued "emergency regulations," amending the regulations governing the mandatory vaccination law "to conform to recent amendments to Section[] 2164" and to "make the regulations consistent with national immunization recommendations and guidelines." (Dkt. No. 28-6, at 1 (Summary of Express Terms of Emergency Regulations Aug. 16, 2019 (the "Summary"))).[5] The Summary noted that when California removed non-medical exemptions to school immunization requirements in 2015 "without taking steps to strengthen the rules governing medical exemptions," the use of medical exemptions to school immunization requirements more than tripled. (Dkt. No. 28-6, at 16). The Summary further noted that "[b]y

5. The mandatory vaccination law authorizes the Commissioner of Health to "adopt and amend rules and regulations to effectuate the provisions and purposes of [§ 2164]." N.Y. Pub. Health Law § 2164(10). The Commissioner is also required, under the Public Health Law, to "establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health," and is authorized to "promulgate such regulations" governing vaccinations. N.Y. Pub. Health Law § 206(1)(l).

providing clear, evidence-based guidance to physicians, th[e] emergency regulation will help prevent medical exemptions being issued for non-medical reasons." (*Id.* at 16-17).

Specifically, the Commissioner added a new subdivision defining "may be detrimental to the child's health," as used in § 2164 of the school vaccination law, to mean "that a physician has determined that a child has a medical contraindication[6] or precaution[7] to a specific immunization consistent with ACIP [the CDC Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care." 10 N.Y.C.R.R. § 66-1.1(l). The amendments also required "the use of exemption forms approved by the New York State Department of Health" and no longer allowed only "a written statement from a physician." N.Y.C.R.R. § 66-1.3(c). Subdivision (c) of 10 N.Y.C.R.R. § 66-1.3, was otherwise unchanged, however, and continued: (i) to require that the "physician certifying that immunization may be detrimental to the child's health, contain[] sufficient

6. "Contraindications (conditions in a recipient that increases the risk for a serious adverse reaction) to vaccination are conditions under which vaccines should not be administered." (Dkt. No. 28-7 at 49 (ACIP General Best Practices Guidelines for Immunization)).

7. "A precaution is a condition in a recipient that might increase the risk for a serious adverse reaction, might cause diagnostic confusion, or might compromise the ability of the vaccine to produce immunity. . . The presence of a moderate or severe acute illness with or without a fever is a precaution to administration of all vaccines." (Dkt. No. 28-7 at 50 (ACIP General Best Practices Guidelines for Immunization)).

information to identify a medical contraindication to a specific immunization and specify the length of time the immunization is medically contraindicated," (ii) to require that the medical exemption "be reissued annually," and (iii) to provide that "[t]he principal or person in charge of the school may require additional information supporting the exemption." *Compare* 10 N.Y.C.R.R. § 66-1.3(c), *with* 2014 N.Y. Reg. Text 336024 (NS) (Notices of Adoption 10 N.Y.C.R.R. § 66-1.3).

During a public comment period, (Dkt. No. 28-4, at 8), the NYS American Academy of Pediatrics, the NYS Academy of Family Physicians, the NYS Association of County Health Officials, the American Nurses' Association, the Medical Society of the State of New York, and the NYS Society of Dermatology and Dermatologic Surgery "expressed support of the regulations." (Dkt. No. 28-5, at 31). The regulations were adopted permanently as of December 31, 2019. (*Id.* at 31-32).

B. Plaintiffs

1. John Doe — Coxsackie-Athens School District

a. Medical History

John Doe, age fifteen, has "multiple auto-immune and progressive neurological disease diagnoses," including

> mitochondrial disorder, hypoglycemia, genetic mutations, environmentally induced porphyria,

> metabolic and hormonal imbalances, eczema, food and environmental allergies, candida infection, amino acid disorder, heavy metal toxicity, and several autoimmune disorders—including Pediatric Autoimmune Neurological Disorder Associated with Streptococcus ("PANDAS"), Irritable Bowel Syndrome ("IBS"), thyroid disease, and Gluten-Sensitive Enteropathy.

(Dkt. No. 99-2, ¶¶ 50, 92). Doe's "conditions are chronic, incurable and at times completely debilitating." (*Id.* ¶ 93). Doe's "disabilities significantly impair multiple major life functions, including but [not] limited to the functions of his immune system." (*Id.*). Since the age of four, Doe has seen "a specialist in Massachusetts known to help children with PANDAS." (*Id.* ¶ 94). "Through years of hard work and vigilant routines by his parents and providers, [Doe] has begun to stabilize and regain some measure of health and normalcy." (*Id.*). "Avoiding triggers, including certain foods, chemicals, and immunizations, has been critical to prevent regression of one or more of [Doe's] auto-immune diseases and in managing his disorders." (*Id.* ¶ 95). "Following the advice of multiple treating physicians, [Doe] has not received any immunizations." (*Id.* ¶ 96).

b. First Medical Exemption Request

On August 23, 2019, Doe's parents submitted a "medical exemption from [Doe's] pediatrician, Dr. Peter Forman, a licensed New York physician who has been [Doe's] primary care physician for more than ten years."

(*Id.* ¶ 97). In support of the medical exemption, Dr. Forman included "a supplemental letter from Dr. Papanicolau," Doe's "treating physician at the Massachusetts clinic he has attended for eleven years." (*Id.*). Drs. Forman and Papanicolau have observed Doe "regress into debilitating flare ups of his underling medical conditions when faced with immune triggers" and "concurred it was unsafe for [Doe] to receive any immunization given his multiple chronic and serious conditions and the risk that immunization could trigger a regression." (*Id.* ¶ 98).

On September 16, 2019, Defendant Randall Squier, Superintendent of the Coxsackie-Athens School District, denied Doe's request for a medical exemption after consulting Dr. Stephen G. Hassett, an emergency medicine physician. (*Id.* ¶ 99). Dr. Hassett is a "paid consultant to the Coxackie-Athens Central School District" and acts under Superintendent Squier's supervision. (*Id.*). Dr. Hassett recommended denying Doe's request for a medical exemption "based on his opinion that" the letters from Drs. Forman and Papanicolau "did not specify how the exemption request qualified under the ACIP contraindications or precautions." (*Id.* ¶ 100). Doe's mother requested that Dr. Hassett "speak to [Doe's] pediatrician or review supplementary materials to clarify why the two treating physicians believed that he needed a medical exemption." (*Id.* ¶ 102). Dr. Hassett refused. (*Id.*). Superintendent Squier "was made aware of these failures." (*Id.*). Following the denial, Dr. Forman called Dr. Hassett, who "indicated that he had no discretion to hear any supplemental information or support for the exemption and was obligated to follow the strict guidelines set forth

by ACIP based only on the information he received on the form." (*Id.* ¶ 103).

c. Second Medical Exemption Request

On October 5, 2019, the Doe family "submitted a second medical exemption letter in which Dr. Forman detailed for each vaccine how [Doe's] conditions qualified under the ACIP guidance as a precaution or contraindication." (*Id.* ¶ 104). "Within twenty-four hours of receiving the second certification form, Defendant Squier again denied the application, again on the recommendation of Dr. Hassett, who said the second certification was 'not supported,'" without specifying why. (*Id.* ¶ 105).

Doe's mother called Dr. Hassett, who "conceded that the exemption letter submitted the second time followed the ACIP guidelines verbatim" but told Ms. Doe that "he would not 'debate' with [her] or provide her with any explanation about his denial and ended the call." (*Id.* ¶¶ 106-07). "Defendant Squier was made aware of these actions." (*Id.*). To attend school without a medical exemption, Doe would have "to receive twenty-four doses of vaccines for ten separate diseases within twelve months," nineteen of which he "would have to receive . . . within a four-week timeline. (*Id.* ¶ 109-10). Doe has been "excluded from participation in classes, in person or online since October 7, 2019." (*Id.* ¶ 113).

d. Appeal to the Commissioner of Education

On November 5, 2019, the Doe family appealed the denial to the Commissioner of Education. (*Id.* ¶ 116). "Two members of the New York State Legislature sent correspondence to the Commissioner of education supporting Doe's appeal on or about December 20, 2019." (*Id.*). "The letters stated that the New York State Legislature did not intend for school districts to have unilateral power to overrule treating physicians." (*Id.*).

On July 30, 2020, the Commissioner issued a decision finding that Coxsackie-Athens' determination was not "arbitrary or capricious" and dismissing the appeal. (Dkt. No. 54-4, at 10; Dkt. No. 99-2, ¶ 117). The Commissioner noted that the Does' first request for a medical exemption was supported by Doe's physician, who had opined that an exemption "to all eight required vaccinations" "was appropriate" because "there [was] an increased risk of adverse events" given Doe's medical history, which included "multiple food allergies, Gluten Enteropathy, abnormal thyroid function, mitochondrial dysfunction and induced porphyria due to lead and mercury exposure," "behavioral issues," and "PANDA[S]." (Dkt. No. 54-4, at 2). The Commissioner noted that the Does' second medical exemption request also sought an exemption "to all eight required immunizations" and that Doe's physician "provided an identical justification for the student's exemption from each of the eight required vaccinations." The Commissioner observed that Doe's physician wrote that "[t]he immunization may be detrimental to [Doe's]

health," and noted Doe's physician's opinion that Doe met the definition of precaution because his medical conditions—those listed in the first medical exemption request—were "moderate or severe illnesses [that] may be episodic with acute onset" and "[t]his precaution avoids causing diagnostic confusion." (*Id.* at 2-3).

The Commissioner found that the Does failed to prove that Coxsackie-Athens' "determination was arbitrary or capricious," explaining that the evidence submitted "consists primarily of printouts of DOH and Centers for Disease Control (CDC) websites about certain immunizations and diseases, including PANDAS," which constituted "general information concerning vaccines" that "does not address the student's unique circumstances."[8] (*Id.* at 5). The Commissioner noted that the Does offered "no evidence such as an affidavit from the student's physician, containing sufficient information to identify that the student has a precaution or contraindication to any of the eight required vaccinations." (*Id.*). The Commissioner

8. Plaintiffs allege that this is improper, asserting that the "Commissioner acknowledged that the second medical exemption submitted by the licensed physician had many pages attached which show CDC guidance on immunization in light of John's conditions, but deemed this too general even though John has these very conditions." (Dkt. No. 99-2, ¶ 120). Plaintiffs also claim that the Commissioner made this determination "without any hearing or testimony from medical professionals about what did and did not fall within those boundaries." (*Id.*). They further assert that the Commissioner only determined whether Doe's "conditions were easily identifiable as contraindications specifically enumerated in the ACIP guidelines which they interpreted without" guidance from medical professionals. (*Id.*).

further found that even if Doe's episodic "moderate or severe illness" constituted a precaution, under the ACIP Guidelines, "the precaution to vaccination only exists until such acute episode resolves." (*Id.*). The Commissioner also rejected the Does' argument that Coxsackie-Athens acted arbitrarily in denying the request "without further inquiry," explaining that although the school was not required to obtain additional information, Superintendent Squier had, "in fact, sought and obtained additional information from the school physician." (*Id.* at 6).

2. Jane Boe — Three Village Central School District

a. Medical History

Jane Boe, age fifteen, has "multiple diagnosed autoimmune syndromes . . . including autoimmune encephalitis, which causes progressive neurological injury and attacks the brain." (Dkt. No. 99-2, ¶ 51). Boe has also been diagnosed with "Postural Orthostatic Tachycardia Syndrome ("POTS"), dysautonomia, and chronic/severe Lyme disease and bartonella." (*Id.* ¶ 127). Boe's "disabilities significantly impair multiple major life functions, including but not limited to the functions of her immune system." (*Id.* ¶ 125). Boe "and her siblings have all had severe adverse reactions to immunization." (*Id.* ¶ 51). Boe's two "brothers developed autoimmune encephalitis and acute neurological neuropsychiatric conditions that were significantly exacerbated by immunization." (*Id.* ¶ 129). Boe's "middle brother became so ill that he was forced to take a medical leave from middle school to

receive medical treatment and homebound instruction" and required "several years of continuous treatment . . . to regain his health." (*Id.* ¶ 130). In 2016, Boe's oldest brother, then age eighteen, received "the Meningococcal vaccine against medical advice prior to attending his freshman year in college." (*Id.* ¶ 131). "This, coupled with a flu vaccine and other immune assaults, are believed to have triggered an acute cascade of neurological and other health symptoms that ended with [Boe's] brother committing suicide in June 2018." (*Id.*). "Genetic testing shows vulnerabilities that may explain why all three children have developed chronic health conditions after immunization." (Dkt. No. ¶ 132).

Boe's "health began to deteriorate significantly after her last set of immunizations at age twelve." (*Id.* ¶ 128). In July 2017, Boe "received the TDaP immunization to attend sleepaway camp" and "[a]fter this immunization, [Boe's] health began to deteriorate again." (*Id.* ¶ 133). To date, Boe "has received all the mandatory immunizations required of her except for the meningococcal vaccine and booster" as Boe's "physicians determined that the risks of getting this vaccine far outweighed any potential benefit." (*Id.* ¶¶ 134, 137).

b. First Medical Exemption Request

In August 2019, Boe's "family submitted a medical exemption from her treating physician Dr. Laura Bennett." (Dkt. No. 99-2, ¶ 138). Dr. Howard Sussman, Three Village's consulting doctor, contacted Dr. Bennett "to discuss the impending denial of the medical exemption

as written" and stated that he "'wouldn't give this child the vaccine either,' but the medical exemption wasn't written sufficiently." (*Id.* ¶ 143). Dr. Sussman "recommended [that Dr. Bennett] write a new one with 'more specific' language." (*Id.* ¶¶ 139, 143). Following this conversation, on Dr. Sussman's advice, Three Village, through its "agents defendant [Superintendent] Cheryl Pedisch and defendant [Principal] Corinne Keane, denied [Boe's] medical exemption." (*Id.*).

According to Plaintiffs, Dr. Sussman "reviews only . . . whether a medical exemption is easily understood by him as falling under the ACIP contraindications" and "does not consider any other 'nationally recognized evidence-based' reasons for a medical exemption and has made this clear to all the defendants." (*Id.* ¶ 142).

c. Second Medical Exemption Request

On September 17, 2019, Boe's family "submitted a second more detailed medical exemption form signed by Dr. Bennett." (*Id.* ¶ 144). Dr. Bennett supplemented the exemption form with "a letter detailing that the reasons for exemption were in line with CDC criteria" and "a letter from Dr. Nancy O'Hara, a licensed physician and specialist [Boe] sees in Connecticut." (*Id.*). "Both physicians noted that [Boe] was undergoing active treatment and agreed that further immunization could put [Boe] at risk of serious harm." (*Id.*). "The school sent the second exemption packet directly to the [DOH] for review." (*Id.* ¶ 145).

In November 2019, Dr. Rausch-Phung, the DOH Director of Immunizations, "recommended the school

deny the exemption," writing that it was in Boe's "'best interest' to be immunized with meningococcal vaccine despite the medical concerns and history." (*Id.* ¶¶ 146-47). Regarding the death of Boe's sibling, Dr. Rausch-Phung stated that "even if it was from an adverse reaction to the vaccine, [it] was not a sufficient reason to grant an exemption." (*Id.* ¶ 147). Following this recommendation from Dr. Rausch-Phung, Three Village "denied the second exemption and indicated that Jane needed to leave school if she was not immunized" by December 20, 2019. (*Id.*).

d. Third Medical Exemption Request

In December 2019, Boe's "family submitted a third medical exemption from a third treating physician, Dr. Caroline Hartridge . . . a physician licensed to practice medicine in New York." (*Id.* ¶ 148). "Dr. Hartridge's exemption letter stated that [Boe] suffered from acute illness, pointing out that acute illness is a listed precaution under the ACIP guidelines concerning meningococcal vaccine and recommending that Jane avoid immunization until her illness was no longer acute." (*Id.*). Three Village sent Dr. Hartridge's letter to the DOH for review. (*Id.* ¶ 149).

"On March 2, 2020, Dr. Rausch-Phung sent a letter allowing a 'one month' exemption upon which she asked that the family submit an additional medical exemption for which she would review." (*Id.* ¶ 150). "The school could not specify whether the month ran from the date of submission of the third exemption letter (December 2019) or the date they received a response from Dr. Rausch-Phung (March

2020)." (*Id.*). Boe's family hired "an attorney to attempt to negotiate with the school for clarity." (*Id.* ¶ 151). Three Village "refused to consider allowing their principal or superintendent to approve the follow up requests and was unable to provide clarity on whether the exemption in place had to be renewed immediately or in April, and how long it might take to get an answer on the follow up request." (*Id.*).

Dr. Sussman "opined" that the one-month exemption "ran from December and so the one month expired two months before the school received the letter back from the DOH or notified the family." (*Id.* ¶ 152). As a result, the school "expelled [Boe] in March 2020." (*Id.*). The school "demanded that Jane Boe be immunized" and did not ask Boe's family "to submit the follow up exemption letter first even though the DOH determination had said her exemption did qualify, though it was to be resubmitted in a month." (*Id.*). "Having already lost one child after giving him the meningococcal vaccine against medical advice, the family was unwilling to risk [Boe's] health by going against their three treating doctors' advice." (*Id.* ¶ 153). Boe has been "unable to attend school since January 2020" and her family has "been forced to homeschool [Boe] and have had to spend enormous amounts of money on online programs to try to provide their daughter with an education." (*Id.* ¶ 154).

Appendix B

3. Jane and John Coe — Lansing School District

a. Medical History

Jane Coe, age twelve, and John Coe, age ten, have "a family history of severe reaction to immunization, including two deaths, along with subsequent genetic testing that reveals genetic vulnerability to injury," and have "never been vaccinated." (Dkt. No. 99-2, ¶ 52). Jane and John Coe's uncle (their father's brother) "died from an adverse reaction to his two-month vaccines." (*Id.* ¶ 158). "The cause of death was documented on the death certificate as having been from immunization and, after a hearing, his estate received compensation from the National Vaccine Injury Compensation Program." (*Id.*). Jane and John Coe's father, aunt, and grandmother have all had "severe reaction[s]" to immunization, and their father's cousin "died after administration of her childhood vaccines." (*Id.* ¶ 160). Jane and John Coe's father "and his surviving siblings had medical exemptions from immunization throughout the rest of their childhoods." (*Id.* ¶ 161). "Upon the advice of medical professionals and considering the family history, John and Jane [Coe] have never been vaccinated and have had exemptions since they were born." (*Id.* ¶ 162). "Both children have multiple food, environmental and drug allergies, and precarious health." (*Id.* ¶ 163). "The family sees a genetic counselor who has identified several genetic mutations and markers that could explain the significant family pattern of adverse reactions and the children's predisposition towards health issues." (*Id.* ¶ 164). "[T]here is a family history of

numerous autoimmune and other conditions consistent with the genetic profile of the children." (*Id.* ¶ 165). Jane and John Coe's "disabilities significantly impair multiple major life functions, including . . . functions of their immune systems." (*Id.* ¶ 166).

b. Medical Exemption Request

In August 2019, Jane and John Coe's "parents submitted applications for medical exemptions explaining the family history and the children's medical history signed by . . . Dr. Christopher Scianna, who is licensed to practice in New York." (*Id.* ¶ 167). "Dr. Scianna concluded that it was unsafe for either child to be vaccinated due to their current states of vulnerable health and their genetic analysis and family history of significant adverse vaccine reactions, including two deaths." (*Id.* ¶ 168). A letter from the Coes' genetic counselor was attached to the exemption application. (*Id.* ¶ 169).

Jane and John Coe "began school as usual in fall 2019." (*Id.* ¶ 170). On January 21, 2020, the Coes "received correspondence from Chris Pettograsso, Superintendent of the Lansing School District, stating that 'the building principals' (Christine Rebera and Lorri Whiteman) had rejected the medical exemptions for both children." (*Id.* ¶ 171). "The family was given one week to get eleven different vaccines for each child to return to school." (*Id.*). Superintendent Pettograsso "noted that the school had received a recommendation from the NYDOH and by unspecified members" of a local "medical team" but "that the building principals [Rebera and Whiteman]

each ultimately made the decision to reject the medical exemptions 'independently.'" (*Id.* ¶ 172). Attached to Superintendent Pettograsso's correspondence was a letter dated December 5, 2019 by Dr. Rausch-Phung, who wrote that "the adverse reactions of family members (including death) are not contraindications for immunization under ACIP and concluded that she didn't have enough information or knowledge to understand if the genetic vulnerabilities were a ground for contraindication." (*Id.* ¶¶ 174-75). She wrote further that:

> There is not sufficient information included regarding the genetic testing performed to conclude that vaccines required for school attendance would be contraindicated in a child with [the reported] variations . . . . The specific source of the genetic tests, the results of these tests, and review and recommendations of this child's genetic findings by a medical genetics specialist would be needed to determine if these results preclude this student from being vaccinated.

(*Id.* ¶ 175). Neither the school nor Dr. Rausch-Phung contacted the Coe family or Dr. Scianna or requested "to consult with the treating physician or geneticist." (*Id.* ¶ 176).

On January 27, 2020, the Coe family submitted a letter from "an attorney and the genetic counselor explaining that the only pediatric genetic specialist in the region had a waiting list for new patients of more than one year." (*Id.*

¶ 177). The attorney: (1) requested a meeting with the school to discuss "a few months [sic] extension to try to expedite an appointment" with the pediatric geneticist, and (2) questioned the legality of the denial and the process leading up to it, asserting that there were "constitutional issues here involving the fundamental rights of the family to refuse medical treatment especially where the treating physicians and providers concur that it could be dangerous to the children's health." (*Id.* ¶ 178). In a January 29, 2020 email Lansing's attorney responded, denying the requests for a meeting or extension. (*Id.* ¶ 179).

The "medical exemption was permanently denied in January 2020, and there is no appeal pending." (*Id.* ¶ 180). Despite this, on May 4, 2020, the DOH wrote Dr. Scianna "seeking all of the children's medical records and noting that they were entitled to the full medical records of the children whether or not the family consented." (*Id.*). The letter from the DOH "vaguely references investigations." (*Id.* ¶ 181). Jane and John Coe "have been excluded from school since January 29, 2020," and their parents have tried to homeschool them since then, while working; the family has suffered "significant economic and emotional damage." (*Id.* ¶ 182).

4. John Foe — Albany City School District

a. Medical History

John Foe is "an eleven-year-old boy with special needs who suffers from Hirschsprung's Disease, a rare and serious genetic condition" "which prevents connections

between the brain and gastrointestinal system from forming." (Dkt. No. 99-2, ¶¶ 53, 184). "As an infant, [Foe] had to undergo major gastrointestinal surgery during which surgeons removed a section of his intestine and then reattached the system back together. He must use a prosthetic colon system that needs to be inserted every night to keep him socially continent." (*Id.* ¶ 185). As "[m]ore than 70% of the immune system is in the gastrointestinal system," the "surgery profoundly affected [Foe's] immune system." (*Id.* ¶ 186). Foe suffers from "severe allergies," and is "so sensitive to chemicals and metals that he cannot wear sunscreen or even drink tap water." (*Id.* ¶ 188). If the water Foe drinks is "not filtered correctly, he has cramping diarrhea, and bleeding rash around his rectum." (*Id.*). Dairy, fruit, "and most antibiotics" trigger similar reactions. (*Id.*). When Foe requires antibiotics, he must be hospitalized and medicated "to manage his adverse symptoms of vomiting, diarrhea and dehydration." (*Id.*).

At age three, Foe "had a severe reaction to immunization." (*Id.* ¶ 189). On the advice of his pediatrician, Dr. Kari Bovenzi, Foe has not received any immunizations since age three. (*Id.* ¶ 190). Dr. Bovenzi determined that Foe "was at substantial risk of having even more severe reactions to subsequent immunization" and advised against immunization based on Foe's "serious reaction to immunization," his medical history, and "his family medical history"—Foe's mother "suffered paralysis after receiving the DTaP shot." (*Id.*).

b. First Medical Exemption Request

On August 23, 2019, Foe's family "submitted a properly certified medical exemption" from Dr. Bovenzi, who is licensed to practice medicine in New York, "detailing why [Foe] should be exempt from further immunization requirements." (*Id.* ¶ 191). Foe's "parents spoke to the school nurses and were told that all their paperwork was in order." (*Id.*). However, on September 23, 2019, Foe's mother received a call from the Albany school transportation department "letting her know that since [Foe's] medical exemption was denied, he would not be able to take the bus the next day." (*Id.* ¶ 192). After speaking to Principal Michael Paolino, several school nurses, and Assistant Superintendent Lori McKenna, Foe's family learned from Assistant Superintendent McKenna that "the medical exemption was being denied on the advice of the district physician, Dr. Laura Staff," and that Foe was no longer allowed to attend school. (*Id.* ¶ 192-93). Because Foe's "family would not immunize their son against medical advice," the "school district expelled [Foe] the same day," and he "has been unable to attend public school since September 23, 2019." (*Id.* ¶ 194).

Prior to Foe's "expulsion from school," he had "qualified for and received critical services under a 504 plan at school" based on his special needs. (*Id.* ¶ 196). "[T]he district refused to provide [Foe] with these services at home." (*Id.* ¶ 197). Foe "developed serious depression and was angry, confused and humiliated by his exclusion" from school. (*Id.* ¶ 198).

c. Second Medical Exemption Request

Following the denial of his first request for a medical exemption, Foe underwent "extensive genetic testing," which revealed that he "carries the MTHFR gene mutation from his maternal side and [he] has several other genetic vulnerabilities that reveal why immunization is particularly dangerous for him." (*Id.* ¶ 199). Dr. Bovenzi "prepared a forty-page medical exemption, providing extensive detail about why [Foe] was at risk of harm from further immunization." (*Id.*). The Foe family submitted "[t]he exemption . . . shortly before Thanksgiving 2019." (*Id.*).

On January 3, 2020, the Foe family received a letter from the school indicating that the school had sent Foe's exemption letter "'to the CDC' for review" and that it had been "determined" that the request "did not meet the criteria laid out in the ACIP guidelines and was therefore again denied." (*Id.* ¶ 200). The letter contained no information "about who reviewed" the exemption letter "or what their specific recommendations were based on." (*Id.*). Foe "has been attending . . . private school since March 2020" but has not been "receiving the services that he would be able to receive in public school, and his family can ill afford to keep sending him there." (*Id.* ¶ 202-03).

5. Jane Goe — Penfield Central School District

a. Medical History

Jane Goe, age seventeen, suffers from "multiple severe diagnosed autoimmune conditions," (Dkt. No. 99-2, ¶ 54),

including type I diabetes, celiac disease, Hashimoto's thyroiditis, Alopecia Areata, and polycystic ovarian syndrome. (*Id.* ¶ 206). Goe's "disabilities significantly impair multiple major life functions, including but not limited to functions of her immune system." (*Id.* ¶ 208). Goe's "Type I Diabetes was triggered by the H1N1 vaccine in third grade." (*Id.* ¶ 209). Goe rapidly "devolve[d] after that event and developed four additional autoimmune diagnoses, losing half of her hair, suffering chronic additional health issues, and missing significant time in school when she was too sick to attend." (*Id.*). Goe has "a family history of serious autoimmune disease" and "genetic testing shows significant vulnerabilities including the rare HLA genotype, which places her at a high risk of developing Guillain-Barre syndrome (an acknowledged potential adverse reaction to the meningococcal vaccine)." (*Id.* ¶ 210). Goe is "sensitive to chemicals" and "has had serious adverse reactions to chlorine and many other environmental exposures." (*Id.*).

Dr. Pamela Grover, who is licensed to practice medicine in New York and "well-regarded for her expertise in autoimmune conditions," is Goe's treating physician and has helped Goe, since sixth grade, to "regain and maintain a reasonable level of health." (99-2 ¶ 211-12). Goe "avoids environmental triggers, must follow a restricted diet, and is undergoing multiple therapies." (*Id.* ¶ 212). Goe has not "received additional vaccines since her adverse reaction in third grade." (*Id.*).

b. First Medical Exemption Request

On "August 18, 2019, Dr. Grover submitted a duly certified medical exemption from immunization," noting that Goe "was suffering from a flare up of her acute autoimmune conditions and could not safely be immunized for at least one year or until her autoimmune conditions were under control." (*Id.* ¶ 213). The exemption request noted that Goe has "had all her immunizations except for the meningococcal vaccine and a fifth does of the tetanus, pertussis and diptheria containing vaccine." (*Id.* ¶ 214).

"On September 11, 2019, Assistant Superintendent Mark Sansouci emailed Goe's mother advising that the medical exemption . . . was being denied on the advice of the School District's [paid] consulting doctor, Dr. Robert J. Tuite," who is a pediatrician and under the supervision of Superintendent Thomas Putnam. (*Id.* ¶ 216). Assistant Superintendent Sansouci forwarded Dr. Tuite's email, which stated that Goe "would have had to have *suffered* Guillian-Barre Syndrome (which causes paralysis) within six weeks of getting a vaccine [in order to be eligible for an exemption,] and that 'it is up to the parents and/or physician to contact pediatric infectious disease/immunology or the DOH department of immunizations to get [a] specialist's input' for the exemption to be considered." (*Id.* ¶ 217). Dr. Tuite advised that if Goe "did not submit a letter from a specialist within fourteen days, she would be excluded from school." (*Id.*).

c. Second Medical Exemption Request

Goe's mother scheduled an appointment for her with Dr. Craig Orlowski, a physician licensed in New York, who has practiced "for nearly forty years," and "serves as an Associate Professor of Clinical Pediatrics at the University of Rochester Medical School, is Chief of Pediatric Endocrinology at the University of Rochester Golisano Children's Hospital . . . and has published widely on many of the autoimmune conditions that [Goe] suffers from." (*Id.* ¶ 218). "Dr. Orlowski agreed that it would be unsafe for [Goe] to receive immunizations at that time and wrote a letter supporting an exemption through April of 2020." (*Id.*).

On September 18, 2019, "Dr. Orlowski's exemption [request] was submitted." (*Id.* ¶ 219). Later that day, Superintendent Putnam forwarded "another denial from Dr. Tuite." (*Id.*). Dr. Tuite, a pediatrician specializing in sports medicine, wrote that although he admired Dr. Orlowski as a pediatric endocrinologist, he felt Dr. Orlowski was "out of his scope of practice/expertise within this area of immunization issues." (*Id.* ¶¶ 218-219). Dr. Tuite further wrote that he felt "strongly that this request does not meet the CDC contraindication or even a precaution from getting this specific vaccines" and that he would "recommend a referral" to a "pediatric infectious disease/immunology specialist such as Dr. Geoffrey Weinberg" or to immunologist Dr. Syed Mustafa, either of whom would "have a wealth of experience and expertise in this area of immunization appropriateness." (*Id.* ¶ 219). Dr. Tuite further stated that he would "honor and trust

their opinion and abide by their advice in these kind of complicated situations." (*Id.*). On September 19, 2019, Goe "was removed from school as the fourteen days from the original notice of denial had run." (*Id.* ¶ 221). "It was homecoming that day" and "[t]he exclusion was public." (*Id.*). Goe "was humiliated and felt that her privacy had been seriously violated." (*Id.*).

Goe's mother "showed Dr. Tuite's email to Dr. Orlowski, who was so outraged that he walked across the hall and presented it to his colleague Dr. Geoffrey Weinberg . . . one of the two doctors that Dr. Tuite suggested were the only specialists that he would consider fit to submit a medical exemption application." (*Id.* ¶ 222). On September 20, 2020, Dr. Weinberg submitted a letter to Dr. Tuite "affirming . . . Dr. Orlowski's medical exemption request and recommending that Dr. Tuite accept the medical exemption for [Goe] at least through the fall given that she was having a flare of symptoms and was at risk of exacerbating her condition." (*Id.* ¶ 223). Goe "was allowed to attend her senior year of high school through the fall, but Dr Tuite indicated that she would need to be immunized by January 28, 2020 or she would be removed from school." (*Id.* ¶ 224).

d. Third Medical Exemption Request

In January 2020, Goe's family "submitted a follow up medical exemption request, written by Dr. Grover, which documented how the request fit into the ACIP guidelines." (*Id.* ¶ 226). "The request was sent on to the [DOH] for further review" and Goe, who was "set to graduate on

July 30, 2020," had not heard back by the time this action was filed. (*Id.* ¶ 227-28).

6. John Joe — Ithaca City School District

a. Medical History

John Joe, age six, "suffered severe anaphylaxis to his hepatitis B vaccine as a baby." (Dkt. No. 99-2, ¶ 56). Joe "has special needs," including "severe autism, obsessive compulsive disorder, and a range of neurological and other health problems." (*Id.* ¶ 232). "Medical tests show mercury poisoning, lead poisoning and aluminum poisoning and an inability to process heavy metals." (*Id.*). Joe's mother "has worked extensively with medical professionals and with rigorous dietary and environmental protocols, which have greatly improved her son's quality of life and health over the years." (*Id.*). Joe's health, however, "is fragile, and setbacks are common." (*Id.*). Joe's "disabilities significantly impair multiple major life functions, including but not limited to functions of his immune system." (*Id.* ¶ 234).

In the fall of 2018, Joe's mother submitted a medical exemption to the school from Dr. Jessica Casey, Joe's treating pediatrician, who is licensed to practice medicine in New York. (*Id.* ¶¶ 235-36). Joe "completed that school year without issue." (*Id.* ¶ 236). Joe's mother submitted a renewed medical exemption from Dr. Casey in the summer of 2019. (*Id.* ¶ 237). Joe "attended his summer programming for children with special needs and began his first-grade year in elementary school in the fall." (*Id.*).

b. Medical Exemption Request

In November 2019, Superintendent Luvelle Brown sent a letter to Joe's mother "letting her know that her medical exemption request was partially denied, and she had to get her son immunized within a week or her son would be expelled from school." (*Id.* ¶ 238). Joe's mother met with Superintendent Brown "to beg him to reconsider, explaining that her son had always had a medical exemption to all further immunization and that multiple physicians had indicated that further immunization would be unsafe for him." (*Id.* ¶ 239). Superintendent Brown responded "that it was out of his hands, and that as far as he understood, [Joe] would need to have an anaphylactic reaction to each [required] vaccine in order to be exempt" from those vaccines. (*Id.* ¶ 240).

Joe "was removed from school in November of 2019" and his "mother has had to quit her job, go on public assistance, and now attempts to attend to all her son's needs on her own." (*Id.* ¶ 241). Joe "had an Individualized Education Plan, which entitled him to extensive needed services, such as speech therapy five days a week, occupational therapy three times a week, music therapy and play therapy." (*Id.* ¶ 242). The school "has refused to provide any of these services at home as they do for other special needs children who are homeschooling." (*Id.*).Joe "has a pending appeal to the Commissioner of Education which as of yet still has not been decided." (*Id.* ¶ 243).

Appendix B

7. John Loe — South Huntington School District

a. Medical History

John Loe, now fifteen, received diagnoses at age seven from pediatric neurologist Rosario Tifiletti of two forms of autoimmune encephalitis: Pediatric Acute-Onset Neuropsychiatric Syndrome ("P.A.N.S.") and later (August 2013) . . . a dual diagnosis of Hashimoto's Encephalopathy." (Dkt. No. 99-2, ¶ 245). Loe "suffers from disabilities which significantly impair multiple major life functions, including but not limited to functions of his immune system." (*Id.* ¶ 246). Loe attends a "Catholic college preparatory school in the neighboring South Huntington School District." (*Id.* ¶ 247).

Loe "was vaccinated in strict accordance with pediatric directives" and New York mandates during the first "several years" of his life. (*Id.* ¶ 248). He also received all influenza and H1N1 flu vaccines. (*Id.*). "Through the years, [Loe] suffered unexplained 'phases' of odd behavioral and health issues . . . Later review of the medical file revealed that these phases closely tracked his immunizations." (*Id.*; *see, e.g., id.* ¶ 249 (in 2009, Loe "decompensate[d]" after receiving DTaP, flu, and H1N1 vaccines at age five); *id.* ¶ 250 (in 2010, Loe's "symptoms heightened" after receiving flu vaccine at age six); *id.* ¶ 271 (in 2011, Loe experienced "debilitating tics and compulsions," including clapping his hands next to his ear causing hearing damage and banging his head and panic attacks and anxiety; developed obsessive compulsive

disorder; and lost penmanship, math, reading, writing, and toileting skills after flu vaccine at age 7)). Loe "became nearly anorexic" and suffered "grave depression." (*Id.* ¶ 252).

In 2012, Loe was seen by pediatric neurologist Dr. Trifiletti, who diagnosed Loe with "P.A.N.S./P.A.N.DA.S. a form of autoimmune encephalopathy, which was confirmed upon his analysis of comprehensive bloodwork reports." (*Id.* ¶¶ 253-54). Dr. Trifiletti recommended "immune modulating treatments" and within "24 to 48 hours," Loe "began eating again, his hallucinations stopped" and "many other symptoms improved." (*Id.* ¶ 254). "Dr. Trifiletti was able to stabilize [Loe's] neurological and autoimmune condition slowly with the medications, ongoing monitoring and testing, and avoidance of known triggers, such as exposure allergens, toxins, and vaccines." (*Id.* ¶ 255). Loe "fared relatively well" under Dr. Trifiletti's treatment, though he "never made it back to baseline symptoms-wise." (*Id.* ¶ 256).

In 2015, when Loe was entering sixth grade, "the school nurse advised that the Tdap was required to remain in school." (*Id.* ¶ 258). "Dr. Trifiletti, advised that a medical exemption was medically indicated for [Loe] as to 'all vaccines.'" (*Id.*). "The exemption was accepted without issue." (*Id.*). Loe received medical exemptions for seventh, eighth, and ninth grades. (*Id.*).

b. Medical Exemption Request

In September 2019, Loe's parents submitted "an updated medical exemption" from Dr. Trifiletti to the

school. (*Id.* ¶ 259). "Shortly thereafter," the school nurse informed Loe's parents that the "'school's chief doctor,' Dr. Jack Geffken . . . rejected Dr. Trifiletti's exemption after speaking with him on the phone." (*Id.* ¶ 260).

"After this phone call, Dr. Trifiletti, who had been treating [Loe] since he was seven years old," informed Loe's parents that he could no longer treat Loe. (*Id.* ¶ 261). Months later, Dr. Trifiletti sent Loe's parents a "stiff letter that made no sense, given that [Loe] was no longer a patient, indicating the benefits of vaccines and contradicting years of documented medical advice about the risks they pose to [Loe] specifically." (*Id.*).

Loe "was removed from school on September 20, 2019 and has not been able to return since." (*Id.* ¶ 262). In November 2019, Loe saw "Dr. Denis Bouboulis, an immunologist licensed to practice in New York, who is experienced . . . in the PANS/Autoimmune Encephalitis community." (*Id.* ¶ 264). On November 14, 2019, Dr. Bouboulis, who "concurred that it would be unsafe for [Loe] to receive the TDaP or meningococcal vaccines," "provided two written medical exemptions." (*Id.* ¶ 265). The school rejected the forms as they were New York City forms rather than New York State form and in December 2019, Dr. Bouboulis prepared new forms.[9] (*Id.* ¶¶ 267-69).

9. During this time period, Loe's parents were told by Dr. Bouboulis's staff that Dr. Bouboulis "had received a call from the NYSDOH, directing that he could not write any further New York medical exemptions 'unless he was the doctor who administered the vaccinations,' and that therefore, he would not be signing any more." (Dkt. No. 99-2, ¶ 268). Dr. Bouboulis agreed to prepare the

On January 7, 2020, Loe's parents "received an email from the principal stating that due to information contained in an attached letter recommending a denial of the exemption from [the school's doctor,] Dr. Geffken, [Loe] would be unable to continue as a student there." (*Id.* ¶ 270). Plaintiffs assert that "Dr. Geffken will not consider anything other than the ACIP contraindications and has narrowed the criteria for medical exemptions substantially beyond even what the state defendants promulgated in the new regulations." (*Id.* ¶ 271). Loe "has all his immunizations except for a final booster dose of the Tdap vaccine (tetanus, diptheria, and pertussis) and the meningococcal vaccine." (*Id.* ¶ 272). Loe, who had been doing well in school prior to "expulsion" "has become very depressed and is not able to keep up with his home studies." (*Id.* ¶ 276).

V. STANDARD OF REVIEW

To survive a motion to dismiss, "a complaint must provide 'enough facts to state a claim to relief that is plausible on its face.'" *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). "Although a complaint need not contain detailed factual allegations, it may not rest on mere labels, conclusions, or a formulaic recitation of the elements of the cause of action, and the factual allegations 'must be enough to raise a right to relief above

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forms, however, after Loe's parents showed him the "legal analysis" from their attorney and the "text of the statute contradicting the NYSDOH erroneous information." (*Id.* ¶ 269).

the speculative level.'" *Lawtone-Bowles v. City of New York*, No. 16-cv-4240, 2017 U.S. Dist. LEXIS 155140, at *5, 2017 WL 4250513, at *2 (S.D.N.Y. Sept. 22, 2017) (quoting *Twombly*, 550 U.S. at 555). The Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor. *See EEOC v. Port Auth.*, 768 F.3d 247, 253 (2d Cir. 2014) (citing *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). However, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

VI. DISCUSSION[10]

A. Abstention

The Albany, Ithaca, South Huntington, and Three Village Defendants argue that "the Court should apply the

10. Defendants argue that CHD does not have standing. "For federal courts to have jurisdiction over" a party's asserted claims, however, "only one named plaintiff need have standing with respect to each claim." *Comer v. Cisneros*, 37 F.3d 775, 788 (2d Cir. 1994); *see Centro De La Comunidad Hispana De Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 109 (2d Cir. 2017) ("It is well settled that where, as here, multiple parties seek the same relief, 'the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement.'") (citation omitted). It is undisputed that the individual plaintiffs have standing with respect to each claim. The Court, accordingly, need not address the issue of CHD's standing here. *See New York State Rifle & Pistol Ass'n, Inc. v. Beach*, 354 F. Supp. 3d 143, 147 (N.D.N.Y. 2018), *aff'd*, 818 F. App'x 99 (2d Cir. 2020); *New York v. United States DOC*, 315 F. Supp. 3d 766, 790 (S.D.N.Y. 2018).

doctrine of abstention and decline to review" Plaintiffs' claims. (Dkt. No. 54-14, at 23). In *New Orleans Public Service, Inc. v. Council of New Orleans*, the Supreme Court explained the *Burford* [11] abstention doctrine[12] as follows:

> Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar"; or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."

491 U.S. 350, 361, 109 S. Ct. 2506, 105 L. Ed. 2d 298 (1989) (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 814). However, "[a]bstention is the exception,

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11. *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943).

12. The Albany Defendants cite cases outlining factors relevant to the *Burford* abstention doctrine, (Dkt. No. 54-14, at 23-24), and as this doctrine appears to be best fit, the Court has not considered the *Colorado River* or *Younger* abstention doctrines. *See Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814, 96 S. Ct. 1236, 47 L. Ed. 2d 483 (1976); *Younger v. Harris*, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

exercise of jurisdiction the rule." *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 593 (2d Cir. 1989). Further, the Supreme Court has "described the federal courts' obligation to adjudicate claims within their jurisdiction as 'virtually unflagging.'" *New Orleans Pub. Serv.*, 491 U.S. at 359 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 203, 108 S. Ct. 523, 98 L. Ed. 2d 529 (1988)).

The Second Circuit has "identified three factors to consider in connection with the determination of whether federal court review would work a disruption of a state's purpose to establish a coherent public policy on a matter involving substantial concern to the public," specifically: "(1) the degree of specificity of the state regulatory scheme; (2) the need to give one or another debatable construction to a state statute; and (3) whether the subject matter of the litigation is traditionally one of state concern." *Liberty Mut. Ins. Co. v. Hurlbut*, 585 F.3d 639, 650 (2d Cir. 2009) (quoting *Hachamovitch v. DeBuono*, 159 F.3d 687, 697 (2d Cir. 1998)). Defendants argue that "at least the first and third *Burford* factors militate in favor of abstention." (Dkt. No. 8-2, at 10). The Court considers each factor below.

1. Specificity of State Regulatory Scheme

Defendants argue that the "amendments to Public Health Law and the implementing regulations (i.e. 10 NYCRR 66-1.3) are specific." (Dkt. No. 54-14, at 23). Section 2164 of the New York Public Health Law and the corresponding regulations governing the mandatory school vaccine law certainly contain a level of specificity.

See generally, N.Y. Pub. Health Law § 2164; 10 N.Y.C.R.R. §§ 66-1.1 to 1.3. This does not, however, end the inquiry because, this "factor focuses more on the extent to which the federal claim requires the federal court to *meddle* in a complex state scheme." *Hachamovitch*, 159 F.3d at 697.

Here, Plaintiffs complain that the medical exemption provisions and the Defendant schools' implementation of those exemptions violate their Fourteenth Amendment rights and that the medical exemption provisions violate the Rehabilitation Act by discriminating against disabled children. None of Plaintiffs' claims require the Court to consider whether Defendants' determination with respect to Plaintiffs' requests for medical exemptions to vaccination was correct under the applicable statute and regulations—rather, the Court is evaluating the constitutionality of Defendants' conduct. Thus, this factor does not favor abstention. *See id.* ("Because Dr. Hachamovitch's due process complaint concerns the absence of a provision for reopening of a proceeding rather than the considerations, values and procedures that should shape its outcome, this . . . factor probably does not favor abstention."); *see also Toyota Lease Tr. v. A-1 Grand Autobody, Inc.*, No. 18-cv-3098, 2019 U.S. Dist. LEXIS 103574, at *7, 2019 WL 2571154, at *3 (E.D.N.Y. June 20, 2019) (concluding that the first factor weighed against abstention where the plaintiff's claims pertained "to whether the lien levied on its vehicle, deprived Plaintiff of a property interest without notice or an opportunity to be heard," explaining that, "[a]s alleged in the Complaint, these claims relate to the constitutionality of Defendants' conduct and thus there is no state law inquiry or analysis embedded within that claim").

2. Interpretation of State Statute

The second factor, "the necessity of discretionary interpretation of state statutes," *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1243 (2d Cir. 1992), does not weigh in favor of abstention. Defendants argue that "the precise meaning of what does, and what does not, constitute a 'medical contraindication or precaution' . . . are at the heart of the dispute." (Dkt. No. 54-14, at 23). The facts concerning Plaintiffs' requests for medical exemptions to vaccination and the Defendant school district's denials, including whether Plaintiffs' medical conditions constitute "medical contraindications or precautions," are certainly relevant to the inquiry of whether the denial constituted a deprivation of substantive due process or violated the Rehabilitation Act. However, no party has asserted that Plaintiff's claims involve the "need to give one or another debatable construction to" the mandatory school vaccine law, the medical exemption, or the governing regulations, nor does there appear to be any such need. *Hachamovitch*, 159 F.3d at 697; *see also Bethphage*, 965 F.2d at 1243 ("[T]he aim of *Burford* abstention is to avoid resolving difficult state law issues involving important public policies or avoid interfering with state efforts to maintain a coherent policy in an area of comprehensive regulation or administration." (internal citation omitted)); *Cty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1308 (2d Cir. 1990) ("The fact that here *only* a federal claim was present raises the level of justification [needed for abstention] even more.").

3. State Concern

There is no question that the subject-matter of this litigation—the vaccination of children and ensuring public health and safety—is "traditionally one of state concern," or that the administration of the mandatory school vaccine law and issuance of medical exemptions is of "paramount importance" to the state. *Hachamovitch*, 159 F.3d at 698; *Jacobson v. Massachusetts*, 197 U.S. 11, 25, 25 S. Ct. 358, 49 L. Ed. 643 (1905)*; see also Bethphage*, 965 F.2d at 1244 (concluding "the subject matter of this case—reimbursement rates under the Medicaid Act—is an area of legitimate state interest," noting that "the Medicaid Act itself requires the creation of a state administrative framework to establish methods and procedures for the procurement of and payment for care and services consistent with efficiency, economy, and quality of care" signaling Congress' recognition "that the establishment and review of reimbursement rates is a legitimate state concern"). This factor therefore weighs in favor of abstention

Having considered the relevant factors, the Court concludes that, on balance, this is not the "extraordinary case[]" that requires abstention. *Hachamovitch*, 159 F.3d at 693. "[T]here is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Bethphage*, 965 F.2d at 1245 (2d Cir. 1992) (quoting *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 540 (9th Cir. 1985)). In this case, while the administration of the mandatory school vaccine law and issuance of medical exemptions are matters of

legitimate concern to the state, it does not appear that interference with the state's administrative scheme or the interpretation of any regulatory provisions is embedded in the determination of whether due process was satisfied—a determination "[t]he federal courts are well-placed to undertake." *Hachamovitch*, 159 F.3d at 698; *see also Orozco by Arroyo v. Sobol*, 703 F. Supp. 1113, 1120 (S.D.N.Y. 1989) (citing *Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir. 1988) (holding *Burford* abstention unwarranted in case involving due process attack on State's medical malpractice insurance scheme)). Accordingly, the Albany Defendants' motion to dismiss based on *Burford* abstention is denied. *See New Orleans Pub. Serv.*, 491 U.S. at 362 ("While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." (quoting *Colorado River*, 424 U.S. at 815-16)).

B. Exhaustion of Administrative Remedies

The School District Defendants seek dismissal on the ground that Plaintiffs failed to exhaust the administrative remedies available to them prior to bringing this action. (Dkt. No. 54-14, at 19-24; Dkt. No. 78-4, at 29-30). Plaintiffs respond that exhaustion of administrative remedies is not a prerequisite to a constitutional claim. (Dkt. No. 83, at 28).

Defendants argue that "plaintiffs should have availed themselves of N.Y. Educ. Law 310, which provides that

an aggrieved party may appeal to the Commissioner of Education 'any . . . official act or decision of any officers, school authorities, or meetings concerning any other matter under [the New York Education Law], or any other act pertaining to common schools."[13] (Dkt. No. 54-14, at 19 (quoting N.Y. Educ. Law § 310 (7))). Defendants also note that "aggrieved families may institute an Article 78 proceeding in state court to review a decision by the Commissioner." (Dkt. No. 54-14, at 22). Plaintiffs do not dispute that these avenues for review are available to them. The Doe Family (Coxsackie-Athens), appealed the medical exemption denial to the Commissioner of Education in November 2019, and the appeal was subsequently denied. (Dkt. No. 99-2, ¶ 116-17; Dkt. No. 54-4). The Joe Family (Ithaca) likewise filed an appeal with the Commissioner, which remains pending. (Dkt. No. 99-2, ¶ 243). There is no indication that any named Plaintiff has filed an Article 78 proceeding. (*See generally id.*).

There is caselaw suggesting that exhaustion of administrative remedies is a prerequisite to a state law claim. *See Watkins-El v. Dep't of Educ.*, No. 16-cv-2256, 2016 U.S. Dist. LEXIS 139860, at *7-8, 2016 WL 5867048, at *3, 2016 U.S. Dist. LEXIS 139860, at *7-8 (E.D.N.Y. Oct. 7, 2016) (finding the plaintiff failed to show a likelihood of success on state law claim that the defendant Office of Student Health improperly denied the request for

13. The Albany, Ithaca, South Huntington and Three Village Defendants and Plaintiff agree, however, that "the Constitutionality of the legislation [at issue] is outside the scope of the Commissioner's review." (Dkt. No. 54-14, at 21; Dkt. No. 83, at 28). The remaining School District Defendants have not addressed this particular issue.

a vaccination exemption, on religious grounds, under Public Health Law § 2164 because the plaintiff "did not appeal the determination . . . thereby failing to exhaust his administrative remedies." (citing *Watergate II Apts. v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57, 385 N.E.2d 560, 412 N.Y.S.2d 821 (1978) ("[O]ne who objects to the act of an administrative agency must exhaust available remedies before being permitted to proceed to litigate in a court of law[.]"))). Plaintiffs, however, do not bring any state law claims. Further, exhaustion of state administrative remedies is not a prerequisite to bringing a federal claim under 42 U.S.C. § 1983. *See Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 516, 102 S. Ct. 2557, 73 L. Ed. 2d 172 (1982) ("[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983."); *see also Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 425 (E.D.N.Y. 2010) ("While a failure to exhaust state administrative remedies does not generally bar federal civil rights claims, the Court is aware of no authority providing that this state law claim may be pursued in federal court [without exhausting state administrative remedies]."), *aff'd*, 500 F. App'x 16 (2d Cir. 2012).

Defendants cite *S.C. v. Monroe Woodbury Central School District*, No. 11-cv-1672, 2012 U.S. Dist. LEXIS 100622, at *39-40, 2012 WL 2940020, at *10 (S.D.N.Y. July 18, 2012), in support of their argument that exhaustion of administrative remedies is required. (Dkt. No. 54-14, at 22). However, unlike the Plaintiffs in this case, who bring substantive due process claims, in *S.C.*, the court discussed administrative remedies in the context of a

procedural due process claim. 2012 U.S. Dist. LEXIS 100622, at *39-40, 2012 WL 2940020, at *10. Moreover, in *S.C.*, the court granted the defendant's motion to dismiss the procedural due process claim, not because the plaintiff failed to exhaust administrative remedies, but on the merits—concluding that the availability of an appeal to the Commissioner and an Article 78 proceeding was a "sufficient post-deprivation remedy" that constituted "adequate process." *Id.*, 2012 U.S. Dist. LEXIS 100622, at *40.

Defendants also cite *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002), for the proposition that "Article 78 of New York's CPLR provides an adequate state law remedy for alleged failures by public officials to take allegedly required or mandated action." (Dkt. No. 54-14, at 22). In *Vandor*, the plaintiff alleged a property taking in violation of its substantive due process rights. 301 F.3d at 38. The Second Circuit affirmed dismissal of the complaint on the ground that the takings claim was unripe because, despite the expiration of the statute of limitations, there was a potential avenue for state court relief under Article 78. *Id.* at 39. *Vandor* is inapplicable here. Takings cases are unique and prior to 2019, under relevant Supreme Court law, a takings claim was not ripe for federal review until "the state regulatory entity has rendered a 'final decision' on the matter." *Dougherty*, 282 F.3d at 88 (2d Cir. 2002) (quoting *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-94, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), *overruled in part by Knick v. Twp. of Scott*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019)). Defendants cite no caselaw supporting a conclusion that

such a requirement is applicable here. In any event, in 2019, the Supreme Court overruled *Williamson County's* "state-litigation requirement." *Knick*, 139 S. Ct. at 2167. Thus, *Vandor* does not allow a conclusion that Plaintiffs were required to exhaust administrative remedies prior to bringing their federal suit. For these reasons, Defendants' exhaustion of administrative remedies argument does not provide a basis for dismissal of Plaintiffs' federal claims.

C. Section 1983 Constitutional Claims

1. Substantive Due Process — Facial Challenge

Defendants argue that Plaintiffs' Fourteenth Amendment substantive due process claim fails as a matter of law because Plaintiffs fail to allege the infringement of a fundamental right or that the mandatory vaccination requirement and medical exemption lack a reasonable relationship to the state's legitimate objective, the public health and safety of society. (Dkt. No. 28-1, at 11-19; Dkt. No. 54-14, at 24-31; Dkt. No. 78-4, at 16-18; Dkt. No. 91-1, at 13-18). Plaintiffs oppose dismissal, arguing that New York's narrow and burdensome medical exemption to its mandatory vaccination requirements infringe "multiple fundamental rights," in violation of their right to substantive due process and equal protection under[14] the

14. The Sixth Claim for Relief is subtitled "Violation of Rehabilitation Act of 1973" but, as Defendants observe, (Dkt. No. 38-1, at 20 n.1; Dkt. No. 54-14, at 31 n.1; Dkt. No. 78-4, at 28-29), it alleges that that "Defendants have violated the rights of medically fragile children to receive equal protection of the law by enacting

Fourteenth Amendment. (Dkt. No. 74, at 6). Specifically, Plaintiffs assert, the alleged narrow and burdensome nature of the medical exemption violates "the right to life, the right to informed consent, the right to refuse medical treatment, fundamental parental and educational rights, equal protection rights, [] privacy rights . . . [and] the . . . right to protection from infringement on the doctor-patient relationship"—all of which are embodied in the fundamental "right to a medical exemption from any [vaccination] . . . that a licensed physician has certified may cause a person harm or death." (Dkt. No. 112, at 20-21).

"[T]he Due process Clause of the Fourteenth Amendment embodies a substantive component that protects against 'certain government actions regardless of the fairness of the procedures used to implement them.'" *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986)). But "'substantive due process,' . . . does not stand as a bar to all governmental regulations that may in some sense implicate a plaintiff's 'liberty.'" *Id.* "Rather, the level of scrutiny" to which a governmental regulation is subject "turns on the nature of the right at issue." *Id.* "Where the right infringed is fundamental, strict scrutiny is applied,"

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and promulgating regulations which disparately impact medically fragile children." (Dkt. No. 9-2, ¶¶ 406-14). As Plaintiffs have not corrected Defendants' observation and have referred to Defendants' alleged violation of equal protection throughout their substantive due process briefing and in arguing for rational basis review, the Court has also considered, in Section VI.C.3., whether Plaintiffs have alleged a plausible equal protection claim.

Leebaert v. Harrington, 332 F.3d 134, 140 (2d Cir. 2003), and to survive review, the "challenged regulation must be narrowly tailored to promote a compelling Government interest" and "must use the least restrictive means to achieve its ends." *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014) (citation omitted). In contrast, "[w]here the claimed right is not fundamental," rational basis review is applied, and "the governmental regulation need only be reasonably related to a legitimate state objective." *Immediato*, 73 F.3d at 461 (citing *Reno v. Flores*, 507 U.S. 292, 303-06, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993)).

The parties disagree about the level of review applicable to the medical exemption. Plaintiffs contend that because the medical exemption burdens fundamental rights, it is subject to strict scrutiny. (Dkt. No. 74, at 12). Defendants respond that because the consequence of "not complying with the immunization" is that the child cannot attend school, the only infringement is on the right to education—which is not a fundamental right—and the medical exemption need only satisfy rational basis review. (Dkt. No. 87, at 6).

a. Whether Plaintiffs Have Asserted a Fundamental Right

"In assessing whether a government regulation impinges on a substantive due process right, the first step is to determine whether the asserted right is

'fundamental.'" *Leebaert*, 332 F.3d at 140. "Rights are fundamental when they are implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." *Immediato*, 73 F.3d at 460-61. Therefore, a "[s]ubstantive 'due process' analysis must begin with a careful description of the asserted right, for '[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.'" *Flores*, 507 U.S. at 302 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125, 112 S. Ct. 1061, 117 L. Ed. 2d 261 (1992)).

At the outset, the Court addresses Plaintiffs' assertion that the mandatory vaccination law and medical exemption, which applies to public and private schools, "unconstitutionally burden[s] minors' right to pursue an education at any public or private school in New York." (Dkt. No. 99-2, at 83). It is well-established that there is no fundamental right to education, and thus the deprivation of a "right to pursue an education," by itself, does not trigger strict scrutiny. *Plyler v. Doe*, 457 U.S. 202, 223, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982) ("Nor is education a fundamental right"); *see Phillips v. City of New York*, 775 F.3d 538, 542 n.5 (2d Cir. 2015) (holding that New York's mandatory school vaccination requirement was within the State's police power and that, in any event, substantive due process challenge to mandatory vaccination law would fail under traditional constitutional analysis because "there is no substantive due process right to public education") (quoting *Bryant v. N.Y.S. Educ. Dep't*, 692 F.3d 202, 217

(2d Cir. 2012).[15]. Accordingly, the Court turns to Plaintiffs' remaining arguments.

Plaintiffs correctly assert that, as a general proposition, they have liberty interests in parenting. In *Troxel v. Granville*, the Supreme Court held that "[t]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); *see also Immediato*, 73 F.3d at 461 ("Parents, of course, have a liberty interest, properly cognizable under the Fourteenth Amendment, in the upbringing of their children."). The Second Circuit, however, has held that "rational basis review is appropriate" when a parental right is invoked against state regulation. *Immediato*, 73 F.3d at 461.

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15. While the Supreme Court in *Plyler* recognized that education is not a fundamental right, the Court also considered the "well-settled principles" regarding the importance of education and of literacy in our democracy, in evaluating a State's decision "to deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens." 457 U.S. at 205, 222-24. Considering all of these factors, the Court applied a "heightened level of equal protection scrutiny," in *Plyler* and found that the State had failed to show that its denial of public education advanced a substantial state interest. *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 459, 108 S. Ct. 2481, 101 L. Ed. 2d 399 (1988) (citing *Plyler*, 457 U.S. at 217-18 & n.16); *see Ramos v. Town of Vernon*, 353 F.3d 171, 175 (2003). The Supreme Court has since noted that it has not extended the holding in *Plyler* "beyond 'the unique circumstances' . . that provoked its 'unique confluence of theories and rationales.'" *Kadrmas*, 487 U.S. at 459 (citations omitted). Plaintiffs have not argued that *Plyler* applies here.

Plaintiffs also cite to their liberty interest in refusing unwanted medical treatment, and more specifically, to informed consent as part of that right. In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court explained that a "person has a constitutionally protected liberty interest in refusing unwanted medical treatment," 497 U.S. 261, 278, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990), and as the Second Circuit has explained, "an individual cannot exercise his established right to refuse medical treatment in a meaningful and intelligent fashion unless he has sufficient information about proposed treatment." *Pabon v. Wright*, 459 F.3d 241, 249-50 (2d Cir. 2006). Therefore, "there exists a liberty interest in receiving such information as a reasonable patient would require in order to make an informed decision as to whether to accept or reject proposed medical treatment." *Id.* The medical exemption regulations, however, do not directly infringe on any such right because they do not force parents to consent to vaccination of their children.

Plaintiffs argue that they have a fundamental right to a medical exemption to the state's vaccination requirement upon submission of a state-certified physician's opinion that vaccination would be harmful to the child. (Dkt. No. 74, at 9). Plaintiffs further argue that schools—and school principals, in particular—should have no discretion to "overrule treating physicians" with respect to their judgment about whether vaccination is in a child's best interest. (*Id.*). Underlying this argument is Plaintiffs' belief that the regulations "arbitrarily narrow the definition of 'what may cause harm,'" which, they believe "exclude[s] hundreds of medically fragile children whose

health and life may be at risk of serious harm" if they are vaccinated. (Dkt. No. 99-2, ¶ 383).

The Court does not find a basis for Plaintiffs' asserted fundamental right. In this country there is a long history of disagreements—scientific and otherwise—regarding vaccinations and their risk of harm, and courts have repeatedly found that it is for the legislature, "in the light of all the information it had," to "choose between" "opposing theories" within medical and scientific communities in determining the most "effective . . . way in which to meet and suppress" public health threats. *Jacobson*, 197 U.S. at 30-31 (discussing Jacobson's offer of proof from "medical profession[als] who attach little or no value to vaccination as a means of preventing the spread of smallpox, or who think that vaccination causes other diseases of the body"; explaining that the Court assumed that "the legislature . . . was not unaware of these opposing theories, and was compelled of necessity, to choose between them"; and holding that it is "no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease"); *Viemeister v. White*, 179 N.Y. 235, 239, 242, 72 N.E. 97 (1904) (observing that "some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox" but explaining that "[t]he possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the Legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases"); *Phillips*, 775 F.3d at

542-43 (2d Cir. 2015) (noting that the "Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors"); *Middleton v. Pan*, No. 16-cv-5224, 2016 U.S. Dist. LEXIS 197627, at *20-21, 2016 WL 11518596, at *7 (C.D. Cal. Dec. 15, 2016) (finding the plaintiffs' allegation that the vaccine at issue "requires them to submit to 'unwanted injections of poisons' that constitute 'felony assault with intent to do serious harm, including but not limited to maiming and or killing the individual' without due process of law," in violation of their "right of self defense" and due process "foreclosed by *Zucht*." (citing *Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922))), *report & recommendation adopted*, 2017 U.S. Dist. LEXIS 225573, 2017 WL 10543984 (C.D. Cal. July 13, 2017). More generally, Justice Roberts has noted that "federal courts owe significant deference to politically accountable officials with the 'background, competence, and expertise to assess public health." *S. Bay United Pentecostal Church v. Newsom*, No. 20A136, 141 S. Ct. 716, 209 L. Ed. 2d 22, 2021 U.S. LEXIS 758, 2021 WL 406258, at *1 (Feb. 5, 2021) (Roberts, J., concurring).

It is well-settled that it is within a state's police power to establish regulations implementing mandatory vaccine laws and vest local officials with enforcement authority. *Jacobson*, 197 U.S. at 25 (observing that "[i]t is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the

public health and the public safety"); *see also Zucht*, 260 U.S. at 176 (explaining that *Jacobson* and other cases, have "settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative" and that "the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law" (citing *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 30 S. Ct. 301, 54 L. Ed. 515 (1910); *Lieberman v. Van de Carr*, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305 (1902))).

The Court therefore concludes that it is within the legislature's authority to pass regulations defining the conditions under which a medical exemption to school vaccination requirements is to be issued, and placing the discretion for deciding medical exemptions in the hands of state and local officials, including school principals. It follows that Plaintiffs have failed to allege that in seeking access to education, they have a fundamental right to make, or have their own doctors make, decisions about medical exemptions to vaccination on behalf of their children.

Plaintiffs argue that "[m]edical exemption cases in the abortion context are illustrative of how courts should scrutinize medical exemptions even more strictly than other important fundamental rights." They assert that under *Planned Parenthood v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) and *Stenberg v. Carhart*, 530 U.S. 914, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000), the regulation's narrow definition of what is "detrimental"

to a child's health and reliance on ACIP guidance, 10 N.Y.C.R.R. § 66-1.1(l), instead of the "clinical judgment" of the child's treating physician, is unconstitutional. (Dkt. No. 89, at 15-16 (citing *Stenberg*, 530 U.S. at 937 ("Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey's* words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion."))). However, *Casey, Stenberg*, and their progeny involved a right the Supreme Court recognized as "fundamental" in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973): the right to an abortion. Plaintiffs fail to cite any caselaw applying the standards utilized in the abortion context to vaccine requirement exemptions, or to any other context where, as here, the right being burdened is not a recognized fundamental right. Further, unlike the medical exemption cases involving abortion, where the denial of an exemption may endanger the life or health of the mother, here, if a medical exemption is denied and the parent continues to believe that vaccinating the child will endanger his or her health, the parent may forgo vaccination and homeschool their child. Therefore, the medical exemption at issue here does not directly implicate the same "unnecessary risk of tragic health consequences" that drives the abortion medical exemption jurisprudence. *Cf. Stenberg*, 530 U.S. at 937 (explaining that in view of division of medical opinion about banned abortion procedure, which "a significant body of medical opinion" believed provided "greater safety for some patients," statute must contain health exception allowing the procedure because "the absence of a health exception will place women at an unnecessary risk of tragic health consequences").

Citing *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977), Plaintiffs argue that the right or liberty "interest in independence in making certain kinds of important decisions" identified in the above caselaw has been applied outside of the abortion context. (Dkt. No. 74, at 19). Yet applying *Whalen* in this case works against Plaintiffs—it supports a conclusion that the regulations at issue *do not* infringe Plaintiffs' rights. In *Whalen*, the plaintiffs argued, among other things, that the patient-identification requirements in the record-keeping law governing Schedule II drugs "threaten[ed] to impair . . . their interest in making important decisions independently." 429 U.S. at 600. The Court observed that, although the record supported the conclusion that "some use of Schedule II drugs has been discouraged by" concern of disclosure, it could not "be said that any individual has been deprived of the right to decide independently, with the advice of his physician, to acquire and to use needed medication," as it was undisputed that "the decision to prescribe, or to use, [Schedule II drugs], is left entirely to the physician and the patient." *Id.* at 603. Here, as in *Whalen*, if a school denies a parent's request for a medical exemption to vaccination for a child, the child is barred from attending school, but the decision whether to vaccinate remains with the child's physician and the parent. *See Whalen*, 429 U.S. at 603 ("This case is therefore unlike those in which the Court held that a *total prohibition* of certain conduct was a deprivation of liberty.") (emphasis added).

Thus, after considering a "careful description" of the rights Plaintiffs assert, the Court finds that Plaintiffs have

failed to allege the infringement of "fundamental rights" that would trigger strict scrutiny. Accordingly, rational basis review applies, and the Court must determine whether the "the governmental regulation [is] reasonably related to a legitimate state objective." *Immediato*, 73 F.3d at 461 (citing *Flores*, 507 U.S. at 303-06); *see also Molinari v. Bloomberg*, 564 F.3d 587, 606 (2d Cir. 2009) ("The law in this Circuit is clear that where, as here, a statute neither interferes with a fundamental right nor singles out a suspect classification, we will invalidate that statute on substantive due process grounds only when a plaintiff can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose.") (citations, internal quotation marks, and brackets omitted).

b. Application of the Rational Basis Test

Under rational basis scrutiny, laws are "accorded a strong presumption of validity" and must be upheld "if there is any conceivable state of facts that could provide a rational basis" for the law. *Heller v. Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993). "[I]t is not the state that must carry the burden to establish the public need for the law being challenged; it is up to those who attack the law to demonstrate that there is no rational connection between the challenged ordinance and the promotion of public health safety or welfare." *Beatie v. City of New York*, 123 F.3d 707, 712 (2d Cir. 1997).

It is well-settled, as Plaintiffs acknowledge, (Dkt. No. 74, at 7), that New York's mandatory vaccination law does not violate substantive due process. *See Phillips*, 775 F.3d

at 542 (rejecting the plaintiffs' argument that "New York's mandatory vaccination requirement" for school children violates substantive due process, explaining that "[t]his argument is foreclosed by the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*"). The issue here is Plaintiffs' substantive due process challenge to medical exemption regulations that: (1) define what "[m]ay be detrimental to the child's health" to warrant a medical exemption; and (2) enable schools, and more specifically, school principals, rather than the child's doctor, to decide whether to grant a medical exemption to vaccination.

i. Definition of "May be Detrimental to the Child's Health

Plaintiffs argue that the state "arbitrarily narrowed the allowable reasons to obtain a medical exemption" by "substituting a narrow set of circumstances, predefined by the CDC's 'ACIP guidelines'" as "the only basis to grant a medical exemption," which excludes "hundreds of additional conditions that vaccine manufacturers acknowledge as potential adverse events." (Dkt. No. 74, at 8-9). As a preliminary matter, the Court notes that this argument ignores the full text of the definition. The regulation defines "[m]ay be detrimental to the child's health" to mean that "a physician has determined that a child has a medical contraindication or precaution to a specific immunization *consistent with* ACIP guidance *or other nationally recognized evidence-based standard of care*."[16] 10 N.Y.C.R.R. § 66-1.1(l).

16. Plaintiffs argue that, in practice, Defendants limited their consideration of the medical exemption requests to whether the

Appendix B

In seeking to repeal the religious exemption and strengthen and clarify the medical exemption, state legislators explained that the amendments were made "[t]o be consistent with national immunization regulations and guidelines," and "to conform with current guidance from the CDC's Advisory Committee on Immunization Practices (ACIP)." (Dkt. No. 28-4, at 28-29). "The legislative objective of PHL § 2164 includes the protection of the health of residents of the state by assuring that children are immunized according to current recommendations before attending . . . school, to prevent the transmission of vaccine preventable disease and accompanying morbidity and mortality. (Dkt. No. 28-6, at 14). Legislators determined that these amendments were necessary because: (1) "[t]he United States is currently experiencing the worst outbreak of measles since 1994," (Dkt. No. 28-3, at 6); (2) "[o]utbreaks in New York," where some communities have immunization rates "as low as 70 percent" "have been the primary driver of this epidemic," (*id.*); (3) California's "vaccination rates improved demonstrably" after it repealed its non-medical exemptions, (*id.*); (4) "[a]ccording to the Centers for Disease Control (CDC), sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States," (Dkt. No. 28-6, at 15); (5) "there are at least 280 schools in New

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child's contraindication or precaution fell within the four corners of the ACIP guidance and did not consider "other nationally recognized evidence-based standard of care." (Dkt. No. 74, at 9). This issue, however, is best addressed in the context of Plaintiffs' individual claims.

York with an immunization rate below 85%, including 211 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity," (*id.*); (6) "[b]y increasing the number of children immunized against vaccine-preventable diseases like measles, this legislation will prevent outbreaks and protect both the immunized children and those members of the community who cannot be vaccinated for medical reasons," (*id.* at 16); (7) when California removed non-medical exemptions "without taking steps to strengthen the rules governing medical exemptions," "the use of medical exemptions to school immunization requirements more than tripled," (*id.*); and (8) by clarifying that "a child may only receive a medical exemption from vaccination requirements when there is a medical contraindication or precaution to a specific immunization consistent with ACIP guidance," and "[b]y providing clear, evidence-based guidance to physicians," the state can help "prevent medical exemptions being issued for non-medical reasons," (*id.* at 16-17). These findings demonstrate a rational basis for the state's decision to: (1) require that a student demonstrate an evidence-based medical contraindication or precaution in order to qualify for a medical exemption, and (2) select the particular standard that would be used to determine whether a student's reasons for an exemption qualify as evidence-based medical contraindications or precautions. Five healthcare professional organizations, including the NYS American Academy of Pediatrics, expressed support of the regulation during a public comment period. (Dkt. No. 28-5, at 31).

Plaintiffs allege that "[t]he CDC itself has clearly stated that the ACIP guidance is not meant to replace

the clinical judgment of a treating physician." (Dkt. No. 99-2, ¶ 11). Plaintiffs further allege that in a reply to an email "from plaintiff Jane Doe asking for clarification on the ACIP guidelines and their role in defining medical exemptions," "Dr. Andrew Kroger from CDC's Immunization Services Division" stated that: "The ACIP guidelines were never meant to be a population-based concept . . . . The CDC does not determine medical exemptions. We define contraindications. It is the medical providers' prerogative to determine whether this list of conditions can be broader to define medical exemptions." (*Id.* ¶ 283). Plaintiffs further allege that "[h]undreds of additional reasons exist which could put some children at substantial risk of harm," citing "the long list of precautions and known adverse reactions listed in manufacturers' inserts," as well as "the long list of injuries and conditions compensated by the Vaccine Injury Compensation Program." (*Id.* ¶ 12). Plaintiffs also cite the "Institute of Medicine reports that clearly and expressly acknowledge subpopulations who have a pre-existing susceptibility to serious adverse reaction." (*Id.*).

As noted above, however, the definition of "may be detrimental to the child's health" is broader than medical contraindications and precautions defined in the ACIP guidance. "May be detrimental to the child's health means that a physician has determined that a child has a medical contraindication or precaution to a specific immunization *consistent with* the ACIP guidance *or other nationally recognized evidence-based standard of care*." 10 N.Y.C.R.R. § 66-1.1(l). The medical exemption form itself refers to guidance beyond the ACIP

recommendations. It states that "[g]uidance for medical exemptions for vaccination can be obtained from the contraindications, indications and precautions described in the vaccine manufacturers' package insert and by the most recent recommendations of the [ACIP]." https://www.health.ny.gov/forms/doh-5077.pdf (last visited Feb. 17, 2021). Because, on its face, the regulation allows for a broader range of medical exemptions than the ACIP guidance alone would, Plaintiffs' arguments regarding the narrowness or inappropriateness of the ACIP guidance do not support their argument that the regulation is facially unconstitutional.

Moreover, even accepting all of the Plaintiffs' allegations as true, the Legislature's decision to refer to the ACIP guidance in the regulation to provide clarity to physicians regarding grounds for medical exemptions and to ensure that medical exemptions are limited to individuals that can demonstrate genuine, evidence-based medical contraindications or precautions is not so arbitrary or irrational as to fail the rational basis test.

The ACIP "General Best Practices Guidelines for Immunization," states that the guidance is "intended for clinicians and other health care providers who vaccinate patients in varied settings, including hospitals, provider offices, pharmacies, schools, community health centers, and public health clinics." (Dkt. No. 28-7, at 2). The ACIP Guidelines are the product of the ACIP General Recommendations Work Group, which is a "diverse group of health care providers and public health officials," and "includes professionals from academic medicine

(pediatrics, family practice, and pharmacy); international (Canada), federal, and state public health professionals." (*Id.* at 5). The revisions to the current ACIP Guidelines "involved consensus-building based on new evidence from the published literature and opinion from subgroups of subject matter experts consulted on specific topics." (*Id.*). The ACIP Guidelines define contraindication and precaution and provide a table delineating contraindications and precautions for each vaccine. (*Id.* at 49-52). "Severe allergic reaction (e.g. anaphylaxis) after a previous dose or to a vaccine component," is identified as a contraindication for every vaccine. (*Id.* at 53-56).

While Plaintiffs argue that the ACIP guidance is too narrow in view of their allegations regarding the numerous adverse reactions for which it fails to account, it cannot be said that the Legislature's use of the ACIP guidance, in furtherance of its objective of strengthening medical exemptions and ensuring they are not issued for non-medical reasons, was irrational. *See Sensational Smiles, LLC v. Mullen*, 793 F.3d 281, 284-85 (2d Cir. 2015) ("While Sensational Smiles disputes this evidence, it is not the role of the courts to second-guess the wisdom or logic of the State's decision to credit one form of disputed evidence over another.").

ii. Authority of School Principals

Plaintiffs argue that the regulations improperly give school principals the authority to overrule the judgment of treating physicians and do not require the principals to consult medical professionals. (Dkt. No. 41-1, at 11).

In support of their argument, Plaintiffs allege that "[t]wo members of the New York State Legislature sent correspondence to the Commissioner of Education supporting the Doe's appeal on or about December 20, 2019," and indicated in their letters "that the New York State Legislature did not intend for school districts to have unilateral power to overrule treating physicians." (Dkt. No. 99-2, ¶ 116).

Under the mandatory vaccination law "[n]o principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school . . . without proof of immunization," N.Y. Public Health Law § 2164(7)(a), or a "medical exemption form approved by the NYSDOH . . . from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health." 10 N.Y.C.R.R. § 66-1.3(c). The Legislature unequivocally delegated authority to DOH to enforce the mandatory vaccination law and its medical exemption. In carrying out this mandate, in addition to establishing regulations implementing mandatory vaccine laws (as discussed above), it is beyond question that state agencies like DOH may vest local officials with the authority to use appropriate discretion in enforcing these regulations. In *Zucht*, the Supreme Court explained that *Jacobson* and other cases, have "settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative" and that "the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a

health law." 260 U.S. 174 at 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (citing *Laurel Hill Cemetery*, 216 U.S. 358, 30 S. Ct. 301, 54 L. Ed. 515; *Lieberman*, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305).

As the Second Circuit previously recognized, in the context of the mandatory school vaccine law, "the Commissioner clearly has a rational basis for allowing individual school districts the autonomy to determine how to implement the regulations in light of the varying populations that live within different districts and the consequential variations in local health concerns." *Friedman v. Clarkstown Cent. Sch. Dist.*, 75 F. App'x 815, 819 (2d Cir. 2003) (rejecting the plaintiffs' argument that "the lack of standards in the regulation allowing unfettered discretion to the individual districts has resulted in unequal treatment of religious beliefs in different school districts" with respect to religious exemptions to vaccines (citing *Catlin v. Sobol*, 93 F.3d 1112, 1120 (2d Cir. 1996) ("we will uphold the statute [on rational basis review] as long as it is rationally related to a legitimate state interest"))). Thus, Plaintiffs have failed to allege "that there is no rational connection" between the delegation of authority to the local school districts, where the Plaintiff children reside, to decide requests for medical exemptions and "the promotion of public health, safety or welfare."[17] *Beatie v*, 123 F.3d at 712; *see also Sensational*

17. Plaintiffs' allegation that two legislators did not intend the amendments to give schools unilateral power to overrule treating physicians does not change this outcome. This allegation does not allow a plausible inference that the Legislature *lacked* a rational basis for placing discretion in the hands of local school districts.

Smiles, 793 F.3d at 284 ("[W]e are required to uphold the [legislative decision] 'if there is any reasonably conceivable state of facts that could provide a rational basis for the [decision].'" (quoting *Heller*, 509 U.S. at 320).

Accordingly, the Court concludes that Defendants are entitled to dismissal of Plaintiffs' facial substantive due process claim.

2. Substantive Due Process — Individual Claims

In the proposed First Amended Complaint, Plaintiffs name the superintendent and principal School District Defendants individually so as "to more clearly state that [they] seek damages as well as equitable relief from individually named school district defendants" in connection with their Fourteenth Amendment substantive due process claims. (Dkt. No. 93, at 2). These Defendants oppose amendment on the ground that any "personal capacity claims against the individual Defendants would be futile." (Dkt. No. 108, at 3; Dkt. No. 111, at 1-2; Dkt. No. 110, at 2-3).

Plaintiffs allege that by denying their requests for medical exemptions to vaccination and refusing to allow the minor Plaintiffs to attend school without vaccination, the individual School District Defendants violated their Fourteenth Amendment substantive due process rights (First Claim for Relief), liberty interest in parenting (Second Claim for Relief), and liberty interest in informed consent (Third Claim for Relief), as well as the Plaintiff

"minors' right to pursue an education at any public or private school in New York" (Fourth Claim for Relief). (Dkt. No. 99-2, at 78-83). Because none of these claims can "be analyzed under [a] more specific constitutional provision," the Court "must assess them in terms of the Fourteenth Amendment's substantive due-process guarantee." *Kia v. McIntyre*, 235 F.3d 749, 758 (2d Cir. 2000) (evaluating liberty interest in parenting claim under substantive due process); *see Blouin ex rel. Estate of Pouliot v. Spitzer*, 356 F.3d 348, 359 (2d Cir. 2004) (addressing asserted violation of liberty interest in the right to bodily integrity and issues concerning the right to refuse consent to medical treatment under Fourteenth Amendment).

To allege a violation of substantive due process against a state actor, a plaintiff must allege a deprivation of a fundamental liberty interest," *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 275 (2d Cir. 2011), or "a valid 'property interest' in a constitutionally-protected benefit," *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). Further, "[f]or a substantive due process claim to survive a Rule 12(b)(6) dismissal motion, it must allege governmental conduct that 'is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.'" *Velez v. Levy*, 401 F.3d 75, 93 (2d Cir. 2005) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998)). A plaintiff must show that the government's alleged acts were "arbitrary," "conscience-shocking," or "oppressive in the constitutional sense," not merely "incorrect or ill-advised." *Lowrance v. C.O. S. Achtyl*, 20 F.3d 529, 537 (2d Cir.

1994). Finally, the Second Circuit has instructed that "[i]n situations in which time for deliberation is available to the official, [courts] apply a 'deliberate indifference' standard, which requires demonstration of a 'willful disregard' of the 'obvious risks,' 'serious implications,' and 'likelihood' of harm." *Spring v. Allegany-Limestone Cent. Sch. Dist.*, 655 F. App'x 25, 28 (2d Cir. 2016) (quoting *Okin v. Vill. of Cornwall—on—Hudson Police Dep't*, 577 F.3d 415, 432 (2d Cir. 2009)).

As discussed at length above, Plaintiffs have failed to allege the infringement of any fundamental right. *See Votta ex rel. R.V. & J.V. v. Castellani*, 600 F. App'x 16, 18 (2d Cir. 2015). While the right to education does not rise to the level of a fundamental right, New York law "does appear to create a property interest in education protected by the Fourteenth Amendment." *Handberry v. Thompson*, 446 F.3d 335, 352-53 (2d Cir. 2006) (citing New York Education Law § 3202(1)); *see also Goss v. Lopez*, 419 U.S. 565, 573-77, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975) (holding that "on the basis of [Ohio] law, appellees plainly had legitimate claims of entitlement to a public education," and that it is a property interest protected by the Due Process Clause). Courts have thus found the deprivation of education to be a valid basis for a substantive due process claim by a student expelled from school. *See, e.g, DeFabio v. E. Hampton Union Free Sch. Dist.*, 623 F.3d 71, 82 (2d Cir. 2010) (explaining "a student's substantive due process rights [may be implicated] upon a showing that an administrator's decision to expel the student was 'arbitrary or irrational or motivated by bad faith.'" (quoting *Rosa R. v. Connelly*, 889 F.2d 435, 439

(2d Cir. 1989)); *Biswas v. City of New York*, 973 F. Supp. 2d 504, 525 (S.D.N.Y. 2013) (same). At the same time, Plaintiffs' right to an education under New York State law is limited by the New York's mandatory school vaccination requirement, and "[t]he case law clearly establishes that "[c]onditioning school enrollment on vaccination has long been accepted by courts as a permissible way for States to inoculate large numbers of young people and prevent the spread of contagious diseases." *V.D. v. State of New York*, 403 F.Supp.3d 76, 87 (S.D.N.Y. 2019).

Here, the Plaintiffs' exclusion from school ultimately resulted from their decisions not to comply with a condition for school enrollment permissibly set by the state; the fact that Plaintiffs felt that their serious medical issues compelled them not to comply with that condition does not change that. Assuming, however, for the purpose of this decision, that Plaintiffs can raise a substantive due process challenge to the School District Defendants' application of the medical exemption, the Court has considered their allegations.

a. John Doe — Coxsackie-Athens School District

The Does assert their substantive due process claim against Defendants Randall Squier, Superintendent of Coxsackie-Athens School District, and Freya Mercer, High School Principal. Doe suffers "chronic, incurable, and at times completely debilitating" medical conditions and has never been vaccinated. His physicians have advised that he not receive immunizations because they "trigger"

"regression of one or more auto-immune diseases and disorders." (Dkt. No. 99-2, ¶¶ 95-96). Superintendent Squier twice denied Doe's parents' request for a medical exemption to vaccination for Doe. His first denial, in August 2019, was based on the opinion of the Coxsackie-Athens' "paid consultant," an emergency medical physician. (*Id.* ¶ 99). The consultant evaluated the letters from two of Doe's treating physicians, both of whom had indicated that immunization was "unsafe" for Doe "given his multiple chronic and serious conditions and the risk that immunization could trigger a regression." (*Id.* ¶ 98). Ultimately, on the consultant's recommendation, Squier denied the Does' request because the treating physicians' letters failed to specify how the exemption request qualified under the ACIP contraindications or precautions. (*Id.* ¶ 99-100). Superintendent Squier denied the Does' second request, in which Doe's pediatrician "detailed for each vaccine how the child's conditions qualified under the ACIP guidance as a precaution or contraindication," on the ground that the consulting doctor found the request "was 'not supported.'" (*Id.* ¶ 104-05). When Doe's mother called about the second denial, the consulting doctor "conceded" that the second request "followed the ACIP guidelines verbatim" but declined to "debate" with Doe's mother or provide additional information. (*Id.* ¶¶ 106-07). Plaintiff alleges that Superintendent Squier "was made aware of these actions." (*Id.* ¶ 107).

Doe appealed the denial to the Commissioner of Education, who concluded that Coxsackie-Athens' determination was not arbitrary or capricious, and dismissed the appeal. (*Id.* ¶ 117; Dkt. No. 54-4). The

Commissioner ruled, inter alia, that Does offered "no evidence such as an affidavit from the student's physician, containing sufficient information to identify that the student has a precaution or contraindication to any of the eight required vaccinations," and that even if Doe's episodic "moderate or severe illness" constituted a precaution, under the ACIP Guidelines, "the precaution to vaccination only exists until such acute episode resolves." (Dkt. No. 54-4, at 5).

The allegations that Superintendent Squier denied the Does' request for a medical exemption twice based on the recommendation of the consulting doctor do not allow a plausible inference of conscience-shocking conduct. The fact that Superintendent Squier "was made aware" of the consulting physician's admission to Jane Doe, following the second denial, that Doe's second request "followed the ACIP guidelines verbatim" does not, standing alone, render Squier's decision to deny that request arbitrary. (Dkt. No. 99-2, ¶ 106). And even if the decision denying Doe's second request could be deemed arbitrary, this decision to follow the consulting doctor's recommendation does not rise to the level of conscience-shocking conduct, or even deliberate indifference. There are no allegations that Superintendent Squier acted outside the scope of authority, harbored personal animus, or was motivated by bad faith. *See Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2d Cir. 2007) (explaining that town board's amendment of the plaintiff's special use permit was "ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation"); *Velez*, 401 F.3d at 94 (explaining that the "intentional[ ] and malicious[ ]

fabricat[ion] and disseminat[ion][of] falsehoods in a common effort to deprive the plaintiff of her job . . . might well be sufficiently 'arbitrary' and 'outrageous,' in a constitutional sense, to make out a valid substantive due process claim" (citing *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999)); *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (dismissing substantive due process claim, observing that there was no evidence that school board's decision regarding disciplinary action "was arbitrary or irrational or motivated by bad faith"). Without such allegations, the allegation that Superintendent Squier's decision was contrary to state law is not sufficient to establish a constitutional claim against him. *See, e.g., Kuck v. Danaher*, 600 F.3d 159, 167 (2d Cir. 2010) (concluding allegations that state officials allegedly imposed "arbitrary requirements contrary to state law" in connection with the plaintiff's renewal of his pistol permit did not "'shock[] the conscience' or suggest[] a 'gross abuse of governmental authority,'" explaining "substantive due process does not entitle federal courts to examine every alleged violation of state law," "especially" because plaintiff had "recourse to state forums to challenge the merits of the [state officials'] decisions"). To the contrary, to the extent Superintendent Squier's denial was "arbitrary," it was the type of state action that is "correctable in a state court lawsuit seeking review of administrative action"; it did not rise to the level of egregious official conduct that violates substantive due process standards. *Natale*, 170 F.3d at 263.

Further, there are no allegations that Principal Mercer had any knowledge or involvement in the denial

of the Does' requests for medical exemptions. In fact, Plaintiffs allege Principal Mercer "exercised absolutely no oversight or input into the process." (Dkt. No. 99-2, ¶ 122). The Second Circuit recently clarified that "there is no special rule for supervisory liability" and explained that "a plaintiff must plead and prove 'that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Tangreti v. Bachmann*, 983 F.3d 609, 612 (2d Cir. 2020) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). As there are no allegations regarding Principal Mercer's individual actions with respect to Doe, there is no basis for liability against her under § 1983.

The Does assert that the regulation assigns the duty of making the determination on medical exemptions to the "principal or person in charge of the school," and that this gives Mercer ultimate responsibility for Doe's request for a medical exemption. 10 N.Y.C.R.R. § 66-1.3(c). However, based on the Does' own allegations, the person who made the decision on Doe's medical exemption was Superintendent Squier, and there is no allegation that, as Superintendent, Squier was not a "person in charge of the school" who was authorized by regulation to make a final decision on Doe's request.

Thus, the Court concludes that the proposed First Amended Complaint fails to state a claim for relief against either Superintendent Squier or Principal Mercer and the proposed amendment to include individual substantive due process claims against them is denied as futile.

b. Jane Boe — Three Village Central School District

The Boes assert their substantive due process claims against Defendants Cheryl Pedisich, Superintendent of the Three Village Central School District, and Corinne Keane, High School Principal. Jane Boe, age fifteen, has received all mandatory immunizations except the meningococcal vaccine and booster, for which she sought a medical exemption. (Dkt. No. 99-2, ¶ 134). Boe sought a medical exemption based on (1) her "multiple diagnosed autoimmune syndromes and health challenges," including the deterioration in her health following vaccinations, (2) the exacerbation of her siblings' autoimmune, neurological, and neuropsychiatric conditions following immunization, and (3) the death of her eighteen-year-old brother, who committed suicide after receiving the meningococcal vaccine against medical advice—the vaccine was "believed to have triggered an acute cascade of neurological and other health symptoms that ended with . . . suicide." (*Id.* ¶¶ 125, 129, 131). Boe alleges that her "physicians determined the risks of getting [the meningococcal vaccine] far outweighed any potential benefit" and in August 2019, Boe's family "submitted a medical exemption from her treating physician."[18] (*Id.* ¶¶ 137-38).

Three Village, through Superintendent Pedisch and Principal Keane, denied Boe's medical exemption on the advice of the school district's consulting doctor. (*Id.* ¶ 139).

18. The proposed First Amended Complaint does not provide any facts regarding the contents of the first request for a medical exemption.

Even assuming Superintendent Pedisich and Principal Keane were aware that in recommending denial of the Boes' August 2019 request, Three Village's consulting doctor had not considered "other 'nationally recognized evidence-based' reasons" beyond the ACIP contraindications and that the consulting doctor had told Boe's doctor that he would not vaccinate Boe either, (*id.* ¶¶ 142-43), the consulting doctor also found that the exemption request required specific information beyond what the Boes had provided. (*Id.* ¶¶ 139, 143-44). The regulations state that a medical exemption request must "contain[] sufficient information to identify a medical contraindication to a specific immunization," and allow "[t]he principal or person in charge of the school to require additional information supporting the exemption." 10 N.Y.C.R.R. § 66-1.3(c). Because, based on the Boes' own allegations, the denial of Boe's request for a medical exemption by Superintendent Pedisich and Principal Keane was consistent with the plain requirements of the regulations, the Boes fail to allege Superintendent Pedisich or Principal Keane's conduct was arbitrary or conscience-shocking. *See, e.g., Kuck*, 600 F.3d at 167 ("Whether authorized or not, the fact that state officials required Kuck to produce proof of citizenship or legal residency in connection with his permit renewal application is hardly outrageous or shocking.").

Further, Superintendent Pedisich and Principal Keane were well within their authority to send Boe's second request for a medical exemption to the DOH for review. The school denied that request based upon the recommendation of Dr. Rausch-Phung. (Dkt. No. 99-2, ¶¶ 146-47). Dr. Rausch-Phung wrote that the death of

Boe's sibling, "even if it was from an adverse reaction to the vaccine, was not a sufficient reason to grant an exemption." (*Id.* ¶ 146). The school officials' decision to accept the recommendation of the Director of the Bureau of Immunizations at DOJ over that of Boe's treating physicians, and their consequent denial of the request, cannot be called outrageous or conscience shocking.

Boe's December 2019 medical exemption request based on "acute illness" was granted—though not until March 2020 and only for a period of one month. (*Id.* ¶¶ 148, 150). However, there is nothing irrational about Three Village's determination, in reliance on the opinion of its consulting physician, that the one-month exemption began in December, when Boe was experiencing and acute illness, and not March, when Dr. Rausch-Phung issued her letter. (*Id.; see also* Dkt. No. 28-7, at 50 (ACIP Guidelines: "The presence of a moderate or severe acute illness with or without a fever is a precaution to administration of all vaccines . . . persons with moderate or severe acute illness should be vaccinated as soon as the acute illness has improved")). Moreover, there is no allegation that Superintendent Pedisich or Principal Keane excluded Boe from school at any point prior to Dr. Rausch-Phung's letter; thus, Boe was effectively provided with a three-month exemption. The Boes allege that Three Village "was unable to provide clarity on whether the exemption in place had to be renewed immediately or in April, and how long it might take to get an answer on the follow up request" and "refused to consider allowing their principal or superintendent to approve the follow up requests," but do not allege that they submitted any follow up requests—

alleging instead that "defendants did not . . . bother to ask [Boe's] family to submit the follow up exemption letter." (Dkt. No. 99-2, ¶¶ 151-52). The Boes do not attribute this conduct to Superintendent Pedisich or Principal Keane, but even if they did, these Defendants' purported failure to "provide clarity" regarding the renewal process does not shock the conscience. Nor was it irrational for Superintendent Pedisich or Principal Keane not to ask the Boes for additional medical exemption requests, as it is the responsibility of the "person in parental relation to the child" to "furnish[] the school" with the "medical exemption form," 10 N.Y.C.R.R. § 66.1-3(c), with or without being asked by school officials.

There are two additional allegations the Court must address. First, the Boes allege that upon expiration of the one-month exemption, "the school demanded Jane Boe be immunized with the same immunization that killed her brother." (Dkt. No. 99-2, ¶ 152). As they do not characterize this as a statement or attribute it to either individual Defendant, it does not allow a plausible inference of personal animus by either Defendant.[19] Second, the Boes label Jane Boe's March 2020 exclusion from school as expulsion. (*See id.* ("The school *expelled* Jane in March 2020.")) (emphasis added). Expelling a student for not being vaccinated, as opposed to merely barring her from attending school while she remained unvaccinated, might

19. The Court further notes that, according to Dr. Rausch-Phung, this was not a basis for a medical exemption. Plaintiff has not alleged that a sibling's adverse reaction to a vaccine is a medical contraindication or precaution consistent with any nationally recognized evidence-based standard of care.

rise to the level of conscience-shocking if there were "no rational relationship between the punishment and the offense." *Rosa R.*, 889 F.2d at 439. There are, however, no accompanying factual allegations that would allow a plausible inference that Three Village subjected Jane Boe to punishment for not being vaccinated, as opposed to merely barring her from attending school while she remained unvaccinated.[20] *See Lawtone-Bowles*, 2017 U.S. Dist. LEXIS 155140, at *5, 2017 WL 4250513, at *2 ("Although a complaint need not contain detailed factual allegations, it may not rest on mere labels, conclusions, or a formulaic recitation of the elements of the cause of action, and the factual allegations 'must be enough to raise a right to relief above the speculative level.'" (quoting *Twombly*, 550 U.S. at 555)).

For these reasons, considered as a whole, the Court concludes that the first proposed Amended Complaint fails to allege that Superintendent Pedisich or Principal Keane engaged in conduct that violated substantive due process standards. Accordingly, the proposed amendment to include individual substantive due process claims against Superintendent Pedisich or Principal Keane is denied as futile.

c. John and Jane Coe — Lansing Central School District

The Coes assert their substantive due process claim against Defendants Chris Pettograsso, Superintendent

20. Doe, Foe and Joe make similar allegations of being expelled. (Dkt. No. 99-2, ¶¶ 112, 194, 238). These allegations fail for the same reason.

of Lansing Central School District; Christine Rebera, Middle School Principal; and Lorri Whiteman, Elementary School Principal. John and Jane Coe, ages twelve and ten, respectively, "have multiple food, environmental and drug allergies, and precarious health," and have never been vaccinated "[u]pon the advice of medical professionals and considering the family history" on their father's side, including the death of an uncle following immunization and their aunt, grandmother, and father's adverse reactions to vaccination. (Dkt. No. 99-2, ¶¶ 158, 160, 162-63).

In January 2020, Superintendent Pettograsso and Principals Rebera and Whiteman denied the Coes' August 2019 request for a medical exemption from Dr. Christopher Scianna, who concluded that vaccination was unsafe "due to their current states of vulnerable health and their genetic analysis and family history of significant adverse vaccine reactions, including two deaths." (*id.* ¶¶ 167-68, 171). The Defendants denied the medical exemption request after receiving a letter from Dr. Rausch-Phung stating that "adverse reactions of family members (including death) are not contraindications from immunization under ACIP" and that there was "not sufficient information included regarding the genetic testing performed to conclude that vaccines required for school attendance would be contraindicated."(*Id.* ¶ 175).[21]

These Defendants' decision to accept the medical opinion of Dr. Rausch-Phung and deny the Coes' request

21. Plaintiffs have not alleged that John or Jane Coe's medical conditions or family history constitute a contraindication or precaution consistent with the ACIP Guidelines or other nationally recognized evidence-based standard of care.

does not allow a plausible inference of arbitrary conduct sufficient to violate substantive due process. To the extent the Coes argue that the timeline Lansing set for vaccination—one week—shocks the conscience because it is inconsistent with New York Public Health Law § 2164(7)(a), which states that no "principal . . . person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without" the required immunization or is inconsistent with the scheduling recommendations outlined in the ACIP Guidelines, *see, e.g.*, N.Y. Pub. Health Law § 2164(2)(c); (Dkt. No. 28-7), such allegations allow an inference of violation of state law but do not suggest conduct that is "sufficiently 'arbitrary' and 'outrageous,' in a constitutional sense, to make out a valid substantive due process claim." *Velez*, 401 F.3d at 94. Accordingly, the proposed amendment to include individual substantive due process claims against Superintendent Pettograsso, Principals Rebera, and Whiteman is denied as futile.

d. John Foe — Albany City School District

The Foes assert their substantive due process claims against Defendants Kaweeda Adams, Superintendent of the Albany City School District, and Michael Paolino, Principal of William S. Hackett Middle School. Foe, age eleven, has longstanding medical issues, severe allergies, and sensitivities to chemicals and metals, and must be hospitalized when antibiotics are necessary. (Dkt. No. 99-2, ¶ 53). Foe has received no immunization since age three on the advice of his pediatrician. (*Id.* ¶ 189). When

their August 2019 request for a medical exemption was denied in September 2019, Assistant Superintendent Lori McKenna informed the Foes that the request had been denied on the advice of Albany's physician. (*Id.* ¶ 193). Albany "expelled" Foe on September 23, 2019. (*Id.* ¶ 194).

In November 2019, Foe's pediatrician submitted a "forty-page medical exemption" request "providing extensive detail about why" Foe, who had undergone extensive genetic testing that revealed he carries "the MTHFR gene" and has "other genetic vulnerabilities." (*Id.* ¶ 199). Albany denied the second request on January 3, 2020; in a letter to the Foe family, "the school"[22] indicated that it had sent the request "to the CDC" and "had determined that it did not meet the criterial laid out in the ACIP guidelines" but provided no further detail. (*Id.* ¶ 200).

As there are no allegations of personal knowledge or involvement by Superintendent Adams or Principal Paolino, the Foes have failed to allege actionable claims against them under § 1983. Accordingly, the proposed amendment to include individual substantive due process claims against Superintendent Adams or Principal Paolino is denied as futile.

22. The proposed First Amended Complaint does not identify who sent the letter or engaged in the alleged conduct.

e. Jane Goe — Penfield Central School District[23]

The Goes bring their substantive due process claim against Defendant Dr. Thomas Putnam, Superintendent of the Penfield Central School District. The proposed First Amended Complaint contains one specific factual allegation regarding Superintendent Putnam: that on September 18, 2019, he forwarded a denial of the Goes' request for a medical exemption from Penfield's consulting physician. (Dkt. No. 99-2, ¶ 219). Even inferring from this allegation that it was Superintendent Putnam who denied the request based on the doctor's statement that he felt "strongly that this request does not meet the CDC contraindication or even a precaution from getting these specific vaccines," there is no plausible inference that Superintendent Putnam's conduct was "arbitrary" or "outrageous." *Velez*, 401 F.3d at 94. Accordingly, the proposed amendment to include and individual substantive due process claims against Superintendent Putnam is denied as futile.

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23. The Penfield Defendants seek dismissal of Goe's claims on the ground that her claims are moot because she graduated in July 2020. (Dkt. No. 78-4, at 12-13). Plaintiffs respond that even if Goe's injunctive relief claims are moot, her claims for compensatory damages, (*see* Dkt. No. 99-2, at 86 (seeking an award of "general, compensatory, nominal and/or punitive damages"), remain viable. The Court agrees. *See Beyah v. Coughlin*, 789 F.2d 986, 988-89 (2d Cir. 1986) (concluding that although the prisoner's transfer mooted claims for declaratory and injunctive relief, it did moot his claims for compensatory and punitive damages).

f. John Loe — South Huntington School District

The Loes bring their substantive due process claim against Defendant Dr. David Bennardo, Superintendent of the South Huntington School District and Brother David Migliorino, Principal of St. Anthony's High School. The proposed First Amended Complaint contains no factual allegations of personal involvement by Superintendent Bennardo.[24] Accordingly, the § 1983 claims against Superintendent Bennardo are dismissed.

The only allegation against Principal Migliorino is that on January 7, 2020, he emailed Loe's parents "stating that due to information contained in an attached letter recommending denial of the exemption from Dr. Geffken [the school district doctor]," Loe "would be unable to continue as a student" at St. Anthony's High School. (Dkt. No. 99-2, ¶ 270). Not only is the proposed First Amended Complaint devoid of allegations that Brother Migliorino, as the principal of a private school was a "state actor,"[25] there

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24. The only reference to Superintendent Bennardo is in an allegation that South Huntington adopted "discretionary policies" that burdened Loe and his family and that "by policy and custom of the district, defendant Bennardo" was a "final decision maker for medical exemptions." (Dkt. No. 99-2, ¶ 279). This conclusory allegation, however, is devoid of factual detail that would allow a plausible inference of liability or personal involvement.

25. "Under 42 U.S.C. § 1983, constitutional torts are only actionable against state actors or private parties acting 'under the color of' state law." *Betts v. Shearman*, 751 F.3d 78, 84 (2d Cir. 2014) (quoting *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 323 (2d

is no plausible inference that his decision that Loe could not continue as a student in view of the recommended denial of the request by South Huntington's consulting doctor, even if the recommendation was erroneous, was "arbitrary" or "outrageous." *Velez*, 401 F.3d at 94. Accordingly, the proposed amendment to include individual substantive due process claims against Superintendent Bennardo or Brother Migliorino is denied as futile.

g. John Joe — Ithaca City School District

The Joes bring their substantive due process claim against Defendants Dr. Luvelle Brown, Superintendent of Ithaca City School District and Susan Eschbach, Principal of Beverly J. Martin Elementary School. Joe, who had "a severe, life-threatening anaphylactic reaction to his hepatitis B vaccine given at birth," submitted a medical exemption request from his pediatrician in the summer of 2019 seeking exemption to "all immunization on a

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Cir. 2002)). While there is "no single test to identify state actions and state actors," "[t]he fundamental question . . . is whether the private entity's challenged actions are 'fairly attributable' to the state." *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012) (first quoting *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009)); then quoting *Rendell—Baker v. Kohn*, 457 U.S. 830, 838, 102 S. Ct. 2764, 73 L. Ed. 2d 418 (1982)). Given that the sole allegation in the proposed First Amended Complaint regarding Brother Migliorino is that he emailed Loe's parents stating that due to South Huntington's denial of the request for a medical exemption, Loe would be "unable to continue as a student" at St. Anthony's High School, (Dkt. No. 99-2, ¶ 270), there is no plausible inference that Brother Migliorino's conduct is attributable to the state.

permanent basis." (Dkt. No. 99-2, ¶¶ 231, 235). According to the proposed First Amended Complaint, in November 2019, Superintendent Brown (1) "partially denied" the medical exemption request Joe's mother had submitted from Joe's pediatrician; (2) informed her that "she had to get her son immunized within a week or her son would be expelled from school"; and (3) in response to Joe's mother's explanation that Joe "had always had a medical exemption to all further immunization and that multiple physicians had indicated that further immunization would be unsafe for him," stated that, "as far as he understood, [Joe] would need to have an anaphylactic reaction to each vaccine in order to be exempt from the additional mandates." (*Id.* ¶¶ 238-40).

Crediting these allegations, the Court finds they fail to allow a plausible inference that Superintendent Brown's conduct in partially denying the Joes' medical exemption request on the ground that it did not assert Joe had an anaphylactic reaction to each vaccine was arbitrary or irrational. The regulations require that any request for exemption "contain[] sufficient information to identify a medical contraindication to a specific immunization." 10 N.Y.C.R.R. § 66-1.3(c). And even if Superintendent Brown knew about and failed to consider Joe's other conditions—he is autistic, has a range of health problems, and a history of mercury, lead, and aluminum poisoning, (Dkt. No. 99-2, ¶ 232)—there is no allegation that Superintendent Brown did anything other than follow the regulation. There is no allegation that Joe had medical contraindications or precautions consistent with nationally recognized evidence-based standards of care

that Superintendent Brown ignored. The Court cannot infer from these allegations a plausible claim of egregious government action in violation of substantive due process. *Cf. Velez*, 401 F.3d at 94 (explaining that the "intentional[ ] and malicious[ ] fabricat[ion] and disseminat[ion][of] falsehoods in a common effort to deprive the plaintiff of her job . . . might well be sufficiently 'arbitrary' and 'outrageous,' in a constitutional sense, to make out a valid substantive due process claim" (citing *Natale*, 170 F.3d at 262)).

To the extent the Joes argue that the timeline Lansing set for vaccination—one week—shocks the conscience because it is inconsistent with New York Public Health Law § 2164(7)(a), which states that no "person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without" the required immunization or is inconsistent with the scheduling recommendations outlined in the ACIP Guidelines, *see, e.g.*, N.Y. Pub. Health Law § 2164(2)(c); (Dkt. No. 28-7), as the Court explained with respect to the Coes, such allegations allow an inference of violation of state law but do not suggest conduct that is "sufficiently 'arbitrary' and 'outrageous,' in a constitutional sense, to make out a valid substantive due process claim." *Velez*, 401 F.3d at 94.

Although the proposed First Amended Complaint names Principal Eschbach individually, there are no allegations that she had any involvement in the handling of the Joes' medical exemption request. It alleges only that "Defendant Susan Esbasch [sic], the principal of the school

who is by statute supposed to make this decision, did not contact the mother or the doctor." (Dkt. No. 99-2, ¶ 240). As the Court explained with respect to the Does' claim against Principal Mercer, an analysis that applies equally here, *see supra* Section VI.C.2.a., this is insufficient to allege that "each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Tangreti*, 983 F.3d at 618 (quoting *Iqbal*, 556 U.S. at 676). Accordingly, the proposed amendment to include individual substantive due process claims against Superintendent Brown and Principal Eschbach is denied as futile.

3. Equal Protection

Plaintiffs contend that "due to their disabilities, which prevent them from being able to be safely immunized per the certifications of their licensed physicians," Defendants have "denied their equal protection rights." (Dkt. No. 100, at 47; Dkt. No. 112, at 23). Plaintiffs allege that "[m]edically fragile sub-populations . . . have not been adequately studied, and there is significant divergence of thought within the medical and scientific community about the risk that is posed to medically fragile subpopulations." (Dkt. No. 99-2, ¶ 409). They further allege that "[t]here is no rational basis for discriminating against children who suffer from hundreds of recognized harms that do not fall on the ACIP contraindications and precautions list." (*Id.* ¶ 411). Defendants assert that dismissal of Plaintiffs' equal protection claim is required for the same reasons their substantive due process claims must be dismissed: the mandatory vaccination requirement and medical

exemption survive rational basis review. (Dkt. No. 28-1, at 20 n.3; Dkt. No. 54-14, at 31 n.1; Dkt. No. 78-4, at 28-29)

The Equal Protection Clause of the Fourteenth Amendment "requires that the government treat all similarly situated people alike." *Harlen Assocs. v. Incorporated Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985)). It is well settled that "[l]aws that discriminate on the basis of disability are subject to rational-basis review and upheld so long as there is a 'rational relationship between the disparity of treatment and some legitimate governmental purpose.'" *Bryant*, 692 F.3d at 219 (quoting *Garcia v. S.U.N.Y. Health Scis. Ctr. Of Brooklyn*, 280 F.3d 98, 109 (2d Cir. 2001)). As the Court explained above, there is a rational basis to support the legislature's selection of the ACIP guidance and other "nationally recognized evidence-based" reasons as the framework against which to assess the propriety of medical exemptions.

Plaintiffs argue that there is no rational basis for restricting the provision of medical exemptions to those students with contraindications or precautions identified in the ACIP Guidelines when there is an entire "sub-population" of medically fragile children whose conditions fall outside the listed contraindications and precautions and about whom there is "divergence of thought in the medical and scientific community." (Dkt. No. 99-2, ¶ 409). However, to the extent the medical exemption allows classification between students with medical conditions that constitute a contraindication or precaution within the

ACIP Guidelines, and students whose medical conditions do not, it does not violate principles of equal protection as there is no suspect classification at issue, *see Bryant*, 692 F.3d at 219 (explaining that classification of students with disabilities who had education plans authorizing aversives and classification of students with disabilities who did not have education plans permitting aversives was "a non-suspect classification subject to rational basis review"), and "must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* Here the state's framework for evaluating medical exemption requests was selected in order to provide "clear, evidence-based guidance to physicians" and "prevent medical exemptions being issued for non-medical reasons." (Dkt. No. 28-6, at 16-17). There were, therefore, rational grounds for Defendants' restriction of medical exemptions to contraindications or precautions consistent with the ACIP guidance or "other nationally recognized evidence-based standard of care." 10 N.Y.C.R.R. § 66-1.1(l). Accordingly, Plaintiffs' equal protection claims are dismissed.[26]

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26. Even assuming Plaintiffs intend to allege individual equal protection claims against the School District Defendants under a "class of one" or "selective enforcement" theory, such claims would fail as Plaintiffs allege no comparators. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564, 120 S. Ct. 1073, 145 L. Ed. 2d 1060 (2000) (explaining that to state a "class-of-one" equal protection claim, a plaintiff must plausibly allege that they were "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment"); *Harlen Assocs.*, 273 F.3d at 499 (explaining that to state an equal protection claim under a selective enforcement theory, a plaintiff must allege: (i) that they were "treated differently from other similarly situated individuals";

4. Unconstitutional Conditions

In their Fourth Claim for Relief, Plaintiffs appear to advance an unconstitutional conditions claim: Violation of the Fourteenth Amendment by unconstitutionally burdening minors' right to pursue an education at any public or private school in New York. (Dkt. No. 99-2, at 83-84). They allege that: "Defendants' practice of conditioning children's right to pursue an education at any school in New York—even private school or daycare—on the parents' waiver of fundamental rights including the right to exercise informed consent in furtherance of the best interests of their child based on the advice of licensed physicians violates the doctrine of unconstitutional conditioning." (*Id.*).

The "unconstitutional conditions doctrine" reflects "an overarching principle . . . that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). "Pursuant to this 'unconstitutional conditions' doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance." *All. for Open Soc'y Int'l, Inc. v. U.S. Agency*

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and (ii) "that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.") (internal quotation marks omitted).

for Int'l Dev., 651 F.3d 218, 231 (2d Cir. 2011) (citing *Perry v. Sindermann*, 408 U.S. 593, 597, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972)), *aff'd sub nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205, 133 S. Ct. 2321, 186 L. Ed. 2d 398 (2013).

Here, as discussed, the proposed First Amended Complaint fails to allege that conditioning admission to school on compliance with the mandatory school vaccination law infringes any constitutional rights. Therefore, there can be no corresponding "unconstitutional conditions" claim.

5. Qualified Immunity

Because amendment of Plaintiffs' constitutional claims against the individual Defendants has been denied as futile, the Court need not address whether any or all of the individual Defendants would be entitled to qualified immunity as defense to those claims.

6. Municipal Liability Claims

Plaintiffs allege that the Defendant School Districts adopted the allegedly unconstitutional policies and practices outlined in the mandatory vaccine law and medical exemption and "officially decided" to give the school principals or school physicians the discretion to "overrule" the opinion of children's treating physicians, and follow a narrow reading of the ACIP guidance in evaluating requests for medical exemptions. (*See, e.g.*, Dkt. No. 100, at 49-50).

Appendix B

The municipal liability allegations Plaintiffs assert against the Defendant School Districts fail to state a plausible claim for relief. It is well-established that a municipality may not be held liable under § 1983 on the basis of respondeat superior. *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694-95, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Rather, municipalities are responsible only for "their own illegal acts," *Pembaur v. Cincinnati*, 475 U.S. 469, 479, 106 S. Ct. 1292, 89 L. Ed. 2d 452 (1986), and are not vicariously liable for civil rights violations perpetrated by their employees, *see Monell*, 436 U.S. at 691. A municipality may be liable under Section 1983 only if "its 'policy or custom . . . made by . . . those whose edicts or acts may fairly be said to represent official policy, inflicts the [complained of] injury.'" *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 128 (2d Cir. 2004) (quoting *Monell*, 436 U.S. at 694). In order to sustain a § 1983 claim for municipal liability, a plaintiff must show that he suffered a constitutional violation, and that the violation resulted from an identified municipal policy or custom. *Id.* at 694-95; *see also Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) ("*Monell* does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation.").

Here, the proposed First Amended Complaint fails to allege that any of the individual Defendants' conduct was so arbitrary, conscience-shocking or oppressive as to implicate substantive due process. Nor are there any

allegations that would allow a plausible inference that any Plaintiff suffered a constitutional violation. Accordingly, the Defendant School Districts are entitled to dismissal of the municipal liability claims against them. *See, e.g., Segal*, 459 F.3d at 219 ("Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants' liability under *Monell* was entirely correct.").

D. Rehabilitation Act

1. Individual Capacity Claims

Section 504 "of the Rehabilitation Act [does not] provide[] for individual capacity suits against state officials." *Garcia*, 280 F.3d at 107. Thus, to the extent Plaintiffs seek to assert Rehabilitation Act claims against the individual Defendants in their personal capacities, their motion to amend is denied as futile. Plaintiffs may, however, proceed against the individual Defendants in their official capacities to the extent they seek prospective injunctive relief. *See Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) ("Rehabilitation Act suits for prospective injunctive relief may, under the doctrine established by *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), proceed against individual officers in their official capacity."). Accordingly, all Rehabilitation Act claims against the individual School District Defendants[27] in their personal capacities are dismissed.

27. As Defendants Zucker and Rausch-Phung are named in their official capacities only, there are no individual capacity claims to dismiss as to them.

2. Discrimination Claims Against the DOH, Three Village, Lansing, Penfield, South Huntington, Ithaca, Coxsackie-Athens, and Albany

In their Fifth Claim for Relief, Plaintiffs allege that the Plaintiff children are "disabled . . . in that each of them suffers from a limitation in the performance of one or more major life activity" and that the Plaintiff children's exclusion from "participation in . . . schooling" "[b]y dint of [Defendants'] manner of administering the medical exemption" violates section 504 of the Rehabilitation Act.[28] (Dkt. No. 99-2, ¶¶ 402-05). Defendants argue they are entitled to dismissal of Plaintiffs' Rehabilitation Act claims on the grounds that the Plaintiff children were denied access to school "because they failed to comply with the vaccination requirements" and thus fail to allege "that they were denied a benefit—namely, attending school—*solely by reason of their disabilities*." (Dkt. No. 28-1, at 20; Dkt. No. 54-14, at 31; Dkt. No. 78-4, at 28; Dkt. No. 91-1, at 18).

Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or

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28. The proposed First Amendment Complaint contains two claims for relief under the Rehabilitation Act. (Dkt. No. 99-2, ¶¶ 402-14 (Fifth and Sixth Claims for Relief)). As discussed, Plaintiffs appear to have mislabeled their equal protection claim as a claim under the Rehabilitation Act. *See supra* note 14.

activity" receiving federal financial support. 29 U.S.C. § 794(a). "Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation." *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016).

"In order to establish a violation of § 504 [of the Rehabilitation Act], Plaintiffs must show that: (1) they are 'qualified individuals' with a disability; (2) Defendants are subject to the Rehabilitation Act; and (3) Plaintiffs 'were denied the opportunity to participate in or benefit from [the government] services, programs, or activities, or were otherwise discriminated against by [D]efendants, by reason of [their] disabilities.'" *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003) (internal quotation marks omitted); *see also C.L. v. Scarsdale Union Free Sch. Dist.*, 744 F.3d 826, 840-41 (2d Cir. 2014).

According to the proposed First Amended Complaint, the Plaintiff children suffer multiple medical conditions and their "disabilities significantly impair multiple major life functions, including . . . functions of [their] immune system[s]," (Dkt. No. 99-2, ¶¶ 93, 125, 166, 187, 208, 234, 246); *see* 42 U.S.C. § 12102(2)(B) ("[A] major life activity . . . includes the operation of a major bodily function, including but not limited to, functions of the immune system[.]"); *Grabin v. Marymount Manhattan Coll.*, No. 12-cv-3591, 2015 U.S. Dist. LEXIS 86646, at *32-34, 2015 WL 4040823, at *10-14 (S.D.N.Y. July 2, 2015) (discussing whether the plaintiff established disability under the Rehabilitation Act where the "major life activity that [the plaintiff]

allege[d] to be limited [was] the functioning of her immune system" (citing 42 U.S.C. § 12102(2)(B)), *aff'd*, 659 F. App'x 7 (2d Cir. 2016)). Plaintiffs also allege that Defendants are recipients of "federal financial assistance." (Dkt. No. 99-2, ¶ 405). For purposes of this motion, Defendants do not challenge the sufficiency of Plaintiffs' allegations as to the first two elements of a Rehabilitation Act claim.

As to the third element, Plaintiffs argue that "the new regulations narrow the medical exemption so that most of the acknowledged potential harms are no longer covered" and that, as a result, those "with disabilities that fall outside of the non-exhaustive ACIP contraindications are discriminated against" and denied access to school.[29] (Dkt. No. 74, at 28). The proposed First Amended Complaint, however, fails to allege disability discrimination. The parties' arguments center on *D.A.B. v. New York City Department of Education*, 45 F. Supp. 3d 400, 407 (S.D.N.Y. 2014). In *D.A.B.*, D.B.'s parents, the plaintiffs, sought a medical exemption from the mandatory vaccination requirements from the New York City Department of Education ("Department") by submitting a letter from D.B.'s pediatrician stating "that D.B. has a 'history of adverse reactions' to vaccinations." *Id.* The Department "denied the request because it found no medical basis for the exemption." *Id.* at 403. In a June 2010 letter to the Department, D.B.'s mother "stated that the

29. Goe, who attended school in Penfield Central School District, fails to allege she was denied access to education: she asserts that despite Penfield's handling of her medical exemption requests, she completed her senior year of high school at Penfield and was "set to graduate." (Dkt. No. 99-2, ¶ 228).

principal had told her that D.B. would require vaccination [to attend the public school], which she stated would be 'contrary to the advice of his physicians.'" *Id.* "Prior to the 2010-2011 school year, D.B. still had not received the necessary vaccinations and the plaintiffs did not request an exemption." *Id.* The plaintiffs did not enroll D.B. in public school, but placed him in "a non-public center." *Id.*

The plaintiffs sued the Department, and asserted, along with their claims under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, that D.B.'s autism "prevent[ed] him from obtaining the required vaccinations"; that "D.B. had been excluded from the proposed placement based on his lack of vaccination"; and that "therefore the enforcement of the [vaccination] requirement constitutes discrimination" under the Rehabilitation Act. *Id.* at 404, 407. The court dismissed based upon the plaintiffs' failure to exhaust administrative remedies, as required by the IDEA, and noted that it was "unclear" whether the plaintiffs could show that D.B. "was excluded from school at all" because they had rejected the proposed public school placement and enrolled D.B. elsewhere, but concluded that in any event the Rehabilitation Act claim was "without merit" because the plaintiffs could not "show that D.B. was excluded from school 'solely by reason' of his disability." *Id.* at 405-07 (quoting 29 U.S.C. § 794(a)).

In rejecting the Rehabilitation Act claim, the court observed that the "vaccination requirement, which allows the possibility of exemptions, is a . . . limited, generally applicable law intended to limit the spread of contagious

disease." *Id.* at 407 (citing N.Y. Pub. Health Law § 2164; *New York State Ass'n for Retarded Children v. Carey*, 466 F. Supp. 479, 486 (E.D.N.Y. 1978) (stating that in contrast to complete exclusion, Section 504 allows "prophylactic measures" to limit the "risk of contagion")). And because of its limited and generally applicable nature, the court found the mandatory vaccination requirement, and medical exemption, did not fall within the category of cases where the conduct, which was found to be discriminatory in violation of the Rehabilitation Act, involved "sweeping, automatic exclusions of all children with a certain disease" *Id.* at 407 (citing *Carey*, 466 F. Supp. at 486 (holding that the exclusion of all mentally disabled children with Hepatitis B violated Section 504); *District 27 Community School Bd. v. Board of Education*, 130 Misc. 2d 398, 502 N.Y.S.2d 325, 335 (Sup. Ct. 1986) (holding that the automatic exclusion of all children with AIDS would violate the Rehabilitation Act)). The court therefore concluded that the plaintiffs failed to show that D.B. "was . . . excluded from public school solely because of his autism." *Id.* at 407. The Second Circuit agreed: in its decision affirming the district court, the Second Circuit noted that "for the reasons well stated by the district court, no reasonable juror could conclude that [the Department of Education] discriminated against [the plaintiff] because of his disability." *D.A.B. v. New York City Dep't of Educ.*, 630 F. App'x 73, 79 (2d Cir. 2015).

Here, the disabilities alleged are impairments of the immune system. Plaintiffs argue that the narrow scope of the medical exemption discriminates against students with "disabilities that fall outside of the non-exhaustive ACIP contraindications." (Dkt. No. 83, at 27-

28). However, the language of the regulation limits medical exemptions to children who can demonstrate that they have "a medical contraindication or precaution to a specific immunization *consistent with* ACIP guidance *or other nationally recognized evidence-based standard of care*." 10 N.Y.C.R.R. § 66-1.1(l) (emphasis added). The mandatory vaccination requirement and medical exemption are facially neutral, as they apply to all students—not just those with disabilities. Furthermore, although Plaintiffs strongly disagree with the state's decision to limit medical exemptions to this class of medical contraindications or precautions, as discussed above, decisions as to what medical contraindications and precautions qualify for exemption, as well as decisions about whether a particular student's condition qualifies for an exemption, are well within the authority of the legislature, state agencies, and local school administrators. *See Bryant*, 692 F.3d at 216 (dismissing claim that the New York Legislature's banning of aversive interventions in education violates the Rehabilitation Act, explaining that "[t]he regulation applies to all students, regardless of disability" and acknowledging the plaintiffs' argument that "there is no scholarly support for banning aversives" but concluding that "such a dispute (regarding which education policy is the most scientifically sound and effective approach that is least likely to present health, safety, and moral and ethical concerns) is best left for resolution by the policymakers and education administrators, not the judiciary").

Further, the Court has reviewed the allegations of the individual Plaintiffs but has found none that allege a plausible inference of disability discrimination. Crediting

their allegations, Plaintiffs allege that their requests for medical exemptions were denied in the course of the application of this facially neutral regulation because their medical exemption requests lacked the requisite detail or were otherwise insufficient; the conditions identified did not qualify under the ACIP guidance; or the doctors relied on by the schools disagreed with student's doctor's opinion that the student's condition qualified for exemption. The First Amended Complaint thus fails to allow a plausible inference that Defendants denied Plaintiffs access to education solely by reason of disability. *See, e.g., Flight v. Gloeckler*, 68 F.3d 61, 64 (2d Cir. 1995) (concluding that "Flight was not denied the additional subsidy 'solely by reason of . . . his disability' within the meaning of § 504" where "[t]he denial of the increased allowance was not based upon Flight's classification as a victim of multiple sclerosis, but rather upon the type of modification that he requested"). Thus, the Court concludes that the proposed First Amended Complaint fails to state a plausible claim for relief under the Rehabilitation Act.

3. Disparate Impact and Reasonable Accommodation Claims

In their briefing, Plaintiffs assert they are proceeding with their Rehabilitation Act claims "under theories of disparate treatment, disparate impact and failure to make a reasonable accommodation," (Dkt. No. 74, at 27), and reference regulations requiring covering entities to make reasonable modifications to their polices . . . to avoid discrimination on the basis of disability." (Dkt. No. 112, at 24 (citing, inter alia, 28 C.F.R. §§ 36.302, 35.130(b)(7)).

However, they do not meaningfully address disparate impact or the reasonable accommodation theories except to allege that the medical exemption "disparately impacts medically fragile children," like the Plaintiff children whose immune systems are compromised and whose conditions "fall outside the narrow list of ACIP contraindications." (Dkt. No. 113, at 26). *See, e.g., B.C.*, 837 F.3d at 158 ("To establish a prima facie case under a disparate impact theory, plaintiff must demonstrate '(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices.'" (quoting *Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 574-75 (2d Cir. 2003) (emphasis omitted))). Indeed, no party has cited any law or advanced any specific arguments suggesting a belief that Plaintiffs have asserted a disparate impact or reasonable accommodation claims.

Having reviewed the proposed First Amended Complaint, the Court concludes that Plaintiffs allege no facts that would allow a plausible inference that they were denied a medical exemption and admission to school "by reason of" a disability within the meaning of the Rehabilitation Act—under the mandatory school vaccination law by its terms or by the Defendant school districts. Defendants, therefore, are entitled to dismissal of Plaintiffs' Rehabilitation Act claims.

E. Motion to Transfer Venue

The Three Village and South Huntington Defendants, as well as Defendant Brother Migliorino, seek severance

of their claims and transfer of venue under 28 U.S.C. § 1404(a) to the Eastern District of New York, where they are located. (Dkt. No. 54-14, at 32-35; Dkt. No. 91-1, at 20-22). Plaintiff responds that severance is unwarranted. (Dkt. No. 83, at 29-30). Under 28 U.S.C. § 1391(b)(1), a civil action may be brought in "a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located." It is not disputed that many of the Defendants reside in the Northern District of New York, thus venue in the Northern District of New York is proper under § 1391. In light of the Court's conclusion that this case must be dismissed, the Court does not reach the issue of whether transfer is warranted under 28 U.S.C. § 1404(a), "[f]or the convenience of parties and witnesses, in the interest of justice." Accordingly, Defendants' motion to transfer is denied as moot.

VII. CONCLUSION[30]

As described above, the medical exemption is reasonably related to the State's public health objective: to sustain a high vaccination rate among children in an attempt to prevent disease outbreaks, the regulation seeks to ensure that medical exemptions are issued for medical reasons based on evidence-based guidance. While the Court is sympathetic to the plight of the Plaintiff parents and children in this case, the Court is unable to find that they have stated a plausible constitutional violation or a federal claim. Rather, their recourse for

30. Plaintiffs have sought to replead once and have not identified additional facts, in their briefing or at oral argument, that would provide a basis for alleging a plausible claim for relief.

any misapplication of the medical exemption in their particular cases is the state administrative process. For these reasons, it is hereby

ORDERED that Defendants' motions to dismiss (Dkt. Nos. 28, 54, 78, 91), are **GRANTED**; and it is further

ORDERED that Plaintiffs' motion to amend (Dkt. No. 93) is **DENIED as futile**; and it is further

ORDERED that Defendants' request for transfer of venue is **DENIED as moot**.

ORDERED that the Complaint (Dkt. No. 1) is **DISMISSED**.

IT IS SO ORDERED.

Dated: February 17, 2021
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JANUARY 5, 2021

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

20-3915

JANE DOE, on behalf of herself
and her minor child, *et al.*,

Plaintiffs-Appellants,

JANE GOE, SR.,

Plaintiff,

v.

HOWARD ZUCKER, in his official capacity as
Commissioner of Health for the State of New York,
M.D., *et al.*,

Defendants-Appellees,

SHENENDEHOWA CENTRAL
SCHOOL DISTRICT, *et al.*,

Defendants.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall

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United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of January, two thousand twenty-one.

Present:

Guido Calabresi,
Reena Raggi,
Denny Chin,
Circuit Judges.

Appellants move for an emergency injunction pending appeal. Upon due consideration, it is hereby ORDERED that the motion is DENIED because Appellants have not met the requisite standard. *See In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007); *see also Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

/s/

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, DATED NOVEMBER 20, 2020

Date Filed	#	Docket Text
11/20/2020	128	TEXT ORDER: The Court has reviewed Plaintiffs' letter response 125 , waiving any further briefing on the issue of whether this Court has jurisdiction to grant their second motion for injunctive relief 116 , and stating that they intend to make a motion in the Court of Appeals under Fed. R. App. P. 8. The Court finds that it does not have jurisdiction to grant Plaintiffs' second motion for injunctive relief. In this action Plaintiffs are challenging the constitutionality of New York's allegedly burdensome medical exemptions to New York's mandatory school immunization requirements. The Court denied Plaintiffs' first motion for injunctive relief, which sought to restrain the implementation and enforcement of the medical exemption regulations, and Plaintiffs have appealed from that order. *Doe v. Zucker*, No. 20-cv-840, 2020 WL 6196148, at *3-5 (N.D.N.Y. October 22, 2020) (noting that Plaintiffs sought to stay regulations codified in 10 N.Y.C.R.R. § 66-1; "an

injunction prohibiting Defendants from 'excluding children from school due to a lack of immunization if that child has presented a certification from a licensed physician advising against such immunization'; and an order directing Defendants 'to provide notice to schools, districts, and families that Plaintiffs and similarly situated children may attend school'"). The rule that applies to injunctions pending appeal, Fed. R. Civ. P. 62(d) "has been narrowly interpreted to allow district courts to grant only such relief as may be necessary to preserve the status quo pending an appeal where the consent of the court of appeals has not been obtained." *International Ass'n of Machinists and Aerospace Workers, AFL-CIO v. Eastern Air Lines, Inc.*, 847 F.2d 1014, 1018 (2d Cir. 1988). Plaintiffs' second motion for injunctive relief seeks to compel the defendants to provide "access to online or other remote educational opportunities." [116, at 1]. This request does not seek to preserve the status quo; the record reflects that the regulations at issue were implemented as emergency regulations in August 2019 and made permanent in December 2019, *see Doe*, 2020 WL 6196148, at *2, and that the

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Plaintiff children have been excluded from school since the 2019-2020 school year. *Doe v. Zucker*, 2020 WL 6196148, at *3. Granting Plaintiffs' second motion for injunctive relief would thus change the status quo. Plaintiffs' second request for injunctive relief raises the same "likelihood of success on the merits" argument that this Court ruled on in its order, which is currently on appeal, denying Plaintiffs' motion to enjoin enforcement of the state regulations. Accordingly, the Court finds that it is without jurisdiction to decide Plaintiffs' second motion for injunctive relief. 116 . The Clerk is directed to terminate the motion 116 ; Plaintiffs may renew the motion upon filing a letter indicating they have received consent from the Second Circuit. SO ORDERED by Judge Brenda K. Sannes on 11/20/2020. (rjb,) (Entered: 11/20/2020)

APPENDIX E — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED OCTOBER 22, 2020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:20-cv-840 (BKS/CFH)

JANE DOE ON BEHALF OF HERSELF AND HER MINOR CHILD; JANE BOE, SR. ON BEHALF OF HERSELF AND HER MINOR CHILD; JOHN COE, SR. AND JANE COE, SR. ON BEHALF OF THEMSELVES AND THEIR MINOR CHILDREN; JOHN FOE, SR. ON BEHALF OF HIMSELF AND HIS MINOR CHILD; JANE GOE, SR. ON BEHALF OF HERSELF AND HER MINOR CHILD; JANE LOE ON BEHALF OF HERSELF AND HER MEDICALLY FRAGILE CHILD; JANE JOE ON BEHALF OF HERSELF AND HER MEDICALLY FRAGILE CHILD; CHILDRENS HEALTH DEFENSE, AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs,

v.

HOWARD ZUCKER, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF HEALTH FOR THE STATE OF NEW YORK; ELIZABETH RAUSCH-PHUNG, M.D., IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE BUREAU OF

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IMMUNIZATIONS AT THE NEW YORK STATE DEPARTMENT OF HEALTH; THE NEW YORK STATE DEPARTMENT OF HEALTH; THREE VILLAGE CENTRAL SCHOOL DISTRICT; CHERYL PEDISICH, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, THREE VILLAGE CENTRAL SCHOOL DISTRICT; CORINNE KEANE, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL PAUL J. GELINAS JR. HIGH SCHOOL, THREE VILLAGE CENTRAL SCHOOL DISTRICT; LANSING CENTRAL SCHOOL DISTRICT; CHRIS PETTOGRASSO, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, LANSING CENTRAL SCHOOL DISTRICT; CHRISTINE REBERA, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, LANSING MIDDLE SCHOOL, LANSING CENTRAL SCHOOL DISTRICT; LORRI WHITEMAN, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, LANSING ELEMENTARY SCHOOL, LANSING CENTRAL SCHOOL DISTRICT; PENFIELD CENTRAL SCHOOL DISTRICT; DR. THOMAS PUTNAM, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, PENFIELD CENTRAL SCHOOL DISTRICT; SOUTH HUNTINGTON SCHOOL DISTRICT; DR. DAVID P. BENNARDO, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, SOUTH HUNTINGTON SCHOOL DISTRICT; BR. DAVID MIGLIORINO, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, ST. ANTHONY'S HIGH SCHOOL,

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SOUTH HUNTINGTON SCHOOL DISTRICT; ITHACA CITY SCHOOL DISTRICT; DR. LUVELLE BROWN, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, ITHACA CITY SCHOOL DISTRICT; SUSAN ESCHBACH, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, BEVERLY J. MARTIN ELEMENTARY SCHOOL, ITHACA CITY SCHOOL DISTRICT; SHENENDEHOWA CENTRAL SCHOOL DISTRICT; DR L. OLIVER ROBINSON, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, SHENEDEHOWA CENTRAL SCHOOL DISTRICT; SEAN GNAT, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, KODA MIDDLE SCHOOL, SHENENDEHOWA CENTRAL SCHOOL DISTRICT; ANDREW HILLS, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, ARONGEN ELEMENTARY SCHOOL, SHENENDEHOWA CENTRAL SCHOOL DISTRICT; COXSACKIE-ATHENS SCHOOL DISTRICT; RANDALL SQUIER, SUPERINTENDENT, ACTING IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT, COXSACKIE-ATHENS SCHOOL DISTRICT; FREYA MERCER, ACTING IN HER OFFICIAL CAPACITY AS PRINCIPAL, COXSACKIE ATHENS HIGH SCHOOL, COXSACKIE-ATHENS SCHOOL DISTRICT; ALBANY CITY SCHOOL DISTRICT; KAWEEDA G. ADAMS, ACTING IN HER OFFICIAL CAPACITY AS SUPERINTENDENT, ALBANY CITY SCHOOL DISTRICT; MICHAEL PAOLINO, ACTING IN HIS OFFICIAL CAPACITY AS PRINCIPAL, WILLIAM S. HACKETT MIDDLE

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SCHOOL, ALBANY CITY SCHOOL DISTRICT; AND ALL OTHERS SIMILARLY SITUATED,

Defendants.

October 22, 2020, Decided
October 22, 2020, Filed

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On July 23, 2020, Plaintiffs, on behalf of their minor children, filed this proposed class action under 42 U.S.C. § 1983 challenging the constitutionality of New York's allegedly burdensome medical exemptions to mandatory school immunization requirements. (Dkt. No. 1). Plaintiffs allege that Defendants, including the New York State Department of Health ("DOH"), New York Commissioner of Health Howard Zucker, DOH Director of the Bureau of Immunizations Elizabeth Rausch-Phung, M.D., eight school districts and their administrators, and Principal of St. Anthony's High School Br. David Anthony Migliorino, have violated their Fourteenth Amendment substantive due process rights, liberty interest in parenting and informed consent, and right to free public education, as well as § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a). (*Id.*). On August 25, 2020, Plaintiffs filed a motion for a temporary restraining order and preliminary injunction under Federal Rule of Civil Procedure 65, seeking an order restraining the implementation and

enforcement of the applicable regulations.[1] (Dkt. No. 41). Defendants oppose Plaintiffs' motion. (Dkt. Nos. 61-66, 81-82). The Court held oral argument on October 15, 2020. Having carefully considered the parties' submissions and oral argument, the Court denies Plaintiffs' motion. The following constitutes the Court's findings of fact and conclusions of law in accordance with Rule 52(a)(2).

II. FINDINGS OF FACT[2]

A. New York School Vaccination Laws

New York Public Health Law § 2164 (the "school vaccination law") requires children aged two months to eighteen years to be immunized from certain diseases

1. Following a telephone conference on August 26, 2020, the Court issued an Order to Show Cause denying Plaintiffs' motion for a temporary restraining order but directing expedited briefing on their motion for a preliminary injunction. (Dkt. No. 46).

2. The facts are taken from the affidavits and attached exhibits submitted in support of, and opposition to, this motion. *See J.S.R. ex rel. J.S.G. v. Sessions*, 330 F. Supp. 3d 731, 738 (D. Conn. 2018) ("In deciding a motion for preliminary injunction, a court may consider the entire record including affidavits and other hearsay evidence."); *Fisher v. Goord*, 981 F. Supp. 140, 173 n.38 (W.D.N.Y. 1997) (noting that a "court has discretion on a preliminary injunction motion to consider affidavits as well as live testimony, given the necessity of a prompt decision"). The "findings are provisional in the sense that they are not binding on a motion for summary judgment or at trial and are subject to change as the litigation progresses." *trueEX, LLC v. MarkitSERV Ltd.*, 266 F. Supp. 3d 705, 721 (S.D.N.Y. 2017); *accord Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 364 (2d Cir. 2003).

before they can attend "any public, private or parochial . . . kindergarten, elementary, intermediate or secondary school." N.Y. Pub. Health Law § 2164(1)(a). The school vaccination law requires children to be immunized against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease. N.Y. Pub. Health Law § 2164(7). A child may not attend school in excess of fourteen days without documentation showing that the child was immunized or in the process of complying with the immunization series. N.Y. Pub. Health Law § 2164(7); 10 N.Y.C.R.R. § 66-1.3(a), (b).

The school vaccination law initially contained two exemptions to the vaccination requirements: a medical exemption requiring a physician's certification that the physician had determined that the vaccination may be detrimental to the child's health, N.Y. Pub. Health Law § 2164(8), and a non-medical exemption that required a statement by the parent or guardian indicating that they objected to vaccination on religious grounds, N.Y. Pub. Health Law § 2164(9), *repealed by* L.2019, c. 35, § 1, eff. June 13, 2019. In 2019, the New York Legislature repealed the religious exemption after finding that "[o]utbreaks in New York have been the primary driver" of the United States' "worst outbreak of measles since 1994," with 810 of the 880 cases confirmed nationwide in 2019. (Dkt. No. 28-3, at 6 (Sponsor Memo, S2994A)). The Legislature further found that:

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> According to the Centers for Disease Control, sustaining a high vaccination rate among school children is vital to the prevention of disease outbreaks, including the reestablishment of diseases that have been largely eradicated in the United States, such as measles. According to State data from 2013-2014, there are at least 285 schools in New York with an immunization rate below 85%, including 170 schools below 70%, far below the CDC's goal of at least a 95% vaccination rate to maintain herd immunity. This bill would repeal exemptions currently found in the law for children whose parents have non-medical objections to immunizations.

2019 New York Assembly Bill No. 2371, New York Two Hundred Forty-Second Legislative Session (May 22, 2019).

On August 16, 2019, following the repeal of the religious exemption, the New York Commissioner of Health issued "emergency regulations," amending the regulations governing the school vaccination law "to conform to recent amendments to Section[] 2164" and to "make the regulations consistent with national immunization recommendations and guidelines." (Dkt. No. 61, ¶ 6; Dkt. No. 61-1, at 1 (Summary of Express Terms of Emergency Regulations Aug. 16, 2019 ("Summary"))).[3]

3. The school vaccination law authorizes the Commissioner of Health to "adopt and amend rules and regulations to effectuate the provisions and purposes of [§ 2164]." N.Y. Pub. Health Law § 2164(10). The Commissioner is also required, under the Public Health Law, to

The Summary noted that when California removed non-medical exemptions to school immunization requirements in 2015 "without taking steps to strengthen the rules governing medical exemptions," the use of medical exemptions to school immunization requirements more than tripled. (Dkt. No. 61-1, at 16). The Summary further noted that "[b]y providing clear, evidence-based guidance to physicians, th[e] emergency regulation will help prevent medical exemptions being issued for non-medical reasons." (*Id.* at 16-17).

These emergency regulations were renewed, effective November 14, 2019, and after a public comment period, permanently adopted as of December 31, 2019. (Dkt. No. 61, ¶ 7). Specifically, the Commissioner added a new subdivision defining "may be detrimental to the child's health," as used in § 2164 of the school vaccination law, to mean "that a physician has determined that a medical contraindication or precaution to a specific immunization consistent with ACIP [the CDC Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care." 10 N.Y.C.R.R. § 66-1.1(l); (Dkt. No. 61-1, at 2). The amendments also required "the use of exemption forms approved by the New York State Department of Health" and no longer allowed "a written statement from a physician." (Dkt. No. 61-1, at 2); 10 N.Y.C.R.R. § 66-1.3(c).

"establish and operate such adult and child immunization programs as are necessary to prevent or minimize the spread of disease and to protect the public health," and is authorized to "promulgate such regulations" governing vaccinations. N.Y. Pub. Health Law § 206(1)(l).

Subdivision (c) of 10 N.Y.C.R.R. § 66-1.3, was otherwise unchanged, however, and continued (i) to require that the "physician certifying that immunization may be detrimental to the child's health, contain[] sufficient information to identify a medical contraindication to a specific immunization and specify the length of time the immunization is medically contraindicated," (ii) to require that the medical exemption "be reissued annually," and (iii) to provide that "[t]he principal or person in charge of the school may require additional information supporting the exemption." *Compare* 10 N.Y.C.R.R. § 66-1.3(c), *with* 2014 N.Y. Reg. Text 336024 (NS) (Notices of Adoption 10 N.Y.C.R.R. § 66-1.3).

B. Plaintiffs

Plaintiffs include at least seven families[4] with children who applied to the Defendant school districts for "medical exemptions" to vaccinations for the 2019-2020 school year. (Dkt. No. 41-12, ¶ 8; Dkt. No. 41-13, ¶ 9; Dkt. No. 41-14, ¶ 9; Dkt. No. 41-15, ¶ 8; Dkt. No. 62-1, at 34; Dkt. No. 41-17, ¶ 10; Dkt. No. 1, ¶ 187). Plaintiffs sought exemptions "from one or more mandatory immunization requirement for school attendance in New York State based on the advice of their treating physicians that such immunization poses unacceptable risks to their children's health." (Dkt. No. 11, ¶ 41). The medical exemptions were denied and the Plaintiff children have been excluded from school since the 2019-2020 school year—in some cases, since

4. The Complaint names seven families in the caption, but discusses an eighth family, the Koe family, in the body of the Complaint. (Dkt. No. 1, at 37).

September 2019. (Dkt. No. 41-17, ¶ 13 (Loe last day of school in September 2019); Dkt. No. 41-12, ¶ 23 (Doe last day of school in October 2019); Dkt. No. 41-13, ¶ 8 (Boe last day of school in December 2019); Dkt. No. 57, ¶ 8 (Coe last day of school in January 2020); Dkt. No. 41-15, ¶ 12 (Foe last day of school in September 2019); Dkt. No. 58, at 3 (Goe graduated in 2020); Dkt. No. 41-16, ¶ 10 (Joe last day of school in November 2019)).

III. STANDARD OF REVIEW

Rule 65 of the Federal Rules of Civil Procedure governs preliminary injunctions. A party seeking a preliminary injunction must establish that: (1) it is likely to suffer irreparable harm in the absence of preliminary relief; (2) either (a) it is likely to succeed on the merits, or (b) there are sufficiently serious questions going to the merits of its claims to make them fair ground for litigation; (3) the balance of hardships tips decidedly in its favor; and (4) a preliminary injunction is in the public interest. *Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011); *accord N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). However, "[w]hen, as here, the moving party seeks a preliminary injunction that will affect government action taken in the public interest pursuant to a statutory or regulatory scheme, the injunction should be granted only if the moving party meets the more rigorous likelihood of success standard." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 149 (N.D.N.Y. 2012) (quoting *Metro. Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 156 (2d Cir. 2010)); *see also Ass'n of Jewish Camp Operators v. Cuomo*, No. 20-cv-687, 470 F.

Supp. 3d 197, 2020 U.S. Dist. LEXIS 117765, at *12, 2020 WL 3766496, at *6 (N.D.N.Y. July 6, 2020).[5]

IV. ANALYSIS

A. Irreparable Harm

A showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quoting *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999)). "Irreparable harm is 'injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.'" *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (quoting *Forest City Daly Hous., Inc. v. Town*

5. The parties dispute whether the injunction sought is a prohibitory injunction, which preserves the status quo, or a mandatory injunction, which changes the status quo and is subject to a heightened standard. *See N. Am. Soccer League, LLC*, 883 F.3d at 37. The "status quo . . . is, 'the last actual, peaceable uncontested status which preceded the pending controversy.'" *Id.* (quoting *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014)). Although Plaintiffs assert that they are seeking to preserve the status quo—"adherence to the plain language of N.Y. Public Health Law 2164(8), without the additional burdens the state defendants' new regulations [contained in NYCRR § 66-1] imposed" in 2019, some of the regulatory provisions Plaintiffs seek to enjoin have been in effect since 2014 and Plaintiffs also seek an order directing the Defendants to provide notice that similarly situated children may attend school. (Dkt. No. 41-1, at 15, 31). In any event, since Plaintiffs fail to meet the likelihood of success standard, the Court need not decide whether a heightened standard applies.

of North Hempstead, 175 F.3d 144, 153 (2d Cir. 1999)). "The relevant harm is the harm that (a) occurs to the parties' legal interests and (b) cannot be remedied after a final adjudication, whether by damages or a permanent injunction." *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (internal footnote omitted).

"[C]ourts considering this issue routinely assume that a child prevented from attending school would suffer irreparable harm" and, accordingly, find that the child's application "turns on [the] likelihood of success on the merits." *Check ex rel. MC v. New York City Dep't of Educ.*, No. 13-cv-791, 2013 U.S. Dist. LEXIS 71223, at *16, 2013 WL 2181045, at *9 (E.D.N.Y. Mar. 22, 2013) (citing *Lewis v. Sobol*, 710 F. Supp. 506, 507 (S.D.N.Y. 1989) (noting that "it was clear that [plaintiff's daughter] would suffer irreparable harm if barred from attending school"), *report & recommendation adopted*, 2013 U.S. Dist. LEXIS 71124, 2013 WL 2181045 (E.D.N.Y. May 20, 2013); *Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 426 (E.D.N.Y. 2010) ("[The Court] is satisfied that there would be irreparable harm to this child entering school after [the start of the school year]."), *aff'd* 500 F. App'x 16 (2d Cir. 2012). Thus, the exclusion of Plaintiffs' minor children from school supports a strong showing of irreparable harm.[6]

6. Defendants argue that even assuming Plaintiffs can establish irreparable harm, their delay in seeking an injunction undermines any assertion of irreparable harm. (Dkt. No. 61-24). "Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at

B. Likelihood of Success

Plaintiffs argue that the new regulations are "overbroad" and "unduly burden fundamental rights and the ability of medically fragile children to obtain a medical exemption."[7] (Dkt. No. 41-1, at 18). In their briefing on this motion Plaintiffs have not advanced any "as applied"

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least a reduced need for such drastic, speedy action." *Citibank N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). The Second Circuit has explained that a party's "failure to act sooner 'undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.'" *Id.* at 277 (quoting *Le Sportsac, Inc. v. Dockside Rsch., Inc.*, 478 F. Supp. 602, 609 (S.D.N.Y. 1979)). Here, the regulation providing the impetus for this action—10 N.Y.C.R.R. 66-1.1(l)—has been in effect since August 2019, (Dkt. No. 61-1), and the minor Plaintiffs had been excluded from school for at least six months, and many for longer, before filing this action. (*See, e.g.*, Dkt. No. 1 (Complaint filed July 23, 2020); Dkt. No. 41-13, ¶ 8 (Boe excluded since December 2019); Dkt. No. 41-12, ¶ 23 (Doe excluded since October 2019)). Plaintiffs argue that the delay in this case, which involves multiple plaintiffs and a proposed class action complaint, should not undercut a finding of irreparable injury. Because Plaintiffs fail to establish likelihood of success, the Court need not consider whether a delay in seeking relief would undermine Plaintiffs' irreparable harm contention.

7. At oral argument, Plaintiffs argued that the medical exemption regulations posed an "unconstitutional condition" on the benefit of a public or private education. "[T]he unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013). As Plaintiffs raised this argument at oral argument and have not provided any authority for considering this doctrine in the context of this case, the Court does not consider it.

arguments regarding the circumstances of the Defendant school district's respective denials of their requests for a medical exemption. Plaintiffs advance a facial challenge to the regulations. (Dkt. No. 41-1, at 31). They seek a stay of the "new regulations," codified in 10 N.Y.C.R.R. § 66-1, an injunction prohibiting Defendants from "excluding children from school due to a lack of immunization if that child has presented a certification from a licensed physician advising against such immunization," and an order directing Defendants "to provide notice to schools, districts, and families that Plaintiffs and similarly situated children may attend school." (Dkt. No. 41-1, at 31).

"[T]o succeed on a facial challenge, the challenger must establish that no set of circumstances exists under which the [regulation] would be valid." *Jacoby & Meyers, LLP v. Presiding Justices of the First, Second, Third & Fourth Dep'ts, Appellate Div. of the Supreme Court of New York*, 852 F.3d 178, 184 (2d Cir. 2017) (quoting *N.Y.S. Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015)). "As a result, a facial challenge to a legislative enactment is the most difficult challenge to mount successfully." *Id.* (quoting *N.Y.S. Rifle & Pistol Ass'n*, 809 F.3d at 265). Here, Plaintiffs claim that the regulations violate their Fourteenth Amendment substantive due process rights, liberty interest in parenting, liberty interest in informed consent, and right to a free public education.[8] (Dkt. No. 1; Dkt. No. 41-1).

8. To be clear about the grounds on which Plaintiffs seek injunctive relief, the Court notes the following: first, although Plaintiffs' Complaint alleges a violation of the right to free public education, they also challenge the application of the regulations to

Appendix E

Plaintiffs are unlikely to succeed on their claim that the challenged regulations violate the Fourteenth Amendment. In *Jacobson v. Massachusetts*, the Supreme Court explained that "the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint." 197 U.S. 11, 26, 25 S. Ct. 358, 49 L. Ed. 643 (1905). "There are manifold restraints to which every person is necessarily subject for the common good." *Id.* "The possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order, and morals of the community." *Id.* (quoting *Crowley v. Christensen*, 137 U.S. 86, 89, 11 S. Ct. 13, 34 L. Ed. 620 (1890)).

It is well-settled, as Plaintiffs acknowledge, (Dkt. No. 41-1, at 18), that New York's mandatory school vaccination

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private schools, (Dkt. No. 1, at 39-44, 69-70). *See* N.Y. Pub. Health Law § 2164(1)(a) (requiring enumerated vaccinations before a child can attend "any public, private or parochial . . . kindergarten, elementary, intermediate or secondary school").

Second, Plaintiffs' motion for preliminary injunctive relief is based upon their constitutional challenges, not the Rehabilitation Act claims alleged in the Complaint.

Third, while Plaintiffs argue in terms of "informed consent" in the Complaint, (Dkt. No. 1, at 69), in their motion papers they articulate this as the parental right "to make critical health decisions" (Dkt. No. 89, at 22), and to "exercise the right of informed consent on behalf of their minor children." (Dkt. No. 41-1, at 20).

law does not violate substantive due process. *See Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015) (rejecting the plaintiffs' argument that "New York's mandatory vaccination requirement" for school children violates substantive due process, explaining that "[t]his argument is foreclosed by the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*"). In this case, Plaintiffs do not challenge the school vaccination law itself. Plaintiffs challenge the regulations defining "may be detrimental to a child's health" and giving school districts the authority to reject, or require additional documentation supporting, a doctor's medical exemption statement ("the medical exemption regulations") as violative of their Fourteenth Amendment rights. (Dkt. No. 41-1, at 16).

It is equally well-settled, however, that a state may establish regulations implementing mandatory vaccine laws and vesting local officials with enforcement authority. *Jacobson*, 197 U.S. at 25 (observing that "[i]t is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety"); *see also Zucht v. King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194, 20 Ohio L. Rep. 452 (1922) (explaining that *Jacobson* and other cases, have "settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative" and that "the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law" (citing *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358, 30

S. Ct. 301, 54 L. Ed. 515 (1910); *Lieberman v. Van de Carr*, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305 (1902)).

In *Jacobson*, the Supreme Court instructed that a court must not invalidate such a law or regulation unless it lacks a "real or substantial relation [to public health]" or is "beyond all question, a plain, palpable invasion of rights[.]" 197 U.S. at 31. The Supreme Court further observed that there may be incidences where "the police power of a state, whether exercised directly by the legislature, or by a local body acting under its authority, may be exerted in such circumstances, or by regulations so arbitrary and oppressive in particular cases, as to justify the interference of the courts to prevent wrong and oppression." *Id.* at 38. The Court noted that the judiciary could interfere, for example, in an "extreme case" of an individual who was not "a fit subject of vaccination" or for whom "vaccination by reason of his then condition, would seriously impair him health, or probably cause his death," "to protect the health and life of the individual concerned." *Id.* at 38-39.

The parties dispute how *Jacobson* applies here. Plaintiffs argue that strict scrutiny is warranted because the medical exemption regulations burden their fundamental rights, including their right to substantive due process, their liberty interest in parenting, their right to refuse unwanted medical procedures, and their right to a public education. (Dkt. No. 41-1, at 16).[9] Defendants respond

9. Plaintiffs have also argued that the regulations burden their fundamental constitutional right to a medical exemption, but have not cited any support for such a right. *See infra* note 11.

that "the correct test to apply is undeniably" the "test of *Jacobson* and *Zucht*," which Defendants characterize as a rational basis test. (Dkt. No. 61-24, at 14). The Court notes that the *Jacobson* framework has been "nearly uniformly relied on" to analyze constitutional challenges to "emergency public health measures put in place to curb the spread of coronavirus." *Page v. Cuomo*, No. 20-cv-732, 478 F. Supp. 3d 355, 2020 U.S. Dist. LEXIS 183769, at *19, 2020 WL 4589329, at *8 (N.D.N.Y. Aug. 11, 2020), and that Plaintiffs have not cited any support for the application of strict scrutiny to school immunization regulations. *See Phillips*, 775 F.3d at 542 n.5 (noting that "no court appears ever to have held" that "*Jacobson* requires that strict scrutiny be applied to immunization mandates").

In any event, whether the Court applies the *Jacobson* framework or the traditional constitutional analysis for state action alleged to burden constitutional rights, Plaintiffs have not shown a likelihood of success. State action that infringes upon a fundamental right is ordinarily analyzed under the test of strict scrutiny. *See, e.g., Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003) (observing that "[w]here the right infringed is fundamental, strict scrutiny is applied to the challenged governmental regulation"). Under that test, the challenged action "must be narrowly tailored to promote a compelling Government interest," and "must use the least restrictive means to achieve its ends." *Evergreen Ass'n, Inc. v. City of New York*, 740 F.3d 233, 246 (2d Cir. 2014) (citation omitted). Under *Jacobson*, the Court considers whether the regulations lack a "real or substantial relation" to the public health and public safety, whether the regulations are "beyond all question, a plain palpable invasion of rights

secured by fundamental law" and whether the regulations are so arbitrary and oppressive as to warrant judicial interference. 197 U.S. at 31-39.

The right and liberty interest in parenting and the right to refuse unwanted medical procedures are fundamental rights. *Troxel v. Granville*, 530 U.S. 57, 66, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) ("[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261, 278, 110 S. Ct. 2841, 111 L. Ed. 2d 224 (1990) (finding a "constitutionally protected liberty interest in refusing unwanted medical treatment"). Plaintiffs, however, are unlikely to succeed in showing that the medical exemption regulations directly infringe on either of these fundamental rights, as they do not force parents to consent to vaccination of their children. Rather, the regulations condition children's right to attend school on vaccination. Thus, the right that is being burdened is the right to attend school at a public or private institution instead of being homeschooled. And, the Second Circuit has made clear, "[t]he right to public education is not fundamental." *Bryant v. N.Y.S. Educ. Dep't*, 692 F.3d 202, 217 (2d Cir. 2012).[10]

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10. For this reason, Plaintiffs' claim that the regulations violate their Fourteenth Amendment right to a free public education, (Dkt. No. 1, at 69-70), is unlikely to succeed. *See Phillips*, 775 F.3d at 542 n. 5 (noting that "[b]ecause 'there is no substantive due process right to a public education' plaintiffs' substantive due process claim fails even under" a strict scrutiny test (citing *Bryant*, 692 F.3d at 217)) (citation omitted).

Thus, education regulations that have an incidental effect of burdening parental rights or right to refuse medical care, have been upheld following rational basis review. *See Immediato*, 73 F.3d at 462 ("[W]hile parents have definite rights over their children's education, 'they have no constitutional right to provide their children with . . . education unfettered by *reasonable* government regulation." (emphasis in original) (quoting *Runyon v. McCrary*, 427 U.S. 160, 178, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976))); *see, e.g., Phillips*, 775 F.3d at 543 (applying rational basis review to the plaintiffs' argument that exclusion from school based on lack of vaccination burdened fundamental right of free exercise of religion and explaining that "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice" (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)). Accordingly, even if the minor Plaintiffs were unable to receive an education at a public or private institution because they cannot receive vaccinations, the school vaccination law and its implementing regulations "would still comport with due process if [they were] reasonably related to a legitimate government objective." *Bryant*, 692 F.3d at 218.[11] Thus, to

11. Citing, inter alia, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), and *Stenberg v. Carhart*, 530 U.S. 914, 937, 120 S. Ct. 2597, 147 L. Ed. 2d 743 (2000), Plaintiffs argue that "[m]edical exemption cases in the abortion context are illustrative of how courts should scrutinize medical exemptions even more strictly than other important fundamental rights" and that under *Casey* and *Stenberg*,

succeed, Plaintiffs must show that the medical exemption regulations lack a "real or substantial relation" to the public health and public safety or are arbitrary and oppressive. *Jacobson*, 197 U.S. at 38.

Plaintiffs argue that the new definition of "detrimental to the child's health" arbitrarily limits medical exemptions to children with medical contraindications or precautions that "fit[] within the narrow confines" of ACIP guidance,

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the regulation's narrow definition of what is "detrimental" to a child's health and reliance on ACIP guidance, 10 N.Y.C.R.R. § 66-1.1(l), instead of the "clinical judgment" of the child's treating physician, is unconstitutional. (Dkt. No. 89, at 15-16 (citing *Stenberg*, 530 U.S. at 937 ("Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey's* words 'appropriate medical judgment' must embody the judicial need to tolerate responsible differences of medical opinion.")). Plaintiffs, however, fail to cite any caselaw applying the standards utilized in *Casey* and *Stenberg*, inter alia, concerning the right recognized in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), to cases where, as here, the right being burdened is not a fundamental right. Further, unlike the medical exemption cases involving abortion, where the life or health of the mother is at stake, if the medical exemption at issue here is denied the parent may forgo vaccination and elect to homeschool their child.

Plaintiffs argue this medical exemption caselaw has been applied outside of the abortion context, citing to *Whalen v. Roe*, 429 U.S. 589, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). Specifically, Plaintiffs cite to the Supreme Court's observation that the record-keeping law at issue in *Whalen* did not condition a patient's access to drugs "on the consent of any state official or other third party." 429 U.S. at 603. This passage does not support the Plaintiffs' claim here, which is founded on an inability to pursue an education, not state interference in medical care.

and removes discretion from treating physicians to determine whether or not their patient requires a medical exemption. (Dkt. No. 41-1, at 10 (citing 10 N.Y.C.R.R. § 66-1.1(l))). The regulations, however, are broader than Plaintiffs' characterization; they allow exemptions for "medical contraindication or precaution to a specific vaccination *consistent with* ACIP guidance *or other nationally recognized evidence-based standard of care*." 10 N.Y.C.R.R. § 66-1.1(l) (emphasis added). In an affidavit, Elizabeth Rausch-Phung, MD, MPH, the Director of the Bureau of Immunization for the New York State Department of Health, explains that the definition was added to "conform the regulations with current guidance from the U.S. Centers for Disease Control," which "maintains immunization schedules and guidelines for when immunization may be detrimental to a child's health due to a contraindication or a precaution to a specific immunization—a nationally recognized evidence-based standard of care." (Dkt. No. 61, ¶ 12; Dkt. No. 61-4 (CDC contraindications and precautions)). According to Dr. Rausch-Phung, "[t]he ACIP includes medical and public health experts, including vaccine experts, scientists, doctors and public health professionals, who meet 3 times every year to discuss vaccine recommendations." (Dkt. No. 61, ¶ 12). Further, during the public comment period for the regulations, the "NYS American Academy of Pediatrics, the NYS Academy of Family Physicians . . . the American Nurses' Association, [and] the Medical Society of the State of New York," among others, "expressed support of the regulations." (Dkt. No. 28-5, at 31). Thus, the Court concludes that Plaintiffs are unlikely to succeed in showing that the regulation's definition of "detrimental

to the child's health" and reference to ACIP guidance or "other nationally recognized evidence-based standard of care" as appropriate resources for a determination of whether a medical exemption is warranted, lacks a "real or substantial relation" to the public health and public safety or is arbitrary and oppressive.

Next, Plaintiffs argue that the regulations improperly give school principals the authority to overrule the judgment of treating physicians and do not require the principals to consult medical professionals. (Dkt. No. 41-1, at 11 (citing 10 N.Y.C.R.R. § 66-1.3(c) ("The principal or person in charge of the school may require additional information supporting the exemption.")).[12] Dr. Rausch-Phung acknowledged that while a principal or person in charge of the school has the responsibility for making the determination at the outset, "schools have the option of requesting that the Bureau of Immunization Medical Director consult on these requests." (Dkt. No. 61, ¶ 18). The State's Medical Exemption Review Procedures advise that "[i]n making a determination on a medical exemption request, the school should seek the appropriate medical consultation (e.g., the school's medical director)." (Dkt. No. 54-13, at 2). As states may vest officials with broad discretion in matters of application of health laws, Plaintiffs are unlikely to succeed in showing that it is irrational or arbitrary to assign review, at the first level, to the principal of the school the child seeks to attend. *See Zucht*, 260 U.S. at 176 (explaining that "the municipality

12. This provision has been in effect since 2014. *Compare* 10 N.Y.C.R.R. § 66-1.3(c), *with* 2014 N.Y. Reg. Text 336024 (NS) (Notices of Adoption 10 N.Y.C.R.R. § 66-1.3).

may vest in its officials broad discretion in matters affecting the application and enforcement of a health law" (citing *Lieberman*, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305)).

Plaintiffs further assert that the required medical exemption forms are burdensome. (Dkt. No. 41-1, at 12 (citing 10 N.Y.C.R.R. § 66-1.3(c) (requiring submission of "[a] signed, completed medical exemption form approved by the NYSDOH or NYC Department of Education from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated")). The form Plaintiffs refer to, however, is a "simple, one-page form," that requires "the patient's name, date of birth, address, school, . . . a description of the patient's contraindications/precautions to a specific vaccination, . . . the date the medical exemption ends," and a physician's signature, medical license number, address, and telephone number." (Dkt. No. 61, ¶ 9; *see, e.g.*, Dkt. No. 63-7, at 7). The information requested in the form clearly relates to the grounds on which a medical exemption may be granted, and is clearly intended to assist a school district determining whether a student should be granted such an exemption. Thus, Plaintiffs are unlikely to be able to show that the required form lacks a rational basis or is arbitrary.

Finally, Plaintiffs argue that the requirement that the medical exemption be "reissued" annually is also

burdensome, (Dkt. No. 41-1, at 13 (citing 10 N.Y.C.R.R. § 66-1.3 (c))). Dr. Rausch-Phung explains that the regulatory amendments "did not change the pre-existing requirement that the medical exemption must be reissued annually." (Dkt. No. 61, ¶ 14). Indeed, this provision has been in effect since 2014. *Compare* 10 N.Y.C.R.R. § 66-1.3(c), *with* 2014 N.Y. Reg. Text 336024 (NS) (Notices of Adoption 10 N.Y.C.R.R. § 66-1.3). Dr. Rausch-Phung further explains that permanent exemptions were never "an option" because, "as indicated by the CDC, 'the majority of contraindications are temporary,'" and "may change over a child's lifetime" and "vaccines can often be administered when the contraindication no longer exists." (Dkt. No. 61, ¶ 14). Based on this explanation, Plaintiffs are unlikely to succeed in showing that the annual medical-exemption requirement is irrational or arbitrary.

Thus, the Court concludes that the public health concerns in maintaining high immunization rates for vaccine-preventable diseases and in avoiding outbreaks of communicable diseases provide ample basis for the newly enacted regulations.[13] And the regulations are not "beyond all question a plain, palpable invasion of rights secured by the fundamental law," or, on their face, arbitrary and oppressive. *Jacobson*, 197 U.S. at 31. The Court does not here consider whether Plaintiffs may be able to show that the regulations are "so arbitrary and oppressive"

13. To the extent Plaintiffs take issue with the specific vaccines required for school admission, (*see, e.g.*, Dkt. No. 41-1 (arguing that "tetanus is not a contagious disease, meaning that vaccines offer only personal protection"), "that is a determination for the legislature, not the individual objectors." *Phillips*, 775 F.3d at 542.

in a particular case, so as to justify judicial interference, *Jacobson*, 197 U.S. at 38; it concludes only that Plaintiffs failed to establish a likelihood of success on their facial challenge to the regulations.[14]

C. Balance of the Hardships

"[T]he balance of hardships inquiry asks which of the two parties would suffer most grievously if the preliminary injunction motion were wrongly decided." *Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 922 F. Supp. 2d 435, 444 (S.D.N.Y. 2013) (alteration in original) (quoting *Tradescape.com v. Shivaram*, 77 F. Supp. 2d 408, 411

14. Plaintiffs request an evidentiary hearing "to clarify the underlying facts of this case," (Dkt. No. 68, at 7), including to resolve particular factual disputes with respect to each named Plaintiff's case, and to establish facts that show that, in practice, the defendants apply the regulations more narrowly than they are written. (*Id.* at 8). However, Plaintiffs seek to enjoin the regulations in toto. (Dkt. No. 41-1, at 7). Neither their briefing nor their requested relief contemplates any "as-applied" challenge to the regulations. Thus, as discussed *supra*, the Court's review is limited to the constitutionality of the law and regulations, as written. As Plaintiffs have "not shown that an evidentiary hearing would resolve any material factual issues," *Amaker v. Fischer*, 453 F. App'x 59, 64 (2d Cir. 2011), the Court, in its discretion, concludes that it may "dispose of the motion on the papers before it." *Maryland Cas. Co. v. Realty Advisory Bd. on Labor Rels.*, 107 F.3d 979, 984 (2d Cir. 1997) (quoting *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 256 (2d Cir. 1989)); *see Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) ("An evidentiary hearing is not required when the relevant facts either are not in dispute or have been clearly demonstrated at prior stages of the case, or when the disputed facts are amenable to complete resolution on a paper record.") (internal citations omitted).

(S.D.N.Y. 1999)). Even assuming that Plaintiffs, being unable to send their children to school, have shown that the balance of the hardships tips in Plaintiffs' favor, without a showing of a likelihood of success on the merits, this factor, alone, is insufficient to warrant injunctive relief.[15]

V. CONCLUSION

For these reasons, it is hereby

ORDERED that Plaintiffs' motion for a preliminary injunction (Dkt. No. 41) is **DENIED**.

IT IS SO ORDERED.

Dated: October 22, 2020
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
U.S. District Judge

15. Since a preliminary injunction shall not issue in this case, the Court need not consider whether the issuance of an injunction would harm the public interest. *U.S. S.E.C. v. Citigroup Glob. Mkts. Inc.*, 673 F.3d 158, 163 n.1 (2d Cir. 2012) ("[W]hen a court orders injunctive relief, it should ensure that injunction does not cause harm to the public interest.").

APPENDIX F — STATUTES AND REGULATIONS

U.S.C.A. CONST. AMEND. XIV

AMENDMENT XIV. CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male

citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix F

NY CLS PUB HEALTH § 2164

§ 2164. Definitions; immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B

1.As used in this section, unless the context requires otherwise:

a. The term "school" means and includes any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school.

b. The term "child" shall mean and include any person between the ages of two months and eighteen years.

c. The term "person in parental relation to a child" shall mean and include his father or mother, by birth or adoption, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a child if he has assumed the charge and care of the child because the parents or legally appointed guardian of the minor have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such child or are living outside the state or their whereabouts are unknown, or have designated the person pursuant to title fifteen-A of article five of the general obligations law as a person in parental relation to the child.

d. The term "health practitioner" shall mean any person authorized by law to administer an immunization.

2.

a. Every person in parental relation to a child in this state shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

b. Every person in parental relation to a child in this state born on or after January first, nineteen hundred ninety-four and entering sixth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand seven, shall have administered to such child a booster immunization containing diphtheria and tetanus toxoids, and an acellular pertussis vaccine, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.

c. Every person in parental relation to a child in this state entering or having entered seventh grade and twelfth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand sixteen, shall have administered to such child an adequate dose or doses of immunizing agents against meningococcal disease as recommended by the advisory committee on immunization practices of the centers for disease control and prevention, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health and planning council.

3.The person in parental relation to any such child who has not previously received such immunization shall present the child to a health practitioner and request such health practitioner to administer the necessary immunization against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B as provided in subdivision two of this section.

4.If any person in parental relation to such child is unable to pay for the services of a private health practitioner, such person shall present such child to the health officer of the county in which the child resides, who shall then administer the immunizing agent without charge.

5.The health practitioner who administers such immunizing agent against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B to any such child shall give a certificate of such immunization to the person in parental relation to such child.

6.In the event that a person in parental relation to a child makes application for admission of such child to a school or has a child attending school and there exists no certificate or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall inform such person of the necessity to have the child immunized, that such immunization may be administered by any health practitioner, or that the child may be immunized without charge by the health officer in the county where the child resides, if such person executes a consent therefor. In the event that such person does not wish to select a health practitioner to administer the immunization, he or she shall be provided with a form which shall give notice that as a prerequisite to processing the application for admission to, or for continued attendance at, the school such person shall state a valid reason for withholding consent or consent shall be given for immunization to be administered by a health officer in the public employ, or by a school physician or nurse. The form shall provide for the execution of a

consent by such person and it shall also state that such person need not execute such consent if subdivision eight of this section applies to such child.

7.

(a)[Expires June 30, 2020] No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization or where the parent, guardian, or any other person in parental relationship to such child can demonstrate that a child has received at least the first dose in each immunization series required by this section and has age appropriate appointments scheduled to complete the immunization series according to the Advisory Committee on Immunization Practices Recommended Immunization Schedules for Persons Aged 0 through 18 Years.

(b)A parent, a guardian or any other person in parental relationship to a child denied school entrance or attendance may appeal by petition to the commissioner of education in accordance with the provisions of section three hundred ten of the education law.

8.If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child's health.

8-a. Whenever a child has been refused admission to, or continued attendance at, a school as provided for in subdivision seven of this section because there exists no certificate provided for in subdivision five of this section or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall:

a. forward a report of such exclusion and the name and address of such child to the local health authority and to the person in parental relation to the child together with a notification of the responsibility of such person under subdivision two of this section and a form of consent as prescribed by regulation of the commissioner, and

b. provide, with the cooperation of the appropriate local health authority, for a time and place at which an immunizing agent or agents shall be administered, as required by subdivision two of this section, to a child for whom a consent has been obtained. Upon failure of a local health authority to cooperate in arranging for a time and place at which an immunizing agent or agents shall be administered as required by subdivision two of this section, the commissioner shall arrange for such administration and may recover the cost thereof from the amount of state aid to which the local health authority would otherwise be entitled.

10. The commissioner may adopt and amend rules and regulations to effectuate the provisions and purposes of this section.

11. Every school shall annually provide the commissioner, on forms provided by the commissioner, a summary regarding compliance with the provisions of this section.

Appendix F

10 NYCRR § 66-1.1

66-1.1 SCHOOL IMMUNIZATION REQUIREMENTS

As used in this Subpart unless the context otherwise requires:

(a) School means and includes a public, private or parochial child-caring center, day-care agency providing day care of children as defined in this section, nursery school as defined in this section, kindergarten, and any elementary, intermediate or secondary class or school building.

(b) Child means and includes any person between the ages of two months and 18 years.

(c) Day care of children means:

(1) outside the City of New York, care provided to children away from the child's residence, for less than 24 hours per day in a licensed child day care center or a group family day care, for compensation or otherwise, for at least three hours a day.

(2) in the City of New York, any service which, during all or part of the day, regularly gives care to six or more children, not of common parentage, who are under six years of age, whether or not the care is given for compensation and whether or not it has a stated educational purpose. The total number of children receiving care shall be counted, including

children or foster children of the owner or person in charge, in determining the applicability of this definition. The term shall not, however, include a service which gives care to children for five or less hours a week or a service which operates for one month a year or less.

(d) Nursery school means a place, other than one providing day care of children as defined in this section, in which organized instruction is provided for children prior to entering any public or non-public school.

(e) Health practitioner means any person authorized by law to administer an immunization. This includes a physician, nurse practitioner, nurse-midwife caring for a pregnant student, registered nurse, licensed practical nurse under the direction of a registered nurse, or physician's assistant.

(f) Fully immunized means that an adequate dosage and number of doses of an immunizing agent licensed by the United States Food and Drug Administration has been received commensurate with the child's age, or the child has been demonstrated to have immunity as defined in this section.

(1) For those immunizations required by section 2164 of the Public Health Law only, the number of doses that a child shall have at any given age, and the minimum intervals between these doses, shall be in accordance with the Advisory Committee

on Immunization Practices Recommended Child and Adolescent Immunization Schedule for ages 18 years or younger, issued by the Advisory Committee on Immunization Practices (ACIP) as referenced in chapter 35 of the Laws of 2019 and posted on the Centers for Disease Control and Prevention website. Any child who completed an immunization series following minimum intervals prescribed in an ACIP Recommended Immunization Schedule pre-dating February 2019 shall continue to be deemed in compliance as long as the number of vaccine doses the child received conforms to the current ACIP Recommended Immunization Schedule.

(i) For all vaccinations, except as provided in subparagraphs (ii) through (vii) of this paragraph, children shall be assessed upon school entry or attendance, and annually thereafter, and be fully immunized commensurate with their age.

(ii) Any child who has satisfied the immunization requirements in effect in regulation on June 30, 2014, entering twelfth grade (or comparable age level grade equivalents) in the 2019-2020 school year only, shall be deemed in compliance with the immunization requirements set forth in this section, including those set forth in subparagraphs (iii) through (vi) of this paragraph, until such child graduates from school; provided, however, that such child shall comply with the meningococcal vaccination

requirement set forth in subparagraph (vii) of this paragraph.

(iii) Any child entering or attending kindergarten through twelfth grade must have received the following vaccine doses, with the minimum intervals between these doses as established by the Advisory Committee on Immunization Practices Recommended Child and Adolescent Immunization Schedule for ages 18 years or younger:

(a) two adequate doses of measles containing vaccine, two adequate doses of mumps containing vaccine, and at least one adequate dose of rubella containing vaccine; and

(b) five adequate doses of diphtheria and tetanus toxoids and acellular pertussis vaccine. If, however, the fourth dose of diphtheria and tetanus toxoids and acellular pertussis vaccine was given at 48 months of age or older, only four adequate doses of vaccine are required. The final doses of vaccine must be received no sooner than 48 months of age. Doses given after age seven should start with one dose of Tdap.

(iv) Four adequate doses of poliomyelitis vaccine. If, however, the third adequate dose of poliomyelitis vaccine was given at 48 months of age or older, only three adequate doses of vaccine are required. The final dose of vaccine

must be received no sooner than 48 months of age. Beginning on or after September 1, 2016, children shall be assessed upon entry or attendance to child-caring centers, day-care agencies, nursery schools and pre-kindergarten programs and must be fully immunized against poliomyelitis commensurate with their age.

(v) Two adequate doses of varicella vaccine.

(vi) By entry to sixth grade or a comparable age level grade equivalent, any child 11 years of age or older must have received one dose of a booster immunization containing tetanus and diphtheria toxoids and acellular pertussis vaccine.

(vii) For meningococcal vaccination, beginning on and after September 1, 2016, children shall be assessed upon entry or attendance to seventh grade, or a comparable age level grade equivalent, and must have received one adequate dose of vaccine upon such entry or attendance. Children shall be assessed upon entry or attendance to twelfth grade, or a comparable age level grade, and must have received two adequate doses of meningococcal vaccine upon such entry or attendance. If, however, the first dose of meningococcal vaccine was given at 16 years of age or older, then only one adequate dose of meningococcal vaccine is required for twelfth grade.

(2) If a child is not fully immunized, catch-up immunization must then take place according to the Advisory Committee on Immunization Practices Recommended Child and Adolescent Immunization Schedule for ages 18 years or younger.

(g) Immunity means that:

(1) for measles, mumps, and rubella, a child has had a positive serologic test, as defined in subdivision (h) of this section, for those diseases, or laboratory confirmation of disease, as defined in subdivision (k) of this section;

(2) for varicella, a child has either had a positive serologic test, as defined in subdivision (h) of this section; laboratory confirmation of disease, as defined in subdivision (k) of this section; or had the disease as verified by a physician, nurse practitioner, or physician's assistant statement;

(3) for hepatitis B, a child has had a positive serologic test, as defined in subdivision (h) of this section; or

(4) for poliomyelitis, positive serologic tests, as defined in subdivision (h) of this section, for all three serotypes of poliomyelitis, prior to September 1, 2019. Serologic tests against poliomyelitis performed on or after September 1, 2019 will not be accepted in place of poliomyelitis vaccination.

(h) Serologic test means a positive blood test for Immunoglobulin G (IgG), or for hepatitis B, a blood test for hepatitis B surface antibody, as determined by the testing lab's criteria. Serology results reported as equivocal are not acceptable proof of immunity. A positive serologic test can be accepted in place of vaccination only for the following diseases: measles, mumps, rubella, varicella, hepatitis B and all three serotypes of poliomyelitis found in the polio vaccines.

(i) Age appropriate means that vaccine doses administered within four calendar days of the recommended minimum age or interval will be considered valid.

(j) In process means that:

(1) a child has received at least the first dose in each immunization series required by section 2164 of the Public Health Law (except in the case of live vaccines in which a child should wait 28 days after one live vaccine administration before receiving another live vaccine, if the vaccines were not given on the same day) and has age appropriate appointments to complete the immunization series according to the Advisory Committee on Immunization Practices Recommended Child and Adolescent Immunization Schedule for ages 18 years or younger; or

(2) a child has had blood drawn for a serologic test and is awaiting test results within 14 days after the blood draw; or

(3) a child's serologic test(s) are negative, and therefore the child in question has appointments to be immunized within 30 days of notification of the parent/guardian to complete, or begin completion, of the immunization series based on the Advisory Committee on Immunization Practices Recommended Child and Adolescent Immunization Schedule for ages 18 years or younger; or

(4) children who are not fully immunized can only continue to attend school if they are in the process of completing the immunization series based on the Advisory Committee on Immunization Practices Recommended Child and Adolescent Immunization Schedule for ages 18 years or younger. If a child does not receive subsequent doses of vaccine in an immunization series according to the age appropriate ACIP catch-up schedule, including at appropriate intervals, the child is no longer in process and must be excluded from school within 14 days after the minimum interval identified by the ACIP catch-up schedule, if not otherwise exempt in accordance with section 66-1.3 of this Subpart.

(k) Laboratory confirmation of disease means, for measles, mumps, rubella or varicella, a positive laboratory test, either culture or polymerase chain reaction, detecting either the virus or viral-specific nucleic acid in a clinical specimen from the child or, for measles or rubella, a positive blood test for Immunoglobulin M (IgM) where such positive laboratory test is not otherwise explained by recent vaccination.

(l) May be detrimental to the child's health means that a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care.

(m) Attend or admit means enrolled in, or admitted to, a school for the purpose of participating in or receiving services at such school, including but not limited to special education or related services, participating in intra-scholastic or interscholastic sports, or other school-sponsored events or activities; or being transported on a school bus or vehicle with other school children; except where such services, transportation, events, or activities are open to the general public.

Appendix F

TITLE: SECTION 66-1.3 – REQUIREMENTS FOR SCHOOL ADMISSION

66-1.3 Requirements for school admission.

A principal or person in charge of a school shall not admit a child to school unless a person in parental relation to the child has furnished the school with one of the following:

(a) A certificate of immunization, as described in section 66-1.6 of this Subpart, from a health care practitioner or from NYSIIS or the CIR, documenting that the child has been fully immunized according to the requirements of section 66-1.1 (f) of this Subpart.

(b) Documentation that the child is in process of receiving immunizations as defined in section 66-1.1(j) of this Subpart. A principal or person in charge of a school shall not refuse to admit a child to school, based on immunization requirements, if that child is in process.

(c) A signed, completed medical exemption form approved by the NYSDOH or NYC Department of Education from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contraindication to a specific immunization and specifying the length of time the immunization is medically contraindicated. The medical exemption must be reissued annually. The principal or person in charge of the school may require additional information supporting the exemption.