

SUPREME COURT : STATE OF NEW YORK
COUNTY OF ROCKLAND

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JANE DOE, as the parent and guardian of her minor unvaccinated daughter, BABY DOE;

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

Petitioners,

DECISION & ORDER

-against-

Index No: 031784/2019 E

ED DAY (in his official capacity as County Executive) and the COUNTY OF ROCKLAND,

Respondents.

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HON. ROLF M. THORSEN, A.J.S.C.

Petitioner commenced the within Article 78 proceeding to challenge a "Declaration of Local State Emergency for Rockland County" (hereinafter "Emergency Declaration") issued by Edwin J. Day, the County Executive of Rockland County, on March 26, 2019 and amended on March 28, 2019. The Emergency Declaration, which was issued in response to a measles outbreak in Rockland County pursuant to Executive Law §24, provides, in relevant part, as follows:

I. Prohibitions

From 12:01 a.m., March 27, 2019 to 11:59 p.m., April 25, 2019, no parent or guardian of a minor or infant under the age of 18 shall cause, allow, permit, or suffer a minor or infant under their supervision, to enter any place of public assembly in Rockland County, if that minor or infant is not vaccinated against measles for any reason other than being serologically immune to measles as documented by a physician, or prevented from receiving a measles vaccination for a medical reason documented by a physician, or because the infant is under the age of 6 months.

The Emergency Declaration defines "a place of public assembly" as:

"a place where more than 10 persons are intended to congregate for purposes such as civic, governmental, social, or religious functions, or for recreation or shopping, or for food or drink consumption, or awaiting transportation, or for daycare or educational purposes, or for medical treatment. A place of public assembly shall also include public transportation vehicles, including but not limited to, publicly or privately owned buses or trains, but does not include taxi or livery vehicles."

Petitioner herein is the parent of a child affected by the Emergency Declaration in that her child - who is not vaccinated pursuant to a religious exemption found in Public Health Law §2164(9) - is now excluded from attending school and other places of public assembly.¹ Thus, Petitioner commenced the within Article 78 proceeding seeking an Order declaring the Emergency Declaration to be null and void on the grounds that the Emergency Declaration is, inter alia, arbitrary and capricious, in violation of lawful procedure, and in violation of state and federal law. Upon the filing of her Petition, Petitioner also moved, by way of Order to Show Cause, for temporary injunctive relief, i.e., an Order temporarily enjoining Respondent from enforcing the Emergency Declaration and permitting Petitioner's child to return to school and otherwise assemble in public places. Respondent opposes the issuance of a stay. The Court has considered the following papers:

1. Order to Show Cause, Verified Petition, Affidavit of Petitioner, Finn Affirmation and Exhibits 1 through 3, and Memorandum of Law; and
2. Respondent's Memorandum of Law in Opposition to Order to Show Cause and attachment.

Having read the foregoing papers and having heard arguments from counsel on April 4, 2019 and due consideration having been given, the Court decides as follows:

It is well-settled that in order "[t]o obtain a preliminary injunction, the moving party must establish (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) that the equities balance in his or her favor." Matter of Goldfarb v. Ramapo, 167 A.D.3d 1009, 1010 (2d Dept. 2018) (Internal citations omitted). Whether "to grant or deny a

¹ It is undisputed that the schools attended by Petitioners' children have no reported cases of the measles.

preliminary injunction lies within the sound discretion of the Supreme Court.'" Id., quoting, Matter of Armanida Realty Corp. v. Town of Oyster Bay, 126 A.D.3d 894, 894-895 (2d Dept. 2015). Applied here, the Court finds that Petitioner has established her entitlement to a preliminary injunction.

"To establish a likelihood of success on the merits, the movant must show its right to a preliminary injunction is plain on the facts of the case.... However, the existence of a factual dispute will not bar the imposition of a preliminary injunction if it is necessary to preserve the status quo and the party to be enjoined will suffer no great hardship as a result of its issuance." Melvin v. Union College, 195 A.D.2d 447, 448 (2d Dept. 1993) (Internal citations omitted). Here, Petitioner's likelihood of success on the merits does not center around disputed facts. Rather, Petitioner's likelihood of success on the merits turns on a legal issue, i.e., whether Mr. Day had the authority pursuant to Executive Law §24 to issue the Emergency Declaration.

As expressly stated in the Emergency Declaration, Mr. Day cited to Executive Law §24 as the legal basis for which he issued the Emergency Declaration.² Section 24 of the Executive Law, entitled "Local state of emergency; local emergency orders by chief executive," states, in relevant part:

1. Notwithstanding any inconsistent provision of law, general or special, in the event of a disaster, rioting, catastrophe, or similar public emergency within the territorial limits of any county, city, town or village, or in the event of reasonable apprehension of immediate danger thereof, and upon a finding by the chief executive thereof that the public safety is imperiled thereby, such chief executive may proclaim a local state of emergency within any part or all of the territorial limits of such local government....

² Specifically, the Emergency Declaration states, in relevant part: "Pursuant to the powers vested in me, by virtue of Executive Law §24, I hereby continue the Declaration of a Local State of Emergency for Rockland County dated March 26, 2019,..." i.e., the Measles Outbreak Emergency Directive. See, Petitioners' Exhibit 1.

2. A local emergency order shall be effective from the time and in the manner prescribed in the order... Such orders shall cease to be in effect five days after promulgation or upon declaration by the chief executive that the state of emergency no longer exists, whichever occurs sooner. The chief executive nevertheless, may extend such orders for additional periods not to exceed five days each during the pendency of the local state of emergency.

Executive Law §24.³ As the definition of "disaster" set forth in Executive Law §20(2)(a) includes "epidemic," Respondent argues that Mr. Day was well within his authority to issue the Emergency Declaration.

As "epidemic" is not defined within Executive Law §24, the Court must look to its ordinary meaning. See, People v. Aleynikov, 31 N.Y.3d 383, 397 (2018) ("When a word used in a statute is not defined in the statute, dictionary definitions serve as 'useful guideposts' in determining the word's 'ordinary' and 'commonly understood' meaning.") Thus, an "epidemic" is defined as "an outbreak of disease that spreads quickly and affects many individuals at the same time." See, <https://www.merriam-webster.com/dictionary/epidemic>. "Epidemic" is also defined as "affecting or tending to affect a disproportionately large number of individuals within a population, community, or region at the same time." Id.

The information provided to this Court at this early stage in the proceeding indicates that since October 2018 to the present (a six-month period), "Rockland County has seen 166 cases of measles." See, Respondent's Memorandum of Law at p. 2. In a population of roughly 330,000 people, 166 cases is equal to .05% of the population, which does not appear, on the record before the Court, to rise to the level of an "epidemic" as included in the definition of "disaster" under Executive Law §24. Petitioner has thus demonstrated that Mr. Day's reliance on Executive Law §24 in issuing the Emergency Declaration may have been misplaced.

Moreover, assuming arguendo, that Mr. Day was within his

³ Executive Law §24 is contained in Article 2-B entitled "State and Local Natural and Man-Made Disaster Preparedness."

authority to issue the Emergency Declaration pursuant to Executive Law §24, it appears to this Court that the Emergency Declaration violates the provision that requires such orders "to not exceed five days" in duration. See, Executive Law §24(2). Here, the Emergency Declaration is in effect from March 27, 2019 to April 25, 2019, a period of thirty (30) days.

Further, with respect to the remaining factors for the Court to consider in determining whether to issue a preliminary injunction, Petitioner has adduced adequate evidence of irreparable injury and a balancing of equities in her favor. Petitioner has shown that without an injunction, her child will continue to miss school and Petitioner will continue to incur monetary expenses as a result of the injunction.

In rendering the within decision, which is limited solely to Petitioner's request for a preliminary injunction, this Court recognizes that the court "may not substitute its judgment for that of the board or body it reviews unless the decision under review is arbitrary and capricious and constitutes an abuse of discretion." See, Pell v. Board of Educ., 34 N.Y.2d 222, 232 (1974) (Internal citations omitted).

E N T E R

Dated: April 5, 2019
New City, New York



HON. ROLF M. THORSEN
Acting Supreme Court Justice

TO: NYSCEF