21-721

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs-Appellants,

against-

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants-Appellees

On appeal from Opinion and Order of the United States District Court for the Southern District of New York, Case No. 1:20−cv−09829−PGG, United States District Judge Paul G. Gardephe, Presiding

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APPENDIX TO MOTION FOR INJUNCTION PENDING APPEAL

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APPENDIX

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APPEAL,ECF

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:20-cv-09829-PGG

Borelli et al v. de Blasio et al
Assigned to: Judge Paul G. Gardephe
Case in other court: U.S Court of Appeals, Second Circuit, 21-00721
Cause: 28:1331vc Fed. Question: Violation of Constitutional Rights

Date Filed: 11/21/2020
Jury Demand: Plaintiff
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Plaintiff

Joseph Borelli
Individually

represented by **James Mermigis**
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85 Cold Spring Road
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ATTORNEY TO BE NOTICED

Plaintiff

Janet Nichols
Individually

represented by **James Mermigis**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Maria Hart
Individually

represented by **James Mermigis**
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Erin Ulitto
Individually

represented by **James Mermigis**
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ATTORNEY TO BE NOTICED

Plaintiff

Crystal J. Lisa
Individually

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James Mermigis
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ATTORNEY TO BE NOTICED

Plaintiff

Michelle Baione
Individually

represented by **James Mermigis**
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ATTORNEY TO BE NOTICED

Plaintiff

Gaetano La Mazza

represented by **Ray L Flores**

(See above for address)
ATTORNEY TO BE NOTICED

James Mermigis
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Children's Health Defense

represented by **Ray L Flores**
(See above for address)
ATTORNEY TO BE NOTICED

James Mermigis
(See above for address)
ATTORNEY TO BE NOTICED

Plaintiff

Christine Kalikazaros

represented by **Ray L Flores**
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ATTORNEY TO BE NOTICED

James Mermigis
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ATTORNEY TO BE NOTICED

Plaintiff

Adriana Aviles

represented by **Ray L Flores**
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ATTORNEY TO BE NOTICED

James Mermigis
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ATTORNEY TO BE NOTICED

Plaintiff

Stephanie Denaro

represented by **Ray L Flores**
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ATTORNEY TO BE NOTICED

James Mermigis
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ATTORNEY TO BE NOTICED

V.

Defendant

Bill De Blasio
in his Official Capacity as Mayor of the City of New York

represented by **Copatrick Thomas**
New York City Law Department
100 Church Street
Ste 2-306
New York, NY 10007
212-356-0885
Email: cthomas@law.nyc.gov

Defendant

Dr. David Chokshi
in his Official Capacity of Health Commissioner of the City of New York

represented by **Copatrick Thomas**
(See above for address)

Defendant

New York City Department of Education

represented by **Copatrick Thomas**
(See above for address)

Defendant

Richard A. Carranza
in his Official Capacity as Chancellor of the New York City Department of Education

represented by **Copatrick Thomas**
(See above for address)

Defendant

City of New York

represented by **Andrew James Rauchberg**
New York City Law Department
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New York, NY 10007
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Fax: (212) 356-8760
Email: arauchbe@law.nyc.gov

Copatrick Thomas
(See above for address)

Date Filed	#	Docket Text
11/21/2020	1	COMPLAINT against Richard Carranza, in his Official Capacity as Chancellor of the New York City Department of Education, David Chokshi, in his Official Capacity of Health Commissioner of the City of New York, City of New York, New York City Department of Education, Bill de Blasio, in his Official Capacity as Mayor of the City of New York. (Filing Fee $ 400.00, Receipt Number ANYSDC-22695719)Document filed by Michelle Baione, Individually and as Parent and Natural Guardian of R.B. and C.B., Maria Hart, Individually and as Parent and Natural Guardian of C.H., A.H., and J.H., Janet Nichols, Individually and as Parent and Natural Guardian of J.N., Joseph Borelli, Individually and as Parent and Natural Guardian of J.B., Erin Ulitto, Individually and as Parent and Natural Guardian of L.U., Crystal Lia, Individually and as Parent and Natural Guardian of F.L., C.L., and G.L.. (Attachments: # 1 Exhibit Covid-19 Report-Schoolchildren, # 2 Exhibit Australian Research Study, # 3 Exhibit British Columbia Study, # 4 Exhibit NCIRS Study, # 5 Exhibit Transmission of Covid Study, # 6 Exhibit French Study-Schools, # 7 Exhibit German Students Study).(Mermigis, James) (Entered: 11/21/2020)
11/23/2020		*****NOTICE TO ATTORNEY REGARDING PARTY MODIFICATION. Notice to attorney James Mermigis. The party information for the following party/parties has been modified: Bill de Blasio, in his Official Capacity as Mayor of the City of New York, David Chokshi, in his Official Capacity of Health Commissioner of the City of New York, Richard Carranza, in his Official Capacity as Chancellor of the New York City Department of Education, Michelle Baione, Individually and as Parent and Natural Guardian of R.B. and C.B., Maria Hart, Individually and as Parent and Natural Guardian of C.H., A.H., and J.H., Janet Nichols, Individually and as Parent and Natural Guardian of J.N., Joseph Borelli, Individually and as Parent and Natural Guardian of J.B., Erin Ulitto, Individually and as Parent and Natural Guardian of L.U., Crystal Lia, Individually and as Parent and Natural Guardian of F.L., C.L., and G.L.. The information for the party/parties has been modified for the following reason/reasons: party name contained a typographical error; party text was omitted;. (pc)** (Entered: 11/23/2020)
11/23/2020		*****NOTICE TO ATTORNEY REGARDING DEFICIENT PLEADING. Notice to Attorney James Mermigis re: Document No. 1 Complaint,,,,,. The filing is deficient for the following reason(s): Add Michelle Baione, Joseph Borelli, Maria Hart, Crystal J. Lisa, Janet Nichols, Erin Ulitto to CM ECF with the party text for each the text accompanying their respective names on the complaint caption title eg "as parent and natural guardian of ". Docket the event type Add Party to Pleading found under the event list Complaints and Other Initiating Documents... (pc)** (Entered: 11/23/2020)
11/23/2020		*****NOTICE TO ATTORNEY TO ELECTRONICALLY FILE CIVIL COVER SHEET. Notice to Attorney James Mermigis. Attorney must electronically file the Civil Cover Sheet. Use the**

		event type Civil Cover Sheet found under the event list Other Documents. (pc) (Entered: 11/23/2020)
11/23/2020		CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Paul G. Gardephe. Please download and review the Individual Practices of the assigned District Judge, located at https://nysd.uscourts.gov/judges/district-judges. Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Please download and review the ECF Rules and Instructions, located at https://nysd.uscourts.gov/rules/ecf-related-instructions..(pc) (Entered: 11/23/2020)
11/23/2020		Magistrate Judge Robert W. Lehrburger is so designated. Pursuant to 28 U.S.C. Section 636(c) and Fed. R. Civ. P. 73(b)(1) parties are notified that they may consent to proceed before a United States Magistrate Judge. Parties who wish to consent may access the necessary form at the following link: https://nysd.uscourts.gov/sites/default/files/2018-06/AO-3.pdf. (pc) (Entered: 11/23/2020)
11/23/2020		Case Designated ECF. (pc) (Entered: 11/23/2020)
11/23/2020	2	EMERGENCY MOTION for Preliminary Injunction *Order to Show Cause*. Document filed by Michelle Baione, Joseph Borelli, Maria Hart, Crystal J. Lisa, Janet Nichols, Erin Ulitto. Return Date set for 11/30/2020 at 11:00 AM. (Attachments: # 1 Affidavit Declaration of James Mermigis, # 2 Exhibit Memorandum of Law in Support, # 3 Exhibit B- Australian Research Study, # 4 Exhibit C- British Columbia Study, # 5 Exhibit D- NCIRS Study, # 6 Exhibit E- Transmission of Covid Study, # 7 Exhibit F- French Schools Study, # 8 Exhibit G- German Student Study).(Mermigis, James) (Entered: 11/23/2020)
11/24/2020	3	ORDER TO SHOW CAUSE: IT IS HEREBY ORDERED that Plaintiffs' application is granted such that the Court will employ an expedited procedure to hear this matter. IT IS FURTHER ORDERED THAT: 1. Defendants show cause why a preliminary injunction should not be issued under Federal Rule of Civil Procedure 65 granting Plaintiffs the following relief: (1) Granting Plaintiffs a preliminary injunction enjoining Defendants, from the shut down of NYC Public Schools; and (2) Such other relief as this Court may deem just and proper. 2. Defendants must submit a brief on this issue of no more than 25 pages on or before December 1, 2020 at 10:00 a.m. 3. Plaintiffs must submit any and all reply papers on or before December 2, 2020 at 10:00 a.m. 4. The Court will hold a preliminary injunction hearing on December 3, 2020 at 2:00 p.m. 5. If any party wishes to introduce testimony at the hearing, it must provide reasonable advance notice to the Court and the other party prior to the December 3, 2020 hearing. 6. Plaintiffs must serve a copy of this Order and the papers on which it is based on Defendants by overnight mail tonight, November 24, 2020. (Status Conference set for 12/3/2020 at 02:00 PM before Judge Paul G. Gardephe.), Motions terminated: 2 EMERGENCY MOTION for Preliminary Injunction *Order to Show Cause*. filed by Maria Hart, Joseph Borelli, Crystal J. Lisa, Michelle Baione, Erin Ulitto, Janet Nichols. (Signed by Judge Paul G. Gardephe on 11/24/2020) (jca) (Entered: 11/24/2020)
11/30/2020	4	ORDER: The Court's November 24, 2020 scheduling order is amended as follows: Plaintiffs will submit their supplementary papers by 5:00 p.m. on December 2, 2020. Defendants will submit their opposition by 12:00 noon on December 7, 2020. Any reply will be submitted by December 8, 2020 at 5:00 p.m. The hearing on Plaintiffs' application for a preliminary injunction is adjourned to December 10, 2020 at 10:00 a.m. (And as further set forth herein.) SO ORDERED. (Responses due by 12/7/2020, Replies due by 12/8/2020., Motion Hearing set for 12/10/2020 at 10:00 AM before Judge Paul G. Gardephe.) (Signed by Judge Paul G. Gardephe on 11/30/2020) (jca) (Entered: 11/30/2020)
11/30/2020	5	LETTER MOTION for Extension of Time *for preliminary injunction briefing schedule* addressed to Judge Paul G. Gardephe from Marilyn Richter dated November 30, 2020. Document filed by City of New York..(Rauchberg, Andrew) (Entered: 11/30/2020)
12/01/2020	6	ORDER terminating 5 Letter Motion for Extension of Time. The schedule set forth in this Court's November 30, 2020 Order (Dkt. No. 4) will govern. So Ordered. (Signed by Judge Paul G. Gardephe on 12/1/20) (yv) (Entered: 12/01/2020)
12/03/2020	7	FIRST MEMORANDUM OF LAW in Opposition re: 2 EMERGENCY MOTION for Preliminary Injunction *Order to Show Cause*. *Letter to follow*. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio..(Richter, Marilyn) (Entered: 12/03/2020)
12/06/2020	8	LETTER MOTION for Extension of Time addressed to Judge Paul G. Gardephe from James Mermigis dated December 6, 2020. Document filed by Michelle Baione, Joseph Borelli, Maria Hart, Crystal J.

		Lisa, Janet Nichols, Erin Ulitto..(Mermigis, James) (Entered: 12/06/2020)
12/07/2020	9	ORDER granting 8 Letter Motion for Extension of Time. The application is granted. The hearing scheduled for December 10, 2020 is adjourned sine die. The Court will enter a briefing schedule after the Amended Complaint and amended application for a preliminary injunction are filed. SO ORDERED. Amended Pleadings due by 12/16/2020. Motions due by 12/16/2020. (Signed by Judge Paul G. Gardephe on 12/7/2020) (jca) (Entered: 12/07/2020)
12/07/2020	10	AMENDED MEMORANDUM OF LAW in Opposition re: 2 EMERGENCY MOTION for Preliminary Injunction *Order to Show Cause*. . Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education..(Kitzinger, Stephen) (Entered: 12/07/2020)
12/16/2020	11	FIRST AMENDED COMPLAINT amending 1 Complaint,,,, against Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education.Document filed by Crystal J. Lisa, Gaetano La Mazza, Children's Health Defense, Christine Kalikazaros, Adriana Aviles, Stephanie Denaro. Related document: 1 Complaint,,,,. (Attachments: # 1 Exhibit Exhibits 1-11, # 2 Exhibit Exhibits 12-22).(Mermigis, James) (Entered: 12/17/2020)
12/17/2020	12	AMENDED MOTION for Preliminary Injunction . Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa. (Attachments: # 1 Affidavit Declaration of Dr. Sin Hang Lee, # 2 Affidavit Declaration of Kevin McKernan, # 3 Affidavit Declaration of Adriana Aviles, # 4 Affidavit Declaration of Christine Kalikazaros, # 5 Affidavit Declaration of Gaetano La Mazza, # 6 Affidavit Declaration of Crystal Lia, # 7 Affidavit Declaration of Stephanie Denaro).(Mermigis, James) (Entered: 12/17/2020)
12/17/2020	13	FIRST MOTION Motion for Judicial Notice re: 11 Amended Complaint, 12 AMENDED MOTION for Preliminary Injunction . . Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa. (Attachments: # 1 Appendix Exhibits in Support of Motion for Judicial Notice).(Mermigis, James) (Entered: 12/17/2020)
12/18/2020	14	ORDER: Plaintiffs recently filed the First Amended Complaint (Dkt. No. 11), an amended motion for a preliminary injunction (Dkt. No. 12), and a motion for judicial notice (Dkt. No. 13). Defendants' opposition is due December 23, 2020 by 5:00 p.m. Any reply will be submitted by December 30, 2020 at 5:00 p.m. SO ORDERED. (Signed by Judge Paul G. Gardephe on 12/18/2020) (Responses due by 12/23/2020, Replies due by 12/30/2020.) (ks) (Entered: 12/18/2020)
12/22/2020	15	FIRST LETTER MOTION for Extension of Time to File Response/Reply *to motion for a preliminary injunction* addressed to Judge Paul G. Gardephe from Marilyn Richter dated December 22, 2020. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education..(Koroleva, Lana) (Entered: 12/22/2020)
12/22/2020	16	ORDER: granting 15 Letter Motion for Extension of Time to File Response/Reply re 15 FIRST LETTER MOTION for Extension of Time to File Response/Reply to motion for a preliminary injunction addressed to Judge Paul G. Gardephe from Marilyn Richter dated December 22, 2020. Defendants' opposition is due by December 28, 2020 at 5:00 p.m. Any reply will be submitted by January 4, 2021 at 5:00 p.m. SO ORDERED. Responses due by 12/28/2020 Replies due by 1/4/2021. (Signed by Judge Paul G. Gardephe on 12/22/2020) (ama) (Entered: 12/22/2020)
12/29/2020	17	MEMORANDUM OF LAW in Opposition re: 13 FIRST MOTION Motion for Judicial Notice re: 11 Amended Complaint, 12 AMENDED MOTION for Preliminary Injunction . ., 12 AMENDED MOTION for Preliminary Injunction . . Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio..(Bowe, Martin) (Entered: 12/29/2020)
12/29/2020	18	DECLARATION of Henry Chou in Opposition re: 12 AMENDED MOTION for Preliminary Injunction .. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education..(Rauchberg, Andrew) (Entered: 12/29/2020)
12/29/2020	19	DECLARATION of Dr. Jay Varma in Opposition re: 12 AMENDED MOTION for Preliminary Injunction .. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education. (Attachments: # 1 Exhibit A, # 2 Exhibit B). (Rauchberg, Andrew) (Entered: 12/29/2020)
12/30/2020	20	LETTER MOTION for Extension of Time to File Response/Reply as to 11 Amended Complaint, addressed to Judge Paul G. Gardephe from Marilyn Richter dated December 30, 2020. Document filed

		by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education..(Rauchberg, Andrew) (Entered: 12/30/2020)
12/30/2020	21	ORDER granting 20 Letter Motion for Extension of Time to File Response/Reply. The Application is granted. SO ORDERED. (Signed by Judge Paul G. Gardephe on 12/30/2020) (kv) (Entered: 12/30/2020)
12/31/2020	22	DECLARATION of Marilyn Richter in Opposition re: 13 FIRST MOTION Motion for Judicial Notice re: 11 Amended Complaint, 12 AMENDED MOTION for Preliminary Injunction . .. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education..(Koroleva, Lana) (Entered: 12/31/2020)
01/04/2021	23	REPLY MEMORANDUM OF LAW in Support re: 12 AMENDED MOTION for Preliminary Injunction . . Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa. (Attachments: # 1 Exhibit Letter to Judge Gardephe regarding Oral Arguments).(Mermigis, James) (Entered: 01/04/2021)
01/05/2021	24	LETTER MOTION for Conference re: 11 Amended Complaint, addressed to Judge Paul G. Gardephe from Marilyn Richter dated 1/5/2021. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education..(Thomas, Copatrick) (Entered: 01/05/2021)
01/07/2021	25	REPLY AFFIRMATION of Letter Response to NYC Letter in Opposition re: 24 LETTER MOTION for Conference re: 11 Amended Complaint, addressed to Judge Paul G. Gardephe from Marilyn Richter dated 1/5/2021.. Document filed by Adriana Aviles, Children's Health Defense..(Mermigis, James) (Entered: 01/07/2021)
01/08/2021	26	ORDER: A hearing on Plaintiffs' application for a preliminary injunction (Dkt. No. 12) will take place on Thursday, January 14, 2021 at 3:00 p.m. The hearing will take place telephonically. The parties are directed to dial 888-363-4749 to participate, and to enter the access code 6212642. The press and public may obtain access to the proceeding by dialing the same number and using the same access code. The Court is holding multiple telephone conferences on this date. The parties should call in at the scheduled time and wait on the line for their case to be called. At that time, the Court will un-mute the parties' lines. Three days before the conference, the parties must email Michael_Ruocco@nysd.uscourts.gov and GardepheNYSDChambers@nysd.uscourts.gov with the phone numbers that the parties will be using to dial into the hearing so that the Court knows which numbers to un-mute. The email should include the case name and case number in the subject line. SO ORDERED. (Telephone Conference set for 1/14/2021 at 03:00 PM before Judge Paul G. Gardephe.) (Signed by Judge Paul G. Gardephe on 1/8/2021) (jca) (Entered: 01/08/2021)
01/11/2021	27	PROPOSED ORDER. Document filed by Adriana Aviles, Michelle Baione, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa..(Mermigis, James) **Proposed Order to be reviewed by Clerk's Office staff.** (Entered: 01/11/2021)
01/11/2021	28	**FILING ERROR - DEFICIENT DOCKET ENTRY -** MOTION for Ray L. Flores II to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number BNYSDC-23448952. **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa. Return Date set for 1/19/2021 at 11:00 AM. (Attachments: # 1 Exhibit Certificate of Good Standing).(Mermigis, James) Modified on 1/11/2021 (aea). (Entered: 01/11/2021)
01/11/2021		*****NOTICE TO COURT REGARDING PROPOSED ORDER. Document No. 27 Proposed Order was reviewed and approved as to form. (km)** (Entered: 01/11/2021)
01/11/2021		**>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice to RE-FILE Document No. 28 MOTION for Ray L. Flores II to Appear Pro Hac Vice . Filing fee $ 200.00, receipt number BNYSDC-23448952. Motion and supporting papers to be reviewed by Clerk's Office staff. The filing is deficient for the following reason(s): missing Certificate of Good Standing from SUPREME COURT OF CALIFORNIA; missing Proposed Order; missing notarized Affidavit pursuant to Local Rule 1.3. Re-file the motion as a Motion to Appear Pro Hac Vice - attach the correct signed PDF - select the correct named filer/filers - attach valid Certificates of Good Standing issued within the past 30 days - attach Proposed Order. (aea)** (Entered: 01/11/2021)

01/12/2021	29	**FILING ERROR - DEFICIENT DOCKET ENTRY -** AMENDED MOTION for Ray Lee Flores II to Appear Pro Hac Vice . **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa. Return Date set for 1/19/2021 at 11:00 AM. (Attachments: # 1 Affidavit Affidavit in Support of Pro Hac Vice Motion, # 2 Exhibit Certificate of Good Standing, # 3 Text of Proposed Order Proposed Order for Pro Hac Vice).(Mermigis, James) Modified on 1/12/2021 (aea). (Entered: 01/12/2021)
01/12/2021		**>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice to RE-FILE Document No. 29 AMENDED MOTION for Ray Lee Flores II to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff. The filing is deficient for the following reason(s): The declaration does not have a case caption. Missing Certificate of Good Standing from SUPREME COURT of California; Re-file the motion as a Motion to Appear Pro Hac Vice - attach the correct signed PDF - select the correct named filer/filers - attach valid Certificates of Good Standing issued within the past 30 days - attach Proposed Order.. (aea)** (Entered: 01/12/2021)
01/12/2021	30	**FILING ERROR - DEFICIENT DOCKET ENTRY -** AMENDED MOTION for Ray Lee Flores II to Appear Pro Hac Vice . **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa. Return Date set for 1/14/2021 at 11:00 AM. (Attachments: # 1 Affidavit Declaration of Ray Lee Flores II, # 2 Exhibit Certificate of Good Standing, # 3 Text of Proposed Order Proposed Order for Pro Hac Vice).(Mermigis, James) Modified on 1/12/2021 (wb). (Entered: 01/12/2021)
01/12/2021		**>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice to RE-FILE Document No. 30 AMENDED MOTION for Ray Lee Flores II to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff... The filing is deficient for the following reason(s): missing Certificate of Good Standing from Supreme Court if California;. Re-file the motion as a Motion to Appear Pro Hac Vice - attach the correct signed PDF - select the correct named filer/filers - attach valid Certificates of Good Standing issued within the past 30 days - attach Proposed Order.. (wb)** (Entered: 01/12/2021)
01/13/2021	31	PROPOSED ORDER. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa..(Mermigis, James) **Proposed Order to be reviewed by Clerk's Office staff.** (Entered: 01/13/2021)
01/13/2021		*****NOTICE TO COURT REGARDING PROPOSED ORDER. Document No. 31 Proposed Order was reviewed and approved as to form. (km)** (Entered: 01/13/2021)
01/13/2021	32	PROPOSED ORDER. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa..(Mermigis, James) **Proposed Order to be reviewed by Clerk's Office staff.** (Entered: 01/13/2021)
01/13/2021		*****NOTICE TO COURT REGARDING PROPOSED ORDER. Document No. 32 Proposed Order, was reviewed and approved as to form. (dt)** (Entered: 01/13/2021)
01/14/2021		Minute Entry for proceedings held before Judge Paul G. Gardephe: Motion Hearing held on 1/14/2021 re: 2 EMERGENCY MOTION for Preliminary Injunction *Order to Show Cause*. filed by Maria Hart, Joseph Borelli, Crystal J. Lisa, Michelle Baione, Erin Ulitto, Janet Nichols. (Court Reporter Pamela Utter) (mr) (Entered: 01/14/2021)
01/15/2021	33	RESPONSE in Support of Motion re: 12 AMENDED MOTION for Preliminary Injunction . *Supplemental Letter in Response to Hearing on January 14, 2021*. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa..(Mermigis, James) (Entered: 01/15/2021)
01/19/2021	34	TRANSCRIPT of Proceedings re: CONFERENCE held on 1/14/2021 before Judge Paul G. Gardephe. Court Reporter/Transcriber: Pamela Utter, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 2/9/2021. Redacted Transcript Deadline set for 2/19/2021. Release of Transcript Restriction set for 4/19/2021..(McGuirk, Kelly) (Entered: 01/19/2021)

01/19/2021	35	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a CONFERENCE proceeding held on 1/14/21 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days....(McGuirk, Kelly) (Entered: 01/19/2021)
01/22/2021	36	RESPONSE in Opposition to Motion re: 12 AMENDED MOTION for Preliminary Injunction . . Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education..(Koroleva, Lana) (Entered: 01/22/2021)
01/23/2021	37	RESPONSE in Opposition to Motion re: 12 AMENDED MOTION for Preliminary Injunction . *Corrected Response*. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education. (Attachments: # 1 Exhibit A, # 2 Exhibit A-1, # 3 Exhibit A-2, # 4 Exhibit A-3, # 5 Exhibit A-4, # 6 Exhibit A-5, # 7 Exhibit A-6, # 8 Exhibit A-7, # 9 Exhibit A-8, # 10 Exhibit A-9, # 11 Exhibit B, # 12 Exhibit C, # 13 Exhibit D, # 14 Exhibit E, # 15 Exhibit F, # 16 Exhibit G, # 17 Exhibit H, # 18 Exhibit I, # 19 Exhibit J, # 20 Exhibit K, # 21 Exhibit L).(Koroleva, Lana) (Entered: 01/23/2021)
01/23/2021	38	RESPONSE in Support of Motion re: 12 AMENDED MOTION for Preliminary Injunction . *Letter Response to Defendants' Supplemental Submission*. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa.. (Mermigis, James) (Entered: 01/23/2021)
01/25/2021	39	RESPONSE in Opposition to Motion re: 12 AMENDED MOTION for Preliminary Injunction . *supplementary letter*. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education. (Attachments: # 1 Exhibit M, # 2 Exhibit N). (Koroleva, Lana) (Entered: 01/25/2021)
02/02/2021	40	AMENDED MOTION for Ray Lee Flores II to Appear Pro Hac Vice . **Motion and supporting papers to be reviewed by Clerk's Office staff.** Document filed by Adriana Aviles, Children's Health Defense. Return Date set for 2/5/2021 at 10:00 AM. (Attachments: # 1 Affidavit Declaration of Ray Lee Flores III, # 2 Exhibit Certificate of Good Standing - CA Supreme Court, # 3 Exhibit Proposed Order for Pro Hac Vice).(Mermigis, James) (Entered: 02/02/2021)
02/03/2021		**>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 40 AMENDED MOTION for Ray Lee Flores II to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (aea)** (Entered: 02/03/2021)
02/04/2021	41	ORDER FOR ADMISSION PRO HAC VICE ON ORAL MOTION granting 40 AMENDED MOTION for Ray Lee Flores II to Appear Pro Hac Vice. (Signed by Judge Paul G. Gardephe on 2/4/2021) (jca) (Entered: 02/04/2021)
02/11/2021		*****DELETED DOCUMENT. Deleted document number 42 Order. The document was incorrectly filed in this case. (mml)** (Entered: 02/11/2021)
02/17/2021	42	LETTER addressed to Judge Paul G. Gardephe from James Mermigis, Esq. dated February 17, 2021 re: Recent State Education Department Mandate to New York State School Districts. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza..(Mermigis, James) (Entered: 02/17/2021)
02/17/2021	43	MEMO ENDORSEMENT on re: 42 Letter, filed by Adriana Aviles, Gaetano La Mazza, Stephanie Denaro, Christine Kalikazaros, Children's Health Defense. ENDORSEMENT: Defendants will submit a response to this letter by February 22, 2021 at 5:00 p.m. SO ORDERED. (Signed by Judge Paul G. Gardephe on 2/17/2021) (jca) (Entered: 02/17/2021)
02/22/2021	44	LETTER addressed to Judge Paul G. Gardephe from Marilyn Richter dated February 22, 2021 re: Responding to Plaintiffs' letter dated Feb 17 2021. Document filed by Richard A. Carranza, David Chokshi, City of New York, Bill De Blasio, New York City Department of Education. (Attachments: # 1 Exhibit O, # 2 Exhibit P, # 3 Exhibit Q, # 4 Exhibit R, # 5 Exhibit S, # 6 Exhibit T, # 7 Exhibit U, # 8 Exhibit V).(Koroleva, Lana) (Entered: 02/22/2021)
02/22/2021	45	LETTER addressed to Judge Paul G. Gardephe from James Mermigis, Esq. dated February 22, 2021 re: Reply Letter to Defendants' submission. Document filed by Adriana Aviles, Children's Health Defense,

		Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza..(Mermigis, James) (Entered: 02/22/2021)
03/02/2021	46	MEMORANDUM OPINION AND ORDER re: 12 AMENDED MOTION for Preliminary Injunction . filed by Adriana Aviles, Crystal J. Lisa, Gaetano La Mazza, Stephanie Denaro, Christine Kalikazaros, Children's Health Defense. For the reasons stated above, Plaintiffs motion for a preliminary injunction (Dkt. No. 12) is denied. The Clerk of Court is directed to terminate the motion (Dkt. No. 12). Plaintiffs will submit a letter to this Court by March 9, 2021 setting forth how they wish to proceed in light of this Opinion. SO ORDERED. (Signed by Judge Paul G. Gardephe on 3/2/2021) (jca) (Entered: 03/02/2021)
03/25/2021	47	NOTICE of Notice of intent after ruling. Document filed by Adriana Aviles..(Flores, Ray) (Entered: 03/25/2021)
03/25/2021	48	**FILING ERROR - NO ORDER SELECTED FOR APPEAL -** NOTICE OF INTERLOCUTORY APPEAL. Document filed by Adriana Aviles. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit..(Flores, Ray) Modified on 3/26/2021 (tp). (Entered: 03/25/2021)
03/26/2021		*****NOTICE TO ATTORNEY REGARDING DEFICIENT APPEAL. Notice to attorney Flores, Ray to RE-FILE Document No. 48 Notice of Interlocutory Appeal. The filing is deficient for the following reason(s): the order/judgment being appealed was not selected. Re-file the appeal using the event type Notice of Interlocutory Appeal found under the event list Appeal Documents - attach the correct signed PDF - select the correct named filer/filers - select the correct order/judgment being appealed. (tp)** (Entered: 03/26/2021)
03/26/2021	49	**FILING ERROR - ALL FILERS NOT SELECTED -** NOTICE OF INTERLOCUTORY APPEAL from 46 Memorandum & Opinion,,. Document filed by Adriana Aviles. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit..(Flores, Ray) Modified on 3/26/2021 (nd). (Entered: 03/26/2021)
03/26/2021		*****NOTICE TO ATTORNEY REGARDING DEFICIENT APPEAL. Notice to attorney Flores, Ray to RE-FILE Document No. 49 Notice of Interlocutory Appeal.. The filing is deficient for the following reason(s): All the filers were not selected for the appeal. Re-file the appeal using the event type Corrected Notice of Appeal found under the event list Appeal Documents - attach the correct signed PDF - select all the correct named filers - select the correct order/judgment being appealed. (nd)** (Entered: 03/26/2021)
03/26/2021	50	CORRECTED NOTICE OF APPEAL re: 49 Notice of Interlocutory Appeal, 48 Notice of Interlocutory Appeal, 46 Memorandum & Opinion,,. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa..(Flores, Ray) (Entered: 03/26/2021)
03/26/2021		Appeal Fee Due: for 50 Corrected Notice of Appeal,.$505.00 Appeal fee due by 4/9/2021..(nd) (Entered: 03/26/2021)
03/26/2021		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 50 Corrected Notice of Appeal,..(nd) (Entered: 03/26/2021)
03/26/2021		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 50 Corrected Notice of Appeal, filed by Adriana Aviles, Crystal J. Lisa, Gaetano La Mazza, Stephanie Denaro, Christine Kalikazaros, Children's Health Defense were transmitted to the U.S. Court of Appeals..(nd) (Entered: 03/26/2021)
03/31/2021		Appeal Fee Payment: for 50 Corrected Notice of Appeal,. Filing fee $ 505.00, receipt number ANYSDC-24330195..(Flores, Ray) (Entered: 03/31/2021)
03/31/2021		USCA Case Number 21-721 from the U.S Court of Appeals, Second Circuit assigned to 50 Corrected Notice of Appeal...(nd) (Entered: 03/31/2021)
04/01/2021	51	NOTICE of of motion for preliminary injunction pending appeal re: 46 Memorandum & Opinion,,. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa..(Flores, Ray) (Entered: 04/01/2021)
04/01/2021	52	MOTION for Preliminary Injunction *Memorandum In Support of Motion*. Document filed by Adriana Aviles, Children's Health Defense, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal J. Lisa..(Flores, Ray) (Entered: 04/01/2021)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

FIRST AMENDED COMPLAINT

Civil No.: 1:20–cv–09829–PGG

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

FIRST AMENDED COMPLAINT

Civil No.: 1:20–cv–09829–PGG

1. Plaintiffs, by their attorneys, **The Mermigis Law Group, P.C.**, for their Complaint against Defendants Mayor Bill de Blasio ("Mayor de Blasio"), Dr. David Chokshi ("Chokshi"), New York City Department of Education ("NYCDOE"), Richard Carranza ("Carranza") and the City of New York ("NYC"), allege as follows:

NATURE OF THIS ACTION

2. This civil action challenges the blatant abuse of discretion by Defendant Mayor de Blasio, Defendant New York City Department of Education, Defendant Carranza and Defendant Chokshi (hereinafter sometimes known collectively as "Defendants") and the unconstitutional,

arbitrary shutdown of New York City Public Schools on Thursday, November 19, 2020, sending 1.1 million students packing and back to full-time remote learning. On December 7, 2020 and December 10, 2020, respectively, Defendants permitted elementary and special needs children back to school on the condition that their parents "consent" to random, medically invasive testing at school over the course of the next ten months. Such testing is both unreliable and unconstitutional. Defendants still bar middle and high school students from returning to school.

INTRODUCTION

3. On December 7, 2020 and December 10, 2020, respectively, Defendants allowed NYC elementary and District 75 schools to re-open with random, mandatory polymerase chain reaction (PCR) testing (hereinafter "Mandatory Testing") as a condition of entry, while middle and high schools remain shuttered (hereinafter "School Action").

4. As a result of the School Action, Defendants have subjected children to indefinite, isolating, and ineffective remote learning, putting children at risk for further academic regression and significant mental health problems.

5. Defendants ordered the Mandatory Testing for all students and teachers without scientific basis and with no prospect of accurate, actionable information deriving from the tests. (See Exhibit 1.)

6. Governor Cuomo's Executive Order 202, signed on March 7, 2020, declaring a state of emergency for the State of New York, justified school closures.

7. Defendants then announced that they would open schools in fall 2020 with more rigorous testing, even though Defendant Mayor de Blasio had said that schools were "extraordinarily safe" and that "Schools are some of the safest places to be right now in New York City."

8. On November 19, 2020, after schools had been open for the better part of two months, Defendant Mayor de Blasio again ordered them shut.

9. Ten days later, with yet another dizzying course correction, on November 29, 2020, Defendant Mayor de Blasio called on the school to reopen. Defendants announced that students in 3-K, Pre-K, and K through 5th grade could return to schools on December 7, 2020. (See Exhibit 2.)

10. Defendants further announced that schools serving students with significant disabilities, known as District 75, could return on December 10, 2020. (See Exhibit 2.)

11. Defendants also announced that middle school (6th through 8th grades) and high school would remain closed except for remote learning until some point in 2021.

12. But there was a catch: to return to in-person schooling, parents must sign a consent form (see Exhibit 3) to allow the schools to administer random genetic COVID-19 testing to children through September 2021 on threat of no in-person learning. When students returned to school without a signed consent form, they were branded trespassers and forced to leave. Middle and high school students will be subjected to the same Mandatory Testing when and if they return to in-person schooling.

13. The so-called "positivity rate," the number of positive cases based on PCR testing in any given region, is cause of great concern to New York City residents as well as the nation as a whole.

14. In most cases, however, "positivity rates" are based either on "presumptive positives" or PCR testing according to NYC Heath. (See Exhibit 4.)

15. PCR testing is not diagnostic. "Positive tests" do not equal COVID-19 infection cases; they include many false positives, i.e., when people are not actually sick but simply "test positive."

16. Additionally, varying numbers of cycles or amplifications make it easy to manipulate the number of positives. After 40 cycles, 100% of the people tested likely would be positive. (See Decl. Sin Lee, MD, Paragraph 21.)

17. The PCR test is a faulty diagnostic test, depending on the test setting. (See Decl. Sin Lee, MD, Paragraph 22.)

18. The endpoint of an RT-qPCR (PCR) test is arbitrarily set by the test kit manufacturer. It is "incomprehensible "that this simple decision frames "the results of PCR testing for the positive case numbers upon which virtually all public health measures are being based." (See Decl. Sin Lee, MD, Paragraph 16.)

19. The Department of Education (DOE) has not disclosed the number of cycles it is using in its PCR testing. (See Decl. Kevin McKernan, Paragraph 21.)

20. This is because PCR testing after a cycle threshold (Ct) value of 35 cycles is completely unreliable (See Decl. Kevin McKernan, Paragraph 9d) and detects only non-infectious (dead) viral material. (See Decl. Kevin McKernan, Paragraph 9e.)

21. The PCR test is "useless" as a specific diagnostic tool to identify the SARS-CoV-2 virus. (See Decl. Kevin McKernan, Paragraph 9f.) False positives often lead to isolation and quarantine of healthy people, causing economic, academic, social, legal and psychological harm.

22. At the PCR cycle levels generally in use in the United States, false positives outnumber true positives. Above a 35-cycle threshold, PCR testing is worthless in detecting active infections, thus leading to purposeless disruptions in communities' and individuals' lives.

23. Defendants are coercing parents and children to "consent" to PCR testing on threat of losing all access to in-person education in blatant violation of New York State law. Under New York Health and Safety Code §§ 2440 et seq., voluntary consent to medical intervention is required and codified in law.

24. The DOE has misrepresented the very nature of the testing it provides. (See Decl. Kevin McKernan, Paragraph 20.) Furthermore, there is no way to challenge the accuracy of the Mandatory Testing. (See Decl. Kevin McKernan, Paragraph 22.)

25. Among all people in society, children are at lowest risk of COVID-19. There is no scientific basis to require PCR testing of all asymptomatic children.

26. There is no evidence to suggest that this testing, without additional laboratory verification, is in any way meaningful or diagnostic. A two-phased test with DNA sequencing would "guarantee no false positive results however that is not being done." (See Decl. Sin Lee, MD, Paragraph 6.)

27. Despite being required to "consent," families do not know the number of cycles at which their children's samples are being tested (above a cycle threshold of 35, the test results are meaningless); they don't know what is being done with the samples; they don't know with whom the data is being shared or why; and they have no means to retest allegedly positive tests, yet these tests determine severe isolation and quarantine measures.

28. Defendants are forcing children to participate in a massive medical experiment without lawful consent.

COVID-19 POSES LOW RISK TO CHILDREN COMPARED TO THE IRREPARABLE HARM OF THEIR LOSING LONG PERIODS OF IN-PERSON SCHOOLING

29. There is no evidence that school-aged children are at higher risk of COVID-19 in a school setting than anywhere else in the community. In fact, having come to that conclusion, several countries have kept schools open or reopened them fully. (See Exhibits 5-11.)

30. There is little to no evidence that students transmit COVID-19 to teachers or adults in a school setting or elsewhere in the community.

31. The COVID-19 infection fatality rate (IFR) of children between 0-19 years old is .00003%. (See Exhibit 12.) Although COVID-19 has a minimal impact on school-aged children, Defendants' School Action is having an overwhelmingly negative impact on them.

32. Acting CDC Director Dr. Robert Redfield has stated that schools are among the safest places for children to be during the coronavirus pandemic, arguing that "there is extensive data that confirms …. K-12 schools can operate with face-to-face learning and they can do it safely and responsibly." (See Exhibit 13.)

33. Mayor DeBlasio has confirmed that the schools are using PCR testing. (See Exhibit 14.)

34. Chancellor Carranza said getting kids back in school is one of the single most important things they can do. (See Exhibit 15.)

35. Instead of coerced testing of the student population, voluntary testing of the adult teacher population would be a more appropriate solution. (See Decl. Kevin McKernan, Paragraph 34.)

36. Temperature testing would be a better and less invasive solution as well. (See Decl. Kevin McKernan, Paragraph 34.)

37. A study found that SARS-CoV-2 transmission in children in schools appears considerably less than the transmission for other respiratory viruses, such as influenza. Further, there is no gold standard for PCR testing of COVID-19. (See Exhibit 20.)

38. There is no evidence of child to adult transmission. (See Exhibit 7.)

39. These data suggest that children are not the primary drivers of COVID-19 spread in schools or the community. (See Exhibit 10.)

40. A recent McKinsey report makes clear that school shutdowns cause irreparable harm to students; "the hurt could last a lifetime." (See Exhibit 17.) The June 2020 report depicts learning loss and higher dropout rates that will lead to lower earnings in later life. Poor quality remote instruction widens the existing achievement gap for Black and Hispanic students, who make up the majority in New York City schools. (See Exhibit 17.)

41. 41. Remote learning also leads to decreased teacher interaction with students. (See Exhibit 16 (There are concerning signs that many teachers have had no contact at all with a significant portion of students . . . only 39% of teachers reported interacting with their students at least once a day, and most teacher-student communication occurred over electronic mail.).)

42. The McKinsey report suggests that if in-classroom instruction resumes by January 2021, students would have already lost almost seven months of learning. If it resumes only in fall 2021, they would have lost over a year of learning. (See Exhibit 17, page 8.)

43. Plaintiffs complain that chaos has engulfed children, parents, teachers, school administrators and staff, as they all struggle with school shutdowns. At best, remote learning is inconsistent. At worst, it is disastrous, leading to truancy and mental health disorders stemming from isolation and depression.

44. Defendants' arbitrary actions deprive Plaintiffs' children, and all New York City school children, of the opportunity for a meaningful education, including appropriate academic instruction, extra-curricular activities, and social support, all of which are critical for later success in life. Defendants' arbitrary and capricious actions put at risk the future of an entire generation of New York City children. These actions have long-term implications for New York City's economic stability, which has already suffered serious harm from recent lockdowns.

PARTIES

45. Plaintiffs are parents of children enrolled in New York City public schools.

46. Plaintiff, Christine Kalikazaros is the parent of Y.K. who had attended P.S. 79 in Queens, New York. Y.K. has been removed from school because Plaintiff refuses to consent to Mandatory Testing. Y.K. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing.

47. Plaintiff, Stephanie Denaro is the parent of D.D. and H.D., both of whom were attending P.S. 2 in Manhattan. D.D. and H.D., have been removed from P.S. 2 because Plaintiff refuses to consent to Mandatory Testing. D.D. and H.D. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing.

48. Plaintiff, Gaetano La Mazza is the parent of R.L., who was attending P.S. 14 in the Bronx. R.L. has been removed from school because Plaintiff refuses to consent to Mandatory Testing. R.L. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing.

49. Plaintiff, Amanda Aviles is the parent of N.A., who was attending P.S. 221 in Queens, New York. N.A. has been removed from school because Plaintiff refuses to consent to Mandatory Testing. Plaintiff took N.A. for a COVID-19 test a day before school opened. The

test was negative, yet the school refused to accept the results. N.A. will not be welcomed back to school unless Plaintiff signs the consent form to Mandatory Testing. Plaintiff, Amanda Aviles, is also the parent of and A.A. who was attending M.S. 67. Middle School 67 was shut down on November 19, 2020 by Defendants and remains closed, depriving A.A. of a basic minimum education.

50. Plaintiff Crystal J. Lia is the parent of F.L., who was attending P.S. 36 on Staten Island, New York. Plaintiff applied for a medical exemption to the Mandatory Testing because F.L. is a severe asthmatic. Defendants denied the medical exemption and removed F.L. from P.S. 36. F.L. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing. Plaintiff will not sign the consent form because she believes Mandatory Testing is unethical and because F.L.'s licensed physician advised against it.

51. Attached to this 1st Amended Complaint are each of their sworn declarations, which are incorporated as though fully set forth herein.

52. Plaintiff Children's Health Defense ("CHD") is a national not-for-profit membership organization of parents, advocates for children, and attorneys. CHD's mission is to safeguard children's health and to advocate for children and families to prevent and stop environmental harms and to change policies that place children at undue risk.

53. CHD accomplishes its mission by, among other things, providing resources, training, and information to members to assist them in protecting the rights and health of their children; educating the public and policymakers about the experiences of children and their families that have suffered environmental harms; and educating members about developments in laws and policies affecting the health of children.

54. CHD has over 100,000 members located across the United States and reaches nearly two million readers per month through its website. Membership is open to all persons who are interested in furthering CHD's purposes and who pay a small fee for lifetime membership. The Board of Directors is composed exclusively of CHD members. CHD has active members in New York City, including parents of children named in this lawsuit.

55. Defendant Bill de Blasio is the Mayor of New York City and has issued a series of executive orders since the COVID-19 pandemic began, including the shutdown of New York City public schools. The Mayor is being sued in his official capacity.

56. Defendant Richard A. Carranza is the Chancellor of the New York City Department of Education and is being sued in his official capacity. Defendant Carranza is responsible for enforcing education law and regulations in the City of New York. The Department of Education has issued directives, updates and supplemental guidance on instruction for the 2020-21 school year with recommendations from the Department of Health.

57. Defendant David Chokshi is the Commissioner for the New York City Department of Health and is being sued in his official capacity. Defendant David Chokshi and the Department of Health provide recommendations and consultation to Defendant de Blasio and Defendant Carranza of the New York City Department of Education.

JURISDICTION & VENUE

58. This action arises under 42 U.S.C. § 1983 because of Defendants' deprivation of Plaintiffs' constitutional rights to due process and equal protection rights under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. This Court has federal question jurisdiction under 28 U.S.C. § 1331 and § 1343 and has authority to award the requested

declaratory relief under 28 U.S.C. § 2201; the requested injunctive relief and damages under 28 U.S.C. § 1343(a) and 42 U.S.C. § 1983; and attorneys' fees and costs under 42 U.S.C. § 1988.

59. The Court has jurisdiction over Plaintiffs' federal law claims under 42 U.S.C. § 1331 and 28 U.S.C. § 1343.

60. The Court has jurisdiction over Plaintiffs' supplemental state court claims under 28 U.S.C. § 1367.

61. Venue is proper in the Southern District of New York under 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to Plaintiffs' claims occurred in this district.

CONSTITUTIONAL ISSUES

62. New York State law recognizes the fundamental right to public education in a classroom setting. The New York Constitution plainly states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State." N.Y. Const., Art. XI, § I. School being a physical school building is confirmed by this same Article, which addresses transportation to and from school.

63. In direct conflict with the New York Constitution, Defendant de Blasio halted all in-person instruction on November 19, 2020 and has only partially re-opened schools to a minority of students whose parents Defendants coerced into Mandatory Testing on their children.

64. Parents have a fundamental right to direct the care and upbringing of their children, and medical decisions fall squarely within that liberty interest. Parents with their chosen healthcare providers are in the best position to safeguard the health and safety of their children.

65. Those parents who prefer remote learning for their children have that option. Those who prefer in-person learning should be able to provide satisfactory documentation to Defendants regarding their children's health, just as they do for all other health considerations. *See Troxel v. Granville*, 530 U.S. 57, 58 (2000) ("There is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children.")

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

42 U.S.C. § 1983 "Violation of Due Process under the Fourteenth Amendment"
Deprivation of Substantive Due Process

(By All Plaintiffs Against All Defendants)

66. Plaintiffs hereby incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

> 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.

U.S. Const., 14th Amend., § 1.

67. The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Due Process Clause includes a substantive component that bars arbitrary, wrongful, government action "regardless of

the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

68. The Due Process Clause recognizes that certain interests are so substantial that no process is enough to allow the government to restrict them absent a compelling state interest. *Washington v. Glucksberg*, 521 U.S. at 719-21.

69. Under the Due Process Clauses of the Fifth and Fourteenth Amendments, "no person may be deprived of life, liberty, or property without reasonable notice and an opportunity to be heard." *Karpova v. Snow*, 497 F.3d 262, 270 (2d Cir. 20007).

70. Plaintiffs have the right to direct their children's education. Access to a foundational level of literacy provided through public education has an extensive historical legacy and is so central to our political and social system as to be "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. at 720-21.

71. Nonetheless, Defendants have deprived Plaintiffs of the right to direct their children's education in violation of the Fourteenth Amendment, by effectively precluding the children from receiving a basic minimum education. This deprivation is real because (1) many students have limited or no access to the internet; (2) the quality of remote education is inferior to in-person instruction; (3) many students find computer-based learning difficult or impossible; and (4) remote learning has demonstrably increased truancy. Defendants' School Action has caused irreparable harm to children and their families.

72. PCR testing, clogs the system, burdens schools and children, does psychological harm, and is unproductive (Decl. Kevin McKernan, paragraph 30.)

73. Defendants lack any compelling, or even rational, interest to burden the right to a minimum education. Although COVID-19 represents a significant public health challenge, the

weight of the evidence shows that children's transmission and infection rates do not justify school closure. Data prove that the mortality and severe adverse health outcome risk to children from COVID-19 is virtually non-existent.

74. Defendants may manage risk to teachers just as other institutions manage risk to essential workers: by offering choices and providing protection to mitigate risk. Schools have already been providing temperature monitoring, masking, social distancing, deep cleaning and hand sanitizing. Defendants have already offered teachers the option to teach remotely. The risk that students present to one another and to teachers and staff pale compared to the undeniable and irreparable harm children now suffer.

75. Plaintiffs have no adequate remedy at law. They will continue to suffer irreparable harm unless Defendants are enjoined from shutting down the schools and coercing parents to submit to their children to Mandatory Testing.

76. Pursuant to 42 U.S.C. § 1983, Plaintiffs are entitled to temporary, preliminary, and permanent injunctive relief restraining Defendants' School Action and Mandatory Testing.

SECOND CLAIM FOR RELIEF

42 U.S.C. § 1983 "Violation of Due Process under the Fourteenth Amendment"
Deprivation of Procedural Due Process

(By All Plaintiffs Against All Defendants)

77. Plaintiffs reallege and incorporate by reference all preceding paragraphs as if fully set forth herein.

78. Defendants' helter-skelter approach to opening and closing the schools has itself caused serious harm to students and their families.

79. Defendants have failed to provide families with adequate notice of when and how schooling will take place.

80. Similarly, they have failed to provide families with an appeals process from positive PCR tests that require isolation, quarantine, and disruption of many lives.

81. They have failed to provide a process to contest the denial of medical exemptions, directly affecting Plaintiff Crystal Lia and her son.

82. They have failed to tailor their requirement for PCR testing, denying certified test results from their partner agency Health and Hospitals without any rational basis.

THIRD CLAIM FOR RELIEF

42 U.S.C. § 1983 Violation of the Equal Protection Clause under the Fourteenth Amendment

(By All Plaintiffs Against All Defendants)

83. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

84. The equal protection doctrine prohibits governmental classifications that affect some groups of citizens differently than others. *Engquist v. Or. Dept. of Agric.,* 553 U.S. 591, 601 (2008) (citations omitted). The touchstone of this analysis is whether a state creates disparity between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt,* 417 U.S. 600, 609 (1974).

85. Denial of education to isolated groups of children poses an affront to one of the goals of the Equal Protection Clause, i.e., to abolish barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

86. Similarly, denial of education to those children whose parents object to invasive, non-diagnostic testing violates equal protection. Because there is no rational basis to require in-school non-diagnostic testing, children whose parents object suffer unequal legal protection.

87. Paradoxically, by depriving children of disadvantaged groups an education, the society forecloses the means by which they may advance in the future.

88. Defendants' actions have disproportionately affected minority children of lower income households, whose families cannot provide high-speed internet access, computers, private tutors, and quiet learning environments.

89. Black, Hispanic and other minority racial and ethnic groups have been subjects of unethical and illegal medical experimentation in the past. Minority parents, who make up the majority of parents in New York City schools, are rightfully wary to hand over their children to medical interventions without their own supervision. The outrage of the decades-running Tuskegee syphilis experiment on Black men and their families still haunts them. They remember that the world's leading public health authority, the CDC, intentionally and knowingly caused disease and death to hundreds of innocent victims for the cause of "science." (See Exh. 19.) A CDC publication details the Tuskegee events but cannot convey the true pain the program inflicted and the anger it still arouses. (See Exh. 19.)

90. The children forced into remote learning are those at greatest risk. They are at risk of losing a minimal education and becoming dropouts.

91. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from shutting down schools.

92. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating and restraining enforcement of Defendants' Orders and any associated guidance documents.

FOURTH CLAIM FOR RELIEF

Violation of Parents' Right to Direct Education

(By All Plaintiffs Against All Defendants)

93. Plaintiffs incorporate the foregoing paragraphs as though fully set forth herein.

94. Parents have the right to direct their children's education and upbringing. *Troxel v. Granville*, 530 U.S. at 58. Parents' ability to access to a foundational level of literacy for their children through public education has an extensive historical legacy and is so central to our political and social system as to be "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. at 720-21.

95. Overwhelming evidence shows that students are falling behind through online learning, especially Black and Hispanic children from lower income households, who make up most New York City school students. (See McKinsey Report, Exh. 17.)

96. New York taxpayers provide funding for education in schools, not for unwarranted medical testing. Because PCR testing alone is not diagnostic, it has no place in schools. If there is any place for testing, it is outside the school setting, supervised by parents and administered by healthcare providers of the parents' choosing.

97. Schools require certification of vaccination compliance and overall health; they do not require that students receive compulsory vaccinations or other medical care at school without true parental consent.

98. There is no rational basis to force children to submit to Mandatory Testing. If PCR testing continues to be a requirement, then parents must be able to obtain equivalent certification from licensed medical providers of their choosing.

FIFTH CLAIM FOR RELIEF

Violation of Fundamental Parental Rights

(By All Plaintiffs Against All Defendants)

99. Plaintiffs incorporate the foregoing as though fully set forth herein.

100. Under New York City's Parents' Bill of Rights, parents have the right to "information regarding all policies, plans and regulations which require parent consultation at the school, district and/or borough level"; and to "be informed about required health, cognitive and language screening examinations." (See Exhibit 21.)

101. Defendants' School Action is a violation of this Bill of Rights, which reflects parent-taxpayers' reasonable expectations of public schooling. Parents are best situated to assess their child's health, academic and social needs, as the Bill of Rights implies. The locus of decision-making for children rests with parents under well-established Supreme Court precedent; not with the Mayor or Commissioner of Education. Parents also have a right to privacy of their child's information. (See Exhibit 22.)

102. Defendants have failed to disclose critical information to Plaintiffs, including when they plan to resume 5-day/week education; when middle and high school classes will resume; and basic information regarding the Mandatory Testing, including how the children's genetic samples are being handled.

103. Parents are entitled to control the upbringing of children, including medical decisions. The CDC's guidance is unequivocal: in-school testing is "unethical and illegal." (Exh. 18.) If any kind of testing remains compulsory, it must occur under direct parental supervision outside school, not under coerced "consent."

SIXTH CLAIM FOR RELIEF

Violations of the Fourth Amendment
Right to be free of unreasonable searches and seizures

(By All Plaintiffs Against All Defendants)

104. Plaintiffs incorporate by reference the foregoing as though fully set forth herein.

> **The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated**, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., 4th Amend.

105. Defendants' Mandatory Testing violates the Fourth Amendment's prohibition against unreasonable searches and seizures. These tests are invasive and remove genetic material from minors as young as six years old without parental supervision and without true consent.

106. "[Y]oung people do not 'shed their constitutional rights' at the schoolhouse door." *Goss v. Lopez,* 419 U.S. 565, 574 (1975).

107. Defendants' Mandatory Testing is an unreasonable search and seizure: "[A] search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of that violation." *Cornfield v. Consol. High Sch. Dist. No. 230,* 991 F.2d 1316, 1320 (7th Cir. 1993).

108. New York State permits certain testing in school, but with critical limitations: (1) testing is only permissible with voluntary parental consent; and (2) in-school testing occurs only for older students. Under New York Education Law § 912-A, parents may request in writing that their child be subject to drug testing, if the child is in the seventh grade or above.

109. The New York State legislature passed this law by democratic vote, unlike Defendants' executive orders. And this drug testing law involves no coercion. Furthermore, testing without direct parental oversight occurs only for middle school students and above, and thus is age-appropriate, unlike Defendants' Mandatory Testing, affecting children as young as six years old.

110. Defendants' Mandatory Testing violates the Fourth Amendment and is at odds with New York's voluntary testing options.

SEVENTH CLAIM FOR RELIEF

Violation of Privacy under the Fourth Amendment

(By All Plaintiffs Against All Defendants)

111. The foregoing paragraphs are repeated and incorporated as though fully set forth herein.

112. Plaintiffs assert the Privacy Clause of the Fourth Amendment that respects the fundamental right of an individual to a zone of privacy for medical decision making.

113. Plaintiffs and their children live in constant fear of a positive PCR test that could result in isolation, quarantine and profound disruption.

114. Defendants' School Action infringes on each Plaintiff's zone of privacy to make personal medical decisions. Defendants' School Action coerces parents to reveal highly personal information to a minimum of six separate agencies and organizations – including name, COVID-19 test results, date of birth, gender, race/ethnicity, school name, address, telephone, mobile number and email address. (Consent Form Exh. 2.) This unreasonable invasion of personal medical privacy violates Plaintiffs' and children's rights.

115. Defendants' School Action unreasonably limits each Plaintiff's parental supervision and choice of medical providers.

116. Defendants have failed to provide proof that the students' genetic material is not being stored for later use. Defendants' coerced, random testing of 20% of the school body on a weekly basis, with a 48-72 hour lag time in providing results, does not provide disease control. It constitutes an unwarranted violation of privacy, however.

EIGHTH CLAIM FOR RELIEF

Violation of Privacy under the Fourth Amendment

(By All Plaintiffs Against All Defendants)

117. Plaintiffs incorporate the foregoing paragraphs as though fully set forth herein.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

U.S. Const., 5th Amend.

118. Plaintiff parents or guardians are the sole people empowered to provide informed consent for their children to medical procedures.

119. No public official or agency has the authority to "consent" on behalf of children to participate in a mass infection detection program.

120. Plaintiffs do not consent that their children be subjects in a randomized experiment through September 2021, nor do they consent that Defendants should exile their children into "remote learning" because of informed refusal.

NINTH CLAIM FOR RELIEF

Violation of N.Y. Constitution, Art. XI, § I, ¶ 1
Provide for the Maintenance and Support of thorough and efficient system of free public schools

(By All Plaintiffs Against All Defendants)

121. Plaintiffs incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

122. New York Constitution, Art. XI, § I, ¶ 1 provides for the Maintenance and Support of a thorough and efficient system of free public schools.

123. Defendants have failed to provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children.

124. Remote learning does not meet Defendants' obligation to provide children with the right to a minimal education.

125. Plaintiffs and their children have no adequate remedy at law and will suffer continuous, irreparable harm to their state constitutional rights unless Defendants are enjoined from shutting down schools and Mandatory Testing.

TENTH CLAIM FOR RELIEF

Violation of N.Y. Pub. Health Law § 2440 *et seq*

(By All Plaintiffs Against All Defendants)

126. Plaintiffs incorporate the foregoing paragraphs as though fully set forth herein.

127. The voluntary consent of human subjects in any experiment or clinical study is absolutely "essential." N.Y. Pub. Health Law § 2441.

128. New York law directly incorporates the Nuremberg Code, requiring that the human subject be "so situated as to be able to exercise **free power of choice without undue inducement or any element of force, fraud, deceit, duress or other form of constrain or**

coercion." N.Y. Pub. Health Law § 2441.

129. New York law prohibits any human subject research without voluntary informed consent documented in writing. Parents must provide written consent for minors. N.Y. Pub. Health Law § 2442.

130. The CDC provides specific, unambiguous guidance for schools during the COVID-19 crisis:

> If a school is implementing a testing strategy, testing should be offered on a voluntary basis. **It is unethical and illegal to test someone who does not want to be tested, including students whose parents or guardians do not want them to be tested**.

(Exh. 18.)

131. Disregarding federal and state law as well as CDC guidance, Defendants attempt to unethically and unlawfully coerce parents into signing consent forms.

132. On information and belief, Defendants are using the data they collect from children in schools for an infection control study. The Mandatory Testing, consent forms, and engagement of multiple healthcare and medical testing organizations are all consistent with clinical study of human research subjects. Defendants have never disclosed such a research agenda to parents, but if true, would constitute yet another cardinal violation of law and ethics.

133. Plaintiffs have not and will not give consent to random testing of their children. There is no rational basis for Defendants to exclude children because of their parents' informed refusal. Defendants' decision to condition public school access on unethical and illegal PCR testing must stop.

134. Unambiguous Second Circuit authority establishes that informed consent to medical experimentation is a *jus cogens* norm. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2009).

135. Informed consent means that the subject has a full understanding of the purpose, procedures, benefits, risks and alternatives available to enable him to make an informed decision about being a study participant.

136. Children in particular must be protected from participation in medical experiments or studies "unless essential." 21 CFR 56.111(b).

137. Defendants have breached their obligation to obtain voluntary and informed consent to Mandatory Testing. Coercion violates voluntariness. Incomplete, misleading and false information violates the information requirement. Defendants' randomized testing and analysis of collected data constitutes public health research that Defendants and their partners have concealed from Plaintiffs and others in violation of law.

CONCLUSION

138. In the 1940's, in a time of great fear and anxiety, Japanese Americans faced internment in concentration camps because of imagined disloyalty. Those rounded up often uttered the phrase, "Shikata ga nai," meaning "it cannot be helped" or "nothing can be done about it." Over a powerful dissent from Justice Robert Jackson, the U.S. Supreme Court upheld the rounding up and detention of citizens under an emergency order. *Korematsu v. United States*, 323 U.S. 214 (1944). Nearly fifty years later, President Reagan apologized for the injustice and indignity they suffered and offered a small measure of compensation. In 1988, President Reagan signed the Civil Liberties Act that in part righted a grievous wrong.

139. While Defendants are fully empowered to enact rational measures to contain infectious disease under existing law, they do not have authority to invent irrational testing regimes, to punish families who refuse to participate in them, and to exile healthy children from

school based on color-coded positivity rates. New York City children are entitled to due process, equal protection, education, informed consent and related rights.

140. Plaintiffs and their children hope and pray that, in this instance, something can be done.

REQUEST FOR JURY TRIAL

141. Plaintiffs request a jury trial on factual matters.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask the Court to grant the following relief:

A. To declare Defendants' Order shutting down Public Schools unconstitutional;

B. To grant a preliminary injunction enjoining the shutdown of schools;

C. To permanently enjoin Defendants from shutting down Public Schools;

D. To order Defendants to issue new orders and guidance, reinstating in-person instruction in all schools without delay;

E. To award Plaintiffs reasonable attorneys' fees, costs, and expenses under applicable state and federal law; and

F. To grant any further relief which the Court determines to be just and proper.

Dated: Syosset, New York
December 16, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Civil No.: 1:20−cv−09829−PGG

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

MOTION FOR PRELIMINARY INJUNCTION

Civil No.: 1:20−cv−09829−PGG

PRELIMINARY STATEMENT

> It is time – past time – to make plain that, while the pandemic poses many grave challenges, there is no world in which the Constitution tolerates color-coded executive edicts that reopen liquor stores and bike shops but shutter churches, synagogues, and mosques.

Roman Catholic Diocese v. Cuomo, 592 U.S. __, 208 L.Ed.2d 206 (2020) (Gorsuch J., concurring).

Plaintiffs are parents of children whose schools have shut them out. While acknowledging the challenges of the COVID-19 pandemic, these parents, like Justice Gorsuch, call for the Constitution to protect fundamental rights. These parents seek a preliminary injunction from this Court to restore their children's ability to return to full-time in-school instruction, K-12th grade, without the unethical and illegal requirement of coerced medical testing. Plaintiffs assert that Defendants' school shutdown of November 19, 2020 and partial reopening with compulsory medical interventions violate Constitutional rights under the Fourth, Fifth and Fourteenth Amendments, including fundamental rights to bodily integrity, informed consent, education and parenting. Plaintiffs' children are unquestionably suffering irreparable harm from these deprivations; Plaintiffs are likely to succeed on the merits, and will show that the balance of equities tips sharply in their favor.

STATEMENT OF FACTS

In this motion for preliminary injunction, Plaintiffs ask the Court to void Defendants' continued partial and full school closures of grades K-12 and to enjoin their forced medical testing of students. Their actions inflict irreparable harm on Plaintiffs and their children without serving any compelling state interest. Their actions have been erratic, unethical and illegal.

We ask the Court to rule in Plaintiffs' favor based on the following uncontested facts:

(1) The Centers for Disease Control and Prevention state that medical testing in schools must be voluntary;

(2) Without true consent, mandated testing is illegal;

(3) Defendants coerce parental consent for school attendance;

(4) Defendants' PCR testing scheme is a clinical study on child subjects;

(5) Parental consent, when coerced, fails to comply with New York State law, which is based on the Nuremberg Code;

(6) Defendants' PCR testing is not diagnostic (despite Defendants' representations to the contrary) and requires further testing for infection detection;

(7) Children are at extremely low risk from COVID-19;

(9) There is no acknowledged "gold standard" for COVID-19 testing;

(10) The short- and long-term academic, psychological and emotional burdens children suffer from school exclusion outweigh the risks of COVID-19;

(11) Low-income students, who are predominantly children of color and who make up the majority of New York City students, suffer disproportionately from school shutdowns; and

(12) The already gaping achievement chasm between rich and poor students will only grow more gaping with continued school closures.

Defendants' polymerase chain reaction (PCR) testing program is not diagnostic, and is subject to manipulation. Testing companies can easily change testing cycles, as described in the Lee and McKernan Declarations. They can change test results from "negative" to "positive" merely by changing the number of cycles. Defendants' program is thus irrational, coercive, unethical, and exorbitantly expensive.

This motion, the accompanying memorandum, Exhibits, Declarations of Dr. Sin Lee and Kevin McKernan, and the Request for Judicial Notice filed concurrently herewith are incorporated by reference as though fully set forth herein. They will prove that not even a rational basis for Defendants' flawed scheme exists, and that Defendants have violated myriad fundamental rights.

As 2020 comes to its long-awaited close, it is time to reflect on where we are, and, more importantly, how we got here. Surely fear of coronavirus disease (hereinafter "COVID-19") has been a driving factor.

Statistics can be terrifying. Terrifying indeed, until one takes the time to consider that according to the Centers for Disease Control and Prevention, (hereinafter "CDC"), only 6% of those who presumptively died from Covid-19, died from (and not with) Covid-19. That means 94% had serious, life-threatening co-morbid conditions at the time of death, such as heart disease, respiratory illness and cancer. "For 6% of the deaths, COVID-19 was the only cause mentioned. For deaths with conditions or causes in addition to COVID-19, on average, there were 2.9 additional conditions or causes per death." *Weekly Updates by Select Demographic and Geographic Characteristics*, CENTERS FOR DISEASE CONTROL AND PREVENTION (updated Dec. 16, 2020), https://www.cdc.gov/nchs/nvss/vsrr/covid_weekly/index.htm.

The Lee and McKernan Declarations explain that 97% of PCR positives tests may actually be false. Plaintiffs' expert declarations, testimony and exhibits will show why a Portuguese Appellate Court recently concluded that executive decisions to isolate and quarantine people on the basis of positive PCR tests, without further diagnosis, are unlawful. The science purporting to justify everything from school closures, masks, mandatory PCR tests and even lockdown measures are not "settled science," as some contend.

Given Defendants' decisions to close schools, it is astonishing to learn that the infection fatality rate for people aged 0-19 years is .00003, according to the CDC. (Appendix, First Amended Complaint ("App. FAC")[1], Exh. 12.) Given this extraordinarily low death rate among

[1] All references to "App. FAC" refer to the Appendix of Exhibits to the First Amended Complaint."

children, it is virtually impossible that Defendants' actions could save lives. And exclusion from school and coerced testing hardly make their lives better.

The National Institutes of Health (hereinafter "NIH") has determined that PCR testing is not the "Gold Standard" of COVID-19 diagnosis as it is widely touted to be. NIH acknowledges that "This RT [reverse transcription] PCR may increase the positivity rate, depending on the number of repetitions of this test." In fact, "[f]or the moment, whenever possible, it is more useful in clinical practice to evaluate tests by several methods because there is no generally accepted reference standard nor is there a gold test for the diagnosis of COVID 19." (App. FAC, Exh. 20.)

According to the CDC:

> If a school is implementing a testing strategy, testing should be offered on a voluntary basis. It is unethical and illegal to test someone who does not want to be tested, including students whose parents or guardians do not want them to be tested.

(App. FAC, Exh. 18.)

Despite this guidance, of which Defendants must be aware, they choose to coerce testing. They confront parents with a Hobson's choice: put your child in isolated, inferior remote learning for at least ten more months (after ten months of remote and disrupted education already) or subject her to intrusive, unwanted medical procedures.

An infamous, fictional character in early 20th Century New York City uttered the words, "I am going to make him an offer he can't refuse." The offer was accompanied by a threat. New York City's Defendants also give parents an offer they can't refuse: turn your children into medical subjects or forsake school.

Just as in the popular film, there is nothing voluntary in Defendants' scenario: comply or your child is *persona non grata*. Indeed, Plaintiff Aviles describes exactly this: when she and her son arrived at his school without a signed "consent" form, they were branded "trespassers."

Informed refusal means the loss of the best education available to most children. That loss affects families differently. The poor do not have the wherewithal to hire private tutors, babysitters, have parents stay home, form learning pods, pay for high-speed internet, buy fancy computers and more to replicate school-based learning. Despite rhetoric to the contrary, Defendants' shutdowns and coercive medical measures impoverish and harm the lives of children, families, schools and New York City itself.

ARGUMENT

I. PLAINTIFFS MEET THE REQUIREMENTS FOR A PRELIMINARY INJUNCTION.

To obtain a preliminary injunction, Plaintiffs must demonstrate: (1) they are likely to suffer irreparable harm in the absence of preliminary relief; (2) they are likely to succeed on the merits; (3) the balance of hardships tips decidedly in their 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). "When, 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. 1:20-CV-0687 (GTS/DJS), 2020 U.S. Dist. LEXIS 117765 (N.D.N.Y. July 6, 2020). Plaintiffs satisfy the four elements above.

II. PLAINTIFFS AND THEIR CHILDREN SUFFER IRREPARABLE HARM.

The Second Circuit has repeatedly found that irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999); *accord Yang v. Kosinski*, 960 F.3d 119, 128 (2d Cir. 2020). The court may presume irreparable injury where the plaintiff is suffering an alleged constitutional right violation. *See, e.g., Yang*, 960 F.3d at 128; *Beal v. Stern*, 184 F.3d 117, 123-24 (2d Cir. 1999) (presuming irreparable harm and proceeding directly to likelihood-of-success standard where constitutional right violations were alleged); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996) ("it is the alleged violation of a constitutional right that triggers a finding of irreparable harm").

The Second Circuit has defined "irreparable harm" as "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113 (2d Cir. 2003). Irreparable harm exists "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chems., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).

A. Exclusion from School Constitutes Irreparable Harm.

Exclusion from school, standing alone, unquestionably constitutes irreparable harm. Courts assume that a child prevented from attending school suffers irreparably. *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. Sobel*, 710 F.Supp. 506, 507 (S.D.N.Y.

1989). (Noting "it was clear that Plaintiff's daughter would suffer irreparable harm if barred from school"); *see also Caviezel v. Great Neck Public Schools,* 701 F.Supp.2d 414, 426 (N.D.N.Y. 2010) ("[The Court] is satisfied that there would be irreparable harm to the child not entering school in the beginning of the school year.").

A recent analysis of school shutdowns during COVID-19 nails it: "the hurt could last a lifetime." The McKinsey & Co. report projects staggering learning loss, high school dropouts, GDP loss twenty years out, and earnings loss in the billions of dollars from school shutdowns in 2020 alone. (App. FAC, Exh. 17 at 8.) Hard evidence makes crystal clear that in-person education is not a luxury; it is a necessity. If the country has essential workers, then it too has essential learners, and New York City children are among them. Parents want their children back in school despite the many hurdles that exist. Courts must rightly assume irreparable harm from school exclusion.

B. Involuntary Testing in School Constitutes Irreparable Harm.

Defendants compel intrusive medical interventions on children as young as six years old without parental supervision or true consent. They are doing this against the bright line guidance of the CDC, which calls such testing "unethical and illegal." (App. FAC, Exh. 18.) Plaintiffs must subject their children to medical procedures by strangers in masks outside their purview or commit them to ineffective, inferior education. Either way, Plaintiffs are forced to give up constitutional rights and suffer irreparable harm.

Plaintiffs have no adequate remedy at law unless Defendants are enjoined from unwarranted school closures and medical testing.

III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS.

A. *Jacobson v. Massachusetts* is not a Blank Check for any Executive Action.

Defendants would have the Court believe that under the Supreme Court's 1905 precedent *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), just about any executive action under passes muster in a declared emergency. They would like the Court to believe that *Roman Catholic Diocese v. Cuomo*, 592 U.S. ___; 208 L.Ed.2d 206 (2020) relates only to religious worship. But neither of these premises is true.

Although it is fair to say that courts have interpreted *Jacobson* liberally, the landmark case itself warned against actions precisely like Defendants':

> [An order] might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons.

Jacobson, 197 U.S. at 28.

Defendants' arbitrary and unreasonable school shutdowns call out for courts to "interfere" for children's protection.

Jacobson acknowledges that government actors may seek to exert police powers that simply go too far:

> There is, of course, a sphere within which the individual may assert the supremacy of his own will, and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will.

Jacobson, 197 U.S. at 29.

Invasive medical testing of children by masked strangers without their authentic parental consent is precisely the kind of government action that *Jacobson* held beyond the pale. Over one hundred years ago, the Supreme Court acknowledged that citizens must rightfully dispute

government authority when it tramples domains that must remain within the "supremacy of his own will." Surely testing inside one's body, or one's child's body, constitutes such a domain for "supremacy of his own will." Plaintiffs rightfully challenge Defendants' overreach.

B. Roman Catholic Diocese Signals a Clear Shift in Interpreting Jacobson.

Defendants quote at length from the Supreme Court's decision upholding emergency restrictions in early 2020. *South Bay United Pentecostal Church v. Newsom*, 140 S. Ct. 1613 (2020). But the Supreme Court has moved on, even if Defendants have not. *Roman Catholic Diocese* signals a fresh, sharper scrutiny towards government actions that infringe constitutional rights during the pandemic.

The Court chose to enjoin Governor Cuomo's restrictions on houses of worship, even though the Governor argued the case was moot (because he rejiggered color-coded designations) and even though a Second Circuit oral argument was just weeks away. The Court sought to make a resounding point: "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese*, 208 L.Ed.2d at 210.

The Court found the matter not moot because the petitioners "remain under a constant threat that the area will be reclassified as red or orange." These are the same color-coded classifications Defendants apply to schools, largely based on PCR testing results.

Justice Gorsuch, concurring, went further: "*Jacobson* hardly supports cutting the Constitution loose during a pandemic." *Roman Catholic Diocese*, 208 L.Ed.2d at 212 (Gorsuch, J., concurring). And further still: "*Jacobson* didn't seek to depart from normal legal rules during a pandemic, and it supplies no precedent for doing so." *Id*. at 213. Justice Gorsuch explicitly rejects *South Bay*'s interpretation of *Jacobson*. *Roman Catholic Diocese*, 208 L.Ed.2d at 214.

He warns sternly: "[W]e may not shelter in place when the Constitution is under attack. Things never go well when we do." *Roman Catholic Diocese*, 208 L.Ed.2d at 214.

The Court in *Roman Catholic Diocese* makes clear that its future jurisprudence during this pandemic will be rooted in the Constitution, not in the expansive emergency powers in *Jacobson*. The Court did not limit its words to the First Amendment or to free exercise of religion. On the contrary, the Court spoke to the need for courts to vigilantly uphold all constitutional rights, even in emergency circumstances, and even when fear runs rampant.

C. Plaintiffs Meet the Bars of Strict Scrutiny and Rational Basis.

Through their arbitrary school closures and medical testing, Defendants have breached Plaintiffs' most fundamental rights: the right to give children a minimal education; the right to protect children from intrusive medical interventions; the right to protect children from unreasonable searches and seizures; the right to protect children's bodily integrity and privacy; the procedural right to challenge unlawful orders to isolate and quarantine children; and the right to authentic informed consent on behalf of children. Taken together, the harms Plaintiffs and their children suffer are profound and irreparable.

All of these abridged rights are deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Wash. v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (internal citations and quotation marks omitted).

The Due Process Clause of the Fourteenth Amendment recognizes that certain interests are so substantial that no process is enough to allow the government to restrict them without a compelling state interest. *Wash. v. Glucksberg*, 521 U.S. at 719-21. When it does so, it must do so in a narrowly tailored manner that is the least restrictive way possible. *Yang v. Kosinski*, 960 F.3d 119, 129-30 (2d Cir. 2020).

The Constitution provides parents the right to direct the education and upbringing of their children. *Wash. v. Glucksberg*, 521 U.S.702, 720, *citing Meyer v. Nebraska*, 262 U.S. 390

(1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Defendants have deprived Plaintiffs and their children of the right to direct education in violation of the Fourteenth Amendment, by effectively precluding children from receiving education and literacy because (1) many students have no or limited access to the internet; (2) remote learning is demonstrably inferior; and (3) truancy demonstrably results in such circumstances. (*See McKinsey Report,* App. FAC, Exh. 17.)

While Defendants have a compelling interest in public health, the weight of the evidence shows that children's transmission and infection rates do not justify school closures. Defendants ignore that the evidence of mortality and adverse health outcome risk to children from COVID-19 is virtually non-existent. Nor does Defendants' interest in public health rationalize coerced medical testing on children. Evidence shows that PCR testing is unable to diagnose infection without further testing and subject to manipulation. (*See* Lee and McKernan Decls., filed concurrently and incorporated by reference as though fully incorporated herein.)

Defendants can manage the infection risk to teachers by offering them choices and providing them protection, as employers do for other essential workers. Defendants did this September through November 2020, before the November 19, 2020 shutdown, offering teachers remote options, fewer students per class, plastic barriers, masks, temperature taking and other protection measures. Teachers' risk mitigation cannot come at the expense of children's education.

Defendants' school closures and coerced testing are crude measures. While they may be well-intentioned efforts to advance public health, they fail to honor Plaintiffs' fundamental rights. They certainly fail to limit fundamental rights in the least restrictive means possible. These crude measures fail even to meet the test of rationality. School closures deprive children of the fundamental right to minimal education, and coerced testing defies many fundamental rights

simultaneously. Defendants should be enjoined from continuing to dig the graves for New York City's schools.

IV. THE BALANCE OF HARDSHIPS TIPS DECISIVELY IN PLAINTIFFS' FAVOR.

"A balance of equities tipping in favor of the party requesting a preliminary injunction" means balancing the requesting party's hardships against the defending party's benefits. *Ligon v. City of New York*, 925 F.Supp.2d 478, 539 (S.D.N.Y. 2013) (characterizing the balancing of "hardship imposed on one party" and "benefit to the other" as "balance[ing] [of] the equities"). "[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).

Furthermore, when plaintiffs seek an injunction to stay enforcement of a law or order that purportedly protects the public interest, the hardship to the government should be measured by the extent to which the law or order serves such protection. *See Ass'n of Jewish Camp Operators v. Cuomo*, No. 1:20-CV-0687 (GTS/DJS), 2020 U.S. Dist. LEXIS 117765.

Without an injunction, Plaintiffs' fundamental right to a minimum education will continue to be honored in the breach, whether in school with forced testing or in inferior remote learning. Defendants cannot argue credibly that the threat to public health from open schools without forced testing is great.

"[A]ctions which are irrational, arbitrary or capricious do not bear a rational relationship to any end." *Cty. of Butler v. Wolf*, Civil Action No. 2:20-cv-677, 2020 U.S. Dist. LEXIS 167544 at *26 (W.D. Pa. Sep. 14, 2020). In *Wolf*, a federal district court found that a governor's emergency restrictions to limit attendance at public gatherings violated constitutional rights. *Cty. of Butler v. Wolf*, 2020 U.S. Dist. LEXIS 167544. The restrictions on which businesses could

remain open were similarly unconstitutional Plaintiffs challenge the open ended uncertainty, the district court recognized the harm that would result to businesses: "A total shutdown of high schools with no end-date and with the specter of additional, future shutdowns can cause critical damage…and adds a government-induced cloud of uncertainty to the usual unpredictability of nature and life." *Id.* at *26.

The Due Process Clause of the Fourteenth Amendment includes a substantive component that bars arbitrary, wrongful, government action "regardless of the fairness of the procedures used to implement them." *Zinermon v. Burch,* 494 U.S. 113, 125 (1990). The "core of the concept" of substantive due process is the protection against arbitrary government action. *Hurtado v. California*, 110 U.S. 516, 527 (1884). Indeed, "the touchstone of due process is protection of the individual against arbitrary actions of government ...." *Id.*

Under the APA, courts are to hold unlawful and set aside agency action that is arbitrary and capricious. 5 U.S.C.S. § 706(2)(A). Although a court reviewing such action cannot substitute its judgment for that of the agency, its inquiry is to be searching and careful. The court must determine if the agency examined the relevant data and articulated a satisfactory explanation for its action. The agency must identify a rational connection between the facts found and the choices made. *New York v United States HHS,* 414 F Supp 3d 475 (SDNY 2019).

A. Defendants' Actions Violate Parental Rights.

Parents have a fundamental right to direct the care and upbringing of their children, and medical decisions fall squarely within that liberty interest. *Troxel v. Granville,* 530 U.S. 57, 58 (2000) ("There is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children."); *see also Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("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.")

These rights 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 ex. rel. Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000). Allowing unknown persons with unknown qualifications, at unspecified intervals, to give children intrusive medical tests is a cause of great concern to parents.

The state cannot interfere in or usurp parental rights to make medical decisions if the parents work with a licensed physician of their choosing: "While this right is not absolute inasmuch as the State, as *parens patriae*, may intervene to ensure that a child's health or welfare is not being seriously jeopardized by a parent's fault or omission, great deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same." *In re Hofbauer*, 47 N.Y.2d 648, 655–56, (1979) (*citing Doe v. Bolton*, 410 U.S. 179 (1973) for the constitutional principle that parents must be able to make medical decisions for their children without interference from the state so long as they are supported by a state licensed physician even if the decision is controversial).

Parents also have a fundamental right to direct the education of their children and choose the type of education that they think is best. *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 534–35 (1925) (state cannot bar parents from choosing to send their children to private school). "In addition to the specific freedoms protected by the Bill of Rights, the "liberty" specially protected by the Due Process Clause, U.S. Const. amend. XIV, includes the rights to marry, to

have children, to direct the education and upbringing of one's children . . . ." *Wash. v. Glucksberg*, 521 U.S. at 705.

B. Defendants' Actions Violate the Unconstitutional Conditions Doctrine.

The Supreme Court expressly clarified that *Doe v. Bolton* prohibits state interference in the doctor-patient relationship in all medical decision-making. *Whalen v. Roe*, 429 U.S. 589 (1977).

The doctrine of unconstitutional conditions prohibits the state from indirectly burdening fundamental rights, such as bodily integrity and privacy, by conditioning a benefit on the waiver of those fundamental rights. Defendants may not condition in-person schooling on the waiver of the rights to informed consent and medical privacy.

New York City children are suffering deeply, whether they have been continuously excluded or face the threat of imminent exclusion because of unwillingness to submit to coerced medical interventions. Each day without relief causes them to fall further behind and suffer more trauma. Deprivation of school is so universally recognized to cause lasting harm that courts routinely presume irreparable harm, even for short periods of exclusion, let alone for the many months of exclusion children have already endured and may endure going forward.

C. Defendants' Actions violate Plaintiffs' rights to equal protection of the law.

For purposes of equal protection claims, the rational basis test does not allow a party to probe the decision-making processes of the government because the Constitution "does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification." *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). While the rational basis test is forgiving, the government action must still bear at least a rational relationship to some legitimate end. *Romer v. Evans*, 517 U.S. 620, 631 (1996). Rational basis

review is a gentle standard for government acts, but it "is not a toothless one ...." *Mathews v. Lucas*, 427 U.S. 495, 510 (1976). Defendants have not proven the rationality of school exclusions and forced medical testing. The evidence of irreparable harm and unlawfulness is overwhelming and irrational.

D. Defendants' Actions Violate Defendants' due process rights under the Fourteenth Amendment.

The Due Process Clause especially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Glucksberg*, 521 U.S. at 720-21 (internal citations and quotation marks omitted). Plaintiffs and their children have a fundamental right to a basic, minimum education. There could be no greater oxymoron than a government official and a Department of Education claiming that education isn't a fundamental right.

Access to a foundational level of literacy provided through public education has an extensive historical legacy and is so central to our political and social system as to be "implicit in the concept of ordered liberty." *Id.*

Defendants have deprived Plaintiffs and their children of this fundamental right in violation of the Fourteenth Amendment by effectively precluding children from receiving a basic minimum education and their fundamental right to literacy.

V. PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST.

Protecting Plaintiffs' constitutional rights serves the public interest. *Jolly v. Coughlin*, 907 F. Supp. 63, 65 (S.D.N.Y. 1995) ("defendants have failed to demonstrate that their epidemiological concerns outweigh the strong public interest in following the law…"); *Roberts*

v. Neace, 958 F.3d 409, 416 (6th Cir. 2020). It serves the public interest for children to be in school and free of coerced medical intrusions. As the Supreme Court observed nearly seventy-five years ago, "Education is perhaps the most important function of state and local faint print governments." *Brown v. Board of Ed.*, 347 U.S. 483, 493 (1954). The vast learning differential between in-school and remote learning for elementary school children is indisputable. While Defendants seem to concur that in-school learning is best for the most students, they continue to place significant hurdles in the way. They continue to shutter middle and high schools and to require unethical and illegal tests when the schools are open.

A preliminary injunction is the best — and only — way to reopen schools to all children and to end Defendants' illegal medical testing regime. Granting Plaintiffs' preliminary injunction protects not just Plaintiffs and their children, but also serves the broader public interest in education and the rule of law.

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CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully ask this Honorable Court issue a preliminary injunction to enjoin Defendants from keeping schools closed and from barring children whose parents do not consent to coerced medical testing.

Dated: Syosset, New York
December 16, 2020

Respectfully submitted,

THE MERMIGIS LAW GROUP, P.C.

/s/ James Mermigis

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

-against-

BILL de BLASIO, in his official capacity as Mayor of the City of New York, **DR. DAVIS CHOKSHI,** in his official capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD CARRANZA**, in his official capacity as Chancellor of the New York City Department of Education, and **THE CITY OF NEW YORK**,

Defendants.

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DECLARATION OF DR. JAY VARMA

20-CV-9829(PGG)

DR. JAY VARMA, declares pursuant to 28 U.S.C. § 1746, under penalty of perjury, that the following is true and correct:

1. I am presently employed as Mayor Bill de Blasio's Senior Advisor for Public Health. I have held this position since April 4, 2020. In this position I develop city-wide strategies and policies related to COVID-19, in collaboration with city officials from the New York City Department of Health and Mental Hygiene ("DOHMH"), New York City Health and Hospitals, and the New York City Department of Education.

2. After graduating magna cum laude with highest honors from Harvard, I completed medical school, internal medicine residency, and chief residency at the University of California, San Diego School of Medicine. In 2001, I joined the Center for Disease Control and Prevention ("CDC") Epidemic Intelligence Service, working on foodborne diseases. From 2003 to 2008, I served in Bangkok, Thailand, directing CDC's TB programs and research in Southeast Asia. From 2008 to 2011, I served in Beijing, China, directing CDC's International Emerging Infections Program which assisted the Chinese government on infectious diseases. From 2011 to 2017, I served as the Deputy Commissioner for Disease Control at the New York City Department of Health and Mental Hygiene. From 2017 to April 2020, I served as the Senior Advisor to Africa Centres for Disease Control and Prevention at the African Union in Addis Ababa, Ethiopia. I guided the creation of Africa CDC, developing its strategy and supporting implementation of its public health programs, and authored the Africa CDC's continent-wide strategy for COVID-19 in Africa and critical policy documents on COVID-19 control measures. I have authored 138 scientific manuscripts, six essays, and one book. A Captain in the United States Public Health Service, I have been recognized as the U.S. Public Health Service Physician Researcher of the Year (2010) and Physician Leader of the Year (2017), and have received the two highest awards in the US Public Health Service (Distinguished Service Medal, 2011; Meritorious Service Medal, 2018).

3. I submit this declaration pursuant to 28 U.S.C. § 1746 in support of Defendants' Opposition to the Motion for a Preliminary Injunction, which would mandate the resumption of in-person learning in all public schools in New York City and would prohibit Defendant New York City Department of Education ("DOE") from requiring that parents provide consent to DOE's on-site testing program when students resume in-person instruction.

4. The Declaration of Demetre Daskalakis, dated September 18, 2020, which I understand was submitted in the case, *J.T. v. de Blasio*, 20-CV-5878, S.D.N.Y. is annexed hereto as Exhibit "A." Dr. Daskalakis has recently left New York City service to take a position with the Centers for Disease Control and Prevention (CDC).

New York City and COVID-19

5. The virus that causes COVID-19 infection has not been eliminated from the United States or anywhere in the world, because there is no medication that can cure infection, and the vaccines that have been approved in the United States are not yet widely available. Many people remain infected in the United States and the rest of the world, creating a large pool of infected people that can infect others.

6. COVID-19 is most commonly transmitted by small viral particles exhaled by an infected person that are deposited into the nose, mouth, and/or eyes of an uninfected person. These viral particles travel through the air. The consensus by CDC, the World Health Organization ("WHO"), and other infectious disease experts is that the only way to limit illness and death from this infection until a large proportion of the population has been vaccinated is through a combination of measures, including: individual behaviors such as wearing masks, maintaining physical distance from others, washing hands, and completely avoiding contact with others when ill; widespread testing with isolation of cases and quarantine of contacts; and community social distancing measures.[1,2]

7. The attached Declaration of Dr. Daskalakis outlines the history of New York City's experience with COVID-19 from March 1, 2020, when the first case was reported, through the period of explosive growth when New York City became the epicenter of the disease

[1] https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e2.htm?s_cid=mm6915e2_w
[2] https://www.who.int/publications/i/item/overview-of-public-health-and-social-measures-in-the-context-of-covid-19

in the United States, through the subsequent reduction to a very low incidence of COVID-19. The surge that began in March peaked in mid-April 2020. As of May 13, 2020, New York City, with over 20,000 confirmed or probable COVID-19 deaths, had the sixth highest number of reported COVID-19 deaths as compared to any *country* in the world.

8. Beginning in mid-April, New York City did a remarkable job of reducing the incidence of COVID-19, commonly referred to as "flattening the curve." On August 10th, New York City had its lowest daily average of new cases (233) since the epidemic's peak.[3]

9. The incidence of COVID-19 again began to increase in New York City in September. On September 24th, the daily average for new cases was 352, a 50% increase in cases over 45 days. It then took only 12 days to increase another 50% to 527 cases on October 6th. The daily average for new cases has continued to surge. On December 15th the daily average for new cases was 3,684, a more than ten-fold increase since September 24th.

10. Multiple factors have contributed to this rise, including, but not limited to, reduction in adherence to essential prevention measures, such as mask wearing and gatherings, the resumption of in-person work and in-person learning at universities, the opening of higher-risk indoor activities, such as dining and fitness gyms, the onset of cooler and lower humidity weather, and large increases in incidence in others parts of the United States with importation of cases into New York City.

11. The positivity rate is an important indicator of the degree of community spread. The positivity rate measures the percent of COVID-19 laboratory tests that have a

[3] The data cited in paragraphs 8 through 14 is available at https://www1.nyc.gov/site/doh/covid/covid-19-data.page#epicurve; https://www1.nyc.gov/site/doh/covid/covid-19-data-trends.page

positive result.[4] The average daily positivity rate in New York City (over a 7-day rolling average) was 1.2%. on August 10th. On November 6th, it was 2.36% and on November 25th, it was 3.61%, which is an increase of more than 50% in 19 days. On December 15th, the positivity rate was 6.21%.

12. The number of hospitalizations also has been rising. On August 10th, the number of COVID-19 patients hospitalized in New York City was 34. On November 6th, it was 59 and on November 25th, it was 114. On December 15th, it was 226. Most significant, this data shows that the *rate of increase* in COVID-19 cases and hospitalizations and the positivity rate has been increasing and that there was a large surge after Thanksgiving. It is anticipated that there will likely be another surge after Christmas and the New Year, similar to the one after Thanksgiving.

13. The reproduction rate (or rate in which someone positive for COVID-19 spreads it to others) in New York City is estimated to be 1.02 (meaning a person positive for COVID-19 will typically infect just over one other person). Any reproduction rate above 1.0 is considered problematic for the control of the virus.

14. As of December 21, 2020, New York City has sustained a total of 24,735 deaths (19,984 confirmed and 4,751 probable), 66,021 hospitalizations and 387,361 cases of COVID-19 (348,0991 confirmed and 39,270 probable).

15. It is anticipated that the number of cases and hospitalizations will continue to rise as a result of the increased travel and social activities during the holiday season and as we

[4] I understand that Plaintiffs have argued that the difference in the New York City and New York State positivity rate data casts doubt on the validity of the City's data. Both sets of data are valid; they simply are compiled differently. New York City measures the positivity rate based on the date the specimen was collected and only analyzes data from nucleic acid amplification tests (i.e., RT-PCR tests), consistent with CDC and WHO guidance. New York State measures the positivity rate based on the date the test results are reported and includes both nucleic acid amplification results and antigen test results.

enter the coldest months, where people spend more time indoors and while decreased relative humidity enhances transmission of the virus.

16. One of the main concerns with a rise in the spread of COVID-19 is that the hospital system not become overwhelmed as it was in the spring in New York City. At that time, there was a shortage of medical equipment, personal protective equipment, ICU beds and medical personnel. There is a particular concern now about a potential shortage of medical personnel. In the spring, when New York City was one of a few areas in the nation that was experiencing a large number of COVID-19 cases, volunteer medical professionals came to New York City from all over the country to provide desperately needed medical services.

17. That is not possible now, when the nation is engulfed in a COVID-19 crisis and many areas already have overwhelmed hospital systems and medical personnel. Nationally, the current COVID-19 increase in the United States began in September and is now setting daily records almost everyday for the number of new cases, hospitalizations and deaths. For the week of December 13th-December 19th, nationally there were 1,508,002 new cases, and 18,587 deaths. On December 21st, there were 115,351 people hospitalized for COVID-19. [5]

Children and COVID-19

18. As set out in the Daskalakis Declaration (Exhibit "A" ¶¶ 20-23) children do get COVID-19. While further studies are needed, the evidence thus far indicates that children are less likely to be symptomatic and less likely to develop severe symptoms than adults. However, the multisystem inflammatory syndrome (MIS-C), which may create serious problems with the heart or other organs and may require hospitalization, continues to appear in children in New York City. As of November 4, 2020, 232 of children have developed MIS-C in New York

[5] https://coronavirus.jhu.edu/region/united-states;
https://covidtracking.com/data/charts/us-currently-hospitalized

City. In addition, children with certain pre-existing medical conditions are at greater risk of developing severe COVID-19 symptoms.[6] The American Academy of Pediatrics recommends that children with COVID-19 infection, even if they had no symptoms, see a pediatrician before returning to sports or physical activity, because of the risk of heart complications in children.[7]

19. As of December 21st, there had been 19 deaths from COVID-19 among children aged 0-17 years (16 confirmed by positive COVID-19 test and 3 probable). As of December 3, 2020, there have been 16,947 cases of COVID-19 among children in New York City and 742 hospitalizations of children aged 0-17 years. The data shows that the 7-day average positivity rate among New York City children is not only increasing, but that it is higher than the positivity rate among adults. As of December 5th, the average positivity rate for children between the ages of 0-4 was 7.02% , for children between the ages of 5-12 it was 6.88 % and for children between the ages of 13-17 it was 8.28 %. [8]

20. Nationally, the number of cases of COVID-19 among children is increasing substantially. The American Academy of Pediatrics, which gathers and aggregates state-level data, reported that as of December 17, 2020, over 1.8 million children had tested positive for COVID-19, which is 12.3 % of all cases in states which report cases by age, and that the number of new cases had increased by 25% in the most recent two week period (from December 3-17, 2020).[9]

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[6] https://www.cdc.gov/coronavirus/2019- ncov/daily-life-coping/children/symptoms.html
[7] https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/clinical-guidance/covid-19-interim-guidance-return-to-sports
[8] https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page and https://www1.nyc.gov/site/doh/covid/covid-19-data-trends.page
[9] https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/

21. In addition, the emerging evidence indicates that children can transmit COVID-19 to others. As referenced in the Daskalatis Declaration (Exhibit A, ¶ 24), the early results of a large South Korean study showed that while children of all ages can transmit COVID-19, transmission rates are low for children under the age of 10, whereas children over 10 may transmit COVID-19 as efficiently as adults.

The Decisions to Pause In-Person Learning on November 19th and to Implement a Phased Resumption beginning the Week of December 7th with Increased Mitigation Measures

22. In-person learning, as part of the hybrid learning model (in-person learning on some days and remote learning on others) was successfully and safely implemented in the fall 2020 for all DOE students whose parents chose that option. New York City was one of the few major cities to offer in-person learning in the fall 2020.

23. Over the summer, New York City officials had decided that all public school buildings would be closed temporarily and all students switched to full remote learning if the 7-day average positivity rate for the City was equal to or greater than 3%. This threshold was reached on November 18th, and the school buildings were closed on November 19th. A positivity rate equal to or greater than 3% was used by New York City officials as an indicator that there are high levels of transmission in the community. Increases above 3% are much more significant than increases below 3%. For instance, a change from 1% to 2%, while a 100% increase, is not as concerning from an epidemiological perspective as an increase from 3% to 4%. The reason is that percentage positivity is a proxy for the number of infections in a community. Statistics from jurisdictions throughout the United States and the world demonstrate that once infections cross a critical threshold, the increase in cases may go from being linear (a steady upward slope) to being exponential (a rapid upward slope that becomes steeper each day).

24. New York City officials then considered how to safely resume in-person learning while community transmission continued to increase and to do so in a way that would be sustainable until a vaccine became widely available and normal school operations could resume.

25. New York State had developed a cluster action initiative which designated geographical areas with high rates of community transmission as zones in which restrictions and closures would be implemented. Consistent with New York State criteria for opening schools in "orange" and "red zones" then in effect, the City decided to increase the frequency of testing performed in schools from once per month to once per week. On November 29th, Mayor de Blasio and Chancellor Carranza announced that using these new procedures, in-person instruction would resume on December 7th for pre-K, 3-K and elementary school (K-5) students and, on December 10th, for students who attend self-contained special education schools. While most schools would initially reopen using the hybrid model in effect before November 19th, the goal would be for these schools to transition to full five-day in-person learning. Whether each school could achieve that goal was dependent on the varying conditions at individual schools, including the availability of adequate space and staff, that would determine whether and when a school could do so safely.[10]

26. The decision to reopen the pre-school, elementary and self-contained special education schools first was based on several factors. The expert consensus from the American Academy of Pediatrics is that in-person learning is particularly important for educating young children in the pre-school and elementary school grades and students with disabilities. Older children are considered more likely to adapt to remote learning and less likely to require

[10] The transcript of the press conference is available at https://www1.nyc.gov/office-of-the-mayor/news/818-20/transcript-mayor-de-blasio-holds-mediaavailability.

parental supervision while learning. It is more challenging for parents who have to work, whether working remotely or out of the home, to ensure that young children and children with disabilities who are learning remotely are properly supervised. Thus, there is a greater need for young children to receive in-person learning, and it is appropriate to begin the phased reopening with these students.

27. As noted above, the scientific consensus is that the risk of COVID-19 transmission and outbreaks is lower in classrooms with younger children compared with older children. Thus, in-person learning for younger children may be less likely to result in COVID-19 transmission to school staff, members of their households, and others in the community. Further, it is easier to ensure the safe behavior of young children. Experience has shown that older children are more likely to engage in risky behavior and not maintain proper social distancing measures. Older children are also more mobile and have more contacts with others outside the home, which provides more opportunities for community transmission.

28. Consistent with these considerations, there is a "growing consensus" among school districts to prioritize in-person learning for young children. [11]

The Closure of Individual Schools and Classrooms and New York State Imposed Directives on Individual Closures and Testing

29. As has been seen throughout the pandemic, the incidence of the virus in New York City (and in the rest of the nation) keeps changing, which requires immediate and flexible responses from public officials. As more is learned about transmission of the virus, and the best ways to reduce transmission, appropriate adjustments are made in policies that most effectively respond to these changing circumstances.

[11] *New York Times,* "In Reopening of Schools, Youngest Lead the Way," December 1, 2020, p. 1.

30. Community social distancing measures need to be adaptive to the state of the epidemic: when incidence rises in a specific area, such measures need to be imposed; when incidence declines, such measures can be progressively removed. It has been well demonstrated from many places throughout the United States and globally that imposition of community social distancing measures, including the cessation of or restrictions on various activities, early during an increase in incidence effectively reduces transmission and allows more rapid removal of those restrictions.

31. In geographic areas in which there is widespread transmission, efforts to minimize the frequency, duration, and intensity of contact within the community through community social distancing can substantially reduce infections, illnesses, and deaths. In the words of the CDC, "[c]ommunity mitigation efforts aim to reduce the rate at which someone infected comes in contact with someone not infected, or reduce the probability of infection if there is contact. The more a person interacts with different people, and the longer and closer the interaction, the higher the risk of COVID-19 spread."

32. Plaintiffs' requested injunction, which I understand would require that all DOE schools continue to provide in-person instruction, would deprive public officials of their necessary authority to control the pandemic and save lives by responding swiftly and appropriately to changing circumstances.

33. While DOE is reopening all its schools for in-person instruction, DOE also has protocols that require the temporary closure of individual classrooms and individual schools if there are positive cases of COVID-19 within that school. All students who are temporarily unable to obtain in-person instruction as a result, are switched to 100% remote learning until in-person instruction is again available.

34. According to these DOE protocols, if there is at least one confirmed COVID-19 case in one classroom, then that classroom must be closed for 14 days. If there are two or more confirmed cases in different classrooms, then the building must be closed during the investigation; if the investigation does not find a source external to school-based interactions for the infections, the entire building is closed for 14 days.

35. In addition to DOE's own protocols, New York State has mandates that require schools in the State to close in certain circumstances. Pursuant to Executive Order 202.68,[12] which has been subsequently extended, Governor Cuomo announced a "cluster action initiative," which develop a zoned approach and directed the New York State Department of Health to determine areas in the State that require enhanced public health restrictions due to severe increases in the number of COVID-19 infections in specific geographic areas of New York State and impose mitigating measures in those areas. .[13,14]

36. The magnitude of disparity between the citywide positivity rate and a particular area is a warning sign that transmission in the area is widespread and requires strong control measures to prevent spread beyond that community. The Order establishes three zones and sets forth different restrictions for each zone.[15]

37. Under the current State guidance, a red zone will be implemented when a region, after the cancellation of elective procedures and a 50 percent increase in hospital capacity, is 21 days away from reaching 90 percent hospital capacity on the current 7-day growth

[12] https://www.governor.ny.gov/news/no-20268-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency
[13] https://www.cdc.gov/mmwr/volumes/69/wr/mm6915e2.htm?s_cid=mm6915e2_w
[14] https://www.who.int/publications/i/item/overview-of-public-health-and-social-measures-in-the-context-of-covid-19
[15] See the following link for access to the current maps: https://nycgov.maps.arcgis.com/apps/instant/lookup/index.html?appid=021940a41da04314827e2782d3d1986f

rate. A geographic area will be eligible for orange zone designation if it has a 4 percent positivity rate (7-day average) over the last 10 days, and it is located in a region that has reached 85 percent hospital capacity, or if the State Department of Health determines that its hospital rate of admissions is unacceptably high. A geographic area will be eligible for yellow zone designation if it has a 3 percent positivity rate (7-day average) over the past 10 days and is in the top 10 percent in the state for hospital admissions per capita over the past week and is experiencing week-over-week growth in daily admissions.[16]

38. On November 23rd, Governor Cuomo announced that based on the metrics for zone designation, parts of all five boroughs were designated as yellow zones. The rest of Staten Island was designated as an orange zone. Schools located within these zones must take additional mitigation measures, including additional testing.

39. Pursuant to Executive Order 202.79, the Winter Plan[17] and Interim Guidance by the New York State Department of Health issued on December 4, 2020, schools in red zones must test 30% of the persons who will be in the school building (students and staff) over the one-month period following the zone designation and schools in orange zones must test 20% of the students and staff over the one-month period following the zone designation. Tests must be conducted on a bi-weekly basis and the number of tests must equal the cited percentage totals over the one-month period. If there are 9 or more positive tests in a school in a red or orange zone, or if there is a sample size of at least 300 tests and the positivity rate of the sample is 2% or more, then that school will have to close.[18] Pursuant to Interim Guidance by the New York State Department of Health issued on November 14, 2020, schools in a yellow zone must

[16] https://forward.ny.gov/cluster-action-initiative
[17] https://forward.ny.gov/covid-19-winter-plan
[18] https://coronavirus.health.ny.gov/system/files/documents/2020/12/guidanceforschoolsinredandorangezones.pdf

test 20% of the students and staff within the two-week period following the zone designation. If the positivity rate in the school is higher than the average 7-day positivity rate in the area where the school is located, then the school must continue testing 20% of the school population on a bi-weekly basis.[19]

The DOE Program uses COVID-19 RT-PCR Testing

40. The DOE in-school testing program uses a nucleic acid amplification test that involves a laboratory procedure known as polymerase chain reaction (PCR) test. As Plaintiffs' declarant, Kevin McKernan, points out, the World Health Organization declared that PCR testing was the "first gold standard" for COVID-19 testing in February 2020. (McKernan declaration ¶ 13). The consensus in the scientific and medical community is that PCR tests are the gold standard for COVID-19 diagnostic tests. As described by the United States Food and Drug Administration ("the FDA"):

> Molecular tests detect the genetic material or nucleic acid present inside a virus particle. The FDA has authorized molecular tests for use in a clinical laboratory setting and authorized some for use in a POC [point of contact} setting. Most molecular tests are polymerase chain reaction (PCR) tests, also called nucleic acid amplification tests (NAAT). In PCR testing, a machine located in a laboratory or at a POC, depending on the test, runs a series of reactions. These reactions first convert the virus's ribonucleic acid (RNA), if present, into deoxyribonucleic acid (DNA) and then amplify it (make millions of copies of the DNA); the test then detects this DNA. By running multiple amplification cycles, a PCR test can sense even low levels of viral genetic material in a patient's sample, so these tests tend to be highly sensitive (especially laboratory PCR tests).[20]

41. The RT-PCR or reverse transcription polymerase chain reaction is a type of PCR test. A PCR test is used to detect viruses and bacteria that contain DNA for

[19] https://coronavirus.health.ny.gov/system/files/documents/2020/11/yellow-zone-update-11.14.20-addendum-final.pdf#:%7E:text=Pursuant%20to%20the%20Interim%20Guidance,instruction%20in%20yellow%20zones%20are

[20] https://www.fda.gov/health-professionals/closer-look-covid-19-diagnostic-testing

amplification. An RT-PCR test is used to detect viruses, such as the virus that causes COVID-19, that have RNA, instead of DNA. The RNA of the virus must be transcribed to DNA for amplification. Thus, all COVID-19 PCR tests are RT-PCR tests, such as the one developed by the CDC.[21]

42. The FDA assesses tests based on their sensitivity and specificity. A test's sensitivity is the fraction of positive cases that the test correctly identifies as positive and a test's specificity is the fraction of negative cases that the test correctly identifies as negative. Tests are assessed based on their sensitivity and specificity. The FDA has assessed PCR tests as both "highly sensitive (especially laboratory PCR tests) and highly specific."[22]

43. The DOE in-school testing program has contracts with two laboratories that provide trained teams to collect the specimens at DOE schools and analyze the specimens using an RT-PCR test. They are BioReference Laboratories and Fulgent Genetics. Both laboratories are certified under the Clinical Laboratory Improvement Amendments of 1988 (CLIA), 41 U.S.C. §263a, accredited by the College of American Pathologists and licensed by the New York State Department of Health (as well as other jurisdictions). [23, 24] Each laboratory has obtained an Emergency Use Authorization from the FDA to perform RT-PCR testing for COVID-19. [25,26]

The DOE In-School Testing Program

44. The challenged in-school testing program has been designed to allow DOE to keep school buildings open and to continue providing in-person instruction during a

[21] https://www.cdc.gov/coronavirus/2019-ncov/lab/virus-requests.html
[22] https://www.fda.gov/health-professionals/closer-look-covid-19-diagnostic-testing
[23] https://www.bioreference.com/about/licensure/
[24] https://www.fulgentgenetics.com/company/about.html
[25] https://www.bioreference.com/wp-content/uploads/2020/04/201278_Coronavirus-Physician-Brochure-singlepages.pdf
[26] https://www.fda.gov/media/138150/download

period when the community spread of COVID-19 is rapidly increasing and restrictions are being imposed on many activities. This requires knowledge of and an immediate response to any COVID-19 concerns in DOE school buildings.

45. In order to ensure consistency and timeliness of reporting across DOE schools, and ensure prompt assessment of test results by the public health experts analyzing the results of every DOE school citywide, testing for this program must be performed on a single day, in the school building, and by one provider. Experience has shown that when testing is performed by outside providers, such as individual doctors or urgent care offices, different tests and specimen collection procedures may be used, which can vary in accuracy and can vary substantially in the time to receive the results. Some laboratories have delays of 3 or more days.[27]

46. The DOE in-school testing program serves three objectives: individual diagnosis; disease control in the school population; and monitoring of COVID-19 prevalence in the school population. First, testing provides individuals with results about their COVID-19 status which can immediately benefit them. Second, testing provides information about COVID-19 cases in a school that can be used to identify people who are exposed and to interrupt transmission through quarantine, classroom closures, and, at times, school closures. Third, testing provides aggregate data about the prevalence of infection among persons physically present in DOE schools; this is a form of monitoring that can guide decision-making about the safety of DOE schools, information crucial to parents, students, and staff.

47. The current in-school testing program began on December 7th, when elementary school buildings re-opened after the pause in in-person learning. The program has

[27] https://www1.nyc.gov/site/doh/covid/covid-19-data-trends.page#tat

been organized in conjunction with the New York City Health + Hospitals, the New York City Department of Health and Mental Hygiene (DOHMH), and the New York City Test & Trace Corps.

48. The contracts with BioReference and Fulgent Genetics require that they provide the results of the tests within 48 hours of receipt of the specimens. In practice, the laboratories usually provide the results within one day.

49. Parents have to provide a consent form for in-school testing by the first day their child returns to his/her school building. If a parent does not provide the consent form, then the child continues with 100% remote learning.[28]

50. There are two exemptions to this requirement: students who need a medical exemption, due to a health condition that would make it unsafe to undergo testing (e.g., facial trauma, nasal surgery); and students with behavioral disabilities who cannot be safely tested in school due to the nature of their disability. Parents who seek one of these exemptions must submit the required form to DOE which then determines whether the standard for the exemption has been met.

51. The consent is in effect until September 20, 2021, however a parent may withdraw their consent at any time, by notifying the school in writing.

52. The testing is free and applies to students in grades 1-12 and to all staff. A randomly selected group of students and staff will be tested each week. Twenty percent (20%) of the students and staff will be tested each week.

53. Medical teams composed of trained individuals come to the schools to gather the specimens. This function is performed by, among others, school nurses, City staff,

[28] The information contained in paragraphs 50- 57 is available on the DOE's website at https://www.schools.nyc.gov/school-year-20-21/return-to-school-2020/health-and-safety/covid-19-testing

and DOE's vendors: BioReference; and Somos Community Care. (Specimens collected by Somos are tested by BioReference.)

54. The testing program is designed to be brief and gentle. Instead of the "long swab" (naso-pharyngeal swab) that goes in the back of the nose, the nasal sample is gathered with a short, small swab that goes just in the front of the nose (anterior nares). The test is not painful. The swab is in each nostril of the nose for five to ten seconds, so the entire process of explaining the test to the child and then swabbing them only takes about two minutes.

55. Parents cannot accompany their child to in-school testing because DOE needs to maintain the classroom pods (which limit the contacts students have with other individuals) and needs to limit the risk of COVID-19 being introduced into the school building. If a student is selected for testing but is uncomfortable or unable to be tested, the student will not be tested, and DOE staff will work with their parent to address any concerns so that the student can participate in future testing.

56. The parent is notified by the school if their child has been selected for random testing about two days before the scheduled test. The parent is then notified that their child has been tested after school on the testing day. The parent is also notified of the test results, generally within 48 hours after their child has been tested.

Safeguards and Confidentiality

57. The three vendors used in the DOE in-school testing program have all signed Non-Disclosure Agreements ("NDAs"), which are publicly available on DOE's website.[29] These NDAs require the vendors to maintain all personally identifiable information in a secure,

[29] https://www.schools.nyc.gov/about-us/policies/data-privacy-and-security-policies/supplemental-information-for-parents-about-doe-agreements-with-outside-entities

confidential manner. The three vendors, as well as DOE and the other government agencies involved in the testing program, are obligated to comply with all applicable laws and regulations which include the New York City Health Code, the federal Family Educational Privacy Rights Act ("FERPA"), the federal Health Insurance Portability and Accountability Act ("HIPAA"), New York State law, and applicable regulations, which require that identifiable information concerning individual students be maintained as confidential information.

58. The specimens are only tested for the virus (SARS-CoV-2) that causes COVID-19. Once the tests have been successfully completed, the specimens are discarded. No information about the DNA of the individual being tested is analyzed, stored or used during the testing. The test involves the extraction of the virus' RNA and testing using the standard, FDA-authorized methods described earlier.

59. I understand that a lawsuit was brought in state court concerning some of the issues raised in this case, *Michael Kane, et al. v. New York City Department of Education*, Index No. 160831-2020E. (Supreme Court, N.Y. County), and that this lawsuit was settled on December 24, 2020 by the stipulation annexed hereto as Exhibit "B". This stipulation provides that DOE certifies and assures that all vendors involved in the collection, storage and analysis of specimens in the DOE testing program shall destroy all specimens collected in the program after completion of the testing protocols and/or after clinical reports are provided. It further provides that the specimens shall not be replicated or used for any other purpose than testing for COVID-19, and that these assurances apply to all specimens previously collected during the program and all current and any future vendors engaged in the program.

60. In addition to notifying the parent of the individual student of the test results, BioReference and Fulgent provide the results of the COVID-19 tests, identified by the

individual student only to the New York City Test & Trace Corps, which performs New York City's contact tracing program, and the two public health agencies, the New York City Department of Health and Mental Hygiene and the New York State Department of Health.

61. The New York State Department of Health is required to provide de-identified data to the CDC. DOE publicly reports de-identified data as does the New York State Department of Health. No information about the COVID-19 test results for individual students is publicly available.

Declarations of Dr. Lee and Mr. McKernan

62. Plaintiffs submit the declarations of Dr. Sin Hang Lee and Kevin McKernan who opine against the DOE testing program. Their views are contrary to the consensus among the scientific and medical communities. Indeed their views are inconsistent with the CDC Guidance and the Journal of the American Medical Association ("JAMA") documents for which Plaintiffs request judicial notice. (Exhibits 1, 6 and 7 to the Motion for Judicial Notice.)

63. Dr. Lee maintains the RT-PCR testing as currently performed is not sufficiently accurate, and that the "Sanger method," which he has developed "would guarantee no false positive results." He wrote to both WHO and Dr. Fauci in early March 2020 espousing this position but acknowledges that he has received no response from either WHO or the National Institutes of Health ("the NIH"). (Lee declaration, pp..6-8). He cites the test results from a Connecticut public health laboratory but acknowledges that the laboratory at that time had a flaw in the test that was used. (*Id.* at 9). He speculates that laboratories can manipulate the number of amplification cycles which will identify more or fewer positive results to please customers whose business benefits from a high number of COVID-19 cases. (*Id.* at 20).

Finally, Dr. Lee criticizes the RT-PCR test because it tests for the presence of the virus but does not indicate whether the person is infectious. (*Id.* at 17).

64. Mr. McKernan acknowledges that the RT-PCR test is being used globally and that WHO declared it the "first gold standard." (McKernan declaration, pp. 7, 13.) He asserts that it is not a diagnostic test because it does not test for whether a person is presently infectious or ill. (Id. at 16). He claims that DOE misrepresented the nature of the test in its consent form which informs parents that this is a diagnostic test and that DOE failed to provide parents with the number of cycles and the primers that the laboratories would use in their testing. (*Id*. at 20, 21). He also claims that DOE failed to provide documentation proving that the laboratories are not selling the genetic material. (*Id*. at 27). He advocates eliminating testing on any asymptomatic persons who have had no contact with COVID-19. (*Id.* at 34). He states that the two to three day period to obtain results is problematic and that during this period a child could infect others. (*Id.* at 30.) . His proposed solutions are accelerated regulatory approval of at home and point of care testing, and specifically in schools, temperature testing and having symptomatic people stay home. (*Id*. at 34-35).

65. The scientific consensus is that a nasal specimen tested using FDA-authorized RT-PCR procedures is highly accurate for detecting the presence of COVID-19. The RT-PCR test is characterized as a diagnostic test by both the CDC and the FDA, as well as other expert bodies, such as the Infectious Disease Society of America, WHO, and every national public health institute in the world, such a Canada, UK, and European Union. There currently is no test routinely available to determine whether individuals are infectious; to make that assessment, laboratories must perform a procedure known as viral culture, which is challenging to perform and requires highly specialized biocontainment facilities that are largely restricted to

federal government or academic research laboratories. The presence of nucleic acid (RNA) for the COVID-19 virus in an individual is currently the best available indicator of COVID-19 infection. Similarly, there currently is no antigen test available that is considered as sensitive and specific as the RT-PCR test, according to the CDC and FDA. Mr. McKernan's assertion that asymptomatic individuals who have had no contact with COVID-19 should not be tested is meaningless, since most asymptomatic individuals do not know whether they have had contact with COVID-19 and the expert consensus is that asymptomatic persons account for a substantial source of new infections and large outbreaks. Mr. McKernan apparently does not dispute the scientific consensus that asymptomatic individuals can be infectious. Consent forms for any type of medical testing do not commonly list the detailed laboratory procedures advocated by Mr. McKernan. Finally, the NDAs signed by the three vendors are available on DOE's website. They show that the vendors must maintain personally identifiable data in a secure, strictly confidential manner and, pursuant to all applicable laws and regulations, may only provide it to the individual who was tested (or the parent/guardian of a tested minor) and the designated public agencies.

Conclusion

66. New York City cannot risk a widespread resurgence of the virus. As set out in paragraph 14 above, in New York City there have been over 24,000 deaths, over 66,000 hospitalizations and over 387,000 cases of COVID-19 since March 2020.[30] Every New Yorker (and every American), has been socially, emotionally and economically impacted by the virus and the necessary restrictions imposed to mitigate it. New York City has carefully reopened, balancing the desire and need to return to pre-COVID-19 life, with the reality that the virus is

[30] https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page#summary

still active, and under the threat of a resurgence. In order to maintain that progress and continue to avoid the loss of life, the City must be able to take proactive, swift and strong action to mitigate the spread of the virus. An order mandating that all schools be immediately reopened for in-person instruction, before the City has the capability to do that safely by employing enhanced testing, and mandating that all schools remain open, regardless of changing circumstances, will place the City in a precarious situation, potentially undermining the months of careful reopening and progress.

Dated: New York, New York
December _28__, 2020

_____
Jay Varma, M.D.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JOSEPH BORELLI, Individually and as Parent and Natural Guardian of J.B., JANET NICHOLS, Individually and as Parent and Natural Guardian of J.N., MARIA HART, Individually and as Parent and Natural Guardian of C.H., A.H., and J.H., ERIN ULITTO, Individually and as Parent and Natural Guardian of L.U., CRYSTAL J. LIA, Individually and as Parent and Natural Guardian of F.L., C.L., and G.L., and MICHELLE BAIONE, Individually and as Parent and Natural Guardian of R.B. and C.B., ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A, and A.A., STEPHANIE DENARO, Individually and as Parent and Natural Guardian of D.D. and H.D., CHRISTINE KALIKAZAROS, Individually and as Parent and Natural Guardian of Y.K, GAETANO LA MAZZA, Individually and as Parent and Natural Guardian of R.L, and CHILDREN'S HEALTH DEFENSE,

Plaintiffs,

-against-

BILL DE BLASIO, in his Official Capacity as Mayor of the City of New York, DR. DAVID CHOKSHI, in his Official Capacity of Health Commissioner of the City of New York, NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA, in his Official Capacity as Chancellor of the New York City Department of Education, and THE CITY OF NEW YORK,

Defendants.

ORDER FOR PRELIMINARY INJUNCTION

20 Civ. 9829 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

On the matter before this Court; Plaintiffs' Motion for Preliminary Injunction (ecf-12) sought to preliminarily enjoin Bill de Blasio, in his Official Capacity as Mayor of the City of New York, Dr. David Chokshi, in his Official Capacity of Health Commissioner of the City

of New York, New York City Department of Education, Richard A. Carranza, in his Official Capacity as Chancellor of the New York City Department of Education, and The City of New York ("Defendants") from requiring students to take mandatory COVID-19 tests as a condition for in-person education, and to preliminarily enjoin Defendants from school closures that were initiated on November 19, 2020, and are still in existence, for grades 6-12 This Court has considered all documentary evidence and considered oral arguments presented by the parties.

The Court hereby rules as follows:

1. Defendants are preliminarily enjoined from continuing school closures for grades 6-12 that went into effect on November 19, 2020

2. Defendants are preliminarily enjoined from requiring students to take mandatory COVID-19 tests as a condition for in-person education.

Dated: New York, New York
January ___, 2021

SO ORDERED.

_____
Paul G. Gardephe, Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ADRIANA AVILES, *et al.*,

Plaintiffs,

v.

BILL DE BLASIO, *et al.*,

Defendants.

----------x

New York, N.Y.

20 Civ. 9829 (PGG)

January 14, 2020
3:05 p.m.

Before:

HON. PAUL G. GARDEPHE,

District Judge

APPEARANCES

RAY FLORES
Attorney for Plaintiffs

LAW OFFICE OF JAMES MERMIGIS
Attorneys for Plaintiffs
BY: JAMES MERMIGIS

JAMES E. JOHNSON
Corporation Counsel for the City of New York
BY: MARILYN RICHTER
Assistant Corporation Counsel

(Case called; all parties telephonically present)

THE DEPUTY CLERK: Counsel for plaintiff, please state your appearances.

MR. FLORES: Ray Flores, *pro hac vice* admission on behalf of the plaintiffs.

MR. MERMIGIS: James Mermigis, 85 Cold Spring Road, Syosset, New York, 11791 on behalf of the plaintiffs. Good afternoon, your Honor.

THE COURT: Good afternoon.

THE DEPUTY CLERK: Counsel for defendant, please state your appearance.

MS. RICHTER: Marilyn Richter for James E. Johnson, Corporation Counsel of the City of New York for the defendants. Good afternoon.

THE COURT: Good afternoon, Ms. Richter. I am going to begin with some background comments.

In this action plaintiffs, who are the parents of children attending New York City School District elementary and middle schools, as well as an organization known as Children's Health Defense, claim that the City of New York, the Mayor and the City's health commissioner, as well as the City's Department of Education or DOE, and its chancellor, have violated various rights set forth in the United States Constitution as well as New York Law citing the amended complaint docket no. 11. Plaintiff's claims are predicated on

the Mayor's November 19, 2020 announcement that in-person classes in the New York City Public School System would be suspended in light of the COVID-19 pandemic. Id., paragraphs 2 and 8. The Mayor announced, 10 days later, that in-person classes would resume on December 7, 2020 as to elementary and special needs students on the condition that parents sign a form consenting to random testing for COVID-19. Id., paragraph 2 and 9 through 112. Plaintiffs seek a mandatory injunction requiring defendants to re-open all New York City public schools for in-person instruction. They also seek a prohibitory injunction that would forbid defendants "from requiring students to take mandatory COVID-19 tests as a condition for in-person education." Citing docket no. 32. Although plaintiffs' frame their request injunction in these terms, their true complaint as to the test is that parents should not be made to provide consent to random COVID-19 testing as a condition to attending New York City public schools. Citing plaintiffs' brief, docket no. 12, at pages, 7, 10 through 11, 13, and 14.

In connection with their requests for injunctive relief, plaintiffs contend that the current circumstances of the COVID-19 pandemic present no obstacle to in-person instruction. Id. at page 17. They further contend that the City's PCR testing is "medically invasive," "unreliable and unconstitutional." Citing amended complaint, Docket no. 11,

paragraphs 2 and 17.

Plaintiffs' application comes at a critical moment in our nation's, as well as our City's history. We are at war with a virus that is killing more than 4,000 of our fellow citizens every day and we are losing the war. There is no treatment for the virus that has been proven safe and effective. While two vaccines have been approved for use, distribution of the vaccines have been halting and is only in its initial stages and early targets for the dissemination of the vaccine have not been met. It will likely be many months before enough people have been vaccinated to have a significant impact on the death and infection rate.

As of today, January 14, 2021, COVID-19 is killing our fellow citizens faster than at any point in the pandemic. On Monday, January 12, 2021, 4,327 people died as a result of contracting the virus. Over the past week the United States has averaged more than 3,300 deaths every day. That reflects a 217 percent increase in the death rate since just November 2020. Moreover, more than 3 million new cases of virus infection have been reported in just the first 13 days of this year. As of yesterday, 23 million Americans have been infected with the virus. At present, 131,300 people are now hospitalized in the United States as a result of the virus. Hospitals in parts of the United States, particularly in Southern California, are near collapse with their intensive

care units full to overflowing. All of the statistics I have just mentioned are taken from the Johns Hopkins University Center for Health Security data which is posted each day on the Internet.

Children have not been spared by the pandemic. A report issued today by the American Academy of Pediatrics and the Children's Hospital Association, indicates that almost 2.3 million children in the United States have tested positive for the virus. More than 171,000 of those cases reported between December 31, 2020 and January 7, 2021. Children now account for 12.5 percent of all COVID-19 infections in the United States. And, the wave of infection among children is increasing. According to the American Academy of Pediatrics, over the two-week period between December 24, 2020 and January 7, 2021, there was a 15 percent increase in COVID-19 cases among children. Children generally experience less severe symptoms than infected adults but they nonetheless account for 1 to nearly 3 percent of reported hospitalizations and two to three percent of children who become infected with the virus require hospitalization. The death rate among children is thankfully quite low but the American Academy of Pediatrics report that 188 children have died from the virus. As to transmission, the weight of the scientific evidence indicates that children, particularly those 10 years of age and older, have a capacity to transmit the virus that is comparable to

that of adults.

In recognition of these facts, many large City school districts including Boston, Philadelphia, the District of Columbia, Chicago, Los Angeles, and San Francisco, have terminated in-person learning. Some districts hope to resume in-person learning if circumstances permit. As to New York City, as everyone listening well knows, the City has not been spared. Indeed, it was the early center of the pandemic with tens of thousands of our fellow New Yorkers dying in the spring of last year. During the summer, as a result of social distancing, the wearing of masks, and other precautions, the infection and death rate declined significantly. Unfortunately, we have seen an exponential increase in the number of deaths and infections since November. According to the New York Times, over the past week there has been an average of 6,126 confirmed new infections each day which represents an increase of 41 percent from the average just two weeks ago. Deaths and hospitalizations show a similar progression. Over the last seven days, 341 New York City residents have died from the virus and an average of 1,915 people have been hospitalized as a result of becoming infected. As of January 11, 2021, 25,698 residents of New York City have died from the virus.

It is in these grim circumstances that plaintiffs demand that City officials reopen all schools to in-person

instruction and do so without requiring parents to consent to random COVID-19 testing. According to plaintiffs and their expert, it is enough to conduct temperature checks at the front door and to ask symptomatic students to stay home. Citing the McKernan declaration, docket no. 12-2 at paragraph 34 to 35, and the amended complaint docket no. 11, paragraph 36. Plaintiffs' expert takes this position, even though according to plaintiffs' own exhibit, an estimated 40 percent of those infected with the COVID-19 virus are asymptomatic, and asymptomatic infected individuals are 75 percent as infectious as symptomatic individuals, again according to plaintiffs' own exhibit. Id. at Exhibit 7. These are the circumstances in which plaintiffs seek injunctive relief.

I will now hear from the parties. I will begin with plaintiff because this is their application. Who will speak on behalf of plaintiffs?

MR. FLORES: Ray Flores, your Honor.

THE COURT: Mr. Flores, please proceed.

MR. FLORES: Thank you, your Honor.

I thank the Court for its attention to this matter. I would also like to call the Court's attention to the fact that mandatory testing is unethical and illegal, according to the CDC. That's Exhibit no. 18 attached to the plaintiff's first amended complaint. The reason that it is unethical and illegal is that it is an emergency use authorized product that cannot

be mandated under federal law. 21 U.S.C. 360bbb-3. These are authorizations for medical products for use in emergency. Additionally, New York State law requires that experimental treatments, experimental diagnostic medical devices, cannot be mandated without informed consent. That means they cannot be forced, coerced, they have to have the option of denying it without fraud, deceit, duress, or constraint.

We also, at length in our papers, do show that the defendants have admitted right out of the gate that their test, that the PCR test, does not detect infectiousness. We also quoted Mr. Fauci, who also said that any cycling over 37 is essentially picking up background noise. Defendants have never come clean with letting us know and letting the public know exactly how many cycles are being used in their testing. This test is arbitrary and capricious. The statistics that the Court just cited are all based on tests that cannot be confirmed, that have had secondary testing. They are just presumptive indicators. So, we believe and we are certain that these numbers are not as accurate as the Court and everyone else would make them believe. In fact, the CDC just released a document on the 13th saying that schools should be the first to open and the last to close. That's CDC Mortality and Morbidity Weekly Report that just came out.

So, even though the numbers and the narratives seem very, very strong against plaintiffs, the facts are that if you

have a test and a maybe, rights cannot be taken away. The right to guarantee literacy from the schools to the children is a fundamental right. The right to direct a child's education, the right for a parent to control medical treatments. These are all fundamental rights. How is it that a test that does not allow for an indicator of infectiousness is going to be justified under the --

THE COURT: May I ask you question? Let me ask you, Mr. Flores. Your adversaries say there is no practical way to confirm infectiousness and they tell me that the only facilities that could do so are located in government or academic centers. Do you believe that there is a practical way to confirm infectiousness?

MR. FLORES: Well, I believe that before any -- first of all, we do not consent to this program. Second of all, with respect to answering your question, there are other methods that the defendants are not aware of and they --

THE COURT: Why don't you tell me what -- again, if you are aware of a practical way to confirm infectiousness, tell me what they are. Tell me what defendants should be doing to confirm infectiousness.

MR. FLORES: Well, there is DNA sequencing; there is the Sanger test; just to name a few.

THE COURT: Well the Sanger test, that's Dr. Lee's invention, right?

MR. FLORES: I believe that's one of the inventions that he has come up with but --

THE COURT: Right now has the so-called Sanger test, has that been adopted by anyone?

MR. FLORES: No, but then again, neither has the PCR test. The PCR test is an unapproved medical device.

THE COURT: Let me come back to my original question which is what is it that you contend defendants should be doing to confirm infectiousness and in what facility would that analysis be conducted.

MR. FLORES: Your Honor, that is not for me to decide at this point in time, it is up to them to put together a program that is within the law. We agree that there is an emergency but we believe also that the schools are the safest place for the children to be and they are not operating inside a bubble. So, if someone is infected, for example, then perhaps the school could take the 500 or so students who had tested positive over the past three months, according to their website, and do a secondary test on them. It is not prohibitive before rights are stripped but --

THE COURT: No. My question to you, sir, was with respect to the secondary test that you just said they could do, what I have asked you to do is to tell me whether defendants are wrong that that secondary test would have to take place in one of a handful of government or sophisticated academic

facilities. That's essentially what they said and what I am trying to find out from you is whether you dispute that.

MR. FLORES: I would be able to do some briefing on that, some supplemental briefing on that once I looked into the matter.

THE COURT: There is another thing I want to ask you about because you make reference to this quite a few times in your brief and you just mentioned it today and that is that the right to a public education is fundamental. That's a term that you use throughout your briefing and you just used it a moment ago. Isn't it a fact that the Second Circuit has explicitly said that the right to a public education is not fundamental?

MR. FLORES: Your Honor, what I said was the foundational literacy is fundamental. The right to direct the education under *Pierce v. Society of Sisters* is fundamental. The right to an education itself is not fundamental but the right of precluding people from an education is subject to scrutiny. Additionally, when there are disparate treatment of groups, that also triggers strict scrutiny.

THE COURT: I want to ask you about your criticism of the PCR test because you have made that point today and it is the central point in your briefing. You say that the PCR test is not reliable and what I think you mean by that is the PCR test is not a reliable test to show infectiousness. I think that's what you mean but maybe your challenge is broader than

that. So, is your challenge to the PCR test broader than whether it can indicate infectiousness? I mean, are you challenging it at a more deeper level?

MR. FLORES: Two points, your Honor.

First of all, the defendants are the ones who admitted it does not detect infectiousness, however they go at length to cite *Jacobsen* and their rights under police power to stop the spread of infection and then they justify the PCR test does not detect infectiousness. So that, to me, is a specious argument, at best.

The second point --

THE COURT: Before we leave that point, what you have said to me in your briefing is that the National Institutes of Health has said that the PCR test is not reliable and your citation for that proposition is Exhibit 20 to the amended complaint. Now, I looked at Exhibit 20 to the amended complaint and it is not a document from NIH, it appears to be a letter to the editor of a medical journal. So, I don't understand why you are citing to this letter to the editor of the Journal of Medical Virology, I don't understand why you are citing to that letter to the editor for the proposition that the National Institutes of Health has said that the PCR test is not reliable.

Would you help me understand that?

MR. FLORES: Well sure, your Honor. It is a document

that was on a National Institutes of Health website and it says there is no gold standard. The WHO has also come out recently and said -- and we cite that in our reply papers -- that the PCR test is flawed. Dr. Fauci has cited that it is unreliable. So the Court understands, there is 203 different PCR tests that are approved under emergency use authorization. Their cycling, their primers are all different on every single one of these tests. That is how there could be positives, for example, with Elon Musk, for example, where two tests are positive, two are negative; or Erykah Badu where one nostril is positive, one is negative. I mean, these are concrete examples of the unreliability of the test and the cycling is an amplification, your Honor, and the amplification of cycling is where they take a sample and increase it billions of times, they replicate it billions of times.

THE COURT: My question to you, sir, my question is are you telling me that because there was a letter to the editor of a journal that you found on some sort of website, are you using that to tell me that the NIH has found that PCR tests are unreliable? Is that what you are telling me?

MR. FLORES: Your Honor, that may be the weakest part of our argument and I do apologize for making it. The stronger points we have made are the Court should look to the appellate court where they determined, based on the Jaafar study, that 97 percent of the positives were false. That, to me, shows -- and

no one has ever come out and said it is the gold standard. It is not even an approved medical device. How can something that is not approved be a gold standard? Under *Doe I v. Rumsfeld*, an EUA product cannot be mandated. This is a serious matter, your Honor. That's why the CDC came out and said it is unethical and illegal. If we want to talk about the gold standard that's one thing, but the CDC came out -- flat out -- and said it is unethical and illegal to mandate it. That's the stronger argument. The gold standard is just the supporting argument, your Honor.

THE COURT: Go ahead, Mr. Flores.

MR. FLORES: Thank you.

THE COURT: Are you there, there Flores?

MR. FLORES: I am. You said "all right" and I assumed that maybe we were finished.

THE COURT: No. I was inviting you to go on.

MR. FLORES: I think I have made my point, your Honor. We cannot be coerced under New York Health Law 2241 and it cannot be mandated under Federal Preemption Law, 21 U.S.C. 360bbb, I believe that's the end of the story, your Honor.

THE COURT: Okay. Let me hear from the City, and the City might as well start with where we just left off. Mr. Flores tells me that the PCR test is not an approved medical device, that the test can't be mandated, and that no one can be coerced to subject itself to the test.

What do you say, Ms. Richter?

MS. RICHTER: Well, first to address the PCR test, the RT-PCR test. I believe it was document no. 7 that the plaintiffs asked your Honor to take judicial notice of for some fact of not the following fact which is also right in that document which is CDC guidance which says that the PCR test is described as the gold standard for COVID-19 testing. What plaintiffs are asking you to do here is reject the test that is used around the world, all over the United States, is approved by the CDC, the FDA, is approved by WHO. The CDC has created its own version of the RT-PCR test which they will provide to various governments that want them, it is described by the FDA has having both high sensitivity which means that it has a good record of identifying positive cases as positive and a high specificity which indicates that it has a high success rate in identifying negative cases as negative. It is the best available test that is used, we could say, almost universally, as we said -- and plaintiffs have not provided anything even when your Honor asked them to contradict this -- to determine infectiousness as opposed to determining the presence of the virus, is something that is not commercially available.

THE COURT: Let me interrupt you there because your adversary has said, and I want to find out if you dispute this, your adversary has said that the PCR test can slow a positive result for weeks after a person is no longer infectious. You

don't disagree with that, do you?

MS. RICHTER: I frankly do not know. I know that nothing is -- no test out there is perfect and that sometimes you have a result where, again, because this does not show infectiousness but shows the presence of the virus, I would assume there are cases where you have sufficient presence of the virus to show a positive result where the person is not infectious any longer. That may be the case.

THE COURT: Let's just accept that for purposes of our discussion. A person -- or I would like to bring it down to the facts here, a student -- a student could be given one of these random PCR tests, the results could be positive, and it may in fact be the case that the child is not infectious any longer and may not have been infectious for some time but, nonetheless, they'll have to stay out of school for -- is it 14 days?

MS. RICHTER: I believe it is still 14 days; yes, your Honor.

THE COURT: Okay. And on top of that, as I understand the DOE protocol, fellow students and teachers that may have had contact with the child who tested positive, they have to go into quarantine also, right?

MS. RICHTER: Not necessarily. I don't think so. I'm not -- I'm not sure. If there is one of a child who is a positive test in a classroom, the classroom is closed. But,

you know, this kind of testing and tracing and provisions for quarantine is what is used, again, throughout the country. And, quarantining is even used without testing. If you have had contact with somebody who may be positive or if you are coming from any place that has high incidence of COVID-19 into New York State, it doesn't matter if you have tested -- it doesn't -- you don't even have to be tested, you have to quarantine. I mean, quarantining is being used throughout the country and throughout the state for the purpose of controlling the virus if there is some possibility that a person may be or become infectious.

So, again, there is nothing that is a hundred percent accurate, we know that. But, because of the tremendous risks, the testing and tracing and the resulting quarantine which is, again, you stay home, and if you are a child you continue your education with remote learning for the two-week period which is what 63 percent of the parents have chosen for their children for this year in any event. It is not a situation -- you are not being confined in someplace that is onerous, you are just being placed in a situation where you will not infect people throughout the larger community and in the schools.

So, yes, it is not a hundred percent perfect but it is the system, the best system that is currently available to treat the situation that we are in which your Honor described in your opening remarks. I wanted to further state about

the -- let me see if there is anything else I wanted to state about the PCR testing.

The other big issue that the plaintiffs raise is the fact that this is mandatory and allegedly unethical and illegal. Nobody -- no parent -- has to compel, agree against their will that their child will be tested. They have a choice. They can have their child attend in-person instruction part-time and now, in some schools, I think it's gone to full-time, or the child can receive remote instruction which -- and, again, your Honor pointed to many of the major school districts in the country and there are others as well that have been continuously providing remote instruction since last spring many of them, and some of them have closed recently because of the situation where the transmission in the community is rising and many places now is completely out of control.

So, remote instruction is available for a parent who does not want to have this testing performed in school. And, again -- and we pointed this out in our papers -- if on a particular day a particular child goes down to be tested and is uncomfortable with the testing, it is not done. And then the school staff speaks to the parent and they see how they can deal with this situation and the concern so that the child can be tested subsequently. We have --

THE COURT: To that point, how young are the youngest

children who are subjected to swab tests? What is the youngest?

MS. RICHTER: It's first grade so that would be children generally 6 years old.

THE COURT: I am just thinking about a 6-year-old child, they're at school, and then they're told that they've been chosen for this test and some masked people show up that they've never seen before, people they don't know, they're all wearing masks, and they stick this swab in the child's nose. It strikes me as something that could be upsetting to a child of no more than 6 years old. I mean, do children get upset by this, particularly the younger children? I mean, their parents are not there, no one they know is performing the test. Do they get upset and, if so, what is the reaction? What do the schools do?

MS. RICHTER: Okay. There are a couple of things you should know.

When a child has been randomly selected for testing, regardless of their age, their parent is notified two days in advance that their child is going to be tested. So, presumably I would assume most, if not all parents, would talk to their child about this and tell them this is going to be done and so on. So, the child has some preparation at home. The testing is performed in some location that is set up within the school, the child is accompanied to the testing site by somebody from

the school staff so, presumably, somebody they know. And, that person then escorts them back to their class afterwards. They are not -- the person who is going to do the testing has been trained and speaks to the child first and explains what's going to be done and why and something is -- this has been proceeding since December 7th -- it has actually, your Honor, been proceeding since we re-opened the schools back in late September, early October, for in-person instruction. It was then being done at that point on a monthly basis. It's now being done on a weekly basis and, weekly, 20 percent of the school population, which includes staff, is being randomly selected for testing. So, by this point in January many, most -- it depends how it works with random testing -- but a great number of the children have already gone through this experience and are talking to each other, I presume, and so on. It's a different test collection procedure than the kind of infamous one that people were initially taking with a very long swab in the back of the nose, this is a small swab that is just taking a specimen from the front of the nose and it is not painful and it is really quick, it's about five to 10 seconds in each nostril. And, frankly, I don't know if many children, including among the 6-year-olds, were initially concerned when they took it if there were issues. But, if there were, if the child did not want to take the test, then they did not have to, no child was forced when they were very uncomfortable, very

unhappy about doing so. And the school staff were then to reach out to the parents and discuss how this could be handled in such a way that the child would be more comfortable in the future.

So, I have not heard any reports of large numbers of children or any children but I have not looked into it. I do not know if that has been a problem. And I do know that everything is being done, including what I have just mentioned so that the children will be comfortable with this.

THE COURT: What I understand from what I have read is that the short swab that you have just mentioned, it is stuck in about an inch in the front of the nose and the swab is performed and, as you said it, it takes about five to 10 seconds in each nostril. Is that what happens?

MS. RICHTER: Yes. That's what the description we have is of the testing procedure.

THE COURT: Now, one of the points that the plaintiffs make is that DOE will not accept the results of tests that are performed at City Health and Hospitals facilities and I presume that the City's Health and Hospitals facilities, they're using the same PCR test that DOE is using. Is it true that DOE doesn't accept the results of PCR tests that are administered at City Health and Hospitals facilities?

MS. RICHTER: That's correct. And I would point out that plaintiffs are, although they pointed that out, they're

seeking other things. I mean what their claims are is somewhat inconsistent. Some of the parents said they would only allow a test that was given by their pediatrician, some said they don't want to do the testing at all; the injunction that is proposed would not require any test results. So, the point that was made by plaintiffs about the City Health and Hospitals Corporation is sort of just kind of something they threw in, I believe, given the position they are taking elsewhere. However, to address and answer your question, the need is to have a picture of what is going on in the school at a particular point in time to understand what is the situation in terms of monitoring and picture of that school so decisions can be made if people went to a City H and H facility or their pediatrician or someplace else the parents, probably some of them, many of them would not be doing it at the same time on the same date, they would not be getting the results back at the same time and it becomes very difficult to analyze the results in the same meaningful way and also for DOE to have the overall picture in a meaningful way when you are trying to determine what the situation is in a particular school building at a particular time.

So, that is the primary concern with using any other facility and that is why we want this done in-house and all being done -- the specimens collected at the same time, the specimens sent to a laboratory and receiving the results at the

same time and having everything be uniform. If somebody goes to a private physician as some of the parents insisted is the only thing that would be acceptable to them, we don't even know if they would use a PCR test and, if they did, where it would be analyzed. There are PCR tests that are analyzed in point of contact situations; the results are not as reliable. It is just we want to get the best possible results we can. And then the advantages to many parents is this is free and this is something they don't have to take their child to somebody else to and possibly miss school and miss instruction remotely, whatever they're doing, to get the results. It is convenient for the parents as well.

THE COURT: One of the points your adversary makes is let's suppose a child has a positive PCR test. Your adversary says, well, what if the parent wants to challenge the result? What if the parent thinks the result is wrong? What option does the parent have to challenge the test result?

MS. RICHTER: They don't, your Honor. And, again, if you look at the CDC website in terms of their programs, recommended programs for testing and tracing, there is no procedure -- there is a procedure, I believe if you had contact but you had a negative test you might be able to get another second negative test and if the first negative test is confirmed by a second negative test a few days later, you may be able to shorten the time you are in quarantine. So, I think

that is an option but in terms of a positive test, suppose there were a second test. First of all, we are talking about a very short period of time here. A person goes into quarantine for 14 days. By the time they would have the second test administered and present the results the quarantine period is, you know, you are well into the quarantine period. So, that's one thing. The second thing is, suppose the second tests were negative. Which one, then, is the valid test result? Is it the first one? Is it the second one? Do you do a third test? Again, the whole structure of this -- and this is not just the New York City public school system, this is testing and tracing programs all over the country -- is the emphasis is on safety, on public safety? And if there is a possibility that you are positive and therefore a possibility of infectiousness, you need to quarantine for the safety of everybody else and also yourself. You know? I mean, it's helpful not to be doing things that are probably not advisable if you are in fact infectious. But, it's primarily a public health issue. But, no, there is no provision to challenge the test result.

THE COURT: Your adversary also complains that DOE destroys all the samples that are taken including the positive samples so, again, there is no way to confirm that the result was actually correct or to prove that it was incorrect because the samples are destroyed and in the City's papers you tell me that, well, we entered into this stipulation in some other case

where we agreed to destroy all the samples. I guess my question is, well, why did DOE agree to that? I mean, what is the logic for destroying all the samples?

MS. RICHTER: Well, a couple of things about that which are interesting. One is that Stephanie Denaro is a plaintiff in this case, your Honor. She was also a plaintiff in the Michael Kane case you are referring to. So, you know, this is a situation where we have a plaintiff who is both demanding that we destroy the sample and presumably that we not destroy the sample. In fact, my understanding -- and it was not my case -- but my understanding was that that was the procedure that was being followed, that the samples were being destroyed but after the test results and any clinical, you know, reports of the test results were completed. However, what happened in the Michael Kane case was that the plaintiffs there -- petitioners there -- did not accept that statement as true and went to court because they had all kinds of concerns, shall we say, that the specimens would be then maintained and used for various nefarious purposes such as selling the specimens or the DNA or something, some information to others for some nefarious purposes, and the Judge there issued a temporary restraining order which prohibited our going forward with the testing program or requiring students to be required to have the consent form until we did sign the stipulation which basically set out what our procedures were already.

And just, if I may, just to address your question fully because there is no practical way to use that specimen to meaningfully prove, quote unquote, that the original test result was not correct therefore we -- being DOE -- but, again, this is not, if you again look at the CDC guidance on testing and so on, there is no provision for a second test so there is no necessity.

THE COURT: I want you to -- you provided the stipulation, I believe?

MS. RICHTER: Yes.

THE COURT: I guess I saw the stipulation in your materials, right?

MS. RICHTER: It is Exhibit B to the declaration of Jay Varma, yes.

THE COURT: What I want you to give me is a copy of the complaint in that case, as well as the TRO you just made reference to.

MS. RICHTER: Sure.

THE COURT: And then if you would, provide an explanation to me in a letter as to why -- you just made reference to the fact that you couldn't retest the samples anyway and so I need more explanation from you on that point.

MS. RICHTER: Right. I mean, you could retest if you had a specimen -- maybe I misspoke. If you had a specimen could you retest it? Yes. But the question is can you

meaningfully, practically, use that second test result to, quote unquote, challenge the first test result in these circumstances? And the answer is no and I will address that in the letter.

THE COURT: Okay. There are a couple other things I am going to ask you for. Dr. Varma, he says in paragraph 40 of his declaration, "The consensus in the scientific and medical community is that PCR tests are the gold standard for COVID-19 diagnostic tests." There is no citation for that proposition so I want to know what Dr. Varma is relying on in saying that the consensus in the scientific and medical community is that PCR tests are the gold standard.

Similarly, in paragraph 65, Dr. Varma makes another statement about scientific consensus, he says the following: "The scientific consensus is that a nasal specimen tested using FDA authorized RT-PCR procedures is highly accurate for detecting the presence of COVID-19." Once again, there is no citations for that proposition. Later in that same paragraph Dr. Varma says that the PCR rest is "the best available indicator of COVID-19 infection." No cite at that point either.

So, I want to understand for paragraph 65 what Dr. Varma is relying on when he speaks of scientific consensus, I want citations and copies of the relevant CDC materials or medical journal articles or whatever it is that he believes

demonstrates scientific consensus on these various points.

MS. RICHTER: Okay.

THE COURT: Ms. Richter, are there other points you wanted to make today?

MS. RICHTER: Well, I guess I should briefly address the legal issues. I sort of think we have sort of covered it but just to kind of stress, I believe Mr. Flores said that there was a fundamental right to literacy although he acknowledged there was no fundamental right to education. I don't believe that the three Supreme Court cases we cited as well as *Phillips*, and *Phillips*, which is Second Circuit, of course, and *Phillips* cites another Second Circuit case *Bryant*, and *Bryant* cites another Second Circuit case which is *Handberry*, which says that there is no fundamental right to education.

On the other hand, here we have the declaration setting out the remote learning experiences of the students, of the plaintiffs here, and those show, based on material provided to DOE by the principals of their schools and comments from their teachers that the children are getting an education and they are making academic progress. I don't think there is a debate about the fact that we would all love to have all the children back in full-time in-person learning if it were possible but remote learning is not equivalent to no education. The children are making progress.

THE COURT: How long will it take you, Ms. Richter, to get me the additional materials that I requested?

MS. RICHTER: Well, I have to speak to Dr. Varma. If we have to gather medical journals and such, I would say 10 days. Would that be all right? Just to get everything together? I might be able to do it faster but I would like to say 10 days.

THE COURT: Mr. Flores, you indicated that you would like to put in some additional as well. Did I hear you correctly?

MR. FLORES: Your Honor, based on this I would like to have an opportunity to address the fundamental rights that we have stated as well as the EUA preclusion from mandating emergency use authorized products, just do a supplemental short brief on that as well, your Honor.

THE COURT: How long will you need, Mr. Flores, to get that in?

MR. FLORES: Six hours.

THE COURT: Okay. Then --

MR. FLORES: I do have some additional comments, your Honor, I would like to address some of the things that were stated.

THE COURT: Yes. I am happy to hear you, I just want to, before we leave this subject about additional submissions, I just want to understand when they're going to come in. So,

based on what you said, Mr. Flores, I will expect a letter from you by tomorrow sometime?

MR. FLORES: That will be fine, your Honor.

THE COURT: And, Ms. Richter, I would ask you to get your submission as well as anything you want to say about what Mr. Flores says in his supplemental letter, I want you to get it in by a week from tomorrow.

MS. RICHTER: Okay.

THE COURT: Go ahead, Mr. Flores.

MR. FLORES: Thank you, your Honor.

I would just like to clarify a few things. First of all, the FDA authorizes for emergency use, it does not approve the PCR test and so that's why it cannot be mandated. Again, too, I got the impression that counsel was trying to state that it was a random test and that it wasn't mandatory. I must drive home the point that it was indeed mandatory and that 12,000 parents have chosen not to sign the consent form -- according to the New York Times -- and we have included that citation in our papers as well.

With respect to no irreparable harm, the McKenzie report which is attached as Exhibit 17 to our complaint, clearly shows the psychological, the long-lasting psychological damage, the achievement gap between rich and poor. I mean, when you have congregant living and multi-generational living among the poor, it is not like you can just add an additional

wing to your house and set up a learning laboratory for your child. I mean, who knows how exactly these programs are supposed to be equal or even tenable. It seems like such an easy choice, all they have to do is agree to something random and it's an equal experience. All that kind of touchy-feely language shrouds the reality and it shows a callousness of the needs of the poor and the disparate treatment and the disparate impact of this program on the poor and the long-lasting psychological effects on the children as well.

Again, your Honor, the PCR test is only good at detecting RNA fragments, it does not detect infectiousness, it does not detect the presence of COVID-19.

I do have my expert available if the Court would like to hear briefly from him; he is easy to understand, he speaks clearly, unlike most experts.

THE COURT: When you say, Mr. Flores, when you say your expert, are you alluding to either Dr. Lee or Mr. McKernan?

MR. FLORES: Yes, Mr. McKernan is on hold. I have one more point before we would let him on, if the Court would.

THE COURT: No. I think I have a very good understanding of Mr. McKernan's views from his declaration so I don't think hearing from him would add anything at this point.

MR. FLORES: Okay. That's fine, your Honor.

And then also with respect to not being able to

confirm the test results, well, counsel had indicated at first that it could not be confirmed and then, secondly, counsel did confirm that it could be split similar to a driving under the influence charge. Every individual has a right to due process where they can confirm the results by an independent forensic test. That is not available. Second of all, when you are talking about quarantining an individual, I mean, it may seem like a no-brainer to hang out for two weeks but that's easier said than done, that's an awfully long time for a child. So, it's just not there and it is illegal under New York Law to quarantine someone without proof on a possibility to get a picture of what's going on in the school. There are already many, many programs in place, there is distancing, there is reconfiguration of the classrooms, there is high-tech ventilation going on. It's not as though the hands are being tied. All those other things are fine and the schools are the safest places in the world for a child to be. However, this last option of a mandatory, illegal, unethical test crosses that line, your Honor.

THE COURT: All right. Thank you, Mr. Flores.

I will await Mr. Flores' submission sometime tomorrow and then look forward to Ms. Richter's submission a week from tomorrow and then I will endeavor to issue my decision as soon as I can after that.

I want to thank both of you for your arguments today.

We are adjourned.

o0o

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

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Date: February 16, 2021

To: BOCES District Superintendents
Superintendents of Public Schools
Public School Administrators
Charter School Administrators

From: Kathleen R. DeCataldo

Subject: In-person Learning and COVID-19 testing and sports participation

The Department has received reports from the field that some school districts are requiring parental consent, on behalf of their children, to COVID-19 testing as a condition of activities including in-person learning and extracurricular activities. The Department hereby clarifies that parent/guardian consent for COVID-19 testing of students may not be a condition of in person learning or other school activities.

The Governor's Cluster Action Initiative and the New York State Department of Health (NYSDOH) guidance require schools providing in-person instruction to test specific percentages of in-person students, teachers, and staff for COVID-19 if the school is in a designated micro cluster zone. Currently there is no requirement to test 100% of the school population for a school to open or remain open. While a school district has an interest in achieving testing of a percentage of the school population when in a zone designation, it cannot impose remote instruction on students whose parents/guardians do not consent to surveillance tests for COVID-19.

We remind schools that the only permissible ground for excluding students is, according to Education Law §906(1), whether they are ill or symptomatic, or if a local health department has otherwise ordered students to quarantine based upon actual or potential exposure to COVID-19. Thus, districts may not exclude healthy or asymptomatic students; students who are participating in a sport; or students whose parent/guardian does not give consent for COVID-19 testing. Relatedly, schools do not have the authority to exclude well or asymptomatic students and staff based on protected characteristics, including race or country of origin.

THE CITY OF NEW YORK
LAW DEPARTMENT
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February 22, 2021

VIA ECF
The Honorable Paul G. Gardephe
United States District Court
Southern District of New York
500 Pearl Street
New York, N.Y. 10007

Re: *Aviles, et al. v. de Blasio, et al.*
20 CV 09829 (PGG)

Dear Judge Gardephe:

Pursuant to the Court's order of February 17, 2021, I write in response to the Plaintiffs' letter of February 17, 2021. This letter and the exhibits submitted herewith also provide information about other recent relevant developments in the ever-changing world of governmental response to the COVID-19 pandemic.

The Guidance issued by the New York State Education Department ("SED") on February 16, 2021, that was provided to the Court by Plaintiffs' counsel on February 17, 2021, was amended by SED on February 17, 2021. The amended Guidance is submitted herewith as Exhibit O, and provides that "To clarify, school districts may not require parent/guardian consent for COVID-19 testing of students in order for the students to participate in in-person learning or other school activities, unless local health authorities direct schools otherwise." On February 18, 2021, Dr. Dave A. Chokshi, the Commissioner of the New York City Department of Health and Mental Hygiene ("DOHMH") issued a determination to the Mayor and the Chancellor which is submitted as Exhibit P and provides, in relevant part:

> To keep school buildings open for in-person instruction and allow the City to continue to effectively monitor and respond to the pandemic, it is essential that COVID-19 testing of in-person students and staff continue in schools, in accordance with current New York City Department of Education guidance and protocols.

> Therefore, in response to guidance issued by the New York State Education Department, parent/guardian consent for COVID-19 testing of students shall continue to be a condition for participation by students opting for in-person learning or other in-person school activities.

The amended SED Guidance further provides that "students may be excluded if they are the subjects of a determination by a local health department, including orders to quarantine based upon actual or potential exposure to COVID-19" and "districts may not exclude students from in-person instruction who: Are healthy or asymptomatic unless directed otherwise by local health authorities…."

DOHMH has previously issued "COVID-19: Understanding Quarantine and Isolation," which is applicable to the New York City Department of Education ("DOE") testing program. A copy is submitted as Exhibit Q. This document provides that individuals who are asymptomatic but have a recent positive diagnostic COVID-19 test result or those who have symptoms should isolate, and that individuals who have been in close contact with a person with COVID-19 should quarantine even if they do not have symptoms.

This is consistent with Guidance issued by the New York State Health Department, which provides that if a person tests positive, "a COVID Contact Tracer will connect you with the support and resources you may need through quarantine" and "People who have come in close contact with someone who is positive are asked to stay home and limit their contact with others." https://coronavirus.health.ny.gov/new-york-state-contact-tracing. This is also consistent with Guidance issued by the United States Centers for Disease Control and Prevention ("CDC"),, which provides: "Who needs to isolate? " "People who don't have symptoms but have tested positive for COVID-19". https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/isolation.html. In addition, the CDC has stated: "Those contacts who test positive (symptomatic or asymptomatic) should be managed as a confirmed COVID-19 case." For persons who never develop symptoms of COVID-19: isolation and other precautions can be discontinued 10 days after the date of their first positive RT-PCR test for SARS-CoV-2 RNA." https://www.cdc.gov/coronavirus/2019-ncov/php/contact-tracing/contact-tracing-plan/investigating-covid-19-case.html#anchor_1590008.

In terms of additional relevant developments, the Mayor and the Chancellor announced that DOE middle schools will reopen for in-person instruction on February 25, 2021. A letter from the Chancellor to parents, dated February 8, 2021, announcing the resumption of in-person instruction in DOE middle schools is submitted herewith as Exhibit R. The students of the Plaintiff parents in this case are either in DOE elementary or middle schools. Accordingly, all the schools these students attend will be open for in-person instruction as of February 25.

In addition, on February 12, 2021, the CDC issued several documents containing guidance for the safe re-opening of schools for in-person instruction. One contains extended discussion of the use of COVID-19 testing as a mitigation strategy. The relevant Guidance document is titled, "Operational Strategy for K-12 Schools through Phased Mitigation". The discussion of testing is in the Executive Summary at pp. 5-6 and at pp. 28-34. A copy of the

Guidance is submitted as Exhibit S. The Guidance states, at page 28, that, "For diagnostic testing, selection of tests should prioritize tests with highly accurate results with high sensitivity and specificity such as NAATs." As previously discussed, see letter of January 25, 2021 and Exhibit referenced therein (Dkt # 39), PCR tests are nucleic acid amplification tests (NAATs).

Beginning on page 29, the Guidance discusses screening testing, to identify those who may be infected with COVID-19 and prevent secondary transmission in communities with significant transmission rates. It states "…the intent is to use the screening testing results to determine who may return to in-person school or work." At page 32 the Guidance states that school-based testing should never be conducted without consent (from the parent or legal guardian of a minor).

The screening program described is an in-school testing program; the Guidance also states that if an in-school testing program cannot be established, then a referral-based testing strategy should be considered (pp. 29, 32 and 34). The Guidance contemplates, by explicit example, the testing of students in grades kindergarten through fifth grade (p. 29). The Guidance further advises testing of teachers, students and staff, and suggests that frequent routine screening tests can be deployed. At page 30, the Guidance proposes weekly routine screening tests and cites, as an example, a random weekly sample of 20% of the students.

On page 30 the Guidance also states that while NAAT tests are high-sensitivity, antigen tests are less sensitive than NAATs, but most can be processed and results obtained at the point of care and provide immediate results (p. 31), (rather than being sent to a laboratory to obtain the results as is the case with most NAATs, p. 28). The Guidance also states, at page 31: "The immediacy of results (test results in 15-30 minutes), modest costs, and feasibility of implementation of antigen tests make them a reasonable option for school-based screening testing." However, given this lesser sensitivity, antigen test results may need confirmation with an NAAT if such a test is necessary. Examples provided are if a symptomatic person tests negative or an asymptomatic person tests positive. (pp. 30-31). As the record shows, DOE is using the more sensitive PCR (NAAT) test for its testing program. Note that there is no suggestion that an NAAT test result be confirmed with a second test. This is consistent with the United States Federal Drug Administration's Guidance "Coronavirus Disease Testing Basics", previously submitted as Exhibit L.

Finally, as to this CDC Guidance, I note the following statement, on page 28: "For students, teachers, and staff who had previously received positive test results and do not have symptoms of COVID-19, retesting is not recommended for up to 3 months from their last positive test result. Data currently suggest that some individuals test persistently positive due to residual virus material but are unlikely to be infectious." The DOHMH document"COVID-19: Quarantine and Isolation," which as discussed above is applicable to the DOE testing program and is submitted as Exhibit Q, provides, at page 4:

> If I previously had COVID-19 and test positive again, do I still need to isolate?
>
> If you were confirmed with COVID-19 (positive diagnostic test) in the past 90 days, you do not need to isolate again if you remain without symptoms but have another positive COVID-19 test. This is because many people who had COVID-19 test positive for weeks or even months after infection, but they are no longer contagious..

I am also submitting, as Exhibit T, a copy of the CDC Guidance, also issued on February 12, 2021, titled "Transmission of SARS-CoV-2 in K-12 schools" which contains an overview of the scientific evidence concerning COVID-19, children and in-person instruction.

Finally, I have been watching for developments in the legislative area. According to news reports, Congressional work on the President's proposed COVID-19 relief bill is on-going; it is anticipated a law will be enacted by mid-March. However, in the interim, it is noteworthy that President Biden's proposed legislation, the "American Rescue Plan," announced on January 20, 2021, includes funds to increase the availability of various testing and other COVID-19 related material. (See Exhibit U, pp. 4-6). President Biden's "National Strategy for the COVID-19 Response and Pandemic Preparedness" issued on January 21, 2021 (Exhibit V), is more specific and states at pages 70-71:

> …the United States has identified twelve immediate supply shortfalls that will be critical to the pandemic response. The President has directed relevant agencies to exercise all appropriate authorities, including the DPA [the Defense Production Act], to accelerate manufacturing, delivery, and administration to meet shortfalls in these twelve categories of critical supplies, including taking action to increase the availability of supplies like…polymerase chain reaction (PCR) sample collection swabs, test reagents, pipette tips, laboratory analysis machines for PCR tests….

Respectfully submitted,

/s/
Marilyn Richter
Assistant Corporation Counsel

THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

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Date: February 17, 2021

To: BOCES District Superintendents
Superintendents of Public Schools
Public School Administrators
Charter School Administrators
Nonpublic School Administrators

From: Kathleen R. DeCataldo

Subject: In-person learning, sports participation and COVID-19 testing (**Amended**)

The Department has received reports from the field that some school districts are requiring parental/guardian consent for schools to test students for COVID-19 as a condition for students to participate in school activities, including in-person learning and extracurricular activities.

To clarify, school districts may not require parent/guardian consent for COVID-19 testing of students in order for the students to participate in in-person learning or other school activities, unless local health authorities direct schools otherwise.

As required by the Governor's Cluster Action Initiative and New York State Department of Health (NYSDOH) guidance, schools in a designated micro cluster zone that provide in-person instruction must test specific percentages of in-person students, teachers, and staff for COVID-19. Thus, while a school district is required to test a percentage of the school population for COVID-19 if they are located in a designated zone, the district cannot require remote instruction for students whose parents/guardians do not consent to surveillance tests for COVID-19, absent a determination by local health authorities.

Education Law §906(1) provides that the only permissible ground for excluding students from in-person learning or participation in school activities based upon communicable disease concerns is if they are ill or symptomatic. In addition, students may be excluded if they are the subjects of a determination by a local health department, including orders to quarantine based upon actual or potential exposure to COVID-19.

Therefore, under Education Law §906 as it relates to communicable diseases, and unless otherwise provided by local health authorities, districts may not exclude students from in-person instruction who:

- Are healthy or asymptomatic unless directed otherwise by local health authorities; or
- Whose parent/guardian does not give consent for COVID-19 testing unless directed otherwise by local health authorities.

Additionally, schools do not have the authority to exclude well or asymptomatic students and staff based on protected characteristics, including race or country of origin.

Arrangements to participate in interscholastic sports are determined by school districts in consultation with local health departments, per the State Department of Health Interim Guidance for Sports and Recreation, and remain unaffected by this guidance. However, as indicated above, if a student wishes to participate in interscholastic athletics, he or she may not be excluded from their chosen modality of learning, including in-person learning, as a pre-condition of participation.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A., and A.A., STEPHANIE DENARO, Individually and as Parent and Natural Guardian of D.D. and H.D., CHRISTINE KALIKAZAROS, Individually and as Parent and Natural Guardian of Y.K., GAETANO LA MAZZA, Individually and as Parent and Natural Guardian of R.L., CRYSTAL LIA, Individually and as Parent and Natural Guardian of F.L., and CHILDREN'S HEALTH DEFENSE,

Plaintiffs,

-against-

BILL DE BLASIO, in his Official Capacity as Mayor of the City of New York, DR. DAVID CHOKSHI, in his Official Capacity of Health Commissioner of the City of New York, NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA, in his Official Capacity as Chancellor of the New York City Department of Education, and THE CITY OF NEW YORK,

Defendants.

MEMORANDUM
OPINION & ORDER

20 Civ. 9829 (PGG)

PAUL G. GARDEPHE, U.S.D.J.:

In this action, Plaintiffs – the parents of children who attend New York City school district elementary and middle schools, and an organization known as Children's Health Defense – claim that the City of New York (the "City"), the Mayor and the City's Health Commissioner, and the City's Department of Education ("DOE") and its Chancellor (collectively, "Defendants"), have violated their rights under the United States Constitution and New York law. (Am. Cmplt. (Dkt. No. 11))

Plaintiffs' claims are predicated on Mayor Bill de Blasio's November 19, 2020 announcement that in-person classes in the New York City public school system would be suspended in light of the COVID-19 pandemic. (See, e.g., id. at ¶¶ 2, 8) The Mayor announced ten days later that in-person classes would resume on December 7, 2020 and December 10, 2020 – as to elementary and special needs students respectively – on the condition that parents sign a form consenting to random COVID-19 testing of their children. (Id. at ¶¶ 2-3, 9-12) On February 11, 2021, DOE announced that on February 25, 2021, in-person instruction would be extended to middle school students.[1] (See Feb. 22, 2021 Def. Ltr., Ex. R (Dkt. No. 44-4) at 1)[2]

Plaintiffs seek a mandatory injunction requiring Defendants to reopen all New York City public schools for in-person instruction. (See Proposed Order for Preliminary Injunction (Dkt. No. 32) at 2) They also seek a prohibitory injunction that would forbid Defendants "from requiring students to take mandatory COVID-19 tests as a condition for in-person education." (Id.) Stated another way, Plaintiffs seek an injunction that would prohibit Defendants from requiring parental consent to random COVID-19 testing as a condition to students attending in-person classes at New York City public schools. (See, e.g., Pltf. Br. (Dkt. No. 12) at 7, 10-11, 13-14) According to Plaintiffs, the COVID-19 pandemic presents no obstacle to in-person instruction, and Defendants' COVID-19 testing program[3] is "medically

[1] All references to page numbers in this opinion are as reflected in this District's Electronic Case Filing ("ECF") system.

[2] On February 8, 2021, DOE announced that its "buildings" could "now re-open . . . to students in grades 6, 7, and 8 in a manner that prioritizes health and safety," noting that 20% of students and staff would undergo weekly COVID-19 testing, and that school staff had been made eligible for vaccination. (Feb. 22, 2021 Def. Ltr., Ex. R (Dkt. No. 44-4))

[3] "The DOE in-school testing program uses a nucleic acid amplification test [("NAAT")] that involves a laboratory procedure known as [a] polymerase chain reaction (PCR) test." (Varma Decl. (Dkt. No. 19) at ¶ 40) The PCR test detects genetic material of the COVID-19 virus. (Id. at ¶ 40) A nasal swab is used to collect the necessary sample. (Id. at ¶ 54)

invasive," "unreliable," and "unconstitutional." (Am. Cmplt. (Dkt. No. 11) at ¶ 2; see also id. at ¶ 17; Pltf. Br. (Dkt. No. 12) at 17 (providing alternative suggestions for how Defendants "can manage the infection risk"))

For the reasons stated below, Plaintiffs' motion for a preliminary injunction will be denied.

INTRODUCTION

Plaintiffs' application comes at a critical moment in our nation's history. We are at war with a virus that has killed more than a half-million of our fellow citizens – more than the total number of American soldiers killed in World War II. See COVID Data Tracker, Centers for Disease Control and Prevention ("CDC"), https://covid.cdc.gov/covid-data-tracker/#cases_totaldeaths (last visited Mar. 1, 2021); see also America's Wars, Dep't of Veterans Affs., https://www.va.gov/opa/publications/factsheets/fs_americas_wars.pdf (last visited Mar. 1, 2021).

January 2021 was the deadliest month of the pandemic, with this nation seeing over six million new infections and more than 95,000 COVID-19 related deaths. COVID Data Tracker, CDC, https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases (last visited Mar. 1, 2021). As of February 26, 2021, "[t]here has been a six-week downward trend in cases." COVID Data Tracker Weekly Review, CDC, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (last updated Feb. 26, 2021). However, there is concern in the United States medical and scientific community about new variants of the virus that have emerged – variants that are more transmissible and might be more deadly – and the efficacy of vaccines to address these new variants. See About Variants, CDC, https://www.cdc.gov/coronavirus/2019-ncov/transmission/variant.html (last updated Feb. 12,

2021); Kelsey Lane Warmbrod, et al., Staying Ahead of the Variants: Policy Recommendations to Identify and Manage Current and Future Variants of Concern (Feb. 2021), Johns Hopkins Ctr. for Health Sec., https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2021/20210216-covid19-variants.pdf. Indeed, the emergence of a new variant in Britain – a variant that is now in the United States (id.) – led to exponential growth in the number of infections and deaths in Britain in January 2021, resulting in a national lockdown and the closing of all schools. United Kingdom Coronavirus Map and Case Count, N.Y. Times, https://www.nytimes.com/interactive/2020/world/europe/united-kingdom-coronavirus-cases.html (last updated Mar. 2, 2021).

As to vaccination, as of February 28, 2021, 7.5% of the United States population has received two doses of approved vaccines. COVID Data Tracker, CDC, https://covid.cdc.gov/covid-data-tracker/#vaccinations (last updated Feb. 28, 2021); see also U.S. Vaccination Efforts, Johns Hopkins Coronavirus Res. Ctr., https://coronavirus.jhu.edu/vaccines/us-states (last visited Mar. 1, 2021). The vast majority of this nation's population thus remains unprotected from the COVID-19 virus.

The virus has not spared children. A report issued by the American Academy of Pediatrics and the Children's Hospital Association indicates that, as of February 18, 2021, more than 3.1 million "total child COVID-19 cases [have been] reported" in the United States, and that "children represent 13.1% . . . of all cases." Children and COVID-19: State-Level Data Report, Am. Acad. of Pediatrics, https://tinyurl.com/22a4f4mh (last updated Feb. 18, 2021). More than 70,000 new child COVID-19 cases were reported during the week of February 11, 2021 to February 18, 2021, and "there was a 6% increase in child COVID-19 cases" from February 4, 2021 to February 18, 2021. Id.

Children account for approximately 1% to 3% of reported hospitalizations, and approximately 0.1% to 2.2% of children who become infected with the virus require hospitalization. Id. The reported death rate among children is, thankfully, quite low, but the American Academy of Pediatrics reports that 247 children have died from the virus. Id.

While there appears to be an emerging scientific consensus that schools can be made safe for children if proper precautions are taken – including appropriate ventilation, masking, distancing, expanded screening testing, and use of hybrid attendance models, see Margaret A. Honein et al., Data and Policy to Guide Opening Schools Safely to Limit the Spread of SARS-CoV-2 Infection, J. Am. Med. Ass'n (Jan. 26, 2021), https://tinyurl.com/y6529wvf,[4] there is nothing inherently safe about the school environment. Indeed,

> large outbreaks have occurred with apparent transmission in schools . . . [and] [p]reventing transmission in school settings will require addressing and reducing levels of transmission in the surrounding communities through policies to interrupt transmission (e.g., restrictions on indoor dining at restaurants). In addition, all recommended mitigation measures in schools must continue[,]

[4] The CDC has stated that, "[w]hen schools implement testing combined with key mitigation strategies, they can detect new cases to prevent outbreaks, reduce the risk of further transmission, and protect students, teachers, and staff from COVID-19. . . . Some schools may also elect to use screening testing as a strategy to identify cases and prevent secondary transmission. Screening testing can be used as an additional layer of mitigation to complement mitigation strategies in schools. Screening testing is intended to identify infected individuals without symptoms (or prior to development of symptoms) who may be contagious so that measures can be taken to prevent further transmission." K-12 School Operation Strategy, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html (last updated Feb. 26, 2021); see id. (discussing additional mitigation strategies such as masking, distancing, handwashing, cleaning, and "contract tracing in combination with isolation and quarantine"); see also COVID-19 in children and the role of school settings in transmission – first update, European Center for Disease Prevention and Control ("ECDC") (Dec. 23, 2020), https://www.ecdc.europa.eu/sites/default/files/documents/COVID-19-in-children-and-the-role-of-school-settings-in-transmission-first-update_1.pdf; see also Transmission of SARS-CoV-2 in K-12 schools, CDC, https://tinyurl.com/knjdhd99 (last updated Feb. 12, 2021) ("For schools to provide in-person learning, associations between levels of community transmission and risk of transmission in school should be considered. If community transmission is high, students and staff are more likely to come to school while infectious, and COVID-19 can spread more easily in schools." (footnote omitted)).

> [including]: . . . expanding screening testing to rapidly identify and isolate asymptomatic infected individuals.

Id.

There is also evidence that children – particularly those ten years of age and older – are capable of transmitting the virus. See, e.g., What We Know About COVID-19 Transmission in Schools, World Health Organization ("WHO"), https://tinyurl.com/xzrzdacn; (last updated Oct. 21, 2020); Young Joon Park et al., Contact Tracing during Coronavirus Disease Outbreak, South Korea, 2020, 26 Emerging Infectious Diseases J., 2465-2468 (Oct. 2020). Indeed, a September 30, 2020 tracing study reports that "children and young adults [are] . . . potentially much more important to transmitting the virus – especially within households – than previous studies have identified." Morgan Kelly, Largest COVID-19 contact tracing study to date finds children key to spread, evidence of superspreaders, Princeton Env't Inst. (Sep. 30, 2020 10:40 AM), https://www.princeton.edu/news/2020/09/30/largest-covid-19-contact-tracing-study-date-finds-children-key-spread-evidence.

Teachers and school staff have likewise suffered the ravages of the virus. "More than 530 K-12 teachers died of covid-19 last year, according to data compiled by the American Federation of Teachers." Meryl Kornfield, A Teacher died of covid-19. Asked to wear masks in his honor, school board members silently refused, Wash. Post (Jan. 24, 2021, 8:27 PM), https://tinyurl.com/y2w477yf.

Given these facts, many large city school districts – such as Boston, Philadelphia, Los Angeles, and San Francisco – terminated in-person learning due to the pandemic. Certain school districts have begun or are planning to begin phased re-openings. See, e.g., Timeline for Reopening and Phasing Additional Students to In-Person Learning, Boston Pub. Schs., https://www.bostonpublicschools.org/Page/8521 (last visited Mar. 1, 2021); Kristen A. Graham,

Philly students won't return Monday, but a reopening decision is days away, The Phila. Inquirer, https://www.inquirer.com/news/philadelphia-school-district-reopen-hite-pft-20210225.html (last updated Feb. 25, 2021); LA Teachers: 'No Current Plans' to Reopen Schools, CBS L.A. (Feb. 26, 2021 at 4:15 PM), https://losangeles.cbslocal.com/2021/02/26/la-schools-teachers-reopen-utla-lausd/; Nanette Asimov and Jill Tucker, S.F. school board approves plan with labor unions to reopen classrooms, https://www.sfchronicle.com/education/article/S-F-school-board-approves-plan-with-labor-unions-15973439.php (last updated Feb. 24, 2021); Hannah Leone, CPS high schools still have no reopening date. Here's how one principal is helping her students cope in the meantime., Chi. Tribune (Feb. 20, 2021 at 5:00 AM), https://www.chicagotribune.com/coronavirus/ct-cps-high-school-return-in-person-covid-19-20210220-or5xkf3z3ncg3itru266s2bkga-story.html; Kate Taylor, 13,000 School Districts, 13,000 Approaches to Teaching During Covid, N.Y. Times (Jan. 21, 2021), https://tinyurl.com/yxkatfbf.

New York City has not been spared. Indeed, it was the early center of the pandemic. See, e.g., Manny Fernandez, Thomas Fuller, and Mitch Smith, 'Our New York Moment': Southern California Reels as Virus Surges, N.Y. Times, https://www.nytimes.com/2021/01/09/us/california-coronavirus.html (last updated Jan. 15, 2021) (referencing New York City as the epicenter of the virus last March and April). As of March 1, 2021, there were "at least 725,155 cases and 29,332 deaths in New York City." New York City Coronavirus Map and Case Count, N.Y. Times, https://tinyurl.com/y9ctka2e (last updated Mar. 1, 2021).

While the enormous toll in death and human suffering that the COVID-19 virus has imposed on the citizens of New York City must be acknowledged, the importance of in-

person classroom learning is not in dispute here. (See Varma Decl. (Dkt. No. 19) at ¶ 26 (noting the particular importance of in-person learning for elementary school students and students with disabilities)) It was for this reason that the schools were reopened for elementary and special needs students in December 2020, and just recently reopened for middle school students. (Am. Cmplt. (Dkt. No. 11) at ¶¶ 2, 8-9; see also Def. Feb. 22, 2021 Ltr., Ex. R (Dkt. No. 44-4)) Defendants have, however, conditioned in-person classroom learning on parental consent to random testing for the COVID-19 virus. (See Def. Feb. 22, 2021 Ltr., Ex. P (Dkt. No. 44-2) ("parent/guardian consent for COVID-19 testing of students shall continue to be a condition for participation by students opting for in-person learning or other in-person school activities"); Am. Cmplt., Ex. 3 (Dkt. No. 11-1) (consent form for COVID-19 testing))

Plaintiffs seek an injunction that would require Defendants to reopen all public schools to in-person instruction, and to do so without requiring parents to consent to random COVID-19 testing. (Proposed Order for Preliminary Injunction (Dkt. No. 32) at 2)

BACKGROUND

I. PARTIES

Plaintiff-Parents Amanda Aviles, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, and Crystal J. Lia are the parents of elementary and middle school children enrolled in New York City public schools. (Am. Cmplt. (Dkt. No. 11) at ¶¶ 45-50; see also Aviles Decl. (Dkt. No. 12-3); Kalikazaros Decl. (Dkt. No. 12-4); La Mazza Decl. (Dkt. No. 12-5); Lia Decl. (Dkt. No. 12-6); Denaro Decl. (Dkt. No. 12-7)) Plaintiff Children's Health Defense is a national not-for-profit membership organization, with a "mission [] to safeguard children's health and to advocate for children and families to prevent and stop environmental harms and to change policies that place children at undue risk." (Am. Cmplt. (Dkt. No. 11) at ¶ 52)

"[Children's Health Defense] has active members in New York City, including parents of children named in this lawsuit." (Id. at ¶ 54)

Defendant Bill de Blasio is the Mayor of the City of New York and, according to Plaintiffs, "has issued a series of executive orders since the COVID-19 pandemic began, including the shutdown of New York City public schools." (Id. at ¶ 55) Richard A. Carranza is the Chancellor of DOE and "is responsible for enforcing education law and regulations in the City of New York." (Id. at ¶ 56) Defendant David Chokshi is the Commissioner for the New York City Department of Health and "provide[s] recommendations and consultation[s] to [Mayor] de Blasio and Defendant Carranza." (Id. at ¶ 57) Finally, Defendant DOE "has issued directives, updates and supplemental guidance on instruction for the 2020-21 school year with recommendations from the Department of Health." (Id. at ¶ 56)

II. THE AMENDED COMPLAINT AND MOTION FOR A PRELIMINARY INJUNCTION

Although the Amended Complaint cites the "unconstitutional, arbitrary shutdown of New York City Public Schools on Thursday, November 19, 2020," Plaintiffs acknowledge that "[o]n December 7, 2020 and December 10, 2020 . . . Defendants permitted elementary and special needs children back to school." (Id. at ¶ 2) Accordingly, the focus of the Amended Complaint is Defendants' requirement of parental consent to "polymerase chain reaction (PCR) testing" as a prerequisite to in-person classroom instruction, and the then continued shutdown of public middle schools and high schools. (Id. at ¶ 3; see id. at ¶ 2) Plaintiffs contend that PCR testing is not scientifically reliable and violates the rights of both children and parents. (See, e.g., id. at ¶¶ 5, 15-17, 21, 23, 28, 62-65) Plaintiffs further contend that remote learning is detrimental to children. (See, e.g., id. at ¶¶ 40-44)

Plaintiffs claim that Defendants have violated their right to (1) procedural and substantive due process, and equal protection, under the Fourteenth Amendment; and (2) be free from unreasonable searches and seizures, and their right to privacy, under the Fourth Amendment. (See id. at ¶¶ 66-76 (First Claim for Relief); id. at ¶¶ 77-82 (Second Claim for Relief); id. at ¶¶ 83-92 (Third Claim for Relief); id. at ¶¶ 104-110 (Sixth Claim for Relief); id. at ¶¶ 111-116 (Seventh Claim for Relief); id. at ¶¶ 117-120 (Eighth Claim for Relief)) Plaintiffs also raise claims under the New York Constitution, Article XI, Section I, New York Public Health Law §§ 2240 et seq., and New York City Parents' Bill of Rights. (Id. ¶¶ 99-103 (Fifth Claim for Relief); id. at ¶¶ 121-125 (Ninth Claim for Relief); id. at ¶¶ 126-137 (Tenth Claim for Relief)) Finally, Plaintiffs contend that Defendants have violated their right to direct the education of their children. (Id. at ¶¶ 93-98 (Fourth Claim for Relief))

In moving for a preliminary injunction, Plaintiffs ask this Court to "restore [Plaintiffs'] children's ability to return to full-time in-school instruction, K-12th grade, without the unethical and illegal requirement of coerced medical testing." (Pltf. Br. (Dkt. No. 12) at 7) In other words, Plaintiffs ask this Court to "void Defendants' continued partial and full school closures of grades K-12 and to enjoin their forced medical testing of students." (Id.)

1. Plaintiffs' Factual Allegations

Plaintiffs contend that "[c]hildren are at extremely low risk from COVID-19," (Id. at 8) and that "the infection fatality rate for people aged 0-19 years is .00003." (Id. at 9 (citing Am. Cmplt., Ex. 12 (Dkt. No. 11-2) (CDC post, updated on September 10, 2020, entitled "Covid-19 Pandemic Planning Scenarios"))) According to Plaintiffs, "children are the least likely group in society to become ill from COVID or to transmit disease." (McKernan Decl.

(Dkt. No. 12-2) at ¶ 28 (Ex. 7, CDC post, updated on September 10, 2020, entitled "Covid-19 Pandemic Planning Scenarios"))

Plaintiffs further claim that "[t]he short- and long-term academic, psychological and emotional burdens children suffer from school exclusion outweigh the risks of COVID-19." (Pltf. Br. (Dkt. No. 12) at 8) According to Plaintiffs,

> Defendants can manage the infection risk to teachers by offering them choices and providing them protection, as employers do for other essential workers. Defendants did this September through November 2020, before the November 19, 2020 shutdown, offering teachers remote options, fewer students per class, plastic barriers, masks, temperature taking and other protection measures. Teachers' risk mitigation cannot come at the expense of children's education.

(Id. at 17)

As to Defendants' requirement that parents seeking in-person learning for their children consent to random PCR testing, Plaintiffs assert that Defendants' PCR testing program is "coerce[d]," and presents "parents with a Hobson's choice: put your child in isolated, inferior remote learning for at least ten more months . . . or subject her to intrusive, unwanted medical procedures." (Id. at 10) According to Plaintiffs, Defendants "mandatory PCR tests" are invasive, unreliable, are not diagnostic, and serve no useful purpose. (Id. at 9; see also id. at 8-10, 14, 17) Indeed, Plaintiffs contend that "97% of PCR positives tests may actually be false." (Id. at 9)

Finally, Plaintiffs assert that "[t]he National Institutes of Health (hereinafter "NIH") has determined that PCR testing is not the 'Gold Standard' of COVID-19 diagnosis as it is widely touted to be. NIH acknowledges that '[t]his RT [reverse transcription] PCR may increase the positivity rate, depending on the number of repetitions of this test.'" (Id. at 10 (citing Am. Cmplt., Ex. 20 (Dkt. No. 11-2)))

In support of these arguments, Plaintiffs submit the declaration of Dr. Sin Hang Lee, a pathologist who previously worked at Milford Hospital, and who currently operates the Milford Molecular Diagnostics Laboratory in Milford, Connecticut. (Lee Decl. (Dkt. No. 12-1) at ¶ 1); Lee Decl., Ex. 1 (Dkt. No. 12-1) (Curriculum Vitae)) According to Dr. Lee, "the current tests to detect SARS-CoV-2 RNA are generating false positives and negatives," and "a two-phased test with DNA sequencing [that he has developed] would 'guarantee no-false positive results[.]'"[5] (Lee Decl. (Dkt. No. 12-1) at ¶ 6; see id. at ¶¶ 7, 22) Dr. Lee further asserts that the "[c]urrent PCR testing detects virus genome-related materials 'long after the infected person has stopped transmitting the virus.'" (Id. at ¶ 17) "To have children take such an unreliable test is . . . absurd." (Id. at ¶ 24) Dr. Lee also argues that the PCR test "would be quite easy and simple to manipulate," such that "the number of positive results" could be inflated. (Id. at ¶ 20)

[5] In a March 22, 2020 letter to the World Health Organization ("WHO") and Dr. Anthony Fauci – the director of the National Institute of Allergy and Infectious Diseases at NIH – Dr. Lee presented his criticisms of the PCR test and offered his laboratory's "Sanger sequencing" test as a solution. (Lee Decl. (Dkt. No. 12-1) at ¶¶ 6-8; Lee Decl., Ex. 2 (Dkt. No. 12-1) (March 22, 2020 letter)) Dr. Lee asked the WHO and Dr. Fauci to "[p]lease inform your affiliated laboratories that we are now in a position to assist them to resolve their questionable RT-qPCR test results." (Lee Decl., Ex. 2 (Dkt. No. 12-1) at 20) In his declaration, Dr. Lee states that "it is almost unbelievable that . . . [he has] received no response from either the WHO or [the] NIH." (Lee Decl. (Dkt. No. 12-1) at ¶ 8)

In 2018, Dr. Lee sued the CDC in connection with a similar "nested PCR/DNA sequencing-based diagnostic technology." Sin Hang Lee, M.D. v. United States, 142 Fed. Cl. 722, 727 (2019) (citation and quotation marks omitted). In that lawsuit, Dr. Lee alleged that the CDC had breached an "implied-in-fact contract" with him to endorse Dr. Lee's "sequencing-based molecular test to diagnose Lyme disease," which Dr. Lee argued was "significantly more accurate than any other test currently used." Id. at 726 (citation and quotation marks omitted). Dr. Lee further alleged that the CDC had "engaged in anti-competitive conduct and defamed him by making certain false statements regarding the results of the sequencing-based molecular test." Id. The Court of Federal Claims granted the Government's motion to dismiss Dr. Lee's breach of contract claim, finding that he had not pled sufficient facts to allege the existence of a contract. Id. at 730. The court dismissed Dr. Lee's tort and antitrust claims for lack of subject matter jurisdiction. Id.

According to Dr. Lee, PCR "test kit manufacturers [have a motive] to please their customers whose business benefits from a high number of COVID-19 cases." (Id.)

Plaintiffs have also submitted a declaration from Kevin McKernan. (McKernan Decl. (Dkt. No. 12-2)) McKernan is the chief scientific officer of Medicinal Genomics Corp., where he focuses on the study of cannabis-based therapeutics. (McKernan Decl., Ex. 1 (Dkt. No. 12-2)) McKernan has a bachelor of science degree from Emory University. (McKernan Decl., Ex. 2 (Dkt. No. 12-2)) McKernan repeats Dr. Lee's criticism that "PCR testing cannot test for viral infectiousness or illness," and that "[p]atients can be qPCR positive for 77 days post infection." (McKernan Decl. (Dkt. No. 12-2) at ¶ 14) Because "[t]he infectious period of [the COVID-19] virus is only 7-10[]days" (id. at ¶ 15), "PCR positivity exists weeks to months past infectiousness." (Id. at ¶ 18 (citing Ex. 4)) Accordingly, "the majority of positive students will be falsely quarantined by this test." (Id. at ¶ 15) McKernan also complains that because Defendants destroy samples after parents receive the results, it is "impossible for families to challenge the accuracy of testing, thus making the test 'irrefutable.'" (Id. at ¶ 23)

McKernan argues that – instead of pursuing a random testing program – Defendants should (1) perform "[t]emperature testing" – which he regards as "a better solution and less invasive" (id. at ¶ 34); and (2) "simply require [that] symptomatic people stay home." (Id. at ¶ 35)

DISCUSSION

I. FACTUAL FINDINGS

A. Impact of the COVID-19 Virus on Public Health

The COVID-19 virus has had a devastating impact on New York City, and has presented public health concerns not seen in a hundred years. In March and April 2020, New York City became the national epicenter of the COVID-19 pandemic, and in subsequent months, the City saw exponential growth in infections and deaths. (See Varma Decl. (Dkt. No. 19) at ¶ 7 ("As of May 13, 2020, New York City, with over 20,000 confirmed or probable COVID-19 deaths, had the sixth highest number of reported COVID-19 deaths as compared to any country in the world." (emphasis omitted)); COVID-19 Email Update, Johns Hopkins Ctr. for Health and Sec. (May 20, 2020) https://myemail.constantcontact.com/COVID-19-Updates---May-20.html?soid=1107826135286&aid=CBH5s4rQyjw ("New York state and New York City have reported steadily increasing tests since late March and steadily decreasing incidence since mid-to-late April, an encouraging sign from the hardest-hit area of the country."); Eric Toner et al., Crisis Standards of Care: Lesson from New York City Hospitals' COVID-19 Experience The Emergency Medicine Perspective (Feb. 2021), Johns Hopkins Ctr. for Health Sec., https://www.centerforhealthsecurity.org/our-work/pubs_archive/pubs-pdfs/2021/210223-NYC-CSC-ER.pdf ("New York City suffered an unprecedented surge of patients with . . . COVID-19 from April to June 2020. . . . Hospitals were overwhelmed and unable to maintain conventional standards of care, forcing hospitals and healthcare workers to adjust the way that care was provided in order to do the most good for the greatest number of patients."))

Infection rates, hospitalizations, and deaths all decreased substantially over the summer, but by September 2020, the City saw a resurgence of the virus. (Varma Decl. (Dkt. No.

19) at ¶ 8) Ultimately, exponential growth in infection rates, hospitalizations, and deaths returned. (Id. at ¶ 9 ("On September 24th, the daily average for new cases was 352, a 50% increase in cases over 45 days. It then took only 12 days to increase another 50% to 527 cases on October 6th. . . . On December 15th[,] the daily average for new cases was 3,684, a more than ten-fold increase since September 24th.")) "The positivity rate is an important indicator of the degree of community spread[,] . . . [because it] measures the percent of COVID-19 laboratory tests that have a positive result. The average daily positivity rate in New York City . . . was 1.2%[] on August 10th. . . . On December 15th, the positivity rate was 6.21%." (Id. at ¶ 11 (footnote omitted)) "As of December 21, 2020, New York City ha[d] sustained a total of 24,735 deaths (19,984 confirmed and 4,751 probable), 66,021 hospitalizations and 387,361 cases of COVID-19 (348,0991 confirmed and 39,270 probable)." (Id. at ¶ 14)

"COVID-19 is most commonly transmitted by small viral particles exhaled by an infected person that are deposited into the nose, mouth, and/or eyes of an uninfected person." (Id. at ¶ 6; see also Ways COVID-19 Spreads, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html (last updated Oct. 28, 2020)) Approved treatments for the COVID-19 virus are still quite limited. See, e.g., Coronavirus (COVID-19) Update: FDA Authorizes Monoclonal Antibodies for Treatment of COVID-19, U.S. Food & Drug Administration ("FDA") (Feb. 9, 2021), https://tinyurl.com/k62yznd5 (discussing the emergency use authorization issued for bamlanivimab and etesevimab); see also Potential Treatments, CDC, https://www.cdc.gov/coronavirus/2019-ncov/your-health/treatments-for-severe-illness.html (last updated Dec. 8, 2020). The CDC, the WHO, and other infectious disease experts have suggested a variety of measures to combat the spread of the virus, including wearing masks, washing hands, social distancing, isolation and quarantining, and vaccination.

(See, e.g., Protect Yourself, CDC, https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html (last updated Feb. 4, 2021); Coronavirus disease (COVID-19) advice for the public, WHO, https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public (last updated Feb. 24, 2021); When to Quarantine, CDC, https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html (last updated Feb. 11, 2021); Varma Decl. (Dkt. No. 19) at ¶ 6)

Throughout the pandemic, public health authorities have implemented measures designed to protect the hospital system from becoming overwhelmed by COVID-19 patients. (Varma Decl. (Dkt. No. 19) at ¶ 16; see also Community Mitigation Framework, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/community-mitigation.html (last updated Feb. 16, 2021); COVID-19 Micro-Cluster Strategy, N.Y. State: N.Y. Forward, https://forward.ny.gov/ (last visited Mar. 1, 2021) ("New rules and restrictions directly target areas to help control COVID-19 spread and protect hospital capacity"))

Although the medical evidence indicates that children infected with the COVID-19 virus are less likely than adults to be symptomatic and to develop severe symptoms, children are not immune, and certain children infected with the virus have suffered multisystem inflammatory syndrome (MIS-C), which can cause serious heart problems and require hospitalization. (Varma Decl. (Dkt. No. 19) at ¶ 18; COVID-19 in Children and Teens, CDC, https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/children/symptoms.html (last updated Feb. 26, 2021))

In New York City – as of December 21, 2020 – for children between the ages of 0-17, there were "19 deaths from COVID-19 . . . (16 confirmed by positive COVID-19 test and 3 probable). As of December 3, 2020, there [were] 16,947 cases of COVID-19 among children . . .

and 742 hospitalizations." (Varma Decl. (Dkt. No. 19) at ¶ 19; see also COVID-19: Data, N.Y.C. Health, https://www1.nyc.gov/site/doh/covid/covid-19-data-totals.page#deaths (last visited Mar. 1, 2021)

In New York City, as of December 5, 2020, "the average positivity rate for children between the ages of 0-4, was 7.02%, for children between the ages of 5-12 it was 6.88% and for children between the ages of 13-17 it was 8.28%." (Varma Decl. (Dkt. No. 19) at ¶ 19; see also COVID-19: Data, N.Y.C. Health, https://www1.nyc.gov/site/doh/covid/covid-19-data.page (last visited Mar. 1, 2021)) According to the American Academy of Pediatrics, as of February 25, 2021, more than 3.1 million children in the United States have tested positive, "which is 13.1% of total cumulated cases in states reporting cases by age." (See Children and COVI-19: State Level Data Report, Am. Acad. of Pediatrics, https://services.aap.org/en/pages/2019-novel-coronavirus-covid-19-infections/children-and-covid-19-state-level-data-report/ (last updated Feb. 25, 2021); see also Varma Decl. (Dkt. No. 19) at ¶ 20 (noting that "the number of new cases [in children] increased by 25% in the . . . period [between December 3 and December 17, 2020]") At least one large study has shown that while children of all ages can transmit the COVID-19 virus, transmission rates are low for children under the age of 10, whereas children over 10 may transmit COVID-19 as efficiently as adults. (Young Joon Park et al., Contact Tracing during Coronavirus Disease Outbreak, South Korea, 2020, 26 Emerging Infectious Diseases J., 2465-2468 (Oct. 2020); see also Varma Decl. (Dkt. No. 19) at ¶ 21)

B. School District Response to the Pandemic

Decisions concerning in-person classroom learning must be premised on the level of community transmission of COVID-19 and the ability to implement appropriate mitigation

measures to protect students, teachers and other staff. See K-12 Operational Strategy, CDC, https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/operation-strategy.html (last updated Feb. 26, 2021); Margaret A. Honein et al., Data and Policy to Guide Opening Schools Safely to Limit the Spread of SARS-CoV-2 Infection, J. Am. Med. Ass'n (Jan. 26, 2021), https://tinyurl.com/y6529wvf.

Here in New York City, public schools were closed to in-person learning between March 16, 2020 and October 1, 2020. See New York City to Close All School Buildings and Transition to Remote Learning, N.Y.C., Office of the Mayor (March 15, 2020), https://tinyurl.com/4um7mz6e; 2020-2021 School Year Calendar, N.Y.C. Dep't of Ed., https://www.schools.nyc.gov/about-us/news/2020-2021-school-year-calendar (last visited Mar. 1, 2021). By the fall of 2020, however, Defendants offered in-person learning as part of a hybrid learning model. (Varma Decl. (Dkt. No. 19) at ¶ 22) "Almost two-thirds of the parents of DOE students (63%), chose 100% remote learning for their children," however. (Chou Decl. (Dkt. No. 18) at ¶ 11)

In the fall, Defendants initially decided to switch to an entirely remote learning model if the seven-day average positivity rate in the City – the percent of COVID-19 laboratory tests that have a positive result – rose to 3%. (Varma Decl. (Dkt. No. 19) at ¶ 23; see also Transcript: Mayor de Blasio Holds Media Availability, N.Y.C., Office of the Mayor (Nov. 19, 2020), https://www1.nyc.gov/office-of-the-mayor/news/794-20/transcript-mayor-de-blasio-holds-media-availability (addressing the 3% standard)) Positivity rate is, of course, an important indicator of community spread. (Varma Decl. (Dkt. No. 19) at ¶ 11) As the positivity rate increases, the increase in rates of infection may move from linear to exponential growth. (Id. at ¶

23) The City reached the 3% threshold on November 18, 2020, and on November 19, 2020, public schools were closed to in-person learning. (Id.)

New York State and New York City subsequently developed protocols for school reopenings. These protocols are premised on rates of infection. (See Varma Decl. (Dkt. No. 19) ¶¶ 24-25, 30-31, 33-39) New York State has a Cluster Action Initiative – a program that "divide[s] clusters and the areas around them into three categories with successively higher restrictions within each one." Cluster Action Initiative, N.Y. State: N.Y. Forward, https://forward.ny.gov/cluster-action-initiative (last visited Mar. 1, 2021). The State program details restrictions for various activities in the color-coded zones of red, orange, and yellow. Id. For example, in the yellow zone[6] – schools can remain open with "20% weekly testing of in-person students and faculty." Id. As of January 27, 2021, the Bronx had two yellow zones, while Manhattan and Queens each had one yellow zone. See COVID-19 Zone Finder, N.Y.C., https://nycgov.maps.arcgis.com/apps/instant/lookup/index.html?appid=021940a41da04314827e2782d3d1986f (last updated Jan. 28, 2021).

DOE has developed protocols for handling classroom outbreaks of the virus. These protocols are premised on the number of confirmed cases in a classroom or school, and

[6] "A geographic area will be eligible to enter a Yellow Zone if it has a 3 percent positivity rate (7-day average) over the past 10 days and is in the top 10 percent in the state for hospital admissions per capita over the past week and is experiencing week-over-week growth in daily admissions." Cluster Action Initiative, N.Y. State: N.Y. Forward, https://forward.ny.gov/cluster-action-initiative (last visited Mar. 1, 2021). While schools in red and orange zones previously were subject to closure, they may now remain open subject to certain conditions, including random testing of in-person students, faculty and staff. Interim Guidance on COVID-19 Testing Requirements for Public and Non-Public Schools Located in Areas Designated as "Red" or "Orange" Cluster Zones Under the New York State Cluster Action Initiative, N.Y. State Dep't of Health, https://coronavirus.health.ny.gov/system/files/documents/2020/12/guidanceforschoolsinredandorangezones.pdf (last updated Dec. 4, 2020); see id. (detailing testing options).

whether the cases appear to be linked. Health and Safety, N.Y.C. Dep't of Educ., https://www.schools.nyc.gov/school-year-20-21/return-to-school-2020/health-and-safety (last visited Mar. 1, 2021). Where "[a]t least two cases" are "linked together" and come from the same classroom, that classroom – having transitioned to remote learning while the cases were being investigated – will "remain[] closed for 10 days; students and staff in close contact with positive case [will] quarantine for 10 days." Id. Where "[a]t least two cases" are "linked together" but come from "different classrooms," both classrooms will be closed during the investigation and will "remain closed and quarantined for 10 days." "Additional school members" will be "quarantined based on where the exposure" occurred. Id.

C. Defendants' PCR Random Testing Protocols

The purpose of Defendant's in-school testing program is three-fold: to determine whether the COVID-19 virus is present in the individual randomly selected for testing; to control the disease in the school population; and to monitor the prevalence of the COVID-19 virus in the school population. (Varma Decl. (Dkt. No. 19) at ¶ 46)

As discussed above, Defendants "in-school testing program uses a nucleic acid amplification test that involves a laboratory procedure known as [a] polymerase chain reaction (PCR) test." (Id. at ¶ 40; see also generally COVID-19 Testing for Students and Staff, N.Y.C. Dep't of Ed., https://www.schools.nyc.gov/school-year-20-21/return-to-school-2020/health-and-safety/covid-19-testing (last visited Mar. 1, 2021))

Students, teachers, and staff are randomly selected for testing. (Varma Decl. (Dkt. No. 19) at ¶ 52) If a child is selected for testing, parents are notified two days in advance of the test. (Id. at ¶ 56) If a student selected for testing expresses anxiety or discomfort with the test on the scheduled day of testing, the student will not be tested at that time and a parent will be

contacted. (Id. at ¶ 55) Testing is performed by trained personnel in the presence of school staff. (Id. at ¶ 53) A short nasal swab is used to collect a sample; the naso-pharyngeal swab, or "long swab," is not used. (Id. at ¶ 54) Obtaining a sample from each nostril is done within a matter of seconds and is not painful. (Id.) Parents are notified both that their child has been tested and of the results.[7] (Id. at ¶ 56; see also Jan. 14, 2021 Tr. (Dkt. No. 34) at 19-21) In the event of a positive test, the child would remain out of school and in quarantine for ten days. (See, e.g., Jan. 14, 2021 Tr. (Dkt. No. 34) at 23-24; see also Health and Safety, N.Y.C. Dep't of Ed., https://www.schools.nyc.gov/school-year-20-21/return-to-school-2020/health-and-safety ("In the event that there is a laboratory- confirmed case in a school, all students and teachers in that class are assumed close contacts and will be instructed to self-quarantine for 10 days since their last exposure to that case. . . . Whenever a student is quarantining at home, the expectation is that they continue engaging with learning remotely if they are feeling well enough.") (last visited Mar. 1, 2021); COVID-19: Understanding Quarantine and Isolation, N.Y.C. Dep't of Health https://www1.nyc.gov/assets/doh/downloads/pdf/covid/covid-19-understanding-quarantine-and-isolation.pdf (last visited Mar. 1, 2021) (explaining the difference between quarantine and isolation and that the period for both should be at least ten days from certain described start points); Feb. 22, 2021 Def. Ltr., Ex. S (Dkt. No. 44-5) at 28 (CDC guidance entitled "Operational Strategy for K-12 Schools through Phased Mitigation," noting that "[f]or students, teachers, and staff who had previously received positive test results and do not have symptoms of

[7] Results are also provided to the New York City Test & Trace Corps, which performs New York City's contact tracing program, and to the New York City Department of Health and Mental Hygiene and the New York State Department of Health. (Varma Decl. (Dkt. No. 19) at ¶ 60) "No information about the COVID-19 test results for individual students is made publicly available." (Id. at ¶ 61)

COVID-19, retesting is not recommended for up to 3 months from their last positive test result."))

Children as young as six years old may be randomly selected for testing. (See Jan. 14, 2021 Tr. (Dkt. No. 34) at 19) Testing will only be conducted on a child if parents have submitted an executed consent form. "If a parent does not provide the consent form, then the child continues with 100% remote learning." (Varma Decl. (Dkt. No. 19) at ¶ 49 (footnote omitted)) Parental consent to testing may be withdrawn at any time. (Id. at ¶ 51) Parents may seek exemption from testing requirements for medical reasons and behavioral disabilities that make testing in school unsafe. (Id. at ¶ 50; see also Chou Decl. (Dkt. No. 18) at ¶ 19)

Random testing in New York City public schools has been conducted since the fall, and beginning on December 7, 2020, the City "increase[d] the frequency of testing performed from once per month to once per week." (Varma Decl. (Dkt. No. 19) at ¶ 25; see id. at ¶ 52 ("Twenty percent (20%) of the students and staff will be tested each week.")) Accordingly, by now, a great number of children in the New York City public school system have already been tested. (Jan. 14, 2021 Tr. (Dkt. No. 34) at 20)

The in-school testing is performed "on a single day, in the school building, and by one provider," to "ensure consistency and timeliness of reporting across DOE schools" citywide. (Varma Decl. (Dkt. No. 19) at ¶ 45; see id. ("Experience has shown that when testing is performed by outside providers, such as individual doctors or urgent care offices, different tests and specimen collection procedures may be used, which can vary in accuracy and can vary substantially in the time to receive the results.")) All vendors used for the in-school testing program sign non-disclosure agreements, so as to "maintain all personally identifiable information in a secure, confidential manner." (Id. at ¶ 57)

Defendants utilize "two laboratories that provide trained teams to collect the specimens at DOE schools and analyze the specimens using an RT-PCR test." (Id. at ¶ 43) "Each laboratory has obtained an Emergency Use Authorization from the FDA to perform RT-PCR testing for COVID-19." (Id. (footnotes omitted))

Once the PCR tests are completed, the specimens are discarded. (Id. at ¶ 58; see id. ("The specimens are only tested for the virus (SARS-CoV-2) that causes COVID-19. Once the tests have been successfully completed, the specimens are discarded. No information about the DNA of the individual being tested is analyzed, stored or used during the testing. The test involves the extraction of the virus' RNA and testing using the standard, FDA authorized methods described earlier."))[8]

D. Reliability and Usefulness of the PCR Test

Plaintiffs contend that Defendants should be enjoined from requiring parental consent to random PCR testing because the PCR test is unreliable and cannot reveal whether the subject of the test is currently infectious – i.e., capable of transmitting the COVID-19 virus. (See

[8] On December 24, 2020, in Michael Kane et al. v. New York City Department of Education, Index No. 160831-2020E (N.Y. Sup. Ct.), DOE entered into a settlement agreement providing that all testing samples from Defendants' COVID-19 testing program would be destroyed. (See Varma Decl., Ex. B (Dkt. No. 19-2) at ¶ 1 ("Stipulation of Settlement and Discontinuance," in which "Respondent, New York City Department of Education . . . hereby certifies and assures that each and every vendor involved in the collection, storage and analysis of COVID-19 specimens collected in [its] schools shall destroy these specimens after completion of the testing protocols and/or after clinical reports are issued and shall not replicate or make any other use of said specimens. Such specimens may not be used for any purpose other than for the COVID-tests.")) Petitioners in Kane – parents of DOE students and DOE teachers and professional staff – sued to prevent implementation of the COVID-19 testing program unless DOE agreed that test specimens would not be used for any other purpose and would be destroyed after the test was performed. (See Jan. 23, 2021 Def. Ltr., Ex. A (Dkt. No. 37-1) (Petition)) Stephanie Denaro – a Plaintiff in the instant case – was one of the petitioners in Kane. (Id.)

Pltf. Br. (Dkt. No. 12) at 7-8, 17; Lee Decl. (Dkt. No. 12-1) at ¶¶ 17-19; McKernan Decl. (Dkt. No. 12-2) at ¶¶ 14-16; Jan. 14, 2021 Tr. (Dkt. No. 34) at 8)

There is broad consensus in the medical and scientific community that the PCR test is a reliable indicator of the presence of the COVID-19 virus in a subject. (See, e.g., Using Antigen Tests, CDC, https://www.cdc.gov/coronavirus/2019-ncov/lab/resources/antigen-tests-guidelines.html (last updated Dec. 16, 2020) ("The 'gold standard' for clinical diagnostic detection of SARS-CoV-2 remains NAATs, such as RT-PCR. Thus, it may be necessary to confirm an antigen test result with a nucleic acid amplification test, especially if the result of the antigen test is inconsistent with the clinical context."); Feb. 22, 2021 Def. Ltr., Ex S (Dkt. No. 44-5) at 3, 28 (CDC "Operational Strategy for K-12 Schools through Phased Mitigation" release,which recommends the "prioritiz[ation] [of] tests with highly accurate results with high sensitivity and specificity such as NAATs"); Jan. 23, 2021 Def. Ltr., Ex. H (Dkt. No. 37-17) at 5 (WHO interim guidance from September 11, 2020, "Diagnostic testing for SARS-CoV-2," which states that, "[w]herever possible, suspected active SARS-CoV-2 infections should be tested with NAAT, such as rRT-PCR"); Jan. 23, 2021 Def. Ltr., Ex. I (Dkt. No. 37-18) at 2-4 (FDA overview entitled "A Closer Look at Covid-19 Diagnostic Testing," which notes that molecular tests – such as NAATs – are highly sensitive and highly specific))

The Court concludes that the PCR test is highly accurate in determining the presence of the COVID-19 virus. Indeed, the PCR test is currently the best indicator of COVID-19 infection that is available for mass, routine use. (Id.; see also Test for Current Infection, CDC, https://www.cdc.gov/coronavirus/2019-ncov/testing/diagnostic-testing.html (last updated Feb. 19, 2021) ("A viral test checks specimens from your nose or your mouth (saliva) to find out if you are currently infected with SARS-CoV-2, the virus that causes COVID-19. . . . [NAATs]

detect the virus's genetic material and are commonly used in laboratories. NAATs are generally more accurate, but sometimes take longer to process than other test types.").

Plaintiffs are correct, however, in asserting that the PCR test does not reveal whether the subject is currently infectious. (See Varma Decl. (Dkt. No. 19) at ¶ 65 ("There currently is no test routinely available to determine whether individuals are infectious."); see also Lab FAQs, CDC, https://www.cdc.gov/coronavirus/2019-ncov/lab/faqs.html (last updated Feb. 25, 2021) (responding to the question, "[c]an a diagnostic RT-PCR test show how infectious someone is," and providing the answer "No. RT-PCR tests are used to identify and diagnose an active infection but cannot be used to show how infectious someone is.")) The PCR test merely indicates whether genetic material of the virus is then present in the subject. See COVID-19 diagnostic testing, Mayo Clinic, https://www.mayoclinic.org/tests-procedures/covid-19-diagnostic-test/about/pac-20488900 (last visited Mar. 1, 2021) (noting that PCR tests "detect[] genetic material of the virus").

Plaintiffs argue that it is "absurd" to require a student who has received a positive test to be quarantined, when the student may not be capable of transmitting the virus to someone else. (Ptf. Br. (Dkt. No. 12) at 8-9; Lee Decl. (Dkt. No. 12-1) at ¶ 22-24; McKernan Decl. (Dkt. No. 12-2) at ¶¶ 15, 18; Jan. 14, 2021 Tr. (Dkt. No. 34) at 32)

In an ideal world – which this assuredly is not – a test for current infectiousness would be readily available. Defendants have asserted, however – without contradiction from Plaintiffs – that "[t]here currently is no test routinely available to determine whether individuals are infectious; to make that assessment, laboratories must perform a challenging procedure known as viral culture, which requires highly specialized biocontainment facilities that are largely restricted to federal government or academic research laboratories." (Def. Br. (Dkt. No.

17) at 13; see also Varma Decl. (Dkt. No. 19) at ¶¶ 62-65; Jan. 23, 2021 Def. Ltr. (Dkt. No. 37) at 2) In a world in which no test is readily available for current infectiousness, a test that reliably indicates the presence of the COVID-19 virus is of great value.

Plaintiff's declarations to the contrary – from Dr. Lee and Keven McKernan – are not persuasive. As discussed above, there is a scientific consensus that the PCR test is highly accurate for purposes of determining the presence of the COVID-19 virus. Indeed, the CDC, the WHO, and public health organizations throughout the world rely on the PCR test to diagnose the presence of the virus. (See, e.g., Jan. 23, 2021 Def. Ltr., Ex. E (Dkt. No. 37-14) at 2 (CDC "Interim Considerations for Testing K-12 School Administrators and Public Health Officials" release; describing molecular testing – such as the PCR test – as the "gold standard" for detecting COVID-19); Jan. 23, 2021 Def. Ltr., Ex. F (Dkt. No. 37-15) at 1 (ECDC "Diagnostic Testing and Screening for COVID-19" release; describing the PCR test as the "gold standard" "for diagnosing suspected cases of COVID-19"))

Moreover, as Plaintiffs conceded at oral argument, their claim that the NIH has stated that the PCR test is unreliable is false. (Jan. 14, 2021 Tr. (Dkt. No. 34) at 12-13)[9] While it is true that the PCR test cannot determine whether an individual is currently infectious, Defendants have asserted that no such test is now available for mass use. (Varma Decl. (Dkt. No. 19) at ¶ 65) Plaintiffs could not refute this assertion at oral argument, and stated that they would address it in a subsequent written submission. (Jan. 14, 2021 Tr. (Dkt. No. 34) at 9-11) Although Plaintiffs have made several submissions since oral argument (Jan. 15, 2021 Pltf. Ltr.

[9] At oral argument, Plaintiffs conceded that in their brief and in the Amended Complaint (see Am. Cmplt., Ex. 20 (Dkt. No. 11-2); Pltf. Br. (Dkt. No. 12) at 10) – they improperly cited a letter to the editor of a medical journal as proof that the NIH had determined that the PCR test is unreliable. (Jan. 14, 2021 Tr. (Dkt. No. 34) at 13 ("Your Honor, that may be the weakest part of our argument and I do apologize for making it."))

(Dkt. No. 33); Jan. 23, 2021 Pltf. Ltr. (Dkt. No. 38); Feb. 17, 2021 Pltf. Ltr. (Dkt. No. 42); Feb. 22, 2021 Pltf. Ltr. (Dkt. No. 45)), none have addressed the availability of a test to determine infectiousness.

As to Dr. Lee's "Sanger sequencing" test, as Plaintiffs acknowledged at oral argument, no public health authority has adopted that test. (Jan. 14, 2021 Tr. (Dkt. No. 34) at 9-10) Finally, Dr. Lee's suggestion that testing labs are manipulating PCR tests to increase the number of positive tests (Lee Decl. (Dkt. No. 12-1) at ¶ 20) is rank speculation.[10]

As to Kevin McKernan, he lacks the medical and scientific background necessary to offer an informed opinion about the issues raised in this action. And as with Dr. Lee, McKernan provides no evidence suggesting that Defendants have incorrectly asserted that there is no practical way – on a mass basis – to test for infectiousness. The alternatives to random testing offered by McKernan are implausible on their face. For example, he recommends "temperature testing," and a policy requiring that symptomatic individuals stay home. (McKernan Decl. (Dkt. No. 12-2) at ¶¶ 34-35) But given that as many as 45% of infected individuals are asymptomatic (Berkeley Lovelace Jr., Dr. Anthony Fauci says WHO's remark on asymptomatic coronavirus spread 'was not correct', CNBC, https://www.cnbc.com/2020/06/10/dr-anthony-fauci-says-whos-remark-on-asymptomatic-coronavirus-spread-was-not-correct.html (updated June 10, 2020) (quoting Dr. Fauci as saying, "'In fact, the evidence we have given the percentage of people, which is about 25% [to] 45%, of the totality of infected people likely are without symptoms . . . [a]nd we know from epidemiological studies that they can transmit to someone who is uninfected even when they are

[10] Dr. Lee's recent unsuccessful litigation against the CDC – which involved a variant of his sequencing technology – and his unhappiness about the CDC's failure to respond to his proposal to perform COVID-19 tests for the agency, provide further reasons to distrust his opinions here.

without symptoms.'")), McKernan's assertion that an approach premised on "temperature testing" of symptomatic individuals is all that is necessary to control the virus in the public schools is deeply flawed. Indeed, implementation of McKernan's suggested approach would be reckless. Finally, as to McKernan's complaint that Defendants destroy PCR test samples (McKernan Decl. (Dkt. No. 12-2) at ¶ 23), this policy is the result of the Kane action – discussed above – in which one of the Plaintiffs in the instant case successfully sued to require Defendants to destroy test specimens. (See Jan. 23, 2021 Def. Ltr., Ex. A (Dkt. No. 37-1) (Kane petition))

* * * *

The Court concludes that a phased reopening of public schools in New York City is appropriate in light of the havoc wreaked by the COVID-19 virus and the medical and scientific evidence discussed above. With respect to Defendants' requirement that parents consent to random COVID-19 testing of their children – as a prerequisite to in-person learning – the Court finds that (1) children are at risk from the COVID-19 virus; (2) children are capable of transmitting the COVID-19 virus; and (3) Defendants' testing program is an important safeguard – together with masking, social distancing, proper ventilation, appropriate sanitation, and other measures – to help ensure a safe classroom environment. The testing program helps ensure the safety of the health of the children tested, their families and friends, their classmates, their classmates' family and friends, teachers and school staff, as well as the larger community. While a test that could determine infectiousness would be preferable, no such test is currently available that could be administered on a mass, routine basis.

II. LEGAL RULINGS

A. Whether All Plaintiffs Have Standing

"Article III of the Constitution limits federal courts to deciding 'Cases' and 'Controversies.' For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue." Dep't of Com. v. New York, 139 S. Ct. 2551, 2565 (2019). To have Article III standing, "a plaintiff must [1] 'present an injury that is concrete, particularized, and actual or imminent; [2] fairly traceable to the defendant's challenged behavior; and [3] likely to be redressed by a favorable ruling.'" Id. (citation omitted).

> At the preliminary injunction stage, "a plaintiff's burden to demonstrate standing will normally be no less than that required on a motion for summary judgment. Accordingly, to establish standing for a preliminary injunction, a plaintiff cannot rest on . . . mere allegations . . . but must set forth by affidavit or other evidence specific facts" that establish the "three familiar elements of standing[.]"

New York v. United States Dep't of Homeland Sec., 969 F.3d 42, 59 (2d Cir. 2020) (quoting Cacchillo v. Insmed, Inc., 638 F.3d 401, 404 (2d Cir. 2011)).

Here, Defendants argue that Plaintiffs La Mazza and Children's Health Defense do not have standing. (Def. Br. (Dkt. No. 17) at 14)

As to Plaintiff La Mazza – who is the parent of a fourth grader (see La Mazza Decl. (Dkt. No. 12-5) at ¶ 1) – Defendants point out that he, like 63% of parents of children in New York City public schools, chose remote learning for his child at the outset of the school year. (Def Br. (Dkt. No. 17) at 15; see also Chou Decl. (Dkt. No. 18) ¶¶ 11-12) Accordingly, public school closures, re-openings, and random testing requirements do not apply to La Mazza's son, who has received and will continue to receive 100% remote learning. (Id.) Plaintiffs have not responded to Defendants' arguments concerning La Mazza's lack of standing. (See Pltf. Reply Br. (Dkt. No. 23))

Plaintiffs' moving papers include a declaration from La Mazza, however, in which he complains that "[t]he City of New York is requiring me to sign a [consent] to mandatory PCR testing for my son R.L., otherwise they will not let my son in school. I refused to sign the consent form and my son R.L. was kicked out of P.S. 14." (La Mazza Decl. (Dkt. No. 12-5) at ¶¶ 6-7)

La Mazza and the other Plaintiffs have alleged that Defendants' random testing program and the denial of in-person learning to those children whose parents refuse to provide consent to the testing program, violates numerous constitutional rights. (See generally Pltf. Br. (Dkt. No. 12)) The Court concludes that, given these circumstances, La Mazza has standing to pursue his claims. Dep't of Commerce, 139 S.Ct. at 2565.

As to Plaintiff Children's Health Defense,

> [t]o bring a Section 1983 suit on behalf of its members, an organization must clear two hurdles. First, it must show that the violation of its members' rights has caused the organization to suffer an injury independent of that suffered by its members. Second, it must 'demonstrat[e] a close relation to the injured third part[ies],' and 'a hindrance' to those parties' 'ability to protect [their] own interests.'"

N.Y. State Citizens' Coal. for Child. v. Poole, 922 F.3d 69, 74 (2d Cir. 2019) (citations omitted).

Children's Health Defense has not met the first hurdle. The Amended Complaint contains no allegations suggesting that Children's Health Defense has suffered an injury as a result of the challenged conduct. While the Amended Complaint states that the organization's "mission is to safeguard children's health and to advocate for children," (Am. Cmplt. (Dkt. No. 11) at ¶ 52) and that it "has active members in New York City, including parents of children named in this lawsuit," (id. at ¶ 54) these allegations do not suffice to demonstrate standing.

"[O]rganizations suing under Section 1983 must, without relying on their members' injuries, assert that their own injuries are sufficient to satisfy Article III's standing

requirements." Poole, 922 F.3d at 74-75. Accordingly, "an organization must show that it has suffered a 'perceptible impairment' to its activities. This showing can be met by identifying 'some perceptible opportunity cost' that the organization has incurred because of the violation of its members' rights." Id. at 75 (citations omitted).

Here, Children's Health Defense asserts in its brief that its "staff and volunteers have spent hundreds of hours studying and responding to questions from members, including Plaintiff Aviles, about Defendants' PCR testing regime and school closures." (Pltf. Reply Br. (Dkt. No. 23) at 15). This assertion in a brief – unsupported by factual allegations in the Amended Complaint or in a declaration – is not sufficient. See United States Dep't of Homeland Sec., 969 F.3d at 59. The Court concludes that Children's Health Defense has not demonstrated that it has standing to pursue its claims.

B. Whether Plaintiffs' Claims Are Moot

As discussed at the outset, there are two prongs to Plaintiffs' claims. They contend that (1) all public schools should be reopened; and (2) Defendants should be enjoined from requiring parental consent for random COVID-19 testing as a condition to in-person instruction. Given that (1) the individual Plaintiffs are parents of elementary and middle school students (Am. Cmplt. (Dkt. No. 11) at ¶¶ 45-50; see also Aviles Decl. (Dkt. No. 12-3); Kalikazaros Decl. (Dkt. No. 12-4); La Mazza Decl. (Dkt. No. 12-5); Lia Decl. (Dkt. No. 12-6); Denaro Decl. (Dkt. No. 12-7)); and (2) Defendants have previously announced the reopening of elementary schools, and reopened middle schools on February 25, 2021, Plaintiffs' claims regarding the reopening of schools are moot.

"A case becomes moot when interim relief or events have eradicated the effects of the defendant's act or omission, and there is no reasonable expectation that the alleged violation

will recur." Irish Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 647 (2d Cir. 1998); see also Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992) (discussing mootness and noting that dismissal is appropriate "if an event occurs while a case is pending . . . that makes it impossible for the court to grant any effectual relief" (citation and quotation marks omitted)).

New York City's elementary schools – and special education schools – were reopened for in-person learning by December 10, 2020 (Varma Decl. (Dkt. No. 19) at ¶ 25), and middle schools were reopened on February 25, 2021. (Def. Feb. 22, 2021 Ltr., Ex. R (Dkt. No. 44-4) at 1) Because Plaintiffs' children are elementary and middle school students (see Aviles Decl. (Dkt. No. 12-3); Kalikazaros Decl. (Dkt. No. 12-4); La Mazza Decl. (Dkt. No. 12-5); Lia Decl. (Dkt. No. 12-6); Denaro Decl. (Dkt. No. 12-7)), an order from this Court directing that the New York City public schools be reopened would have no effect on them. See Church of Scientology, 506 U.S. at 12. Accordingly, as to this issue, Plaintiffs' claims are moot.

There is a "narrow exception" to the mootness doctrine that applies where a dispute "is capable of repetition, yet evading review." Altman v. Bedford Ctr. Sch. Dist., 245 F.3d 49, 71 (2d Cir. 2001) (citation and quotation marks omitted); see id. ("A narrow exception to the principle that a moot claim is to be dismissed, available only in exceptional situations, is that the court may adjudicate a claim that, though technically moot, is capable of repetition, yet evading review." (citations and quotation marks omitted)). This exception

> applies only in exceptional situations, where the following two circumstances are simultaneously present: (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.

Spencer v. Kemna, 523 U.S. 1, 17 (1998) (citations, quotation marks, and alteration marks omitted).

Here, Plaintiffs' claims regarding the reopening of the public schools satisfy neither requirement. The challenged actions have not been of short duration. Indeed, the middle schools were closed for several months. Moreover, it would be speculative for this Court to find that Defendants will again close elementary and middle schools for in-person learning. Accordingly, the individual Plaintiffs' claims regarding the reopening of public schools are moot.

C. Whether Plaintiffs Have Demonstrated a Right to Injunctive Relief

1. Legal Standards

"When a preliminary injunction will affect government action taken in the public interest pursuant to a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." Agudath Israel of Am. v. Cuomo, 983 F.3d 620, 631 (2d Cir. 2020) (citation and quotation marks omitted). Moreover, where – as here –

> the movant is seeking to modify the status quo by virtue of a "mandatory preliminary injunction" (as opposed to seeking a "prohibitory preliminary injunction" to maintain the status quo), or where the injunction being sought "will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits," the movant must also: (1) make a "strong showing" of irreparable harm, and (2) demonstrate a "clear or substantial likelihood of success on the merits."

Yang v. Kosinski, 960 F.3d 119, 127-28 (2d Cir. 2020) (footnotes omitted) (emphasis in original); see also New York v. United States Dep't of Educ., 477 F. Supp. 3d 279, 293 (S.D.N.Y. 2020) ("A preliminary injunction is one of the most drastic tools in the arsenal

of judicial remedies. . . . When the moving party seeks an injunction that will affect government action taken pursuant to a regulatory scheme, the plaintiffs must establish a clear or substantial likelihood of success on the merits." (citations and quotation marks omitted)).

2. Likelihood of Success

a. Due Process Claims

Plaintiffs allege that they and "their children have a fundamental right to a basic, minimum education . . . and [a] fundamental right to literacy." (Pltf. Br. (Dkt. No. 12) at 22) According to Plaintiffs, Defendants have deprived them and their children "of the right to direct education in violation of the Fourteenth Amendment, by effectively precluding children from receiving education and literacy[,] because (1) many students have no or limited access to the internet; (2) remote learning is demonstrably inferior; and (3) truancy demonstrably results in such circumstances." (Id. at 17 (citing Am. Cmplt., Ex. 17 (Dkt. No. 11-2) (McKinsey Report entitled "COVID-19 and student learning in the United States: The hurt could last a lifetime")); see id. at 22)

i. Substantive Due Process

"[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." Bryant v. N.Y. State Educ. Dep't, 692 F.3d 202, 217 (2d Cir. 2012) (citation and quotation marks omitted). To determine "whether a government rule or regulation infringes a substantive due process right, the first step is to determine whether the asserted right is fundamental, – i.e., implicit in the concept of ordered liberty, or deeply rooted in this Nation's history and tradition." Id. (citation and quotation marks omitted).

In Bryant, the Second Circuit held that "[t]he right to public education is not fundamental." Bryant, 692 F.3d at 217 (citing Handberry v. Thompson, 446 F.3d 335, 352 (2d Cir. 2006)). Moreover, neither the Supreme Court nor the Second Circuit has found that there is a fundamental right to literacy.

Where, as here, "the right [allegedly] infringed is not fundamental, the governmental regulation need only be reasonably related to a legitimate state objective." Id. (citation and quotation marks omitted). As the Second Circuit recognized, that is a "low threshold." Id. at 218.

Here, the Court has determined that Defendants' testing regime is reasonably related to a legitimate state objective – curbing the spread of the COVID-19 virus. The Second Circuit has acknowledged that "stemming the spread of COVID-19 is unquestionably a compelling [governmental] interest." Agudath, 983 F.3d at 633 (citation, quotation marks, and alteration marks omitted). Moreover, remote learning is offered to those students whose parents refuse to consent to random testing. Given these circumstances, the Court concludes that Plaintiffs have not demonstrated that they are likely to prevail on their substantive due process claim. See Bryant, 692 F.3d at 217-18; Brach v. Newsom, No. 2:20-cv-06472-SVW-AFM, 2020 WL 6036764, at *1, 4-5 (C.D. Cal. Aug. 21, 2020) (denying temporary restraining order "seeking to enjoin the enforcement of California's school reopening framework, which prohibit[ed] in-person education in counties on a statewide COVID-19 monitoring list"; finding that there is no fundamental right to education and that plaintiffs were "unlikely to succeed on the merits of their substantive due process claim"; noting that "federal courts should exercise restraint" in areas such as public education, that are generally in "the control of state and local authorities" (citations and quotation marks omitted)).

ii. Procedural Due Process

Plaintiffs contend that they have been deprived of a property right without due process. (Pltf. Reply Br. (Dkt. No. 23) at 8-9)

"A procedural due process claim is composed of two elements: (1) the existence of a property or liberty interest that was deprived and (2) deprivation of that interest without due process." Bryant, 692 F.3d at 218. "To prevail on a procedural due process claim, the plaintiff must demonstrate: (1) that the plaintiff possessed a constitutionally protected interest, (2) that such interest was deprived as a result of government action, (3) and that the deprivation occurred without constitutionally adequate pre- or post-deprivation process." D.C. by Conley v. Copiague Union Free Sch. Dist., No. 16-cv-4546 (SJF) (AYS), 2017 WL 3017189, at *8 (E.D.N.Y. July 11, 2017) (citation and quotation marks omitted).

The Supreme Court has acknowledged that where, based on state law, citizens have "legitimate claims of entitlement to a public education," "a student's legitimate entitlement to a public education [is] a property interest which is protected by the Due Process Clause." Goss v. Lopez, 419 U.S. 565, 573-74 (1975). The Second Circuit has made clear, however, that there is no "property interest in any particular type of education program or treatment." Bryant, 692 F.3d at 218; see id. (rejecting a procedural due process claim where the challenged policy did "not prevent . . . children from obtaining a public education, even if, as Plaintiffs allege, these children would receive a better education if aversive interventions were permitted") (emphasis in original). Accordingly, "a student's procedural due process rights with respect to his or her education only arise where the student 'is excluded from the entire educational process.'" D.C. by Conley, 2017 WL 3017189, at *9 (citation omitted).

Here, Plaintiffs have not shown that they are likely to prevail on their procedural due process claim, because their children have not been "'excluded from the entire educational process.'" Id. (citation omitted). Under Defendants' protocols, "[a]ll students who are temporarily unable to obtain in-person instruction . . . are switched to 100% remote learning." (Varma Decl. (Dkt. No. 19) at ¶ 33) Any argument that Plaintiffs' children would receive a better education in an in-person environment is not sufficient, under Bryant, to make out a procedural due process claim. Bryant, 692 F.3d at 218.[11]

b. Equal Protection Claim

The "Equal Protection Clause requires that the government treat all similarly situated people alike." Harlen Assocs. v. Inc. Vill. of Mineola, 273 F.3d 494, 499 (2d Cir. 2001).

> Although the prototypical equal protection claim involves discrimination against people based on their membership in a vulnerable class, [the Second Circuit] ha[s] long recognized that the equal protection guarantee also extends to individuals who allege no specific class membership but are nonetheless subjected to invidious discrimination at the hands of government officials.

Id.; see also Lopes v. Westchester Cnty., No. 18-CV-8205 (KMK), 2020 WL 7029002, at *7 (S.D.N.Y. Nov. 30, 2020) ("Where . . . a plaintiff does not claim to be a member of a constitutionally protected class, he may bring an [e]qual [p]rotection claim pursuant to one of two theories: (1) selective enforcement, or (2) class of one.") (citations and quotation marks omitted)); Vaher v. Town of Orangetown, N.Y., 916 F. Supp. 2d 404, 433 (S.D.N.Y. 2013) (same).

[11] Plaintiffs' complaint that Defendants' "destruction [of test specimens] makes it impossible for Plaintiffs to be heard to contest PCR findings" (Pltf. Reply Br. (Dkt. No. 23) at 9) does not change the result. Whether a child receives a positive or negative test result, no child "'is excluded from the entire educational process.'" D.C. by Conley, 2017 WL 3017189, at *9 (citation omitted).

Plaintiffs contend that Defendants have violated their rights to equal protection. (Pltf. Br. (Dkt. No. 12) at 21) Acknowledging the applicability of rational basis review – which requires merely a "rational relationship to some legitimate end" (see id.) – Plaintiffs argue that "Defendants have not proven the rationality of school exclusions and forced medical testing." (Id. at 22) In their reply brief, Plaintiffs go on to allege that "Defendants' actions have a disparate impact on Black and Hispanic children." (Pltf. Reply Br. (Dkt. No. 23) at 10; see also Jan. 15, 2021 Pltf. Ltr. (Dkt. No. 33) at 5)

Plaintiffs' papers are devoid of any allegations regarding classifications, and their conclusory allegations as to the disparate impact of Defendants' actions and policies on Black and Hispanic children (see Pltf. Br. (Dkt. No. 12) at 8; Pltf. Reply Br. (Dkt. No. 23) at 10) are not sufficient to state an equal protection claim under either a "class of one" theory or a selective-enforcement theory. See Vaher, 916 F. Supp. 2d at 433.

The actions Plaintiffs challenge have applied across-the-board to all New York City public school children. The only classifications have been by grade-level or special needs. Moreover, as discussed above, Defendants' actions are reasonably and rationally related to the legitimate objective of curbing the spread of the COVID-19 virus. Accordingly, Plaintiffs have not demonstrated a likelihood of success on their equal protection claim. See Brach, 2020 WL 6036764, at *7 (rejecting plaintiffs' equal protection claim; noting that "[t]he Equal Protection Clause simply does not require that government classifications be supported by scientific consensus – or even the most reliable scientific evidence. '[R]ational-basis review allows for decisions "based on rational speculation unsupported by evidence or empirical data."'" (citation omitted)).

c. Parental Rights Claims

Plaintiffs contend that "[p]arents have a fundamental right to direct the care and upbringing of their children, and medical decisions fall squarely within that liberty interest." (Pltf. Br. (Dkt. No. 12) at 19) "Allowing unknown persons with unknown qualifications, at unspecified intervals, to give children intrusive medical tests is a cause of great concern to parents." (Id. at 20) Plaintiffs further argue that they have a "fundamental right to direct the education of their children and choose the type of education that they think is best." (Id.)

The Supreme Court has "recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000). As to a child's education, however, Supreme Court jurisprudence does "not begin to suggest the existence of a fundamental right of every parent to tell a public school what his or her child will and will not be taught." Leebaert v. Harrington, 332 F.3d 134, 141 (2d Cir. 2003). And while the Second Circuit has acknowledged that "[p]arents . . . have a liberty interest . . . in the upbringing of their children," and "definite rights over their children's education, 'they have no constitutional right to provide their children with . . . education unfettered by reasonable government regulation.'" Immediato v. Rye Neck Sch. Dist., 73 F.3d 454, 461 (2d Cir. 1996) (citation omitted) (emphasis in original).

Here, the Court concludes that there is no fundamental parental right to dictate to a school district – in the midst of a global pandemic the likes of which has not been seen in more than a hundred years – whether classes should be conducted remotely or in-person. For reasons already stated, the Court finds that Defendants' actions have been reasonable under the circumstances. As the Brach court noted,

> the manner of providing public education is "generally committed to the control of state and local authorities." [Fields v. Palmdale Sch. Dist., 427 F.3d 1197,

> 1206 (9th Cir. 2005)] Plaintiffs' proposed constitutional right would at least unsettle "local autonomy" in public education, which the Supreme Court has described as "a vital national tradition." Missouri v. Jenkins, 515 U.S. 70, 99 (1995) (citation omitted); see also Horne v. Flores, 557 U.S. 433, 448 (2009) (internal citations omitted) (noting that federal courts should exercise restraint in imposing injunctions "involv[ing] areas of core state responsibility, such as public education").

Brach, 2020 WL 6036764, at *5.

As to Plaintiffs' challenge to Defendants' random testing program, it is undisputed that parents have a right to make medical decisions for their children. See, e.g., Parham v. J.R., 442 U.S. 584, 604 (1979) ("The fact that a child may balk at hospitalization or complain about a parental refusal to provide cosmetic surgery does not diminish the parents' authority to decide what is best for the child."). But that right is not absolute. See, e.g., Phillips v. City of New York, 775 F.3d 538, 542-43 (2d Cir. 2015) (per curiam) (rejecting plaintiffs' claim "that New York's mandatory vaccination requirement violates substantive due process" as "foreclosed" by Supreme Court precedent holding that "mandatory vaccination [is] within the State's police power"); see also van Emrik v. Chemung Cnty. Dep't of Soc. Servs., 911 F.2d 863, 866-68 (2d Cir. 1990) (state caseworker arranged for a child to receive x-ray examination but did not obtain parental consent; court concluded that such action was not permissible "unless a judicial officer has determined, upon notice to the parents and an opportunity to be heard, that grounds for such an examination exist and that the administration of the procedure is reasonable under all the circumstances").

Here, Defendants' protocols require parental consent before a COVID-19 test can be administered to a student. (Varma Decl. (Dkt. No. 19) at ¶ 49) Should parents refuse to sign the consent form, their child will receive remote learning from their school. (Id.) Accordingly, no school official will perform medical tests on a child without parental consent. Moreover, those parents who provide written consent are given notice of the intent to test their child, and

are allowed to retract their consent at any time. (Id. at ¶¶ 51, 56) Also, any child for whom parental consent has been provided but who is nonetheless uncomfortable with the test can state as much and will not be tested. (Id. at ¶ 55; see also id. at ¶¶ 50-56)

Given these circumstances and safeguards, this Court concludes that Plaintiffs have not demonstrated a likelihood of success on their parental rights claims.

d. Unlawful Search and Privacy Claims

Plaintiffs assert that Defendants' random testing program constitutes an unreasonable search and seizure under the Fourth Amendment. (Pltf. Br. (Dkt. No. 12) at 16) According to Plaintiffs, "[a] nasal swab . . . requires a warrant in the absence of voluntary informed consent." (Pltf. Reply Br. (Dkt. No. 23) at 11)

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The Fourth Amendment's guarantee has been extended "to searches and seizures by state officers, including public school officials." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995) (citations omitted).

For purposes of analyzing Plaintiffs' Fourth Amendment claim, this Court assumes that Defendants' nasal swab random testing program constitutes a search.

In Vernonia School District 47J, the Supreme Court considered a school district's "Student Athlete Drug Policy . . . [that] authorize[d] random urinalysis drug testing of students who participate[d] in the District's school athletics programs." 515 U.S. at 648. "Students wishing to play sports [had to] sign a form consenting to the testing and [had to] obtain the written consent of their parents." Id. at 650. Previously, the Supreme Court had "held that state-compelled collection and testing of urine" constituted a search "subject to the demands of the

Fourth Amendment." Id. at 652 (citation omitted). Accordingly, the Supreme Court assessed the school district's random drug testing program by applying the "ultimate measure [for determining] the constitutionality of a governmental search" – "'reasonableness.'" Id.

In determining whether the school district's drug testing program was reasonable, the Supreme Court balanced the search's "intrusion on the individual's Fourth Amendment interests against [the search's] promotion of legitimate governmental interests." Id. at 653 (citation and quotation marks omitted). The Court noted that although searches to "discover criminal wrongdoing" "generally require[]" a "judicial warrant" to be reasonable – and a showing of probable cause – "[a] search unsupported by probable cause [and a warrant] can be constitutional" where "'special needs'" are present. Id. (citation omitted); see also Cassidy v. Chertoff, 471 F.3d 67, 74-75 (2d Cir. 2006) (collecting cases upholding "warrantless, suspicionless searches in a variety of circumstances in which the government's actions were motivated by 'special needs'").

The Supreme Court has "found such 'special needs' to exist in the public school context." Vernonia Sch. Dist., 515 U.S. at 653. In determining whether "special needs" are present, courts should consider (1) "the nature of the privacy interest upon which the search . . . at issue intrudes," id. at 654; (2) "the character of the intrusion that is complained of," id. at 658; and (3) "the nature and immediacy of the governmental concern at issue, and the efficacy of [the] means for meeting [that concern]." Id. at 660; see also Cassidy, 471 F.3d at 75 (same).

As to the first factor – the nature of the privacy interest intruded upon – the Supreme Court noted that

> Fourth Amendment rights . . . are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations,

> and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools "provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels." Committee on School Health, American Academy of Pediatrics, School Health: A Guide for Health Professionals 2 (1987). In the 1991-1992 school year, all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio. U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991–1992, p. 1. Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." [New Jersey v. T.L.O., 469 U.S. 325, 348 (1985) (Powell, J., concurring).

Id. at 656-57.

Accordingly, "while children . . . do not shed their constitutional rights . . . at the schoolhouse gate," their rights are nonetheless different in the schoolhouse. Id. at 656 (citation and quotation marks omitted).

Here, New York City public school children and their parents have been presented with the following options: (1) sign a consent form for in-school COVID-19 testing and receive in-person instruction; or (2) do not sign the consent form and receive remote-learning instruction. (Varma Decl. (Dkt. No. 19) ¶ 49)

As to the first factor of the Vernonia School District analysis – "the nature of the privacy interest upon which the search . . . intrudes," 515 U.S. at 654 – Defendants' random testing program involves a medical examination or procedure. As discussed above, parents are generally responsible for making medical decisions concerning their child. As in Vernonia School District, however, the nasal swab test has been designed for the student's "own good and that of their classmates." Id. at 656. The nasal swab test also takes place "'within the school environment [where students] have a lesser expectation of privacy than members of the population generally.'" Id. at 657 (citation omitted). And as in Vernonia School District,

Defendants' testing program is premised on parental consent – consent that may be withdrawn at any time. (Id. at 650; see also Varma Decl. (Dkt. No. 19) ¶¶ 49-51)

As to the second factor – "the character of the intrusion that is complained of" – the Court finds that the intrusion is minimal in nature. The testing program involves use of a short nasal swab; the test is performed in a matter of seconds; is not painful; and does not involve "[a body part or] function traditionally shielded by great privacy." See id. at 685 (citation and quotation marks omitted). As discussed above, parental consent is required for testing; a parent may seek exemption from testing; parents are given two-days' notice of the test; and no child will be tested against their will. (Varma Decl. (Dkt. No. 19) ¶¶ 49-50, 55-56) As to confidentiality, access to individual test results is tightly restricted, and specimens are destroyed after testing is completed. (Id. ¶¶ 57-61)

The third Vernonia School District factor is "the nature and immediacy of the governmental concern at issue, and the efficacy of [the] means for meeting [that concern]." 515 U.S. at 660. Here, "the nature and immediacy of the governmental concern" could hardly be more compelling. The random testing program is designed to control the spread of the COVID-19 virus in schools and in the larger community.[12] (See Varma Decl. (Dkt. No. 19) ¶¶ 5-21, 44, 46) Moreover, in such circumstances, public officials are not required to demonstrate that the search at issue is the "'least intrusive'" means available. Vernonia School Dist., 515 U.S. at 663 (citation omitted). Indeed, the Supreme Court stressed in Vernonia School District that it has

[12] Although the governmental interest here is compelling, in Vernonia School District, the Supreme Court instructed that public officials are not required to demonstrate a "compelling" interest in the Fourth Amendment context. 515 U.S. at 661. Instead, the appropriate inquiry is whether the governmental interest is "important enough to justify the particular search at hand." Id. (emphasis in original). The circumstances of the COVID-19 pandemic are "important enough" to justify the administration of the random nasal swab test in the New York City public schools.

"repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." Id. (citation omitted).

As to the efficacy of the random testing program to detect the presence of the COVID-19 virus in the schools, as this Court has found, Defendants' PCR test is the most reliable tool currently available for this purpose. While the PCR test does not reveal infectiousness, as this Court has explained, no such test can be made widely available at this time.

Having considered all of the Vernonia School District factors, the Court concludes that they demonstrate that Defendants' random testing program is reasonable. Accordingly, Plaintiffs' have not shown a likelihood of success on their Fourth Amendment and privacy claims.

e. Unconstitutional Conditions Doctrine

Plaintiffs contend that Defendants' random testing program violates the unconstitutional conditions doctrine. (Pltf. Br. (Dkt. No. 12) at 21)

> Pursuant to [the] "unconstitutional conditions" doctrine, . . . 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 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 (2013).

Contrary to Plaintiffs' claim, access to a public school education may be conditioned on parental consent to various medical tests and procedures. For example, it is well established that a state may require vaccination as a condition to attending public school. See, e.g., Zucht v. King, 260 U.S. 174, 176 (1922) (stating that it is "settled that it is within the police

power of a state to provide for compulsory vaccination"); Phillips, 775 F.3d at 540, 543 (rejecting parents' challenge to New York state requirement that all children be vaccinated in order to attend public school; "New York could constitutionally require that all children be vaccinated in order to attend public school. New York law goes beyond what the Constitution requires by allowing an exemption for parents with genuine and sincere religious beliefs. Because the State could bar [the] . . . children from school altogether, a fortiori, the State's more limited exclusion during an outbreak of a vaccine-preventable disease is clearly constitutional."); Whitlow v. California, 203 F. Supp. 3d 1079, 1091 (S.D. Cal. 2016) ("conditioning school enrollment on vaccination has long been accepted by the courts as a permissible way for States to innoculate large numbers of young people and prevent the spread of contagious diseases").

While Defendants' random COVID-19 testing program is (1) not a vaccination, and (2) is administered pursuant to an Emergency Use Authorization,[13] there are significant parallels between the testing and vaccination programs. For example, both programs are administered in the school environment, are designed to curb the spread of disease, and offer parents an opportunity to seek an exemption. The nasal swab testing program places significantly less serious burdens on parents and children, however, because (1) it is premised on parental consent, and remote learning is offered to those children whose parents do not consent; and (2) unlike vaccines, the nasal swab test presents little to no risk of serious side effects.

This Court concludes that Plaintiffs have not demonstrated that they are likely to prevail on their unconstitutional conditions doctrine claim.

* * * *

[13] Plaintiffs contend that PCR tests are Emergency Use Authorization products, and that use of such products cannot be made mandatory. (Pltf. Br. (Dkt. No. 33) at 2 (citing 21 U.S.C. §360bbb-3)) As discussed above, Defendants' random testing program is premised on parental consent. (Varma Decl. (Dkt. No. 19) at ¶ 49)

Because Plaintiffs have not demonstrated a likelihood of success on any of their claims, their application for a preliminary injunction will be denied.[14]

CONCLUSION

For the reasons stated above, Plaintiffs' motion for a preliminary injunction (Dkt. No. 12) is denied. The Clerk of Court is directed to terminate the motion (Dkt. No. 12).

Plaintiffs will submit a letter to this Court by **March 9, 2021** setting forth how they wish to proceed in light of this Opinion.

Dated: New York, New York
March 2, 2021

SO ORDERED.

Paul G. Gardephe
United States District Judge

[14] Plaintiffs' motion for judicial notice (Dkt. No. 13) is denied as moot. The Federal Rules of Evidence do not apply to Plaintiffs' motion, see Mullins v. City of New York, 626 F.3d 47, 52 (2d Cir. 2010); Gov't Emps. Ins. Co. v. Wellmart RX, Inc., 435 F. Supp. 3d 443, 455 (E.D.N.Y. 2020); Zeneca Inc. v. Eli Lilly & Co., No. 99 CIV. 1452 (JGK), 1999 WL 509471, at *2 (S.D.N.Y. July 19, 1999), and the Court has considered all of the documents submitted by the parties in rendering its decision. The Clerk of Court will terminate the motion (Dkt. No. 13).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Adriana Aviles, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal Lia, and Children's Health Defense

(List the full name(s) of the plaintiff(s)/petitioner(s).)

-against-

Bill de Blasio, Dr. David Chokshi, Richard Carranza (in their Official Capacities) New York Department of Education, The City of New York

(List the full name(s) of the defendant(s)/respondent(s).)

20 CV 9829 (PGG)( )

NOTICE OF APPEAL

Notice is hereby given that the following parties: Adriana Aviles, Stephanie Denaro, Christine Kalikazaros, Gaetano La Mazza, Crystal La Mazza, and Children's Health Defense

(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit from the ☐ judgment ☑ order entered on: March 2, 2021

(date that judgment or order was entered on docket)

that: The Court denied Plaintiffs injunction to end mandatory parental consent to PCR testing in New York City Schools in its March 2, 2021 Memorandum Opinion and Order

(If the appeal is from an order, provide a brief description above of the decision in the order.)

March 24, 2021
Dated

/s/ James G. Mermigis
Signature*

Mermigis, James, G.
Name (Last, First, MI)

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* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

Rev. 12/23/13

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

Civil No.: 1:20−cv−09829−PGG

PLAINTIFFS' NOTICE OF MOTION

(Fed. R. Civ. P. 65)

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PLEASE TAKE NOTICE that pursuant to Federal Rules of Civil Procedure, rule 65, Plaintiffs hereby move the Court for a preliminary injunction to enjoin Defendants from mandating parental consent for Polymerase Chain Reaction (PCR) tests as a condition for attending school while Appeal is pending.

In support of this motion, Plaintiffs rely on the accompanying Memorandum of Law, and all the pleadings and papers on file in this action, and any argument and evidence that is presented on the hearing of this motion.

Dated: San Diego, CA

April 1, 2021

Respectfully submitted,

s/ Ray L. Flores

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UNITED STATES COURT
SOUTHERN DISTRICT OF NEW YORK

ADRIANA AVILES, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

BILL de BLASIO, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

Civil No.: 1:20−cv−09829−PGG

PLAINTIFFS' MOTION FOR INJUNCTION PENDING APPEAL, OR, ALTERNATIVELY, A TEMPORARY INJUNCTION PENDING ADJUDICATION OF AN EMERGENCY MOTION TO THE COURT OF APPEALS

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PRELIMINARY STATEMENT

On March 2, 2021, this court denied Plaintiffs' ("Parents") motion to preliminarily enjoin Defendants' ("DOE's") coercive polymerase chain reaction (PCR) nasal swab testing program and to reopen all New York City schools pending a litigated outcome. Plaintiffs have appealed this decision and now seek a narrow injunction pending appeal. They seek to enjoin the unlawful PCR mandate and to readmit all children to school, while permitting Defendants to continue PCR testing on a voluntary basis. Unless this court acts, Defendants' program will continue to violate federal and state law, and Plaintiffs' children, forced out of school, will continue to be irreparably harmed.

As more fully discussed below, Plaintiffs have established enough of a likelihood of success on the merits to grant them this temporary relief pending appeal, particularly given the irreparable harm while being denied access to school.

This motion is filed under Fed. R. App. P. 8(a)(1)(C), which requires that a party must move first in the court for an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

STATEMENT OF FACTS

The court and parties are familiar with the underlying facts. Some of these facts merit further consideration. Parents sought an injunction to prohibit Defendants from coercing consent to random COVID-19 testing as a condition of reopening all New York City public schools (*See* Proposed Order for Preliminary Injunction (Dkt. No. 32) at 2) and for any in-person schooling. (*See, e.g.*, Pltf. Br. (Dkt. No. 12) at 7, 10-11, 13-14.)

At first, Parents/appellants filed this case in response Mayor Bill de Blasio's November 19, 2020 announcement to suspend all in-person classes in response to COVID-19. (*See, e.g., id.*

at ¶¶ 2, 8.) Just ten days later, Mayor de Blasio announced that elementary and special needs schools would reopen December 7, 2020 with the caveat that in-person schooling would require parental "consent" to mandatory nasal swab PCR testing of their children. (Am. Cmplt. (Dkt. No. 11) at ¶¶ 2-3, 9-12.) If Parents did not consent to this invasive medical procedure, their children were relegated to "remote learning," with different teachers and no access to school activities or premises whatsoever. Parents filed the First-Amended Complaint against DOE's coerced nasal swab PCR testing and the continued shutdown of middle and high schools.

Parents/appellants allege that DOE's PCR testing for COVID is preempted by federal law regarding Emergency Use Authorization medical products and devices, thus violating Parents' and children's rights. (*See, e.g., id.* at ¶¶ 5, 15-17, 21, 23, 28, 62-65.) In addition, DOE's PCR testing regime violates New York Public Health Law §§ 2240 et seq. that requires voluntary consent. Parents further allege that remote learning is separate and unequal, violating their rights to equal protection. (*See, e.g., id.* at ¶¶ 40-44.)

Defendants claim its Emergency Use Authorization (EUA) testing program is lawful because the pandemic is serious, parents may withdraw their consent at any time, the intrusion into the nasal cavity is not significant, and there "currently is no test routinely available to determine whether individuals are infectious." (Varma Declaration (Dkt. No. 19) at ¶ 65.) Defendants justify their testing program and acknowledge that their laboratories have "Emergency Use Authorization from the FDA to perform RT PCR testing for COVID-19." (*Id.* at ¶ 43 (footnotes omitted).)

As alleged, Parents filed an accompanying order to show cause, seeking an injunction to end coerced testing and to reopen all public schools. After the hearing on the preliminary

injunction motion on January 14, 2021, middle schools reopened on February 25, 2021 with mandatory PCR testing.

On March 2, 2021, this court ruled that "Plaintiffs have not demonstrated a likelihood of success on any of their claims" and denied Plaintiffs' application for a preliminary injunction. (Dkt. 46 at 47.) This court reached that decision after stating that "Defendants' random testing program is premised on parental consent." (Dkt. 46 ftn. l3.) But Plaintiffs assert that there is no valid consent. On the contrary, Defendants' coerce participation by denying children in-person education if parents refuse. Federal law, however, requires that people have "the option to accept or refuse administration" of EUA medical products. 21 U.S.C. § 360bbb-3(III). Thus Defendants' PCR testing program violates federal law, and state law, and must be enjoined.

STANDARD OF REVIEW

Rule 62(d) permits this court to enter an injunction pending appeal of an order granting or denying a preliminary injunction. *See* Fed. R. Civ. P. 62(d) ("While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.").

A court considering entering such an injunction pending interlocutory appeal must consider whether: (1) the movant will suffer irreparably injury absent the stay; (2) a party will suffer substantial injury if a stay is issued; (3) the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal; and (4) public interests may be affected. *Nation v. Tanner*, 108 F. Supp. 3d 29, 34 (N.D.N.Y. 2015), citing *LaRouche v. Kezer*, 20 F.3d 68, 72 (2d Cir. 1994).

A denial of a preliminary injunction pending resolution of the underlying litigation does not necessarily indicate that an injunction pending appeal should be denied. In determining whether to grant relief pending appeal, "the 'success on the merits factor cannot be rigidly applied,' because if it were 'the court would have to conclude that it was probably incorrect in its determination on the merits.'" *Protect Our Water v. Flowers*, 377 F. Supp. 2d 882, 884 (E.D. Cal. 2004) (citations omitted). Or, put another way, the court is put in the odd position of deciding whether to overrule itself. *Morgan Guar. Trust Co. of N.Y. v. Republic of Palau*, 702 F.Supp. 60, 65–66 (S.D.N.Y.1988) ("By definition, of course, the effort has been made to achieve a result that is just and supported by the authorities and that therefore will be supported upon review. To conclude otherwise would require the judgment to be set aside.")

In approaching the standard to apply to likelihood of success on an injunction pending appeal, the Second Circuit found:

> "considerable merit in the approach expressed by the District of Columbia Circuit: 'The necessary "level" or "degree" of possibility of success will vary according to the court's assessment of the other [stay] factors.'" *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (*quoting Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 182 U.S. App. D.C. 220, 559 F.2d 841, 843 (D.C. Cir. 1977)). In applying this test, the court could grant "a stay pending appeal where the likelihood of success is not high but the balance of hardships favors the applicant . . . ." *Id.* "'The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury plaintiff[] will suffer absent the stay. Simply stated, more of one excuses less of the other.'" *Id.* (*quoting Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991)).

Cooper v. United States Postal Serv., 246 F.R.D. 415, 418 (D. Conn. 2007).

Thus, "[a]s the standard makes clear, a grant of injunctive relief pending appeal does not depend solely or even primarily on a consideration of the merits." *LaRouche*, 20 F.3d at 72. Indeed, "the degree to which [any one] factor must be present varies with the strength of the other factors, meaning that 'more of one [factor] excuses less of the other.' " *In re World Trade*

Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007) (*quoting Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006)). Accordingly, "the factors are viewed on a sliding scale, and [t]he necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors." *Seneca Nation v. Paterson*, No. 10-CV-687A, 2010 WL 4027795, at *1 (W.D.N.Y. Oct. 14, 2010) (citation and internal quotation marks omitted). *Id.*

Plaintiffs believe that a preliminary injunction is merited because federal law preempts DOE's program. The court also did not evaluate irreparable harm and the public interest. These reasons have led Plaintiffs to bring this motion and appeal. Parents ask this court to re-analyze the issues and grant the preliminary injunction.

LEGAL ARGUMENT

A. Introduction.

Federal law preempts Defendants' PCR testing program because it requires the option to refuse all Emergency Use Authorization medical products and devices. 21 U.S.C. § 360bbb et seq. Congress enacted the law, determined the policy, weighed the pros and cons, and determined that investigational products can be authorized for emergency use, but only if people can freely choose whether or not to use them. Any form of duress violates this policy. Forcing parents into the choice described above is a form of duress, rendering the consent invalid.

Federal law vests the Secretary of Health and Human Services with the permissive authority to grant Emergency Use Authorizations ("EUAs"). The statute requires:

Individuals to whom the product is administered are informed –

(I) That the Secretary has authorized the emergency use of the product;

(II) Of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) **of the option to accept or refuse administration of the product**, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.

21 U.S.C. § 360bbb-3(I-III).

On February 4, 2020, the FDA issued an EUA authorizing the CDC emergency use for the first Real-Time Reverse Transcriptase (RT)-PCR Diagnostic Panel. The FDA issued the EUA under and subject to the statute, thus giving all individuals to whom the test is offered the right to accept or refuse it.

By now, the FDA has granted over 300 different EUAs for COVID-19 testing products; each EUA letter references its reliance on Section 360bbb-3 above. The FDA has also recognized that no approved PCR test yet exists for COVID detection, so there are no PCR tests available that could be subject to mandate. 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(I)-(III). Federal law requires that people be able to accept or refuse the administration of EUA products.

The Centers for Disease Control and Prevention (CDC) has specifically opined on COVID-19 testing in schools, following 21 U.S.C. § 360bbb-3(I)-(III). It states: "If a school is implementing a testing strategy, testing should be offered on a **voluntary basis**. It is unethical and **illegal** to test someone who does not want to be tested, including students whose parents or guardians do not want them to be tested." (emphasis added) (App. FAC, Dkt. 11, Exh. 18).

After the preliminary injunction hearing but before this court's judgment, the Department of Education sent a letter to all school superintendents and administrators, declaring "that parent/guardian consent for COVID-19 testing of students may not be a condition of in person learning or other school activities." (Dkt. 42 p. 3) (emphasis in original). Further, the letter stated: "We remind schools that the only permissible ground for excluding students is, according to Education Law § 906(1), whether they are ill or symptomatic, or if a local health department

has otherwise ordered students to quarantine based upon actual or potential exposure to COVID-19." (emphasis in original) (*Id.* at p. 3). The following day, the Department of Education backtracked, adding the words, "unless local health authorities direct schools otherwise." (Dkt. 44-1 p. 1). Thus, it initially got it right: testing cannot be a condition for in-person learning or school activities, but then retreated to justify its illegal program.

Although DOE argues that it conducts its testing program with requisite consent, it does not. This court erred when it failed to examine consent, which is absolutely essential if the testing regime is to survive scrutiny under federal and state law.

DOE's primary form of duress is to threaten removal of children from school if parents refuse. Engaging in this spurious tactic, DOE acts with impunity. Parents recognize that remote learning is no alternative to in-person learning; it is the punitive consequence imposed for refusal. DOE's coercion has a tangible, detrimental impact on children and families, diminishing children's education and disrupting their lives.

This court must analyze whether DOE's testing program is lawful. It previously accepted DOE's fiction that remote learning is an acceptable alternative to in-person schooling. (*See* Dkt. 46 n.13.) It failed to discuss the other factors necessary to evaluate an injunction, namely (1) irreparable harm to students, including inferior education, stigmatization, and trauma; and (2) the public interest in stopping an illegal program. Since it failed to consider the elements required for a preliminary injunction, the court's denial of the preliminary injunction was in error.

B. Mandatory participation in an Emergency Use Authorization program is illegal.

1. The Court erred in ignoring the federal preemption doctrine.

The Supremacy Clause states:

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

U.S. CONST. Art. VI.

The Supremacy Clause of the U.S. Constitution can nullify both state legislative requirements and state common law duties. *Medtronic v. Lohr*, 518 U.S. 470, 503 (1996) (Breyer, J., concurring in part and concurring in the judgment); *id.* at 510 (O'Connor, J., joined by Rehnquist, C.J., Scalia, J., and Thomas, J., concurring in part and dissenting in part); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (plurality opinion); *id.* at 548-49 (Scalia, J., joined by Thomas, J., concurring in judgment in part and dissenting in part). Federal law and precedent are explicit that consent to EUA products must be voluntary. 21 U.S.C. § 360bbb-3(III). The court erred when it failed to consider preemption.

Federal law explicitly preempts state and local law regarding medical devices. No state may have requirements different from or in addition to federal requirements. 21 U.S.C. § 360k. Federal law states:

> § 360k. State and local requirements respecting devices
>
> > (a) General rule. Except as provided in subsection (b), no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
> >
> > > (1) which is different from, or in addition to, any requirement applicable under this Act [21 USCS §§ 301 et seq.] to the device, and
> > >
> > > (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act [21 USCS §§ 301 et seq.].

As federal law is explicit that EUA use of medical products must be voluntary, and state law may not differ or add to federal law, there is little question that DOE's testing program violates federal law.

The duress that DOE is imposing is palpable. Under New York law, duress is "when the party making the claim was forced to agree to it by means of a wrongful threat precluding the exercise of his free will." *Shire Realty Corp. v. Schorr*, 55 A.D.2d 356, 365 (App. Div. 2nd Dept. 1977), quoting *Austin Instrument v. Loral Corp.*, 29 N.Y.2d 124, 130 (1971). DOE makes wrongful threats precluding Parents' free will; it is duress.

2. Regulatory background

During public health emergencies, the FDA regulates medical countermeasures like PCR diagnostic tests for newly emergent infectious diseases, such as COVID-19. Where, as here, the disease threat is novel, the FDA merely authorizes, rather than approves, such products. Federal Food, Drug, and Cosmetic Act ("FFDCA") § 564. The FDA has not approved PCR tests for COVID; it has only granted them EUA status. These diagnostics tests remain experimental with no assurance of efficacy.

3. EUA background

Congress vested the HHS Secretary with the power to "authorize the introduction into interstate commerce, during the effective period of a declaration of emergency…a drug, device, or biological product intended for use in an actual or potential emergency. . . ." 21 U.S.C. § 360bbb-3(a)(1) of the Federal Food, Drug, and Cosmetic Act. The statute provides for the FDA to authorize both unapproved products and uses. *See* 21 U.S.C. § 360bbb-3(a)(2).

The FDA explains its emergency use authorization for PCR as follows:

> [PCR]is not yet approved or cleared by the United States FDA. When there are no FDA-approved or cleared tests available, and other criteria are met, FDA can make tests available under an emergency access mechanism called an Emergency Use Authorization (EUA). The EUA for this test is supported by the Secretary of Health and Human Service's (HHS's) declaration that circumstances exist to justify the emergency use of in vitro diagnostics for the detection and/or diagnosis of the virus that causes COVID-19.

Fact Sheet For Patients, CENTERS FOR DISEASE CONTROL AND PREVENTION (CDC), CDC 2019-nCoV Real-Time RT-PCR Diagnostic Panel (updated: Dec. 1, 2020), https://www.fda.gov/media/134921/download. Thus, FDA acknowledges that these tests are stopgap measures authorized under emergency circumstances, without the benefit of a rigorous approval or licensing process.

4. DOE freely admits its program is based on EUA, non-FDA approved PCR products.

DOE states that it has two laboratories that analyze the specimens using PCR testing (Varma Decl. (Dkt. 19) at ¶ 43) and that "[e]ach laboratory has obtained an **Emergency Use Authorization** from the FDA to perform RT-PCR testing for COVID-19." *Id.* (footnotes omitted), Opinion page 23 (emphasis added). Thus, the tests that DOE requires are EUA only; they are tests that the FDA has neither approved nor licensed.

5. Federal precedent establishes that even members of the U.S. military may not be coerced to accept EUA products.

The Department of Defense may not require a member of the armed services to receive an "investigational new drug or a drug unapproved for its applied use" without the informed consent of the service member or a Presidential waiver. 10 U.S.C. § 1107(f)(1) as quoted in *Bates v. Donley*, 935 F. Supp. 2d 14, 17 (D.D.C. 2013). In *Doe #1 v. Rumsfeld*, 297 F. Supp. 2d 119 (D.D.C. 2003), a court found that the FDA had not properly licensed the anthrax vaccine that the Department of Defense was mandating and granted the plaintiffs' preliminary injunction to

stop use of the experimental product. *Doe #1 v. Rumsfeld*, 297 F.Supp.2d at 135; *Bates*, 935 F. Supp. 2d at 19.

The judge concluded:

> The Court is persuaded that the right to bodily integrity and the importance of complying with legal requirements, even in the face of requirements that may potentially be inconvenient or burdensome, are among the highest public policy concerns one could articulate.… **[T]he United States cannot demand that members of the armed forces also serve as guinea pigs for experimental drugs**….The court ruled that requiring a person to submit to an inoculation without informed consent or the presidential waiver is **an irreparable harm** for which there is no monetary relief. (emphasis added)

Doe # 1 v. Rumsfeld, 297 F. Supp. 2d at 135. This case serves as the closest available precedent for the DOE program.

In a subsequent case, *Doe v. Rumsfeld*, Judge Emmet G. Sullivan ordered:

> . . . until FDA properly classifies AVA [anthrax vaccine] as a safe and effective drug for its intended use, an injunction shall remain in effect prohibiting defendants' use of AVA on the basis that the vaccine is either a drug unapproved for its intended use or an investigational new drug within the meaning of 10 U.S.C. § 1107. Accordingly, the involuntary anthrax vaccination program, as applied to all persons, is rendered illegal absent informed consent or a Presidential waiver….

Doe v. Rumsfeld, 341 F. Supp.2d 1, 19 (2004).

Unlike in the military context, there is no statutory option for civilians for a Presidential waiver to override the right to informed consent. It is imperative that this court prohibit coerced PCR testing here.

6. Federal law specifically prohibits mandatory use of EUA products for civilians.

Individuals must be informed under 21 U.S.C. § 360bbb-3(e)(1)(a)(ii)(III) "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their

benefits and risks." This statutory language, “to accept or refuse” an unapproved medical product, frames an individual’s free choice.

While the statutory language references “consequences of refusing administration of the product,” the only logical reading of that phrase regards medical consequences for refusing the experimental product, such as a greater or lesser risk of infection. The notion that a child may be expelled from school for refusing to be the subject of an experimental test flies in the face of statutory interpretation. The court did not explain how it upheld coerced EUA testing.

7. This Court erred when it arrived at the wrong conclusion.

The court concluded that "the PCR test is currently the best indicator of COVID-19 infection that is available for mass, routine use.” (Opinion Dkt. 46) at 24.) But its judgment on the test’s utility is beside the point: subjecting children to EUA tests violates federal and state law. PCR testing may be the best indicator of COVID infection, but DOE cannot mandate an EUA medical product, especially when it likely can obtain equivalent results through voluntary participation.

8. New York Law incorporates Nuremberg Code provisions on informed consent.

New York law substantially incorporates the Nuremberg Code’s seminal language: a subject must be able to “exercise free power of choice without any element of force, fraud, deceit, duress or other form of constraint or coercion.” New York Public Health Law § 2441. The first principle of the Nuremberg Code, the global standard for ethical medicine, states:

> The voluntary consent of the human subject is **absolutely essential**." This means that the person involved should have legal capacity to give consent; should be so situated as to be able to exercise free power of choice, without the intervention of any element of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion; and should have sufficient knowledge and comprehension

> of the elements of the subject matter involved, as to enable him to make an understanding and enlightened decision. (emphasis added.)

Interpreting the Nuremberg Code regarding the right to informed consent, the Second Circuit acknowledged that "[t]he universal and fundamental rights of human beings identified by Nuremberg — rights against genocide, enslavement, and other inhumane acts … — are the direct ancestors of the universal and fundamental norms recognized as *jus cogens*," meaning that a state may not derogate from such rights under any circumstances. (internal citations omitted) *Abdullahi v. Pfizer, Inc*., 562 F.3d 163, 179 (2d Cir. 2009). The Second Circuit placed free, informed consent on par with other *jus cogens* human rights norms. EUA products are by definition experimental, authorized only for emergency use, subject to voluntary consent.

C. The Court's confusion between a valid vaccine mandate under *Jacobson v. Massachusetts* and an EUA mandate is reversible error.

The court further erred when it misconstrued *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905), as providing a legal basis for an experimental product mandate. The court's parallels to *Jacobson* ran askew, to wit: "While Defendants' random COVID-19 testing program is (1) not a vaccination, and (2) is administered pursuant to an Emergency Use Authorization, there are significant parallels between the testing and vaccination programs." (Dkt. 46 at 45.) While there may be some similarities, no court has **ever** authorized the mandate of an EUA product, in school or otherwise. On the contrary, the only available federal precedent prohibits an EUA mandate even for military personnel. Should school children have fewer rights than military personnel?

Furthermore, the Court misconstrued *Jacobson*'s progeny to apply to EUA products, citing *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015). ("Plaintiffs argue that New York's mandatory vaccination requirement violates substantive due process. This argument is

foreclosed by the Supreme Court's decision in *Jacobson v. Commonwealth of Massachusetts*.") The court further confused the mandate question by citing *Whitlow v. Cal. Dep't of Educ.*, 203 F. Supp. 3d 1079, 1083 (S.D. Cal. 2016), a decision that upheld school vaccine mandates for federally licensed and approved vaccines. ("For more than 100 years, the United States Supreme Court has upheld the right of the States to enact and enforce laws requiring citizens to be vaccinated. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 27.") The court conflated unlawful coercion of EUA products with a state's lawful police powers to mandate FDA-licensed and approved vaccines that the CDC has recommended for use. (Opinion Dkt. 46 n.13)

Recent Supreme Court jurisprudence suggests an even narrower reading of *Jacobson*. In a case regarding New York pandemic-related restrictions affecting First Amendment rights, the Supreme Court concluded that "even in a pandemic, the Constitution cannot be put away and forgotten." *Roman Catholic Diocese v. Cuomo*, 208 L. Ed. 2d 206, 210 (2020). In his concurrence, Justice Gorsuch questioned *Jacobson*'s relevance further:

> Why have some mistaken this Court's modest decision in *Jacobson* for a towering authority that overshadows the Constitution during a pandemic? . . . We may not shelter in place when the Constitution is under attack. Things never go well when we do.

Roman Catholic Diocese v. Cuomo, 208 L. Ed. 2d at 214 (Gorsuch, J., concurring). The Supreme Court would be unlikely to find compelling the court's comparison of a mandate for an approved, licensed, and recommended vaccine with a mandate for an EUA test that does not detect infection and which requires only 20% of the students at any given time.

D. Standard of Review

1. The applicable standard for questions of law is *de novo* review.

We request this court, as with the appellate court, to review questions of law *de novo*. Since the appellate court is concerned primarily with enunciating the law, they do not defer to a trial court's legal assessments. Once this court reviews the law de novo and examines the requirements for voluntary consent to EUA products under federal and state law, Plaintiffs are likely to win on the merits. One cannot dispute students' irreparable harm in being relegated to remote learning, nor the public interest in enjoining illegal government action.

In applying the de novo standard of review, a "finding is 'clearly erroneous' when, although there is evidence to support it, the court reviewing all of the evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948). Here, this court erred by failing to examine the requirements under federal and state law for consent.

2. The court misunderstood the facts and misapplied the requirements for the issuance of a Preliminary Injunction, thereby abusing its discretion.

The court abused its discretion when it failed to follow the enumerated three-part test for the preliminary injunction. Only subjectively and selectively did it delineate Parents' likelihood of success on the merits, while ignoring the critical factors of irreparable harm and public interest.

a. Parents and their children suffer irreparable harm since remote learning does not equal in-person schooling.

The court failed to consider carefully the widening achievement gap, the stunting of emotional and social development, and the socio-economic differences that make each child's

learning location incalculably different. DOE's policy sadly echoes the era of "separate but equal" that the Supreme Court attempted to end in 1954.The following text was the final and critical citation in Plaintiffs' brief (Dkt. 12 p. 18):

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.
>
> An educational opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.
>
> **We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.**

Brown v. Bd. of Educ., 347 U.S. 483, 493-95 (1954) (emphasis added).

The vast learning differential between in-school and remote learning for elementary and middle school children is indisputable.

b. The court failed to apply the Second Circuit's preliminary injunction review standard.

The Second Circuit has repeatedly found that irreparable harm "is the single most important prerequisite for the issuance of a preliminary injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 233-34 (2d Cir. 1999); *accord, Yang v. Kosinski*, 960 F.3d 119, 128 (2d Cir. 2020). Exclusion from school, standing alone, unquestionably constitutes irreparable harm. Courts assume that a child prevented from attending school suffers irreparably. *Lewis v. Sobel*, 710 F.Supp. 506, 507 (S.D.N.Y. 1989). (Injunction Pages 7-8.)

The court failed to examine the irreparable harm that children and parents suffer when they are deprived of in-person learning. It is doubtful that mandatory, online education for refusing EUA products can survive even rational basis review, leave aside the strict scrutiny required here.

c. DOE's Program undermines the public interest.

DOE's program violates federal and state law and thus violates the public interest *per se*. As a society, the illegality of and EUA mandate, unlawful searches and the denial of the best available education for children impact us all.

DOE's program place Parents under unacceptable duress. They are faced with the choice of isolating children at home, thereby stunting their educational and social development (including extracurricular activities such as sports, clubs, drama and music) or acceding to invasive and traumatic testing of their children so they can have a more normal educational experience.

d. The court failed to balance the harms to the parties.

The balance of equities favors allowing children to attend school in-person pending the outcome of this case. Children are being irreparably harmed while barred from attending school.

Parents seek to end coercion and to have DOE respect their rights to informed consent under federal and state law. Some parents, perhaps most, may prefer that their children be tested in school. Appellants do not object to truly voluntary testing. Testing of the willing can continue, providing DOE with approximately the same data it seeks through 100% compliance.

When plaintiffs seek an injunction to stay enforcement of a law or order that purportedly protects the public interest, a court must measure the hardship to the government by the extent to which the law or order actually serves such protection. *See Ass'n of Jewish Camp Operators v. Cuomo*, No. 1:20-CV-0687 (GTS/DJS), 2020 U.S. Dist. LEXIS 117765 (2020). Here, DOE's program violates law and fails to serve the public interest of upholding the right to informed consent to EUA products.

e. The court abused its discretion when it applied only the success on the merits test for a preliminary injunction.

This court's denial of Parents' injunction was solely based on its interpretation of the likely success on the merits. It concluded no likelihood of success on each of the causes of action in the First Amended Complaint. A grant of injunctive relief pending appeal does not depend solely or even primarily on a consideration of the merits, however. *LaRouche v. Kezer*, 20 F.3d at 72. Rather, injunctive relief depends on all the preliminary injunction factors, with special emphasis on irreparable harm, which the court failed to properly evaluate.

i. DOE's Procedural Due Process infringements require the issuance of an injunction.

The court erred when it found no due process violation because students still had limited access to education. (Dkt. 46 p. 37.) Requiring online participation while denying an in-person education violates due process. Although Plaintiffs argue that this court should apply strict scrutiny, DOE's program is unlawful even under a rational basis test.

ii. DOE's program violates Equal Protection because some children are allowed to attend schools while others not.

An unlawful school program that segregates children violates *Brown*. The lower courts in *Brown* ruled that inferior school premises were acceptable because African-American students had "separate but equal" access to education. *Brown* overruled that legal fiction that had endured for decades. Here, DOE defends its actions by arguing that remote learning is indeed "separate but equal." This court should dispel this legal fiction.

The court erred when it avoided the issue of consent and when it concluded that no child "'is excluded from the entire educational process.'" *D.C. by Conley v. Copiague Union Free Sch. Dist.*, No. 16-cv-4546 (SJF) (AYS), 2017 WL 3017189, at *9 (E.D.N.Y. July 11, 2017). (Dkt. 46

n.11.) As the Supreme Court held in *Brown*, the doctrine of "separate but equal" has no place in public education. 347 U.S. at 495.

iii. DOE clearly conducts an unlawful search and violates student rights to privacy and bodily integrity.

The court justifies DOE's unlawful search incorrectly based on *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 648 (1995). That case is distinguishable since student football players were engaged in illegal and dangerous drug use whereas here, it is DOE that is coercing an illegal medical test, not the students. In *Vernonia*, the school district used a lawful test, unanimously approved by parents, to detect an unlawful and dangerous activity. In the matter here, DOE is coercing an unlawful EUA test that violates Parents' and children's rights.

iv. DOE's program violates the Unconstitutional Conditions Doctrine.

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 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 (2013). (Pltf. Complaint (Dkt. No. 12) at 21.) While arguably attempting to protect students, DOE has conditioned access to school on submission to an illegal, invasive, emergency medical test. Compulsion to submit to these tests infringes on Parents' and children's rights to refuse, as recognized in federal and state law. "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969). This court must restore the appropriate balance in New York's schools between school officials demanding absolute authority to impose an EUA testing regime and

Parents and children demanding that their right to refuse an unwanted EUA medical test be honored without reprisal.

CONCLUSION

DOE's mandatory testing program is illegal under federal and state law. This court incorrectly concluded that DOE's EUA testing scheme is somehow made legal through duress. DOE's EUA testing policy directly conflicts with 21 U.S.C. § 360bbb-3; federal law preempts it. Parents ask this court to examine the issues *de novo* and to grant the preliminary injunction to enjoin the unlawful PCR mandate and to readmit all children to school, without requiring Defendants to discontinue PCR testing on a voluntary basis.

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Respectfully submitted,

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