

21-0537-CV

United States Court of Appeals

for the

Second Circuit

JANE GOE, SR., on behalf of herself and her minor child, JANE DOE, on behalf of herself and her minor child, JANE BOE, SR., on behalf of herself and her minor child, JOHN COE, SR., on behalf of himself and his minor children, JANE COE, SR., on behalf of herself and her minor children, JOHN FOE, SR., on behalf of himself and his minor child, JANE LOE, on behalf of herself and her medically fragile child, JANE JOE, on behalf of herself and her medically fragile child, CHILDRENS HEALTH DEFENSE,

Plaintiffs-Appellants,

(For Continuation of Caption See Inside Cover)

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

BRIEF AND SPECIAL APPENDIX FOR PLAINTIFFS-APPELLANTS

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– v. –

HOWARD ZUCKER, in his official capacity as Commissioner of Health for the State of New York, M.D. ELIZABETH RAUSCH-PHUNG, in her official capacity as Director of the Bureau of Immunizations at the New York State Department of Health, NEW YORK STATE DEPARTMENT OF HEALTH, THREE VILLAGE CENTRAL SCHOOL DISTRICT, CHERYL PEDISICH, acting in her official capacity as Superintendent, Three Village Central School District, CORINNE KEANE, acting in her official capacity as Principal, Paul J. Gelinis Jr. High School, Three Village Central School District, LANSING CENTRAL SCHOOL DISTRICT, CHRIS PETTOGRASSO, acting in her official capacity as Superintendent, Lansing Central School District, CHRISTINE REBERA, acting in her official capacity as Principal, Lansing Middle School, Lansing Central School District, LORRI WHITEMAN, acting in her official capacity as Principal, Lansing Elementary School, Lansing Central School District, PENFIELD CENTRAL SCHOOL DISTRICT, DR. THOMAS PUTMAN, acting in his official capacity as Superintendent, Penfield Central School District, SOUTH HUNTINGTON SCHOOL DISTRICT, DAVID P. BENNARDO, DR., acting in his official capacity as Superintendent, South Huntington School District, BR. DAVID MIGLIORINO, acting in his official capacity as Principal, St. Anthony's High School, South Huntington School District, ITHACA CITY SCHOOL DISTRICT, DR. LUVELLE BROWN, acting in his official capacity as Superintendent, Ithaca City School District, SUSAN ESCHBACH, acting in her official capacity as Principal, Beverly J. Martin Elementary School, Ithaca City School District, COXSACKIE-ATHENS SCHOOL DISTRICT, RANDALL SQUIER, Superintendent, acting in his official capacity as Superintendent, Coxsackie-Athens School District, FREYA MERCER, acting in her official capacity as Principal, Coxsackie-Athens School District, ALBANY CITY SCHOOL DISTRICT, KAWEEEDA G. ADAMS, acting in her official capacity as Superintendent, Albany City School District, MICHAEL PAOLINO, acting in his official capacity as Principal, William S. Hackett Middle School, Albany City School District;
and all others similarly situated,

Defendants-Appellees.

SHENENDEHOWA CENTRAL SCHOOL DISTRICT, DR. L. OLIVER ROBINSON, acting in his official capacity as Superintendent, Shenendehowa Central School District, SEAN GNAT, acting in his official capacity as Principal, Koda Middle School, Shenendehowa Central School District, ANDREW HILLS, acting in his official capacity as Principal, Arongen Elementary School, Shenendehowa Central School District,

Defendants.

CORPORATE DISCLOSURE STATEMENT, RULE 26.1

Appellant Children's Health Defense ("CHD") is a non-profit corporation. It has no parent corporation and no stock. No publicly held company owns 10% or more of its stock.

/s/ Mary Holland

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PRELIMINARY STATEMENT

This case presents a vital issue implicating the health and wellbeing of some of our most vulnerable citizens: Where a state-licensed physician certifies that inoculation may seriously harm or kill a child, can the state nevertheless override that medical decision and require the child to be vaccinated anyway?

The answer must be a resounding “no.” Indeed, the Supreme Court long ago recognized that any constitutionally-sound vaccine mandate must contain a medical exemption for those whose medical condition puts them at risk of harm from the vaccine. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

Since *Jacobson*, the Court continues to afford the strictest level of scrutiny to policies infringing upon medical exemptions, facially invalidating such policies whenever it is plausibly alleged that the law could exclude even a few who might need protection. *Stenberg v. Carhart*. 530 U.S. 914, 937 (2000); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 325 (2006).

For instance, in 1973, the Court held that, if a state-licensed physician certifies that a person needs a medical exemption to an otherwise constitutionally-sound policy, the state must accept it without further review or interference. *Doe v. Bolton*, 410 U.S. 179, 199-200 (1973). Moreover, *Doe* held that states cannot attempt to pass laws that limit the criteria a physician can consider in determining medical necessity. To protect the fundamental rights of patients to make decisions

in accordance with best medical judgment, physicians must be able to base their decision on any factor relevant to the patient's health. *Doe*, 410 U.S. 179.

This case presents a straightforward application of *Doe*. State-licensed physicians certified that each of the Plaintiff-Appellant children needs a medical exemption to avoid the risk of serious harm. This is enough to establish their constitutional right to a medical exemption and it is not lawful to subject the exemption decisions to further review. Yet, as Appellants plausibly allege, individual school districts adopted policies allowing school principals to substantively review and overrule the medical exemption certifications of state-licensed physicians. Further, in violation of *Doe*'s holding that the state cannot limit the criteria that physicians consider in medical exemptions, the New York State Department of Health ("DOH") also dangerously narrowed the state's statutory medical exemption to exclude most at risk children, including Appellant children, and prohibit treating physicians from using their best medical judgment.

As a result of the new regulation and policies (collectively "challenged policies"), hundreds of New York children's medical exemptions have been improperly rejected. The parents of these vulnerable children are given the Hobson's choice to either place their child at serious risk of harm by vaccinating them against medical advice or forego access to an education for their child at any public or private school in the state, among other consequences. In short, the

challenged polices unconstitutionally burden Appellants' fundamental right to a medical exemption.

In dismissing the complaint, the district court (1) erred in holding that there is no fundamental right to a medical exemption from immunization requirements that could kill or seriously harm a child; (2) failed to apply the unconstitutional conditions doctrine, proposing that since there is no "fundamental right" to an education, any conditions on access to school (even those that infringe fundamental rights) are subject only to rational basis review; and (3) misapplied *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and Chief Justice Roberts's concurrence in *South Bay II*, as establishing *carte blanche* authority for administrative agencies to impose unfettered restrictions on fundamental rights in the name of public health without judicial review.

These foundational legal errors require urgent correction. As this case pends, disabled children across the state are facing ongoing serious harm, both to their physical safety and through the ongoing deprivation of all access to school and services.

JURISDICTIONAL STATEMENT

Plaintiffs appeal from a final judgment entered pursuant to a decision by the United States District Court for the Northern District of New York (Hon. Sannes, B) dismissing all of Plaintiffs' claims under Fed. R. Civ. P. 12(b)(6). The district court

had jurisdiction pursuant to 28 U.S.C. §1331, §1347 and §1367 and 42 U.S.C. §§1983 and 1988. Defendants' motion to dismiss was granted in an Opinion and Order dated February17, 2021 (SPA-1) and judgment was entered dismissing the suit the same day (SPA-86).¹ Plaintiffs filed a timely notice of appeal on March 1, 2021 (A-771). This Court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291.

¹ The Appendix is cited as A___, the Special Appendix as SPA___.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Where a state-licensed physician certifies that inoculation may cause a child serious harm, may the state override that medical judgment and require the child to be vaccinated anyway?
2. Can the state condition attendance at any public or private school or daycare (including entirely online programs) on a parent's waiver of their right to refuse immunizations that the child's state-licensed physician certifies may harm or kill their child, or would doing so constitute an unconstitutional condition?
3. Was it proper for the district court to apply a lesser standard of review than strict scrutiny to infringements on acknowledged fundamental rights out of notions of deference to public health?
4. Did the district court err by relying on disputed factual materials outside of the complaint and affording favorable inferences to the Defendants in dismissing all claims under Fed. R. Civ. P. 12(b)(6)?
5. Did the complaint plausibly allege violations of their rights under §504 of the Rehabilitation Act?
6. Did the complaint plausibly allege municipal liability?

STATEMENT OF THE CASE

On July 23, 2020, eight families² of medically fragile disabled children and Children’s Health Defense, a not-for-profit organization that advocates for children’s safety, filed a proposed class-action lawsuit challenging medical exemption policies promulgated by DOH and named and unnamed school districts across New York State.

The Complaint alleges that the challenged policies unduly burden children’s access to needed medical exemptions, thereby putting vulnerable disabled children at risk of serious harm and violating multiple fundamental rights of the families under 42 U.S.C. §1983 as well as federally protected rights guaranteed under §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794(a)(“the Rehabilitation Act”).

Defendants each moved to dismiss the complaint. Plaintiffs filed an amended complaint as of right as to Defendant Migliorino with a letter motion seeking leave to amend as to the remaining Defendants, which was opposed. The parties briefed both issues.

The district court reviewed the motions to dismiss against the revised amended complaint (“Amended Complaint”)(A-686) for facial sufficiency.³

² Only seven families remain in this suit. The Koe family withdrew their claims on October 26, 2020 (A-683; Dkt 104).

³ The revised Amended Complaint reflected the withdrawal of all claims by the Koe family. All citations to the complaint will be to the Revised Amended Complaint (A-683) as that is the version of the complaint against which the Court assessed the sufficiency of the claims.

Telephonic oral arguments were held on January 6, 2021. On February 17, 2021, the district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6), denying Plaintiffs' motion to amend as consequently futile (A 139-140).

On March 1, 2021, Plaintiff-Appellants ("Appellants") timely filed their notice of appeal. (A-771).

STATEMENT OF THE FACTS

New York Public Health Law §2164 ("P.H.L. §2164" or the "mandatory vaccination law") requires all parents residing in the state to ensure that their children are vaccinated at specified intervals with an average of fifty doses of sixteen different vaccines beginning at two months and continuing until the child turns eighteen. (SPA-89).

The mandate is not limited to parents of children who attend school – it is an obligation that all parents must follow under the plain language of the statute, whether or not a child attends school. P.H.L. §2164(2). But one consequence of noncompliance is that the child cannot attend any public or private school in New York state. P.H.L. §2164(7).

If a child cannot safely receive a vaccine, the statute states that the child is supposed to be exempt: "If any physician licensed to practice medicine in this state certifies that such immunization may be detrimental to a child's health, the

requirements of this section shall be inapplicable...” P.H.L. §2164(8) (“statutory medical exemption”). Until 2019, the statute also included a religious exemption.

When the Legislature repealed the religious exemption in 2019, it also considered whether to amend or repeal the medical exemption but declined to do so. There was no need. The number of children who seek medical exemptions is far too low to impact herd immunity and the justification for repealing the religious exemption was primarily to protect those who could not be vaccinated for medical reasons, as everyone else was vaccinated and presumably immune. *See, e.g., Amended Complaint* (A-761 ¶378).

Nonetheless, acting on their own initiative, the DOH defendants promulgated a regulation in August 2019 that substantially limits the availability of the medical exemption. And, with DOH’s encouragement, individual school districts elected to further undercut the protection by deputizing school principals and superintendents to substantively review and aggressively overrule children’s state-licensed doctors about what is safe for these medically fragile children.

i. State interference with a physician’s best medical judgment

Appellants challenge a 2019 rule change to the DOH administrative regulations that they assert impermissibly limits a physician’s best medical judgment in making medical determinations. 10 NYCRR §66-1.1(1)(“New

Regulatory Definition”).⁴ The New Regulatory Definition predefines for physicians what may be considered in determining if a child needs to be exempt to the mandatory vaccine law: “*May be detrimental to the child’s health means that a physician has determined that a child has a medical contraindication or precaution to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care.*” *Id.*

Appellants allege that, facially and as applied, the new regulatory definition usurps clinical judgment from treating physicians and allows state actors to reject any exemption that does not fall squarely within the four enumerated contraindications provided in the Center for Disease Control and Prevention’s (“CDC”) “Best Practices Guidance of the Advisory Committee on Immunization Practices” (“ACIP” or “ACIP Guidance”). Amended Complaint (A-752 ¶¶313-318).

According to Appellants, this not only burdens their right to make medical decisions without the state limiting their physician’s “best medical judgment” but it also puts children at serious risk of harm. The ACIP Best Practices Guidance is not exhaustive and was never meant to replace clinical judgment or define the limits of valid or necessary medical exemptions. *Id.* (A-688, 737). Dr. Andrew Kroger, a representative of the ACIP committee and author of the most recent ACIP Guidance

⁴ These regulations were originally passed on an “emergency” basis. On December 31, 2019, the regulations became permanent (10 NYCRR §66-1.1[l]).

emphasized this point in writing to plaintiff Jane Doe: “*The ACIP guidelines were never meant to be a population-based concept....The CDC does not determine medical exemptions. We define contraindications. It is the medical provider’s prerogative to determine whether this list of conditions can be broader to define medical exemptions.*” Amended Complaint (A-737 ¶283).

The complaint lists hundreds of additional evidence-based reasons not covered by the new regulatory definition that could give rise to the necessity of a medical exemption to protect a vulnerable child, including (1) over one hundred uncovered known adverse-reactions to vaccines routinely compensated as typical vaccine injuries by the United States Government through the Vaccine Injury Compensation Program, (2) over two hundred uncovered precautions and known adverse reactions listed in the vaccine manufacturer’s own package inserts, and (3) the findings of dozens of Institutes of Medicine Reports, which expressly caution that the evidence reveals subpopulations who have pre-existing susceptibility to serious adverse reactions that would not be easily identified in generalized practice guidelines. *See, e.g., Amended Complaint* (A-688 ¶12, A-739-749; ¶¶290-300; A-749 ¶306).

The district court made a disputed finding of fact in the Defendants’ favor that the addition of the phrase “or other nationally recognized evidence-based standards of care” allows physicians meaningful expansion beyond ACIP to cover these

conditions. (SPA-53). Nothing in the 580 pages of disputed factual material the court took judicial notice of to make this inference establishes that this is true. (A-103-682 and SPA-96).

Either way, Appellants allege that to the extent “other nationally-recognized standards of care” is even assessed, it is unconstitutionally vague and neither the DOH nor implementing school districts apply it to expand ACIP in any meaningful way. *Id.* (A-752). The Complaint alleges that in practice the DOH routinely instructs physicians and reviewing school districts to limit their issuance or review to the narrowest possible interpretation of ACIP and does not interpret “or other nationally recognized evidence-based standards of care” to expand the protection beyond a narrow reading of ACIP. *Id.*

Indeed, Plaintiffs detailed multiple examples where their physicians submitted exemptions based on “other nationally recognized evidence-based standards of care,” or even one of the ACIP precautions, only to have their exemptions denied for not falling into one of the four narrow enumerated ACIP “contraindications.” (A-702-736). Throughout the individual named families’ stories, Appellants pointed to examples of the DOH issuing instruction to schools and physicians to solely assess whether an exemption falls under ACIP, without any reference or examination of “other nationally-recognized standards of care.” *Id.*

Appellants allege the new regulatory definition endangers vulnerable

children. *Id.* Clinical guidelines were never meant to be - and cannot safely be - substituted for the clinical judgment of a treating physician based on all reliable and relevant available evidence. (A-752).

By limiting physicians to the limited conditions identified as contraindicated in a generalized clinical guideline, whole categories of disabled children whose disability prevents them from safely receiving one or more required immunizations are excluded. (A-739-749). As a result of these new regulations, children are being denied medical exemption protection and stripped of educational rights and services.

ii. **Third party review and rejection of a treating physician’s best medical judgment**

Appellants also challenge policies recommended by the DOH and formally adopted by implementing Defendant school districts on a discretionary basis that deputize school administrators to substantively review and overrule treating physicians about what qualifies as a valid reason for exemption.

Pursuant to statute and regulation, school districts are not required to determine the “sufficiency” of a treating physician’s opinion. And, while DOH regulation allows school districts to request additional information through amendments to 10 NYCRR §66-1.3(c), this is discretionary and at least facially, does not suggest schools should engage in substantive review. 10 NYCRR §66-1.3(c)(SPA-92).

Pursuant to statute, school principals are only required to ascertain that a physician licensed to practice in New York signed the exemption request, that it was submitted on the correct form and that it provides a reason a child should be exempt and for how long. 10 NYCRR § 66-1.1(1); P.H.L. §2164(7).

Nonetheless, with the encouragement of the DOH, many individual districts elect to engage in burdensome substantive reviews, narrowing the definition of what may cause harm even more than the new regulation does, and allowing school principals with no medical training to overrule treating physicians, often without any explanation to the families.

Each Appellant family submitted certified medical exemptions from one or more New York licensed physician. Each was denied and stripped of educational rights. Appellants allege that their stories are representative of hundreds, if not thousands, just like them across the state.

JOHN DOE

John Doe is a fifteen-year-old boy whose diagnoses include mitochondrial disorder, hypoglycemia, genetic mutations, environmentally induced porphyria, metabolic and hormonal imbalances, eczema, food and environmental allergies, candida infection, amino acid disorder, heavy metal toxicity and multiple autoimmune disorders including Pediatric Autoimmune Neurological Disorder Associated with Streptococcus (“PANDAS”), Irritable Bowel Syndrome (“IBS”),

thyroid disease and Gluten Sensitive Enteropathy. Amended Complaint (A-703). John's conditions are chronic, incurable, and at times completely debilitating. *Id.* ¶93. John's disabilities significantly impair multiple major life functions including but not limited to functions of his immune system. Because of his disabilities, John is unable to take vaccines or interact with other typical levels of toxic exposure without significant harm to his health and regression of his debilitating neurological and physical symptoms. *Id.* at ¶¶93-6.

In August 2019, John submitted certifications from two treating physicians certifying that John cannot safely take vaccines. One was the specialist from the practice in Massachusetts that has been treating and managing John's conditions since he was four years old. The other was from John's pediatrician, a New York licensed physician who treated him for over ten years. *Id.* at ¶97.

The Cossackie-Athens School District overruled John's treating physicians' recommendations on the ground that the forms had not provided an explanation of how the reasons for exemption qualified under ACIP. *Id.* at ¶¶99-100.

In making their determination to deny John's exemption, the District consulted with Dr. Hassett, an emergency room medicine doctor who has no expertise or experience in John's conditions or even in treating children. *Id.* at ¶102. He has never examined John and neither he nor the school district defendants made any attempt before denying the request to ask for additional information about how

the conditions fell within ACIP or another evidence-based standard of care. *Id.*

After the denial, John's pediatrician called Dr. Hassett and asked why the exemption was denied. Dr. Hassett told him that he was obligated to follow the strict guidelines set forth by ACIP and could not consider any supplemental information, including any phone call with the treating physicians, to determine if a condition falls within the ACIP guidelines, but could consider only the information that was provided on the form. *Id.* at ¶103.

On Saturday, October 5, 2019, the family submitted a second medical exemption from their physician. In this request, John's pediatrician provided detailed analysis and information for each vaccine describing how the child's medical conditions qualified for precautions or contraindications under the ACIP guidance and citing to specific language from the CDC supporting the exemption. *Id.* at ¶104. Within 24 hours of receiving this second request, the school denied it with no explanation at all other than that though the second request complied with ACIP it was "unsupported." The school did not request any follow up supporting information or allow John's family or providers to supplement the record. *Id.* at ¶¶105-7. Defendants Squire and Mercer refused to provide any explanation or opportunity to be heard. John was removed from school. *Id.*

John's family appealed the decision to the Commissioner of Education on November 5, 2019. The case pended without decision for over eight months, until

August 2019 (after this suit was filed). No hearing was allowed and the Doe family was never able to appear. Two members of the New York State Legislature wrote letters in support of John's appeal, noting that the new regulations were being applied in a manner that was antithetical to the statutory medical exemption's plain language. *Id.* at ¶116. The Legislators both stressed that the New York State Legislature never intended or passed any law that would allow schools to overrule treating physicians. *Id.*

The Commissioner denied the appeal, refusing to consider constitutional claims or whether the regulations violate the statute (a constitutional separation of powers issue). Rather, review was limited to whether the actions violated the regulations. The Commissioner held that because the regulations allow, but do not require schools to request any supplemental materials, the school was empowered to reject the medical exemption if they could not understand how it complies with ACIP. *Id.* at ¶119. In denying the appeal, the Commissioner made no attempt to consider whether John was in danger from immunization, only whether his conditions were easily identifiable as contraindications specifically enumerated in the ACIP guidelines which they interpreted without any hearing or testimony from medical professionals about what did and did not fall within those boundaries. *Id.* at ¶120. John has been excluded from school since October 7, 2019. *Id.* at ¶113.

JANE BOE

Jane Boe, fifteen, has multiple serious diagnosed conditions and autoimmune syndromes, including autoimmune encephalitis, which causes progressive neurological injury and attacks the brain. Amended Complaint (A-708 ¶125). She is up to date on all immunizations and boosters aside from the meningococcal vaccine. *Id.* at ¶134.

Meningococcal vaccine can only provide personal protection and cannot prevent infection and asymptomatic transmission to others. There is no “herd immunity” benefit possible with this category of vaccines – it is for personal protection only. *Id.* at ¶¶135-136.

Like Jane, both Jane’s brothers developed autoimmune encephalitis and acute neurological neuropsychiatric conditions that were significantly exacerbated by immunization. *Id.* at ¶129.

Jane’s health began to seriously deteriorate in reaction to her last set of immunizations at age twelve. *Id.* at ¶128. Jane’s middle brother became so ill from an adverse reaction to vaccination that he had to take a medical leave from middle-school for several years after his last vaccine. *Id.* at ¶130.

Jane’s eldest brother died two years ago because of complications from the meningococcal vaccine. *Id.* at ¶51. He had the same diagnosed conditions, history of adverse reactions and vulnerabilities as Jane and their middle brother, and he had

taken the meningococcal vaccine against medical advice to attend college. After he received the vaccine, his mental and physical health drastically deteriorated to the point where he committed suicide. His providers characterized the cause of death as arising out of his adverse reactions to the vaccine. *Id.* at ¶¶51, 131

Jane's multiple treating physicians each agreed that for Jane, the risk of injury and harm from the meningococcal vaccine far outweighed any potential benefit. Her primary care physician, a New York State licensed doctor, submitted a certified exemption in the fall of 2019. *Id.* at ¶¶137-8. Acting under the guidance of a consultant who never met Jane, the Three Villages School District denied Jane's exemption. *Id.* at ¶139.

Jane then submitted another, more detailed medical exemption, with certifications from two of her treating physicians, who certified that it was not safe for Jane to get the meningococcal vaccine. Both doctors took care to explain how the reasons for exemption fit within the CDC criteria for precaution and contraindication. *Id.* at ¶144. The school rejected the second exemption and Jane was removed from school. *Id.* at ¶¶145-7. Jane then submitted a third medical exemption certification from a third state-licensed provider. *Id.* at ¶148.

In denying the second and third requests, the school was counseled by Defendant Elizabeth Rausch-Phung, M.D. ("Dr. Rausch-Phung") a non-practicing physician at the DOH who has never met or examined Jane. Dr. Rausch-Phung

advised the school that death of a sibling was not listed as a covered reason for exemption under ACIP (even though Jane shared the same risk factors as her brother). But, she acknowledged that one of Jane's other bases for exemption did meet the ACIP criteria and she should be accepted, though she suggested that Jane should submit new exemption requests every thirty days. *Id.* at ¶¶147-150. The Three Villages School District disregarded the advice to accept and elected to deny Jane's third exemption and formally expel her in March 2020. *Id.*

JANE AND JOHN COE

Two children in the Coe family died from adverse vaccine reactions. Amended Complaint (A-714). The family proved causation in contested proceedings and received compensation from the National Vaccine Injury Compensation Program for one of the children. *Id.* at ¶158. Several other members of the Coe family also suffered documented severe life-threatening adverse reactions to vaccines. Jane and John's father and aunt were both severely vaccine-injured and had permanent medical exemptions for the remainder of their childhoods. *Id.*

On the advice of medical professionals, Jane and John Coe have not been vaccinated. The Coe children carry genetic mutations and markers that indicate the same vulnerability as their deceased family members to serious vaccine injury or death. They also have multiple food, environmental, and drug allergies and precarious health. *Id.* ¶¶162-65. The children's disabilities significantly impair

multiple major life functions including but not limited to functions of their immune systems. *Id.* ¶166.

In August 2019, the family submitted a medical exemption written by their licensed physician and supplemented by a letter from a genetic counselor who has been working with the family for many years. The Lansing Central School District accepted the exemptions, and the children began school without issue. *Id.* ¶¶167-170.

On January 21, 2020, without warning, the family received an email from the Superintendent of the Lansing Central School District, stating that the “building principals” for the children’s respective schools had rejected the medical exemptions and their children would each need to get eleven different vaccines within one week or else would be removed from school. *Id.* ¶171.

Attached to the correspondence was a letter dated December 5, 2019, written by Dr. Rausch-Phung. Dr. Rausch-Phung indicated that the death of a family member from vaccines was not enumerated under ACIP as a contraindication. She further noted that she lacked the expertise to determine whether the children’s genetic vulnerabilities were a “contraindication” (she made no mention of precautions or other nationally recognized evidence-based standards of care). Therefore, she stated the family should seek a corroborating opinion from a pediatric genetic specialist and submit additional information. *Id.* at ¶¶174-5.

The school district did not advise the Coe family that they needed any follow up information or corroborating opinions before making their final determination to overrule the Coe children's doctor on January 21st, 2020. *Id.* at ¶176. They just denied the exemption request. *Id.*

The Coe family, through counsel, responded within days by letter to the school district and their attorneys. Counsel pointed out that the regulations also allow for “other nationally recognized evidence-based standards of care” and that the children's doctor provided nationally recognized evidence-based reasons for exemption in his lengthy medical exemption letters. She also objected to the requirement that a specialist corroborate the opinion (nothing in the regulations authorizes this all too frequent requirement) but nonetheless asked the Lansing Central School District defendants for a short additional extension of time to attempt to comply with his corroboration request. The only pediatric genetic specialist that in the state was scheduling new patients a year or more out. The family requested at least a few months to try to expedite a new appointment. *Id.* at ¶¶177-8.

Defendants denied the request for an extension and in the response to the concern that Dr. Rausch-Phung's requests were unconstitutional, stated that the two building principals had made their decisions to overrule the Coe family physician “independently” of her medical advice. *Id.* at ¶179. They refused to provide any notice of the grounds of denial or any opportunity to be heard on the issue. *Id.* The

Coe children were removed from school on or about January 29, 2020. They have been prohibited from participating in school – even online – since. *Id.* at 182.

JOHN FOE

John Foe, eleven, was born with Hirschsprung's Disease, a rare genetic disease that prevents the formation of connections between the brain and gastrointestinal system. As an infant, surgeons removed a large section of John's intestine. The surgery profoundly affected John's immune system, more than 70% of which is in the gastrointestinal system. He uses a prosthetic colon that must be inserted every night to keep him socially continent. Amended Complaint (A-718).

John also suffers from a long list of severe allergies. He is so sensitive to chemicals and metals that he cannot wear sunscreen or even drink tap water. When he drinks water that is not filtered correctly, he suffers cramping, diarrhea, and a bleeding rash around his rectum. *Id.* at ¶188.

When John needs to take antibiotics, he first has to be hospitalized and requires concurrent administration of metronidazole and other in-patient treatment to manage adverse reactions that inevitably result. *Id.*

Another of John's known triggers is immunization. John's family history reveals increased vulnerability to vaccines. His mother, who shares many of the same genetic mutations as John, suffered paralysis in reaction to a vaccine. John also suffered a severe reaction to a vaccine when he was three. On the advice of his

pediatrician, among other reasons, John has not been vaccinated since his reaction at age three. *Id.* at ¶¶189-90.

Acting on the advice of a consultant who has never met John, the Albany City School District rejected the medical exemptions submitted by John's state licensed treating physician, who has treated John since he was a baby. The District asserted that there was not enough detail about how the exemption comported with ACIP. *Id.* John's physician then worked with attorneys to prepare a forty-page exemption request, documenting in detail John's multiple evidence-based reasons for needing an exemption and the peer-reviewed science that supports the determination. The District denied the second request immediately as well. *Id.* at ¶¶199-200.

John has been removed from school since September 2019. This has devastated John. He loved his school and was beloved by his classmates. They referred to him affectionately as the "mayor" of the school. He was an honors student, and an avid participant in marching band, chorus, chess club and running club. John has special needs and qualified for and received critical services under a 504 plan. Following his expulsion, the District refused to provide John with these services at home. *Id.* at ¶¶195-198.

As a result of his exclusion from school and services, John became severely depressed. His family, frightened and helpless as they watch their child's mental and emotional health deteriorate, are seriously considering moving to a new state so that

John can receive an education and needed services, even though as New York licensed teachers, their careers, as well as their lives and their families, are all in Albany. *Id.*

THE GOE FAMILY

Jane Goe, seventeen, suffers from multiple severe autoimmune conditions and genetic mutations that are well-established by science as putting her at serious risk of harm from certain vaccines. Her diagnoses include type I Diabetes, Celiac Disease, Hashimoto's Thyroiditis, Alopecia Areata and Polycystic Ovarian Syndrome. Her cascading and multiplying autoimmune conditions were triggered by a vaccine received in the third grade. Within short order, she lost half her hair, developed five serious autoimmune conditions, and became so debilitated that she was unable to attend school for significant periods of time in the years that followed. Amended Complaint (A-721).

Vaccines have been shown to trigger autoimmune disease in susceptible individuals and in Jane's case it was the clear trigger. Jane's family history reveals serious propensity towards autoimmune disease, and she carries a rare HLA genotype which places her at high risk of developing Guillain-Barre syndrome (an acknowledged potential severe adverse reaction to vaccines which causes death and/or paralysis). *Id.* ¶¶209-10.

Jane is up to date on all vaccines except the meningococcal vaccine and the

fifth dose of the tetanus, diphtheria, and pertussis containing vaccine (Tdap). *Id.* at ¶204. No component of any of the vaccines Jane is missing can provide any herd immunity benefit. These vaccines are all acknowledged by uncontroversial scientific consensus to provide personal protection only but still allow asymptomatic infection and transmission. *See, e.g., Id.* at ¶215.

Jane's primary care physician, who has been working with Jane and her family for years to get Jane's health to a minimal level of functionality submitted a medical exemption on August 18, 2019 that meets the criteria under the ACIP contraindications and precautions. *Id.* at ¶213.

On September 11, 2019, the school district defendants denied Jane's medical exemption on the advice of Dr. Robert J. Tuite, who is a pediatrician specializing in sports medicine with no expertise in Jane's conditions. The Penfield School District, acting on the advice of Dr. Tuite, does not consider anything other than the ACIP contraindications as valid reasons for exemption. *Id.* ¶¶216-17.

In their denial, the Penfield School District insisted that Jane had to have *suffered* Guillaine-Barre syndrome (through death or paralysis) after administration of a specific vaccine before being exempt and in that event, would only be exempt from the vaccine that caused her death or paralysis. They also stated that a licensed physician was not sufficient, even though Jane's doctor has decades of experience and understands Jane's health better than any other doctor in the state. Instead,

pursuant to Dr. Tuite's advice, Jane's family had the burden of submitting a corroborating exemption from a specialist. *Id.* at ¶¶216-17. Jane was given fourteen days to find a specialist that could see her and evaluate her, secure a certification against immunization, and submit it to the school or she would be removed and deprived of an education. *Id.*

With great difficulty, Jane's mother was able to get an appointment with a highly qualified specialist within the fourteen-day window. She did this by taking time off work, calling every specialist she could identify in the area repeatedly, and camping out outside of providers' offices to beg for an appointment until a specialist was finally able to fit her in, in this case, Dr. Craig Orłowski. Dr. Orłowski, who has been practicing medicine for over forty years, is the Chief of Pediatric Endocrinology at the University of Rochester Golisano Children's Hospital, an Association Professor of Clinical Pediatrics at the University of Rochester Medical School and has published widely on many of the conditions Jane suffers from. Luckily for Jane, Dr. Orłowski immediately understood that Jane could not safely take the Tdap or Meningococcal vaccine and wrote an exemption. *Id.* at ¶218.

Dr. Orłowski's exemption was submitted to the school on September 18, 2019. Later that same day, Jane's mother received an email from the Superintendent alerting her that the district had elected to deny the second request. Forwarded with the email was a response from Dr. Tuite, who is not a specialist, has never published

anything, primarily works in sports medicine, has no expertise in Jane's health conditions, and has never examined Jane. He said "*I have a lot of admiration for Dr. Orłowski as a pediatric endocrinologist but quite frankly I feel that he is out of his scope of practice/expertise within this area of immunization issues...*" he recommended that the school deny the exemption unless one of two named specialists he "trusted" in these types of "complicated situations" were to author the exemption. *Id* at ¶¶219-20.

The next day, Jane was humiliated in front of her peers, publicly removed from the homecoming events she was supposed to participate in (which were open to the public) and told she was no longer welcome at the school. Defendants widely spread the information that she was removed for failure to be vaccinated. *Id.* at ¶221.

While Jane was excluded from school, Jane's mother again had to take time off work and try to get an appointment with one of the two specialists that the school district indicated were *the only* doctors that they would consider an exemption request from. She was unable to get an appointment. However, she had the idea to show the denial to Dr. Orłowski, who was so offended that he marched over to Dr. Weinberg's office, who is one of the two only doctors that Dr. Tuite "trusts" and showed him the letter from the Penfield School consultant. Dr. Weinberg was shocked and immediately wrote a letter corroborating Dr. Orłowski's opinion and recommending that Jane be exempt at least through the fall semester. *Id.* ¶¶222-23.

Reluctantly, the defendants had to re-admit Jane back into school. However, they only admitted her until January 2020, when they would require Jane to go through the whole process again and submit another medical exemption. *Id.* ¶224. To try to stave off the same horrific experience, Jane's family had to hire an attorney and a team of consultants to write the January exemption. They never received an acceptance back. Jane spent every day of the rest of her senior year terrified that a letter would come in the mail announcing that her exemption was denied, and she would not be able to graduate with her class. *Id.* at ¶¶225-28.

Jane did graduate, after the filing of the complaint, before any denial or acceptance of her subsequent exemption requests was received back. But in addition to facing deprivation of school in the fall, Jane's family had to incur legal expense, loss of work, trips to multiple specialists and enormous stress, anxiety and impact on the whole family. Jane's health deteriorated under the burden. The family seeks compensatory damages. *Id.*

JOHN JOE

John Joe is a six-year-old boy who had a severe, life-threatening anaphylactic reaction to his hepatitis B vaccine given at birth. John has special needs. He has severe autism, obsessive compulsive disorder, and a range of neurological and other debilitating health problems. On the advice of medical professionals, John has had a

medical exemption to all immunizations since the anaphylactic reaction at birth. Amended Complaint (A-726).

John and his mother, Jane Joe, who is raising him alone with limited resources, moved to the Ithaca City School District in 2018. John received a medical exemption from the school for the 2018-2019 school year. *Id.* at ¶236. John attends summer school pursuant to his Individualized Education Plan (“IEP”) plan with the District. In the June 2019, John’s pediatrician submitted another exemption to cover the summer and the 2019-2020 school year. It was accepted. *Id.* at ¶237.

In November 2019, without warning, the Ithaca City School District sent Jane a letter informing her that her son’s medical exemption was being revoked other than for further hepatitis B vaccination. John was given a week to receive a dozen or more additional required vaccines, or he would be removed from school and services. *Id.* at ¶239.

As certified by his pediatrician (and all his treating doctors before her) John cannot be safely vaccinated. His mother had to quit her job teaching with the district, go on public assistance, and now attempts to attend to all her son’s extensive special needs on her own. *Id.* at ¶241.

Before he was removed from school, John’s IEP entitled him to extensive services, including speech therapy five days a week, occupational therapy three days a week, music therapy and play therapy. The Ithaca City School District refuses to

provide any of these services to him now, even though they provide services to other homeschooled children who are not excluded for medical reasons. *Id.* at ¶242. Jane timely filed an appeal to the Commissioner of Education in 2019. She still has not received any response to date (May 14, 2021). The family remains in crisis and John's functionality is suffering without his needed services. *Id.* at ¶243.

JOHN LOE

John Loe, fifteen, is diagnosed with two forms of debilitating autoimmune encephalitis: Pediatric Acute-Onset Neuropsychiatric Syndrome ("P.A.N.S.") and Hashimoto's Encephalopathy. He's had a medical exemption to all further vaccination since age seven. Amended Complaint (A-731).

For the first seven years of his life, John was vaccinated in strict accordance with ACIP guidelines, receiving in addition to the required vaccines all the influenza and H1N1 flu vaccines that were strongly recommended. Following a series of immunizations at age five, John's health increasingly began to deteriorate. His condition worsened after his age six immunizations and finally reached a crisis point immediately following his immunizations the following year. At that point, John became so ill that he could tolerate only a sip of water and one saltine cracker a day. His neurological and physical symptoms became debilitating and alarming, including hallucinations, head banging, self-harm, and threats of suicide. *Id.* at ¶¶248-53.

John was referred to a pediatric neurologist, who diagnosed John's serious medical conditions and stabilized his health. Upon this neurologist's advice, John has not received any vaccines since age seven and, until last year, his schools accorded him a medical exemption without issue every year. *Id.* at ¶¶254-59.

John, who has been extensively vaccinated, is only missing a final booster dose of the Tdap vaccine (tetanus, diphtheria, and pertussis) and two doses of meningococcal vaccine (meningitis). Each of these missing vaccines is in the category of vaccines that can provide only personal protection and cannot stop infection and transmission to others. *Id.* at ¶¶272-3.

In 2018, John began attending St. Anthony's High School ("St. Anthony's"), a private Catholic college preparatory school in the South Huntington School District. For the 2018-19 school year, St. Anthony's accepted his annual medical exemption for the Tdap and meningococcal vaccines.

But in September 2019, the school revoked John's medical exemption. It based its decision on the advice of an osteopath who acts as consultant to the South Huntington School District, and who St. Anthony's elected to use to assist with their review. This consultant never met John and has no expertise in John's serious health conditions. Based on his advice, St. Anthony's removed John from classes on September 20, 2019. *Id.* at ¶¶260-62.

John's pediatric neurologist, who he'd relied on since he was seven years old to help him manage his severe conditions, suddenly dropped him as a patient after receiving intimidating calls from the school district's consultant . *Id.* at ¶261.

For the remainder of the fall of 2019, the family's life revolved around the uphill battle of trying to return John back to school and to find a new specialist. There are few specialists with expertise to treat John's conditions and their waiting lists are long. John's health and academics declined dramatically. *Id.* at ¶263.

In November 2019, the Loes finally secured an appointment with a pediatric immunologist with expertise in autoimmune encephalopathy. The new specialist agreed that it is unsafe to immunize John any further and wrote a medical exemption immediately. *Id.* at ¶265.

St. Anthony's denied this request, wrongly asserting that the immunologist needed to fill out a separate medical exemption form for each vaccine rather than list them both on one form. John's mother missed substantial work time and essentially "camped out" at the immunologist's office to get another appointment and a third set of forms. By then, the immunologist was hesitant to sign the new forms because the DOH contacted him after he signed the first ones and, though nothing in the law supports this, the DOH told him that only pediatricians who administer the vaccine can write exemptions. After the Loes showed him the statute and regulatory guidance, the immunologist ultimately signed the forms. *Id.* at ¶¶266-69.

Months of bureaucratic delay followed the submission of the third set of forms. In the meantime, John was not able to attend school. In spring 2020, St. Anthony's denied John's third medical exemption, asserting that the consulting osteopath felt the immunologist could not "sufficiently defend" the exemptions in his phone conversation with him. Thus, St. Anthony's immediately and permanently formally expelled John. The Principal (Defendant Br. Migliorino) told the family that he informed all of the teachers and administrators of the reason in violation of John's medical privacy rights. *Id.* at ¶270.

John's school expulsion was traumatic for him. A hallmark of his condition is severe social anxiety. Before his expulsion, John was just at a point of recovering enough health to start developing confidence. He was proud to have been accepted to St. Anthony's, which had been his dream since he started Catholic school in first grade. He was doing well at St. Anthony's, getting recognition for his music and was excited to be in several school bands. He was finally overcoming some of his social anxiety and making friends. John's confidence has now been shattered. He is severely depressed and is not able to keep up with his home studies. *Id.* at ¶275-78.

School expulsion has dashed John's college prospects and substantially altered the course of his life for the worse. His parents work full time and home instruction has not been successful. Additionally, because his medical exemption was rejected, John was excluded from the P.S.A.T. course and has fallen behind. He

feels hopelessly lost and his depression and anxiety have become debilitating. His mother reached out to psychologists who can provide counseling about his situation, feelings, and homeschooling encouragement, but John refuses to engage and has shut down to an alarming degree. *Id.* at ¶277.

SUMMARY OF THE ARGUMENT

New York’s arbitrary burdens on the statutory medical exemption are not constitutional. The fundamental right to a medical exemption from vaccine requirements that could harm or kill a child is well-established, particularly where, as here, state-licensed physicians certify that compliance puts the child at risk of serious harm. *See, e.g., Jacobson*, 197 U.S. 11 at 36-39; *Doe*, 410 U.S. 179 at 199-200; *Ayotte*, 546 U.S. 320.

In dismissing the complaint, the district court (1) erred in holding that there is no fundamental right to a medical exemption from immunization requirements that could kill or seriously harm a child; (2) failed to correctly apply the unconstitutional conditions doctrine, proposing that since there is no “fundamental right” to an education, any conditions on access to school are subject only to rational basis review, even if the condition substantially infringes well-established fundamental rights; and (3) misapplied *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and Chief Justice Roberts’s concurrence in *South Bay II*, as establishing *carte blanche* authority for administrative agencies to impose unfettered restrictions on

fundamental rights in the name of public health without judicial review.

Throughout, the district court also erred by failing to credit Plaintiffs well-pled factual allegations, relying on disputed factual exhibits submitted by the Defendants outside of the complaint, and drawing inferences in favor of the Defendants rather than the Plaintiffs.

Appellants plausibly alleged violations of viable constitutional and federal claims against state and municipal defendants and individual school district defendants including Br. Migliorino. The decision below should be reversed, and the case remanded to determine the appropriate relief.

STANDARD OF REVIEW

This Court “review[s] de novo the dismissal of a complaint under [Federal] Rule [of Civil Procedure] 12(b)(6), accepting all factual allegations as true and drawing all reasonable inferences in favor of the plaintiff.” *N.J. Carpenters Health Fund v. Royal Bank of Scotland Grp., PLC*, 709 F.3d 109, 119 (2d Cir. 2013) (citation omitted). To survive a motion to dismiss, a complaint must provide “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 570 (2007)). “Although a complaint need not contain detailed factual allegations, it may not rest on mere labels, conclusions, or a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555.

ARGUMENT

I. POINT ONE: APPELLANTS HAVE A FUNDAMENTAL RIGHT TO A MEDICAL EXEMPTION FROM VACCINATION WHERE THEIR STATE-LICENSED PHYSICIANS CERTIFY THAT SUCH VACCINATION MAY CAUSE THEM HARM OR DEATH.

The district court erred by failing to acknowledge the well-established right to a medical exemption from vaccine regulations in cases where a child is at risk of serious harm or death from the vaccine.

The right to a medical exemption from regulations that place a person at risk of serious harm or death is a fundamental constitutional right that has been recognized by the Supreme Court for over a hundred and fifteen years. *Jacobson*, 197 U.S. 11, 27, 36-39 (holding that the state's interest in mandating vaccines to protect the public at large from communicable disease can override personal liberty interests *but cannot* supersede a person's constitutional right to a medical exemption if he is at risk of harm from the vaccine).

This right is among the most strictly guarded by the Supreme Court, and infringements are rarely, if ever, allowed to stand. This medical exemptions involve more than just liberty interests.

To be sure, medical exemptions of course involve infringements on multiple well-established fundamental liberty interests (such as the right to refuse medical treatment, internationally recognized rights of informed consent and bodily autonomy, fundamental rights of parents to make medical decisions for their

children in accordance with their chosen physician, fundamental physician/patient rights, and fundamental privacy rights, each of which independently requires strict scrutiny review).

But at its core, the right to a medical exemption derives from the inalienable and superior right to life – and the associated right to defend and preserve one’s life.

This is one of the most universally guarded fundamental right - not just under our constitutional system, but in any civilized nation. It is a natural right, deeply rooted in our foundational concepts of law and justice and is considered by scholars as antecedent to the validity of any governmental system. *See, e.g.,* A.J. ASHWORTH, SELF-DEFENCE AND THE RIGHT TO LIFE, 34 Cambridge L.J. 282, 282 (1975).

John Locke discussed self-preservation from infringements on the right to one’s bodily security as being so fundamental to basic human nature that “no law can oblige a man to abandon it.” *Id* (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, Ch II, 6, 1690).

In his Commentaries on the Laws of England, William Blackstone described the right to protect one’s “life and limb” from harm as “the primary law of nature,” holding that it is an “absolute right” which “every man has a right to enjoy.” *Id.* (citing 1 W. BLACKSTONE, COMMENTARIES 119).

Given the foundational nature of this right, it is not surprising that Courts have a long history of safeguarding medical exemptions. The *Jacobson* decision, for example, substantially predates the application of the Bill of Rights and substantive due process liberty interest analysis to review of state action. Nonetheless, even in 1905, the Court *de facto* recognized the Fourteenth Amendment's protection of the right to life – specifically the right to a medical exemption if one's life or health was jeopardized by an otherwise permissible vaccine requirement - as a constitutionally protected right subject to rigorous independent judicial scrutiny. *Jacobson*, 197 U.S. 11 at 36-39.

Since *Jacobson*, the Supreme Court continues to give far less leeway to infringements on medical exemptions than to infringements of other fundamental rights derived only from liberty interests. Even where the state establishes a compelling interest, the Court consistently draws a bright line against infringements on the right to a medical exemption.

In determining the sufficiency of a law's medical exemption protection, two clear doctrines emerged: (1) strict harm avoidance, and (2) a bar against interfering with the licensed provider's independent "best medical judgment" about the necessity of an exemption. The Appellants plausibly alleged that the challenged regulations and policies violate both doctrines and are therefore unconstitutional.

a. The challenged policies violate the harm avoidance doctrine.

Jacobson's harm avoidance principle – that a state cannot compel a person to submit to an otherwise permissible health regulation that puts him at risk of harm – continues to be strictly observed. Public health law scholars acknowledge this principle of harm avoidance as part of the foundational holding of *Jacobson*. See, e.g., LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT 126-28 (2d ed. 2008) (per *Jacobson*, public health regulations require five elements to be constitutional: (1) public health necessity, (2) reasonable means, (3) proportionality, (4) harm avoidance, and (5) fairness).

The Supreme Court's medical exemption cases since *Jacobson* consistently uphold the harm avoidance principle, clarifying that, if a medical exemption is narrow enough to exclude even a few who might need it, it is unconstitutional on its face. See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 937 (2000); *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320 (2006).

In *Stenberg v. Carhart*, the Supreme Court held that the hypothetical possibility that a woman in need could be excluded by the challenged statute's narrow medical exemption rendered the law unconstitutional. 530 U.S. 914 at 937. Plaintiffs in that case challenged a statutory ban on partial-birth abortion. The parties agreed that the statute was a permissible restriction on the abortion right. However, the suit centered on the infringement on the medical exemption right.

Plaintiffs facial challenge alleged that the language of the statutory medical exemption was too narrow, as it excluded women whose health, but not life, may be in danger.

The Court agreed and struck the statute down as facially unconstitutional, even over Defendants' credited objections that (1) other arguably safer abortion options remained for women whose health but not life was at risk; and (2) the proof had not established that a woman would ever necessarily need a partial-birth abortion to protect her health but not life from serious harm. The Court's analysis for determining "necessity" in the case of a medical exemption is instructive:

The word "necessary" in *Casey's* phrase "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother," . . . cannot refer to an absolute necessity or to absolute proof . . . *Casey's* words "*appropriate medical judgment*" must embody the *judicial need to tolerate responsible differences of medical opinion.*"

Id. at 937 (citing *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833 (1992) (emphasis added)).

In *Ayotte*, the Supreme Court addressed another hypothetical facial challenge to an abortion regulation's medical exemption, again finding the law unconstitutionally narrow as it allowed for the possibility that the health but not life of a young woman might be at risk without protection. *Ayotte*, 546 U.S. 320 at 328.

In that case, the challenged law required that a provider notify a minor's parents 48 hours before performing an abortion unless her life was in danger. The Court's unanimous decision affirmed that the restriction on abortion was permissible under strict scrutiny because parents have a liberty interest in notification 48 hours before their child has an abortion, and the state's compelling interest in safeguarding that fundamental parental right was sufficient to infringe upon a young woman's liberty interest in abortion.

But the Court still found the law unconstitutional because it could impermissibly infringe on the woman's separate – and superior – right to a medical exemption “in some very small percentage of cases” where a young woman's health, but not life, might be endangered by waiting 48 hours to perform an abortion. Since the medical exemption was written narrowly enough to permit the possibility, either facially or as applied, that some at-risk women might not receive an exemption, the Court held that the law's medical exemption was facially unconstitutional and sent it back for the lower court to determine if declaratory or injunctive relief would suffice, or if the entire parental notification statute needed to be struck down.

The Court recognized that even if a few minors were excluded, either because their health but not life was at risk, or because physicians failed to issue them a medical exemption because they were unsure if their determinations of medical

necessity fit within the arbitrary new definition, the law would be unconstitutional: “under our cases, it would be unconstitutional to apply the Act in a manner that subjects minors to significant health risks.” *Ayotte*, 546 U.S. 320,328.

Ayotte illustrates how much stricter the scrutiny is for medical exemptions compared to other fundamental rights, even well protected rights such as abortion. A plaintiff alleging a facial challenge to a regulation infringing on the liberty right to choose an abortion, for example, must establish that “in a large fraction of cases in which [the law] is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.” *Casey*, 505 U.S. 833 at 895. However, in analyzing a facial challenge to a medical exemption, this Court held that, even where the risk of burden might occur only in “some very small percentage” of cases potentially not covered by the exemption, the medical exemption protection is too narrow and, therefore, unconstitutional. *Ayotte*, 546 U.S. 320 at 328.

As the cases above illustrate, even the possibility that a medical exemption is narrow enough that it could plausibly exclude someone in need is enough to render it facially unconstitutional. Here, the state’s constricted regulation on medical exemptions cannot survive where the risks are not just hypothetical or limited to a few cases. Rather, the complaint plausibly alleges that hundreds of children *certified by their treating doctors as at significant risk of harm* from one or more vaccines are actively being denied medical exemptions in New York.

The complaint and moving papers provide evidence of hundreds of additional evidence-based reasons that exist beyond the narrow ACIP guideposts that put some children at substantial risk of harm or death. Manufacturers, the United States government, and the Institutes of Medicine, among others, acknowledge these risk categories, and the Appellants plausibly alleged that the new regulation, as applied, arbitrarily excludes a substantial percentage of children in need from protection. Amended Complaint (A-688 ¶12, A-739-749; ¶¶290-300; A-749 ¶306).

Moreover, as discussed in more detail in the next section, the policies adopted by the Defendant school districts, which authorize non-medically trained school administrators to try to interpret medical guidelines and overrule treating physicians if they cannot understand how the recommendation comports with the guideline, also necessarily put children at risk. School principals cannot safely be allowed to overrule treating physicians about what is or is not safe for a vulnerable disabled child. And just like in *Ayotte*, with such uncertainty surrounding the definition of what may permissibly be defined as “causing harm” under the new regulation, physicians are likely to avoid writing needed exemptions.

Ultimately, even after improperly affording favorable inferences to the Defendants (as discussed below), the district court acknowledged that the complaint plausibly alleged that the state’s policies, as applied, are excluding at least some percentage of children in need of an exemption from protection. Pursuant to

controlling precedent, the challenged policies should have therefore been found facially unconstitutional in violation of the harm avoidance doctrine.

b. The challenged policies impermissibly infringe on the physician's independent medical judgment.

In addition to violating the harm avoidance doctrine, the challenged policies also violate the Supreme Court's clear instructions on the limits of allowable state interference in medical exemption determinations.

Almost fifty years ago, the Court examined state interference in the process of determining whether a medical exemption is "necessary" which was almost identical to the policies challenged here. The Court declared the state's policies unconstitutional. *Doe* 410 U.S. 179 at 199-200.

Doe is an important case in medical exemption jurisprudence because it lays out how to balance compelling interests of the state with the right to a robust and inclusive medical exemption for those at risk of harm. The ultimate compromise the Court struck is that, so long as a person submits certification from a state-licensed physician, the state cannot further encroach on the doctor/patient relationship and the exemption must be granted. "If a physician is licensed by the State, he is recognized by the State as capable of exercising acceptable clinical judgment." *Doe*, 410 U.S. at 200. No further state interference is constitutional. *Id.*

i. *Doe* prohibits the state from limiting the factors a physician can consider.

In *Doe*, the Supreme Court affirmed the lower court’s holding that a physician must be able to consider a broad range of factors to clinically determine whether a medical exemption is “necessary.” “We agree with the District Court that the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman’s age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment.” *Id.*

Doe’s warning has been consistently upheld. Several subsequent Supreme Court cases cite *Doe* to hold that it is unconstitutional for the state to predefine the criteria a physician can rely upon in making medical determinations. *See, e.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (citing *Doe* to reject the state’s attempt to predefine viability and holding that medical determinations must be reserved to the unconstrained judgment of the responsible attending physician); *Colautti v. Franklin*, 439 U.S. 379, 396-97 (1979) (affirming *Doe*’s holding that the state must allow a physician the “room he needs to make his best medical judgment” and stressing that *Doe* “underscored the importance of affording the physician adequate discretion in the exercise of his medical judgment in light of all attendant circumstances”).

Considering this controlling precedent, DOH's requirement that a physician limit her determination of "what may cause harm" to a narrow interpretation of the recommendations in the ACIP best practices guidelines, or any other predefined criteria beyond best medical judgment, is unlawful. Physicians already make medical decisions based on the best available evidence incorporated with their clinical judgment. They can, and certainly should, consider ACIP's recommendations. But they also need to be able to make their decision based on all relevant factors – clinical examination, family history, emerging peer-reviewed evidence, Institutes of Medicine reports, and anything else that responsibly informs a physician's determination about the patient's health. For the safety of the patient, a treating physician's judgment must not be artificially limited, particularly by a definition that does not encompass all of the reasons an exemption may be needed.

As the author of the current ACIP guidelines explained to plaintiff Jane Doe, best practices guidance, such as ACIP, are not exhaustive and cannot replace clinical judgment. They are meant to serve as a guide for the practitioner to use as a starting point to be considered alongside all the attendant circumstances impacting the child's health. Nothing should preclude the physician from examining the totality of circumstances. DOH Guidance which instructs that it is improper, for example, for physicians to consider severe family history of adverse reactions –

even proven vaccine caused deaths of family members with the same risk factors as the child— shocks the conscience and is not supported by science.

ii. *Doe* prohibits substantive review or corroboration of a medical exemption determination made by the patient’s chosen state-licensed physician.

Second, *Doe* held it unconstitutional to allow third parties (in that case, private and public hospitals) to substantively review a treating physician’s medical exemption determination. The Court acknowledged that the admitting hospitals have good reasons to want to independently verify the medical exemption determination before allowing the abortion to proceed at their hospital. However, they held that this compelling interest does not override the fundamental rights of the patient to receive medical care in accordance with her physician’s best judgment:

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

Id. at 192 (emphasis added).

Doe also held that it is unconstitutional to require the treating state-licensed physician to establish that other physicians corroborate her determination. The Court’s discussion of corroborating opinions in *Doe* is particularly apposite here:

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

Id. (emphasis added).

The same reasoning applies with greater force to the challenged policies here. Hospitals have an independent duty of medical care to the patients who receive surgery at their facilities. It is understandable (though unconstitutional) that they would want to ensure that they are not allowing otherwise unlawful medical procedures to take place by reviewing medical necessity determinations. But schools have no such justification. They are not in the business of making medical decisions for their students and they are not qualified to do so. The district court's holding, that *Jacobson* somehow extends to schools the right to deputize non-medically trained school principals to overrule treating physicians about whether a child is at risk of harm, was an error of law and violates both *Doe* and *Jacobson*. If it is unconstitutional for public and private hospitals to require as a condition of admission a review of the medical exemption determination made by the patients' doctor, it is certainly unconstitutional for public and private schools to impose such a condition for admission to school. Similarly, if it is unconstitutional to require a

doctor to show that other physicians will corroborate his medical exemption opinion, it is certainly unconstitutional to overrule the treating physician when a consultant or school administrator does not agree with a child’s doctor. The Supreme Court’s precedent repeatedly cautions that unanimity of medical opinion cannot be required in the context of medical exemptions. *See, e.g., Stenberg* 530 U.S. at 937.

By enacting Public Health Law § 2164(8), which provides a medical exemption if “*any* physician” licensed in the state certifies that a child’s health may be at risk from a vaccine, the New York State Legislature reached the constitutional limit of permissible restriction on medical exemptions. Under *Doe*, further regulation is unconstitutional. The challenged DOH regulation and policy, and the defendant School Districts’ applications thereof, violate both the plain language of the statute and binding Supreme Court precedent.

c. The district court erred by holding that medical exemption protection only applies in the context of abortion “or other fundamental rights”.

Medical exemption case law leaves no room to uphold the challenged policies in this case. The district court sidestepped this problem by holding that *Doe* and *Ayotte* only apply in the case of abortion or in other cases where the Supreme Court had recognized that a “fundamental right” might be implicated.⁵ (SPA-48).

⁵ The district court did not directly address *Doe* in its 87-page decision, though *Doe* was a central part of the Plaintiffs argument. It is assumed that when the district court discussed “*Casey, Stenberg* and their progeny” as not applying outside of the abortion context, the court meant to include *Doe* and *Ayotte*.

i. *Doe's holding is not limited to the abortion context*

Nothing in the case law supports limiting *Doe's* holding to abortion cases. In fact, the Supreme Court has already recognized that *Doe's* prohibition on state interference in the doctor patient medical decision-making process applies to all medical decision making not just abortion-related decisions. *See, e.g., Whalen v. Roe* 429 U.S. 589, 603 (1977).

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

Whalen, which did not involve abortion "or any other fundamental right", expressly recognizes that *Doe* applies protection to all medical decision-making, not just medical exemption decisions in the context of abortions. As the Supreme Court

repeatedly recognizes, patients must be able to make such medical decisions in accordance with their chosen physician’s best medical judgment about when an exemption is warranted, “without being required to obtain the consent or corroboration of any state officials or third parties.” *Id.*

ii. Medical exemptions are not a derivative right.

The district court’s theory that the medical exemption precedent only allows strict scrutiny in cases where there is an associated separate right recognized as “fundamental” by the Supreme Court is inapposite. (SPA-48). *Ayotte* and its progeny clarify the right to self-defense in the form of a medical exemption as a separate right from the liberty right to an abortion. *Ayotte*, 546 U.S. at 325.

In *Ayotte*, the Court held that the state’s compelling interest in notifying parents 48 hours before their child has an abortion is sufficient to outweigh the infringements on a woman’s liberty interest in abortion. Thus, the abortion right was is not relevant to the case. However, the Court did not stop there. Instead, it recognized that a young woman’s right to a *medical exemption* from the otherwise permissible 48-hour waiting period in cases where her health may be at risk of harm is a distinct – indeed, far stronger – right than her liberty interest in obtaining an abortion. The Court held this independent right to a medical exemption could not be infringed, no matter how compelling the state’s interest and even in cases where the burden on the abortion right itself is permissible. *Id* at 328.

This was the case in *Doe*, and *Stenberg* as well, where the Court addressed medical exemptions in the context of otherwise permissible state infringement on abortions. And of course, as recognized by the district court, the Supreme Court itself expressly held that *Doe* applies outside of the abortion context. *Whalen* 429 U.S. 589, 603 (SPA-48-49).

Nor is there any logical reason that medical exemption holdings should be limited to the abortion context. They apply even more strongly here.

In the abortion context, the medical exemption cases involve situations where exercise of the exemption *will necessarily* result in the death of another person. Abortion cases balance heavy interests. On the one hand, there is the woman's privacy and other liberty interests to choose not to carry a child. On the other, there is the child's right to survive and the state's obligation to protect that child's life. The compromise is that the woman's liberty rights prevail pre-viability, and the state's compelling interest in safeguarding the child prevail post-viability.

But there is an exception. Even post-viability, if a woman's health or life would be jeopardized by being prevented from ending the pregnancy, the state's compelling interests must yield even though the viable child will necessarily die.

Abortion cases represent the ultimate test of *Jacobson's* warning that state rights must yield to individual rights to a medical exemption if they are at risk of

harm. In the context of abortions, it is one hundred percent certain a child will die as a result of the exemption.

The Court is right. A woman cannot be required to put her health at risk to protect her unborn child's life; neither can parents be forced to sacrifice their child's health for society. While these types of sacrifices might be heroic if freely offered, if forced through duress, they usher in unimaginable tyranny.

In actuality, the odds that a medically fragile child will harm others in vaccine medical exemption cases are nowhere near as stark as the abortion cases. Assuming, *arguendo*, that a trial had been held and the State presented evidence showing that any of the exempt children pose a direct threat to others by exercising their medical exemptions (which has not been established), at best, the argument would be that there is a chance that the child's exemption could lead to another person catching and possibly being harmed by a disease that might have been prevented had the child taken the vaccine. This is not enough. As this Court recognized in *Ayotte*, even in situations where exemptions will necessarily result in the death of another person, medical exemptions cannot be withheld from those at risk of harm. 546 U.S. at 328.

Finally, the district court's attempt to set aside the extensive case law protecting the constitutional right to a medical exemption ignores *Jacobson*, which arose in the context of immunizations not abortion. *Jacobson* was the first case to

articulate the right to a medical exemption as deserving of heightened independent judicial scrutiny, and it prepared a framework later followed in the abortion context.

To be sure, *Jacobson* held that the state has a right to protect the community from contagious disease (arising out of the state's own right to self-defense) which can override personal liberty interests in certain emergency circumstances. But *Jacobson* also held that such compelling state interests are insufficient to override a person's right to defend his own life through a medical exemption if he is personally at risk of serious harm from the vaccine because of his physical condition or state of health. *Jacobson*, 197 U.S. 11, 36-39.⁶ Medical exemptions are not derivative of liberty rights. They are superior to liberty rights.

Additional Fundamental Infringed Liberty Rights

The other issue with the district court's proposed distinction is that there are at least four additional well-established fundamental rights infringed by the challenged actions: (1) the right to refuse medical treatment, (2) the right to informed consent; (3) the right to make medical decisions in accordance with one's chosen physician's best medical judgment; and (4) parental rights to direct the care and upbringing of children (which expressly encompasses the right to make medical

⁶ It should be noted that the Massachusetts law at issue in *Jacobson*, had an acceptably broad medical exemption that did not allow for review of a physician's medical exemption. *Jacobson* 197 U.S. 11 at 12. !

decisions on their behalf). The district court recognized that these rights are well-established fundamental rights infringed by the challenged regulations. (SPA-44-45).

In *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 278 (1990), the Supreme Court recognized that “a person has a constitutionally protected liberty interest in refusing unwanted medical treatment.” The district court agrees this is a fundamental right. (SPA-45). The district court also recognized that there is a fundamental right to informed consent and to make medical decisions in accordance with the best medical judgment of the state, unfettered by state intervention. (SPA 45-49).

To the extent that the district court asserts that *Doe* only applies in the case where there is an associated fundamental right at stake in the medical exemption infringements, it did not explain why *Doe* wouldn’t apply here after recognizing that these rights related to medical decisions are burdened in this case.

Indeed, there are no distinguishing factors here which would allow abdication of *Doe*. Just like *Doe*, in this case the court must consider whether state policy can allow public and/or private institutions to condition admission on state or third-party review of a person’s medical exemption from state regulation. *Doe*’s answer is no, there or here. *Doe*, 410 U.S. 179; *Whalen* 429 U.S. 589, 603.

Similarly, any attempt by the state to try to limit medical exemptions upfront by artificially constraining the factors a physician can consider has already been clearly articulated as a constitutional violation on the patient's right to receive medical care in accordance with their physician's best medical judgment. *Id.*

The district court also recognized that parents have a fundamental liberty interest in "directing the care and upbringing of their children." Central to this right is the parent's right to make medical decisions for their children until and unless they are found unfit. *See Troxel v. Granville*, 530 U.S. 57, 58 (2000) ("There is a presumption that fit parents act in their children's best interests" and thus "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."); *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").

The district court proposed that parents' fundamental rights, which normally are afforded strict scrutiny, should only receive rational basis review anytime a state law is implicated. (SPA-44). The cases the court cites do not support such a departure from Supreme Court precedent, which frequently holds that parents'

fundamental rights cannot be infringed by state regulations unless the law satisfies strict scrutiny. *Troxel*, 530 U.S. 57, 58; *Parham v. J.R.*, 442 U.S. 584, 604.

The circuit court cases the district court relied on involve the rights of public schools to make educational policy applying to their public school. These cases have nothing to do with the case before this Court. Indeed, to the contrary, here, the state is proposing to allow schools to make decisions *wholly outside* of their purview or qualification – that is, medical decisions for which they have no training or right to invade. Even the Defendants recognize that schools are not qualified to make these decisions.

It is constitutionally impermissible for the state to usurp parents' rights to make medical decisions for their child because of a difference of medical opinion between the treating physician and the random school district consultant, a person who has never examined the child and who is, thus, inherently less qualified to make critical health decisions. Such a regime is also against the child's best interest. Advised by their physicians, parents are in the best position to determine a course of action to protect their medically fragile child's health, particularly where there are differing medical opinions. Parents of medically fragile children typically spend years working with providers, diving deep into the medical literature, and gaining first-hand experience with their child's reactions to various medical interventions and triggers. They love their children and are best equipped to ask the appropriate

questions, evaluate, and make the final determination in the child's best interests. Thus, there is no rational basis for substituting fit parents right to make medical decisions with the unqualified opinions of school administrators.

Parental rights to make final medical determination for their child adhere not only to the parent but to the child as well. "The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state." *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000).

New York State's highest court cited *Doe* to hold that notions of *parens patriae* do not allow the state to usurp parental rights to make medical decisions as long as the decision is supported by a state-licensed physician. *Matter of Hofbauer*, 47 N.Y.2d 648, 655–56, (1979) (holding that parents and children have protected constitutional rights to choose a trusted physician and follow the advice of the state-licensed physician; pursuant to *Doe v. Bolton*, the state cannot substitute its judgment based on a difference of medical opinion about what is best for the child).

Doe's holding is clear and prescient: medical exemptions are between a patient and her state licensed doctor, and it is unconstitutional (and generally unsafe) for the state to intervene or deputize third parties to second guess that determination. In sum, "the State does not have the constitutional authority to give a third party an

absolute, and possibly arbitrary, veto over the decision of the physician and his patient.” *Danforth*, 428 U.S. at 74.

While there may be compelling circumstances which would allow a court to infringe medical or parental fundamental rights, just as compelling interests narrowly tailored sometimes justify infringements on the right to an abortion, binding precedent holds that such interests are rarely, if ever, enough to outweigh a person’s separate right to a medical exemption if they are at risk of serious harm from the state law. The state cannot require vulnerable children to put their health and life in danger without the strictest level of scrutiny and due process protection afforded.

II. POINT TWO: THE DISTRICT COURT’S HOLDING VIOLATES THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

As discussed *supra*, the district court acknowledges that pursuant to *Doe*, parents have a fundamental right to make medical decisions in accordance with their chosen physician’s best medical judgment without state interference. And, the court acknowledges infringement of a number of other fundamental rights.

Nonetheless, the district court did not apply strict scrutiny analysis to the infringements, reasoning that “if a school denies a parent’s request for a medical exemption to vaccination for a child, the child is barred from attending school, but

the decision whether to vaccinate remains with the child’s physician and parent.” (SPA-49).

According to the district court, so long as the DOH is not holding children down and forcibly vaccinating them against medical advice (s their parents scream no) the state can permissibly subject the parents to duress by withholding educational and other property rights unless the parents agree to let them vaccinate the children against medical advice. (SPA-45-49).

As a threshold matter, the District Court made a clear error of fact. The mandatory vaccine requirements apply to all children, not just children who wish to attend school. P.H.L. § 2164(2)(SPA-89). The new regulatory definition preventing physicians from recommending exemption for children at risk unless they fit a narrow criterion could lead to severe health and custody consequences far worse even than the deprivation of education and services, which is but one of the punishments for noncompliance.

But even if the challenged policies only applied as a condition to attend school, the court’s reasoning is inapposite. It squarely violates the unconstitutional conditions doctrine.

Whether parents have a “fundamental right” to access an education is irrelevant to this case. It is well settled law that a government cannot condition receipt of a benefit, fundamental or not, on the waiver of a constitutional protection.

“[E]ven though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.” *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

For example, in *All. For Open Soc’y Int’l, Inc., v. U.S. Agency for Int’l Dev.*, the plaintiffs brought a successful facial challenge to the application of a law that required organizations to issue a statement against prostitution as a condition of eligibility for a discretionary grant to help stop the spread of HIV. 651 F.3d 218, 231 (2d Cir. 2011)(citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)), *aff’d sub nom. Agency for Int’l Dev. V. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205 (2013). The CDC argued that since NGOs are not entitled to the grants, and since public health science shows prostitution drives HIV spread, which the grant was dedicated to halting, this was a proper condition designed to advance compelling public health interests that only incidentally burdened free speech rights.

This Court disagreed, recognizing that the government is not allowed to do indirectly what it cannot do directly in conditioning a government benefit. Since the CDC could not require NGOs to issue statements against prostitution normally (it would violate their free speech rights) they could not require them to do it to be eligible for a grant. An injunction was awarded and affirmed by the Supreme Court.

Agency for International Development, 570 U.S. 205 (2013)

The present case presents even more compelling argument against state coercion. *Doe* has firmly established the boundaries of state interference in medical exemption determinations, and the Appellants have firmly plead violations of those boundaries. The district court seems to acknowledge that the state is not allowed to subject medical exemptions to review or to limit a physician's medical judgment.

Thus, the state cannot get around this by conditioning a benefit, particularly a benefit as vital as access to any public or private school, on waiver of these rights.

The unconstitutional conditions doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013).

In his concurring opinion in the recent *Roman Catholic Diocese*, Justice Gorsuch pointed out that reliance on *Jacobson* in public health cases has been grossly misapplied by the circuits and tends to improperly ignore analysis of the level of coercion that a penalty presents: "Finally, consider the different nature of the restriction. In *Jacobson*, individuals could accept the vaccine, pay the [\$5 (about \$140 today)] fine, or identify a basis for [medical] exemption. The imposition on Mr. Jacobson's claimed right to bodily integrity, thus, was avoidable and relatively modest. It easily survived rational basis review, and might even have survived strict scrutiny, given the [medical exemption] opt-outs available." *Roman Cath. Diocese*

of *Brooklyn v. Cuomo*, 141 S. Ct. 63, 71 (2020). This point was not disputed by the majority or the dissent. “Tellingly, no Justice disputes these points.” *Id.*

Whether a state’s total deprivation of access to any public or private school is “settled as not violating fundamental” rights (or not⁷), the deprivation of educational rights is certainly far more coercive than requiring a person to pay \$140. There can be no serious question that the deprivation of an education causes irreparable and catastrophic injury sufficient to place parents under a state of duress sufficient to trigger the unconstitutional conditions doctrine and remove arguments that it is only an “incidental” burden on the fundamental right.

In *Brown v. Board of Education*, the Supreme Court held that the right to an education is so fundamental to a child’s well-being that “in these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.” 347 U.S. 483 (1954). Similarly, in *Plyler v. Doe*, the

⁷ Appellants do not concede this point. As the Supreme Court held in *Plyler v. Doe*, total deprivation of access to school is entitled to at least some vigorous review, particularly given the devastating impact it has on children. Just as excluding vulnerable children of “illegal” aliens from school was found unconstitutional, excluding medically fragile children from all access to education similarly cannot likely even be found to serve a rational purpose. The reasoning is indistinguishable: “[t]hese children can neither affect their parents’ conduct nor their own undocumented [or noncompliant vaccination] status. The deprivation of public education is not like the deprivation of some other governmental benefit.” *Plyler v. Doe*, 457 U.S. 202, 202–03 (1982). Moreover, the Supreme Court’s holdings in *Pierce v. Soc’y of the Sisters* and *Myers v. Nebraska* clearly establish that while a state may not be required to provide a free education, the state cannot dictate to parents what types of education their children can access (*Meyer v. Nebraska*, 262 U. S. 390, 43 (1923)– particularly if they are paying for the education themselves. *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

Supreme Court held that “The deprivation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage: the deprivation of education takes an inestimable toll on the social, economic, intellectual, and psychological well-being of the individual, and poses an obstacle to individual achievement” 457 U.S. 202, 202–03 (1982).

The toll is even greater for these medically fragile children, many of whom require special education services that their parents cannot provide at home. Many children have been deeply psychologically scarred by their humiliating exclusion from school and by being ostracized by the community for a condition completely beyond their control.

The Defendants’ decision to exclude these disabled children from any participation in school, even from online school participation and remote special education services, is cruel, inhuman and can serve only punitive purposes. If a child’s parents decide not to waive their right to follow the advice of their physician, deprivation of school does nothing to solve the issue of the child’s vaccine status. Rather, the child will still be out of compliance with the mandatory vaccine requirements, but now they will also be without access to their federally guaranteed rights to educational and services.

The DOH’s decision to exclude the children even from online educational

opportunities illustrates the punitive intent. The only possible purpose for this punishment is coercing parents to forego their constitutional rights. That purpose violates the unconstitutional conditions doctrine.

III. POINT THREE: COURTS CANNOT DEVIATE FROM STRICT SCRUTINY BECAUSE THE CASE IMPLICATES PUBLIC HEALTH

The second justification the district court afforded for reviewing the infringement of fundamental rights under rational basis instead of strict scrutiny is a misapplied and outdated theory that cases involving public health should not be subjected to judicial scrutiny. (SPA-49). In fact, the district court took this so far as to decide that it would not assess the as applied challenges *at all*: “their recourse for any misapplication of a medical exemption in their particular case is the state administrative process”. (SPA-85). This, despite the facts showing that appeals to the commissioner could not address constitutional violations, nor whether a child was actually at risk of harm.

In abdicating review, the district court misapplied *Jacobson*, and relied heavily on a misapplication of Chief Justice Roberts’s concurrence in *South Bay II* as establishing *carte blanche* authority for administrative agencies to avoid judicial review in cases involving public health.

The district court’s approach violates the Supreme Court’s holding in *Roman Catholic Diocese*, 141 S. Ct. 63, 68. It is now black letter law that strict scrutiny

applies whenever fundamental rights are burdened, without exception for public health cases. *Id.*

a. *Jacobson* requires strict scrutiny review of vaccine medical exemption cases

The district court quotes inapposite language from *Jacobson* to avoid strict scrutiny of the infringements on fundamental rights. *See, e.g.*, (SPA-49). But *Jacobson* explicitly holds that deference is inappropriate in medical exemption cases. *Jacobson* 197 U.S. 11 at 36-39.

It is true, *Jacobson* advocates substantial deference to the state on calculations about whether vaccination or another public health initiative might be the most effective way to combat a particular public health emergency. However, the *Jacobson* Court specifically cautions that such deference is not to be afforded to judicial review of whether the state provided a sufficient medical exemption to protect an individual at risk of serious harm. *Id.*

This is because, as this Court recently acknowledged, “the *Jacobson* Court itself specifically noted that ‘even if based on the acknowledged police powers of a state,’ a public-health measure ‘must always yield in case of conflict with ... any right which [the Constitution] gives or secures.’ *Agudath Israel*, 983 F.3d 620, 635 (quoting *Jacobson* 197 U.S. 11 at 25).

As discussed above, there is no greater constitutional right than the right to protect one's life against state requirements that put an individual at significant risk of harm or death. The primary example in *Jacobson* of a situation where public health measures must yield to a person's constitutional rights is a situation where someone "unfit" to be vaccinated alleges he was denied a medical exemption from otherwise permissible state regulation. In *Jacobson*, the Court held that it would not only be unconstitutional to fine a person \$5 in a case where he would be at risk of harm if he complied with the vaccine requirements, it would be "cruel and inhuman in the last degree." *Id.*

Jacobson demands that where a person plausibly alleges that he is "not at the time a fit subject of vaccination, or [for whom] vaccination by reason of his then condition would seriously impair his health," the judiciary is not only competent to strictly review the appropriate tailoring of the medical exemption but *must do so*:

"We are not to be understood as holding that the statute was intended to be applied to such a case, or, if it was so intended, that the judiciary would not be competent to interfere and protect the health and life of the individual concerned." *Id.* at 39.

In this case Appellants have plausibly alleged that they are not fit subjects of vaccination and yet the state is denying them an exemption. They are entitled to strict scrutiny review of their claims.

b. *The South Bay II decision requires strict scrutiny review of this case*

The Chief Justice’s nonbinding concurrences from *South Bay (I or II)* do nothing to undercut the clear direction from *Jacobson* to strictly scrutinize medical exemption cases. On the contrary, in his *South Bay II* concurrence, which the district court cites as authority for abstaining from review, Chief Justice Roberts clarifies that his much-criticized statement in *South Bay I* does *not* allow courts to avoid strictly scrutinizing constitutional violations: “I adhere to the view that the ‘Constitution principally entrusts the safety and the health of the people to the politically accountable officials of the States.’ [quoting his concurrence in *South Bay I*]. **But the Constitution also entrusts the protection of the people's rights to the Judiciary. Deference, though broad, has its limits.**” *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021)(**emphasis added**).

Justice Robert’s concurrence was the most deferential opinion in *South Bay II*. The concurrence collectively issued by Justices *Gorsuch*, *Alito* and *Thomas* leaves little doubt that the Supreme Court no longer tolerates deviation from strict scrutiny based on public health deference:

“In cases implicating this form of “strict scrutiny,” courts nearly always face an individual's claim of constitutional right pitted against the government's claim of special expertise in a matter of high importance involving public health or safety. It has never been enough for the State to insist on deference or demand that individual rights give way to collective interests. Of course we are not scientists, but neither may we abandon the field when government officials with experts in tow seek to infringe a constitutionally protected liberty. The whole point of strict scrutiny is to test the government's assertions,

and our precedents make plain that it has always been a demanding and rarely satisfied standard. (citations omitted). Even in times of crisis—perhaps *especially* in times of crisis—we have a duty to hold governments to the Constitution. *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 718 (2021).

The district court erred by failing to apply strict scrutiny to this case generally, and by failing to provide any review to the as applied cases out of outdated notions of “deference” to public health calculations.

IV. THE DISTRICT COURT IMPROPERLY RELIED ON DISPUTED FACTUAL MATERIALS OUTSIDE OF THE COMPLAINT AND AFFORDED IMPROPER INFERENCES TO THE DEFENDANTS

In making their determination that the state’s purposes meet rational basis review, the district court relied heavily on contested facts submitted by defendants as exhibits in support of their motion to dismiss. Reliance on these materials constitutes error of law.

“Generally, consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the complaint itself. *Faulker v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). While “considering materials outside the complaint is not entirely foreclosed on a 12(b)(6) motion.” *Id.* A complaint is “deemed to include any written instrument attached to it as an exhibit or any statement or documents incorporated by reference.” *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016)(quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002). Where a document is deemed “‘integral’ to the complaint, and thus potentially able

to be incorporated by reference, “it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document.” *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010). “It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document.” *Id.* (quoting *Faulkner*, 463 F.3d at 134). “If material is not integral to or otherwise incorporated in the complaint, it may not be considered unless the motion to dismiss is converted to a motion for summary judgment and all parties are ‘given a reasonable opportunity to present all the material that is pertinent to the motion.’” *Id.* (quoting Fed. R. Civ. P. 12(d)).

The district court incorporated by reference 580 pages of materials submitted by defendants rife with disputed facts. (A-103 to A-682). The court relied on these disputed facts, instead of the well pleaded allegations in the complaint, to provide justification for the state’s justification of need to enact the challenged policies and most of the “facts” section of the court’s decision comes from these disputed factual assertions of the defendants. *See, e.g.*, SPA - at 50-55. Appellants submit that this was improper.

For instance, Appellants dispute that children with medical exemptions jeopardize community health. The complaint alleges that the number of children who apply for medical exemptions is far too low to impact herd immunity. Though they weren’t given an opportunity, since this was not a decision made after hearing or on

summary judgment but rather through 12(b)(6), Appellants could have easily submitted documents to prove the uncontroversial fact that less than a third of one percent of all school children in New York even submit medical exemptions for consideration. The state claims they need 80-95% compliance for herd immunity. Even if the number “tripled” as the district court fears, medical exemptions will not be anywhere near high enough to jeopardize conservative herd immunity standards.

Tellingly, the defendants’ own materials show the legislature found there was no need to amend the medical exemption in combatting the measles outbreak. And the measles outbreak was over by the time that the regulations were enacted. The district court erred by using the defendant’s disputed facts and applying figures relevant to the religious exemption as “proof” that the state had reason to limit the medical exemption. These percentages are unrelated and inaccurate, as well as irrelevant on a motion to dismiss.

Moreover, to the extent that 800 people contracted measles in New York in 2019, no one has died in New York for over twenty years from measles despite yearly outbreaks. The documented risks to the children in this suit are far higher than the risk that they may pose to anyone else.

And, the district court’s reliance on other hearsay from the DOH newsletter, such as the assertion that the “American Academy of Pediatricians” supported the emergency regulations, is similarly misplaced. There is no indication of which

portion of the extensive changes to the regulation were supported or for which reasons, and there has been no opportunity to cross-examine such statements of support to ensure that they are relevant to the need to prevent at-risk children from receiving medical exemptions.

Similarly, the disputed facts fail to credit the well-pled allegations in the complaint, which discuss the different categories of vaccine. While some vaccines (like the measles vaccine, which is believed to provide protection both from severe symptomatic disease and infection and transmission) may have an impact on herd immunity, most of the vaccines on the schedule cannot impact herd immunity. This latter category of vaccine does not provide sterilizing immunity, so recipients may be personally protected from severe disease, but they can still be infected and asymptotically infect others. Many of the children in this suit are only missing vaccines in that category. There is no rational basis for denying them the right to a medical exemption to protect themselves in cases where their treating physicians certify they are at risk of severe harm from the vaccine.

In the end, none of these facts are even relevant. The Supreme Court has been very clear that even in cases where a medical exemption will definitely result in the death of another person (such as in the post-viability abortion context), the state cannot require a person to subject themselves to harm against the advice of their state-licensed physicians to avoid that occurrence. Here, even Defendants' factual

submissions do not suggest that the children’s ability to exercise their medical exemptions will cause a death, leave aside any real harm to any other person.

V. APPELLANTS RIGHTS UNDER §504 OF THE REHABILITATION ACT WERE VIOLATED

Section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving federal financial support. 29 U.S.C. § 794(a). “Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to make a reasonable accommodation.” *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016). “In order to establish a violation of § 504 [of the Rehabilitation Act],

Here, Appellants plausibly alleged: (1) they are ‘qualified individuals’ with a disability; (2) Defendants are subject to the Rehabilitation Act; and (3) Plaintiffs ‘were denied the opportunity to participate in or benefit from [the government] services, programs, or activities, or were otherwise discriminated against by [D]efendants, by reason of [their] disabilities.’” *Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003). The first two categories are undisputed by the court.

For the third, the complaint alleges that in limiting the definition of “what may cause harm” Defendants adopted discriminatory policies which exclude whole categories of disabled children from the protection of a medical exemption from the

vaccine requirements. These children, due to their disability, cannot safely take one or more of the mandatory vaccines and should have been afforded an accommodation. This has been documented in each case by their state-licensed physicians. They allege that in addition to discrimination and disparate impact claims, the Defendants failed to provide them with reasonable accommodations.

To the extent that the schools wish to deny them their educational rights, Defendants need to establish in court that the children pose a “direct threat” to the other students sufficient to exclude them anyway. This is a high bar.

Children who are actively infected with HIV or hepatitis b for example have already been determined to *not* meet the standard for posing a direct threat sufficient to justify exclusion from school. How then could a child who is not even infected, but is merely unvaccinated for hepatitis b present a direct threat? Such a holding cannot stand. The existence of a direct threat must be proven through objective evidence and deference cannot be afforded just because schools consult with non-treating physicians: “[t]o use the words of the question presented, petitioner receives no special deference simply because he is a health care professional.” *Bragdon v. Abbott*, 524 U.S. 624, 649–50 (1998)

VI. MUNICIPALITIES ARE LIABLE FOR THEIR UNCONSTITUTIONAL POLICIES AND SO ARE PRIVATE SCHOOL ACTORS

The district court erred by holding that the school districts are not liable. Appellants allege that each of the Defendant School Districts officially adopted discretionary policies deputizing school administrators to substantively review and overrule the opinion of the children's treating physicians, thereby putting vulnerable children at risk of serious harm, and burdening their constitutional right to receive a medical exemption in accordance with the recommendation of their state-licensed physicians. These allegations are sufficient to give rise to municipal liability.

As recognized by the district court, “[i]n order to sustain a § 1983 claim for municipal liability, a plaintiff must show that he suffered a constitutional violation, and that the violation resulted from an identified municipal policy or custom.” (SPA-76)(citing *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 694-95(1978). *Doe* holds that it is unconstitutional to subject the medical exemption determination of a state-licensed physician to review by any state official or third party or limit the criteria a physician can consider in making her best medical judgment. *Doe*, 410 U.S. 179. *Jacobson* holds it is unconstitutional to deprive a person in need of a medical exemption. *Jacobson*, 197 U.S. 11 at 36-39. The well-pled allegations of the complaint allege that the individual school districts violated all of these constitutional rights and should be liable. Similarly, Br. Migliorino and

the St. Anthony's School are not immune from suit. Private persons, jointly engaged with state officials as they were here in the prohibited action, are acting "under color" of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents" *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941 (1982)(citations omitted).

CONCLUSION

For the reasons stated above, Appellants respectfully request that this Court reverse the district court's dismissal and facially invalidate the challenged regulation and policy, or in the alternative remand the case to the district court for further proceedings on the Revised First Amended Complaint.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(A) 1.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 17,317 words as permitted by Order of the Court, as counted by Microsoft Word, excluding the cover, table of contents, table of authorities, signature block, and certificates of counsel.
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14 point Times New Roman font, a proportionally spaced typeface, using Microsoft Word.

Dated: May 14, 2021

/s/Sujata S. Gibson
Sujata S. Gibson, Esq.

SPECIAL APPENDIX

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

JANE DOE on behalf of herself and her minor child; JANE BOE, Sr. on behalf of herself and her minor child; JOHN COE, Sr. and JANE COE, Sr. on behalf of themselves and their minor children; JOHN FOE, Sr. on behalf of himself and his minor child; JANE GOE, Sr. on behalf of herself and her minor child; JANE LOE on behalf of herself and her medically fragile child; JANE JOE on behalf of herself and her medically fragile child; CHILDREN'S HEALTH DEFENSE, and all others similarly situated,

Plaintiffs,

v.

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

HOWARD ZUCKER, in his official capacity as Commissioner of Health for the State of New York; ELIZABETH RAUSCH-PHUNG, M.D., in her official capacity as Director of the Bureau of Immunizations at the New York State Department of Health; the NEW YORK STATE DEPARTMENT OF HEALTH; THREE VILLAGE CENTRAL SCHOOL DISTRICT; CHERYL PEDISICH, acting in her official capacity as Superintendent, Three Village Central School District; CORINNE KEANE, acting in her official capacity as Principal Paul J. Gelinas Jr. High School, Three Village Central School District; LANSING CENTRAL SCHOOL DISTRICT; CHRIS PETTOGRASSO, acting in her official capacity as Superintendent, Lansing Central School District; CHRISTINE REBERA, acting in her official capacity as Principal, Lansing Middle School, Lansing Central School District; LORRI WHITEMAN, acting in her official capacity as Principal, Lansing Elementary School, Lansing Central School District; PENFIELD CENTRAL SCHOOL DISTRICT; DR. THOMAS PUTNAM, acting in his official capacity as Superintendent, Penfield Central School District; SOUTH HUNTINGTON SCHOOL DISTRICT; DR. DAVID P. BENNARDO, acting in his official capacity as Superintendent, South Huntington School District; BR. DAVID MIGLIORINO, acting in his official capacity as Principal, St. Anthony's High School, South Huntington School District; ITHACA CITY SCHOOL DISTRICT; DR. LUVELLE BROWN, acting in his official capacity as Superintendent, Ithaca City School District; SUSAN ESCHBACH, acting in her official capacity as Principal, Beverly J. Martin Elementary School, Ithaca City School District; COXSACKIE-ATHENS SCHOOL DISTRICT; RANDALL SQUIER, Superintendent, acting in his official capacity as Superintendent, Coxsackie-Athens School District; FREYA MERCER, acting in her official capacity as Principal, Coxsackie Athens High School, Coxsackie-Athens School District; ALBANY CITY SCHOOL DISTRICT; KAWEEEDA G. ADAMS, acting in her official capacity as Superintendent, Albany City School District; MICHAEL

PAOLINO, acting in his official capacity as Principal, William S. Hackett Middle School, Albany City School District; and all others similarly situated,

Defendants.¹

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

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MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

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

the Complaint under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6); a request by the Three Village, South Huntington, and Brother Migliorino Defendants to transfer venue to the Eastern District of New York; and Plaintiffs' motion to amend the Complaint, (Dkt. Nos. 28, 54, 78, 91, 93).² The parties have briefed these motions fully and on January 6, 2021, the Court held oral argument. For the reasons that follow, Defendants' motions to dismiss are granted, the motion to transfer venue is denied as moot, and Plaintiffs' motion to amend is denied.

II. MOTION TO AMEND

With their motion to amend, (Dkt. No. 93), Plaintiffs have submitted a proposed First Amended Complaint. (Dkt. Nos. 93-1, 99-2).³ Plaintiffs assert that under Rule 15(a)(1)(B), they may file an amended pleading as to Defendant Migliorino as a matter of course because they filed their motion to amend within 21 days of his motion to dismiss. (Dkt. No. 93, at 1). Plaintiffs seek the Court's leave under Fed. R. Civ. P. 15(a)(2) to file the First Amended Complaint with respect to all other Defendants. (*Id.*). Defendants oppose Plaintiffs' motion to amend in its entirety on the ground that amendment is futile. (Dkt. Nos. 108 to 111).

Federal Rule of Civil Procedure 15(a)(1) provides that: "A party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21

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

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

days after service of a motion under Rule 12(b) . . . whichever is earlier.” Plaintiffs filed their proposed First Amended Complaint on October 22, 2020, six days after Defendant Migliorino filed his motion to dismiss, (Dkt. No. 93 (motion to amend filed Oct. 22, 2020); Dkt. No. 91 (Defendant Migliorino’s motion to dismiss filed Oct. 16, 2020)), and thus may amend as to Defendant Migliorino as a matter of course. As to the remaining Defendants, however, Plaintiffs “may amend [their] pleading only with the . . . court’s leave.” Fed. R. Civ. P. 15(a)(2).

In general, leave to amend should be freely given “when justice so requires.” Fed. R. Civ. P. 15(a)(2). “Where plaintiffs seek to amend their complaint while a motion to dismiss is pending, a court ‘has a variety of ways in which it may deal with the pending motion to dismiss, from denying the motion as moot to considering the merits of the motion in light of the amended complaint.’” *Haag v. MVP Health Care*, 866 F. Supp. 2d 137, 140 (N.D.N.Y. 2012) (quoting *Roller Bearing Co. of Am., Inc. v. Am. Software, Inc.*, 570 F. Supp. 2d 376, 384 (D. Conn. 2008)); *see also Pettaway v. Nat’l Recovery Sols., LLC*, 955 F.3d 299, 303–04 (2d Cir. 2020) (adopting the rule that “when a plaintiff properly amends her complaint after a defendant has filed a motion to dismiss that is still pending, the district court has the option of either denying the pending motion as moot or evaluating the motion in light of the facts alleged in the amended complaint,” explaining that “[t]his is a sound approach that promotes judicial economy by obviating the need for multiple rounds of briefing addressing complaints that are legally insufficient”).

Since Defendants have had an opportunity to respond to the proposed amendments, and argue that the amendments are futile, the Court considers the merits of the motions to dismiss in light of the proposed First Amended Complaint. If the claims in the proposed First Amended Complaint cannot survive the motions to dismiss, then Plaintiffs’ motion to amend will be denied

as futile. *See Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002) (“An amendment to a pleading will be futile if a proposed claim could not withstand a motion to dismiss pursuant to Rule 12(b)(6).”).

III. MATERIALS OUTSIDE THE COMPLAINT

Because Defendants have submitted exhibits in support of their motions to dismiss, (*see generally* Dkt. Nos. 28, 54, 78, 91), before setting forth the facts, the Court must determine which exhibits, if any, it may consider in deciding their motions. “Generally, consideration of a motion to dismiss under Rule 12(b)(6) is limited to consideration of the complaint itself.” *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). However, considering “materials outside the complaint is not entirely foreclosed on a 12(b)(6) motion.” *Id.* A complaint “is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference.” *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 230 (2d Cir. 2016) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)). “Where a document is not incorporated by reference, the court may nevertheless consider it where the complaint relies heavily upon its terms and effect, thereby rendering the document integral to the complaint.” *Id.* (quoting *DiFolco v. MSNBC Cable L.L.C.*, 622 F.3d 104, 111 (2d Cir. 2010) (internal quotation marks omitted)). Even where a document is deemed “‘integral’ to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document.” *Id.* (quoting *DiFolco*, 622 F.3d at 111). “It must also be clear that there exist no material disputed issues of fact regarding the relevance of the document.” *Id.* (quoting *Faulkner*, 463 F.3d at 134). “This principle is driven by a concern that a plaintiff may lack notice that the material will be considered to resolve factual matters.” *Id.* Thus, “if material is not integral to or otherwise incorporated in the complaint, it may not be considered unless the motion to dismiss is converted

to a motion for summary judgment and all parties are ‘given a reasonable opportunity to present all the material that is pertinent to the motion.’” *Id.* (quoting Fed. R. Civ. P. 12(d)).

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

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

State Defendants’ Exhibit 7 is the 2013 Infectious Diseases Society of America (“IDSA”) “Clinical Practice Guideline for Vaccination of the Immunocompromised Host.” (Dkt. No. 28-9). State Defendants’ Exhibits 8 and 9 are vaccine recommendations by the American Academy of Pediatrics (“AAP”) and the American Academy of Family Physicians (“AAFP”), respectively. (Dkt. Nos. 28-10, -11). The State Defendants cite these documents as “[e]xamples of other nationally-recognized evidence-based standards of care.” (Dkt. No. 28-1, at 9 n.1). As these

documents are not referenced in the proposed First Amended Complaint and the State Defendants have cited no legal authority for the Court's reliance on them at this stage, the Court declines to consider Exhibits 7, 8, or 9.

In addition to documents already discussed, the Albany, Ithaca, South Huntington, and Three Village Defendants attach administrative decisions by the Commissioner of Education. (Dkt. Nos. 54-4 to -11). The Albany Defendants appear to rely on these administrative decisions in support of their argument that Plaintiffs must exhaust their administrative remedies by seeking review by the Commissioner before proceeding in federal court. (*See* Dkt. No. 54-14, at 20 (citing administrative decisions as examples of the Commissioner's consideration of medical exemption requests)). One of the Commissioner's decisions—the decision dismissing John Doe's appeal—is described in several paragraphs, and quoted, in the proposed First Amended Complaint. (Dkt. No. 99-2, ¶¶ 117–21; Dkt. No. 54-4).⁴ The Court may therefore consider that decision as incorporated into the complaint. Alternatively, the Court may take judicial notice of that decision, as well as the other administrative decisions, “though [the] factual findings may not be taken as true for purposes of the motion to dismiss.” *Zynger v. Dep't of Homeland Sec.*, 615 F. Supp. 2d 50, 61 (E.D.N.Y. 2009), *aff'd*, 370 F. App'x 253 (2d Cir. 2010); *see Colon v. Holdridge*, No. 9:13-cv-1546, 2015 WL 1730240, at *4, 2015 U.S. Dist. LEXIS 48528, at *10 (N.D.N.Y. Apr. 14, 2015) (“[T]he court may consider matters of which judicial notice may be taken, such as public filings and administrative decisions”) (citing *Kavowras v. N.Y. Times Co.*, 328 F.3d 50, 57 (2d Cir. 2003)).

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

The Albany Defendants' last exhibit, Exhibit L, is a copy of "the procedures issued by the New York State Department of Health for the review of requests for medical exemptions which can be found at:

https://www.health.ny.gov/professionals/doctors/conduct/docs/medical_exemption_review_procedures_for_schools.pdf." (Dkt. No. 54-1, ¶ 15; Dkt. No. 54-13). Exhibit L is dated October 2019. The link to the website leads to procedures dated October 2020. While the documents appear identical, because no party has addressed whether there are differences or which, of the two, the Court should consider, the Court does not consider this document at this stage in the litigation.

The Cossackie-Athens, Penfield, and Lansing Defendants have submitted an affidavit by Daniel Driffill, Assistant Superintendent for Business of Penfield Central School District, in support of their motion to dismiss. (Dkt. Nos. 78-2 to -3). There is no assertion that the affidavit is integral to the Complaint or proposed First Amended Complaint and the Court declines to treat these Defendants' motion as one for summary judgment. Accordingly, the Court does not consider the affidavit in determining these Defendants' motion to dismiss. *See Goel v. Bunge, Ltd.*, 820 F.3d 554, 560 (2d Cir. 2016) (observing that if a district court wishes "to take account" of "materials outside the pleadings" that are not integral to the complaint "at the motion-to-dismiss stage" it must treat the motion as one for summary judgment and concluding that the district court erred in relying on, among other things, the plaintiff's affidavit in deciding the defendants' motions to dismiss (citing Fed. R. Civ. P. 12(d))).

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

Throughout the proposed First Amended Complaint, Plaintiffs refer to the State-required medical exemption form. (Dkt. No. 99-2, ¶ 267 (comparing the State medical exemption form to the New York City DOH form); *see also id.* ¶¶ 15, 102, 103, 105, 119, 144, 150, 285, 288–89).

The Medical Exemption Form is available on New York’s DOH website:

<https://www.health.ny.gov/forms/doh-5077.pdf> (last visited Feb. 17, 2021). As it is a governmental form, referred to in the regulations and integral to the pleading in this case, the Court takes judicial notice of it. *See Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC*, 127 F. Supp. 3d 156, 166 (S.D.N.Y. 2015) (finding it “clearly proper” to take judicial notice of documents retrieved from official government websites); *see also, e.g., Malin v. XL Cap. Ltd.*, 499 F. Supp. 2d 117, 131–32 (D. Conn. 2007) (“XL’s SEC documents, specifically SEC Forms . . . are referenced in the [complaint] and therefore are properly incorporated by reference.”), *aff’d*, 312 F. App’x 400 (2d Cir. 2009).

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

IV. FACTS

A. New York’s Mandatory Vaccination Law

New York Public Health Law § 2164 (the “mandatory vaccination law” or “mandatory vaccination requirement”) requires children aged two months to eighteen years to be immunized from certain diseases before they can attend “any public, private or parochial . . . kindergarten, elementary, intermediate or secondary school.” N.Y. Pub. Health Law § 2164(1)(a). The mandatory vaccination law requires children to be immunized against poliomyelitis, mumps,

measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease. N.Y. Pub. Health Law § 2164(7). A child may not attend school in excess of fourteen days without documentation showing that the child was immunized or is in the process of complying with the immunization series. N.Y. Pub. Health Law § 2164(7); 10 N.Y.C.R.R. § 66-1.3(a), (b).

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

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

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

On August 16, 2019, following the repeal of the religious exemption, the New York Commissioner of Health issued “emergency regulations,” amending the regulations governing

the mandatory vaccination law “to conform to recent amendments to Section[] 2164” and to “make the regulations consistent with national immunization recommendations and guidelines.” (Dkt. No. 28-6, at 1 (Summary of Express Terms of Emergency Regulations Aug. 16, 2019 (the “Summary”))).⁵ The Summary noted that when California removed non-medical exemptions to school immunization requirements in 2015 “without taking steps to strengthen the rules governing medical exemptions,” the use of medical exemptions to school immunization requirements more than tripled. (Dkt. No. 28-6, at 16). The Summary further noted that “[b]y providing clear, evidence-based guidance to physicians, th[e] emergency regulation will help prevent medical exemptions being issued for non-medical reasons.” (*Id.* at 16–17).

Specifically, the Commissioner added a new subdivision defining “may be detrimental to the child’s health,” as used in § 2164 of the school vaccination law, to mean “that a physician has determined that a child has a medical contraindication⁶ or precaution⁷ to a specific immunization consistent with ACIP [the CDC Advisory Committee on Immunization Practices] guidance or other nationally recognized evidence-based standard of care.” 10 N.Y.C.R.R. § 66-1.1(l). The amendments also required “the use of exemption forms approved by the New York State Department of Health” and no longer allowed only “a written statement from a physician.” N.Y.C.R.R. § 66-1.3(c). Subdivision (c) of 10 N.Y.C.R.R. § 66-1.3, was otherwise unchanged,

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

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

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

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

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

B. Plaintiffs

1. John Doe – Cocksackie-Athens School District

a. Medical History

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

mitochondrial disorder, hypoglycemia, genetic mutations, environmentally induced porphyria, metabolic and hormonal imbalances, eczema, food and environmental allergies, candida infection, amino acid disorder, heavy metal toxicity, and several autoimmune disorders—including Pediatric Autoimmune Neurological Disorder Associated with Streptococcus (“PANDAS”), Irritable Bowel Syndrome (“IBS”), thyroid disease, and Gluten-Sensitive Enteropathy.

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

b. First Medical Exemption Request

On August 23, 2019, Doe’s parents submitted a “medical exemption from [Doe’s] pediatrician, Dr. Peter Forman, a licensed New York physician who has been [Doe’s] primary care physician for more than ten years.” (*Id.* ¶ 97). In support of the medical exemption, Dr. Forman included “a supplemental letter from Dr. Papanicolau,” Doe’s “treating physician at the Massachusetts clinic he has attended for eleven years.” (*Id.*). Drs. Forman and Papanicolau have observed Doe “regress into debilitating flare ups of his underlying medical conditions when faced with immune triggers” and “concurred it was unsafe for [Doe] to receive any immunization given his multiple chronic and serious conditions and the risk that immunization could trigger a regression.” (*Id.* ¶ 98).

On September 16, 2019, Defendant Randall Squier, Superintendent of the Cocksackie-Athens School District, denied Doe’s request for a medical exemption after consulting Dr. Stephen G. Hassett, an emergency medicine physician. (*Id.* ¶ 99). Dr. Hassett is a “paid consultant to the Coxackie-Athens Central School District” and acts under Superintendent

Squier's supervision. (*Id.*) Dr. Hassett recommended denying Doe's request for a medical exemption "based on his opinion that" the letters from Drs. Forman and Papanicolau "did not specify how the exemption request qualified under the ACIP contraindications or precautions." (*Id.* ¶ 100). Doe's mother requested that Dr. Hassett "speak to [Doe's] pediatrician or review supplementary materials to clarify why the two treating physicians believed that he needed a medical exemption." (*Id.* ¶ 102). Dr. Hassett refused. (*Id.*) Superintendent Squier "was made aware of these failures." (*Id.*) Following the denial, Dr. Forman called Dr. Hassett, who "indicated that he had no discretion to hear any supplemental information or support for the exemption and was obligated to follow the strict guidelines set forth by ACIP based only on the information he received on the form." (*Id.* ¶ 103).

c. Second Medical Exemption Request

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

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

a four-week timeline. (*Id.* ¶ 109–10). Doe has been “excluded from participation in classes, in person or online since October 7, 2019.” (*Id.* ¶ 113).

d. Appeal to the Commissioner of Education

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

On July 30, 2020, the Commissioner issued a decision finding that Coxsackie-Athens’ determination was not “arbitrary or capricious” and dismissing the appeal. (Dkt. No. 54-4, at 10; Dkt. No. 99-2, ¶ 117). The Commissioner noted that the Does’ first request for a medical exemption was supported by Doe’s physician, who had opined that an exemption “to all eight required vaccinations” “was appropriate” because “there [was] an increased risk of adverse events” given Doe’s medical history, which included “multiple food allergies, Gluten Enteropathy, abnormal thyroid function, mitochondrial dysfunction and induced porphyria due to lead and mercury exposure,” “behavioral issues,” and “PANDA[S].” (Dkt. No. 54-4, at 2). The Commissioner noted that the Does’ second medical exemption request also sought an exemption “to all eight required immunizations” and that Doe’s physician “provided an identical justification for the student’s exemption from each of the eight required vaccinations.” The Commissioner observed that Doe’s physician wrote that “[t]he immunization may be detrimental to [Doe’s] health,” and noted Doe’s physician’s opinion that Doe met the definition of precaution because his medical conditions—those listed in the first medical exemption request—were “moderate or severe illnesses [that] may be episodic with acute onset” and “[t]his precaution avoids causing diagnostic confusion.” (*Id.* at 2–3).

The Commissioner found that the Does failed to prove that Coxsackie-Athens' "determination was arbitrary or capricious," explaining that the evidence submitted "consists primarily of printouts of DOH and Centers for Disease Control (CDC) websites about certain immunizations and diseases, including PANDAS," which constituted "general information concerning vaccines" that "does not address the student's unique circumstances."⁸ (*Id.* at 5). The Commissioner noted that the Does offered "no evidence such as an affidavit from the student's physician, containing sufficient information to identify that the student has a precaution or contraindication to any of the eight required vaccinations." (*Id.*). The Commissioner further found that even if Doe's episodic "moderate or severe illness" constituted a precaution, under the ACIP Guidelines, "the precaution to vaccination only exists until such acute episode resolves." (*Id.*). The Commissioner also rejected the Does' argument that Coxsackie-Athens acted arbitrarily in denying the request "without further inquiry," explaining that although the school was not required to obtain additional information, Superintendent Squier had, "in fact, sought and obtained additional information from the school physician." (*Id.* at 6).

2. Jane Boe – Three Village Central School District

a. Medical History

Jane Boe, age fifteen, has "multiple diagnosed autoimmune syndromes . . . including autoimmune encephalitis, which causes progressive neurological injury and attacks the brain." (Dkt. No. 99-2, ¶ 51). Boe has also been diagnosed with "Postural Orthostatic Tachycardia

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

Syndrome (“POTS”), dysautonomia, and chronic/severe Lyme disease and bartonella.” (*Id.* ¶ 127). Boe’s “disabilities significantly impair multiple major life functions, including but not limited to the functions of her immune system.” (*Id.* ¶ 125). Boe “and her siblings have all had severe adverse reactions to immunization.” (*Id.* ¶ 51). Boe’s two “brothers developed autoimmune encephalitis and acute neurological neuropsychiatric conditions that were significantly exacerbated by immunization.” (*Id.* ¶ 129). Boe’s “middle brother became so ill that he was forced to take a medical leave from middle school to receive medical treatment and homebound instruction” and required “several years of continuous treatment . . . to regain his health.” (*Id.* ¶ 130). In 2016, Boe’s oldest brother, then age eighteen, received “the Meningococcal vaccine against medical advice prior to attending his freshman year in college.” (*Id.* ¶ 131). “This, coupled with a flu vaccine and other immune assaults, are believed to have triggered an acute cascade of neurological and other health symptoms that ended with [Boe’s] brother committing suicide in June 2018.” (*Id.*). “Genetic testing shows vulnerabilities that may explain why all three children have developed chronic health conditions after immunization.” (Dkt. No. ¶ 132).

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

b. First Medical Exemption Request

In August 2019, Boe’s “family submitted a medical exemption from her treating physician Dr. Laura Bennett.” (Dkt. No. 99-2, ¶ 138). Dr. Howard Sussman, Three Village’s

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

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

c. Second Medical Exemption Request

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

In November 2019, Dr. Rausch-Phung, the DOH Director of Immunizations, “recommended the school deny the exemption,” writing that it was in Boe’s “‘best interest’ to be immunized with meningococcal vaccine despite the medical concerns and history.” (*Id.* ¶¶ 146–47). Regarding the death of Boe’s sibling, Dr. Rausch-Phung stated that “even if it was from an adverse reaction to the vaccine, [it] was not a sufficient reason to grant an exemption.” (*Id.* ¶

147). Following this recommendation from Dr. Rausch-Phung, Three Village “denied the second exemption and indicated that Jane needed to leave school if she was not immunized” by December 20, 2019. (*Id.*).

d. Third Medical Exemption Request

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

“On March 2, 2020, Dr. Rausch-Phung sent a letter allowing a ‘one month’ exemption upon which she asked that the family submit an additional medical exemption for which she would review.” (*Id.* ¶ 150). “The school could not specify whether the month ran from the date of submission of the third exemption letter (December 2019) or the date they received a response from Dr. Rausch-Phung (March 2020).” (*Id.*). Boe’s family hired “an attorney to attempt to negotiate with the school for clarity.” (*Id.* ¶ 151). Three Village “refused to consider allowing their principal or superintendent to approve the follow up requests and was unable to provide clarity on whether the exemption in place had to be renewed immediately or in April, and how long it might take to get an answer on the follow up request.” (*Id.*).

Dr. Sussman “opined” that the one-month exemption “ran from December and so the one month expired two months before the school received the letter back from the DOH or notified the family.” (*Id.* ¶ 152). As a result, the school “expelled [Boe] in March 2020.” (*Id.*). The school “demanded that Jane Boe be immunized” and did not ask Boe’s family “to submit the follow up exemption letter first even though the DOH determination had said her exemption did qualify,

though it was to be resubmitted in a month.” (*Id.*). “Having already lost one child after giving him the meningococcal vaccine against medical advice, the family was unwilling to risk [Boe’s] health by going against their three treating doctors’ advice.” (*Id.* ¶ 153). Boe has been “unable to attend school since January 2020” and her family has “been forced to homeschool [Boe] and have had to spend enormous amounts of money on online programs to try to provide their daughter with an education.” (*Id.* ¶ 154).

3. Jane and John Coe – Lansing School District

a. Medical History

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

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

b. Medical Exemption Request

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

Jane and John Coe “began school as usual in fall 2019.” (*Id.* ¶ 170). On January 21, 2020, the Coes “received correspondence from Chris Pettograsso, Superintendent of the Lansing School District, stating that ‘the building principals’ (Christine Rebera and Lorri Whiteman) had rejected the medical exemptions for both children.” (*Id.* ¶ 171). “The family was given one week to get eleven different vaccines for each child to return to school.” (*Id.*). Superintendent Pettograsso “noted that the school had received a recommendation from the NYDOH and by unspecified members” of a local “medical team” but “that the building principals [Rebera and Whiteman] each ultimately made the decision to reject the medical exemptions ‘independently.’” (*Id.* ¶ 172). Attached to Superintendent Pettograsso’s correspondence was a letter dated December 5, 2019 by Dr. Rausch-Phung, who wrote that “the adverse reactions of family members (including death) are not contraindications for immunization under ACIP and concluded that she didn’t have enough information or knowledge to understand if the genetic vulnerabilities were a ground for contraindication.” (*Id.* ¶¶ 174–75). She wrote further that:

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

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

On January 27, 2020, the Coe family submitted a letter from “an attorney and the genetic counselor explaining that the only pediatric genetic specialist in the region had a waiting list for new patients of more than one year.” (*Id.* ¶ 177). The attorney: (1) requested a meeting with the school to discuss “a few months [sic] extension to try to expedite an appointment” with the pediatric geneticist, and (2) questioned the legality of the denial and the process leading up to it, asserting that there were “constitutional issues here involving the fundamental rights of the family to refuse medical treatment especially where the treating physicians and providers concur that it could be dangerous to the children's health.” (*Id.* ¶ 178). In a January 29, 2020 email Lansing's attorney responded, denying the requests for a meeting or extension. (*Id.* ¶ 179).

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

4. John Foe – Albany City School District

a. Medical History

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

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

b. First Medical Exemption Request

On August 23, 2019, Foe’s family “submitted a properly certified medical exemption” from Dr. Bovenzi, who is licensed to practice medicine in New York, “detailing why [Foe]

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

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

c. Second Medical Exemption Request

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

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

5. Jane Goe – Penfield Central School District

a. Medical History

Jane Goe, age seventeen, suffers from "multiple severe diagnosed autoimmune conditions," (Dkt. No. 99-2, ¶ 54), including type I diabetes, celiac disease, Hashimoto's thyroiditis, Alopecia Areata, and polycystic ovarian syndrome. (*Id.* ¶ 206). Goe's "disabilities significantly impair multiple major life functions, including but not limited to functions of her immune system." (*Id.* ¶ 208). Goe's "Type I Diabetes was triggered by the H1N1 vaccine in third grade." (*Id.* ¶ 209). Goe rapidly "devolve[d] after that event and developed four additional autoimmune diagnoses, losing half of her hair, suffering chronic additional health issues, and missing significant time in school when she was too sick to attend." (*Id.*). Goe has "a family history of serious autoimmune disease" and "genetic testing shows significant vulnerabilities including the rare HLA genotype, which places her at a high risk of developing Guillain-Barre syndrome (an acknowledged potential adverse reaction to the meningococcal vaccine)." (*Id.* ¶ 210). Goe is "sensitive to chemicals" and "has had serious adverse reactions to chlorine and many other environmental exposures." (*Id.*).

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

b. First Medical Exemption Request

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

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

c. Second Medical Exemption Request

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

On September 18, 2019, "Dr. Orłowski's exemption [request] was submitted." (*Id.* ¶ 219). Later that day, Superintendent Putnam forwarded "another denial from Dr. Tuite." (*Id.*). Dr. Tuite, a pediatrician specializing in sports medicine, wrote that although he admired Dr. Orłowski as a pediatric endocrinologist, he felt Dr. Orłowski was "out of his scope of practice/expertise within this area of immunization issues." (*Id.* ¶¶ 218–219). Dr. Tuite further wrote that he felt "strongly that this request does not meet the CDC contraindication or even a precaution from getting this specific vaccines" and that he would "recommend a referral" to a "pediatric infectious disease/immunology specialist such as Dr. Geoffrey Weinberg" or to immunologist Dr. Syed Mustafa, either of whom would "have a wealth of experience and expertise in this area of immunization appropriateness." (*Id.* ¶ 219). Dr. Tuite further stated that he would "honor and trust their opinion and abide by their advice in these kind of complicated situations." (*Id.*). On September 19, 2019, Goe "was removed from school as the fourteen days from the original notice of denial had run." (*Id.* ¶ 221). "It was homecoming that day" and "[t]he exclusion was public." (*Id.*). Goe "was humiliated and felt that her privacy had been seriously violated." (*Id.*).

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

d. Third Medical Exemption Request

In January 2020, Goe’s family “submitted a follow up medical exemption request, written by Dr. Grover, which documented how the request fit into the ACIP guidelines.” (*Id.* ¶ 226). “The request was sent on to the [DOH] for further review” and Goe, who was “set to graduate on July 30, 2020,” had not heard back by the time this action was filed. (*Id.* ¶ 227–28).

6. John Joe – Ithaca City School District

a. Medical History

John Joe, age six, “suffered severe anaphylaxis to his hepatitis B vaccine as a baby.” (Dkt. No. 99-2, ¶ 56). Joe “has special needs,” including “severe autism, obsessive compulsive disorder, and a range of neurological and other health problems.” (*Id.* ¶ 232). “Medical tests show mercury poisoning, lead poisoning and aluminum poisoning and an inability to process heavy metals.” (*Id.*). Joe’s mother “has worked extensively with medical professionals and with rigorous dietary and environmental protocols, which have greatly improved her son’s quality of life and health over the years.” (*Id.*). Joe’s health, however, “is fragile, and setbacks are

common.” (*Id.*). Joe’s “disabilities significantly impair multiple major life functions, including but not limited to functions of his immune system.” (*Id.* ¶ 234).

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

b. Medical Exemption Request

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

Joe “was removed from school in November of 2019” and his “mother has had to quit her job, go on public assistance, and now attempts to attend to all her son’s needs on her own.” (*Id.* ¶ 241). Joe “had an Individualized Education Plan, which entitled him to extensive needed services, such as speech therapy five days a week, occupational therapy three times a week, music therapy and play therapy.” (*Id.* ¶ 242). The school “has refused to provide any of these services at home as they do for other special needs children who are homeschooling.” (*Id.*). Joe

“has a pending appeal to the Commissioner of Education which as of yet still has not been decided.” (*Id.* ¶ 243).

7. John Loe – South Huntington School District

a. Medical History

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

Loe “was vaccinated in strict accordance with pediatric directives” and New York mandates during the first “several years” of his life. (*Id.* ¶ 248). He also received all influenza and H1N1 flu vaccines. (*Id.*) “Through the years, [Loe] suffered unexplained ‘phases’ of odd behavioral and health issues . . . Later review of the medical file revealed that these phases closely tracked his immunizations.” (*Id.*; *see, e.g., id.* ¶ 249 (in 2009, Loe “decompensate[d]” after receiving DTaP, flu, and H1N1 vaccines at age five); *id.* ¶ 250 (in 2010, Loe’s “symptoms heightened” after receiving flu vaccine at age six); *id.* ¶ 271 (in 2011, Loe experienced “debilitating tics and compulsions,” including clapping his hands next to his ear causing hearing damage and banging his head and panic attacks and anxiety; developed obsessive compulsive disorder; and lost penmanship, math, reading, writing, and toileting skills after flu vaccine at age 7)). Loe “became nearly anorexic” and suffered “grave depression.” (*Id.* ¶ 252).

In 2012, Loe was seen by pediatric neurologist Dr. Trifiletti, who diagnosed Loe with “P.A.N.S./P.A.N.DA.S. a form of autoimmune encephalopathy, which was confirmed upon his

analysis of comprehensive bloodwork reports.” (*Id.* ¶¶ 253–54). Dr. Trifiletti recommended “immune modulating treatments” and within “24 to 48 hours,” Loe “began eating again, his hallucinations stopped” and “many other symptoms improved.” (*Id.* ¶ 254). “Dr. Trifiletti was able to stabilize [Loe’s] neurological and autoimmune condition slowly with the medications, ongoing monitoring and testing, and avoidance of known triggers, such as exposure allergens, toxins, and vaccines.” (*Id.* ¶ 255). Loe “fared relatively well” under Dr. Trifiletti’s treatment, though he “never made it back to baseline symptoms-wise.” (*Id.* ¶ 256).

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

b. Medical Exemption Request

In September 2019, Loe’s parents submitted “an updated medical exemption” from Dr. Trifiletti to the school. (*Id.* ¶ 259). “Shortly thereafter,” the school nurse informed Loe’s parents that the “‘school’s chief doctor,’ Dr. Jack Geffken . . . rejected Dr. Trifiletti’s exemption after speaking with him on the phone.” (*Id.* ¶ 260).

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

Loe “was removed from school on September 20, 2019 and has not been able to return since.” (*Id.* ¶ 262). In November 2019, Loe saw “Dr. Denis Bouboulis, an immunologist licensed to practice in New York, who is experienced . . . in the PANS/Autoimmune Encephalitis

community.” (*Id.* ¶ 264). On November 14, 2019, Dr. Bouboulis, who “concurred that it would be unsafe for [Loe] to receive the TDaP or meningococcal vaccines,” “provided two written medical exemptions.” (*Id.* ¶ 265). The school rejected the forms as they were New York City forms rather than New York State form and in December 2019, Dr. Bouboulis prepared new forms.⁹ (*Id.* ¶¶ 267–69).

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

V. STANDARD OF REVIEW

To survive a motion to dismiss, “a complaint must provide ‘enough facts to state a claim to relief that is plausible on its face.’” *Mayor & City Council of Balt. v. Citigroup, Inc.*, 709 F.3d 129, 135 (2d Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

“Although a complaint need not contain detailed factual allegations, it may not rest on mere

⁹ During this time period, Loe’s parents were told by Dr. Bouboulis’s staff that Dr. Bouboulis “had received a call from the NYSDOH, directing that he could not write any further New York medical exemptions ‘unless he was the doctor who administered the vaccinations,’ and that therefore, he would not be signing any more.” (Dkt. No. 99-2, ¶ 268). Dr. Bouboulis agreed to prepare the forms, however, after Loe’s parents showed him the “legal analysis” from their attorney and the “text of the statute contradicting the NYSDOH erroneous information.” (*Id.* ¶ 269).

labels, conclusions, or a formulaic recitation of the elements of the cause of action, and the factual allegations ‘must be enough to raise a right to relief above the speculative level.’” *Lawtone-Bowles v. City of New York*, No. 16-cv-4240, 2017 WL 4250513, at *2, 2017 U.S. Dist. LEXIS 155140, at *5 (S.D.N.Y. Sept. 22, 2017) (quoting *Twombly*, 550 U.S. at 555). The Court must accept as true all factual allegations in the complaint and draw all reasonable inferences in the plaintiff’s favor. See *EEOC v. Port Auth.*, 768 F.3d 247, 253 (2d Cir. 2014) (citing *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007)). However, “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

VI. DISCUSSION¹⁰

A. Abstention

The Albany, Ithaca, South Huntington, and Three Village Defendants argue that “the Court should apply the doctrine of abstention and decline to review” Plaintiffs’ claims. (Dkt. No. 54-14, at 23). In *New Orleans Public Service, Inc. v. Council of New Orleans*, the Supreme Court explained the *Burford*¹¹ abstention doctrine¹² as follows:

Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are

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

¹¹ *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

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

“difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar”; or (2) where the “exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.”

491 U.S. 350, 361 (1989) (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 814).

However, “[a]bstention is the exception, exercise of jurisdiction the rule.” *United Fence & Guard Rail Corp. v. Cuomo*, 878 F.2d 588, 593 (2d Cir. 1989). Further, the Supreme Court has “described the federal courts’ obligation to adjudicate claims within their jurisdiction as ‘virtually unflagging.’” *New Orleans Pub. Serv.*, 491 U.S. at 359 (quoting *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988)).

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

1. Specificity of State Regulatory Scheme

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

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

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

2. Interpretation of State Statute

The second factor, “the necessity of discretionary interpretation of state statutes,” *Bethphage Lutheran Serv., Inc. v. Weicker*, 965 F.2d 1239, 1243 (2d Cir. 1992), does not weigh in favor of abstention. Defendants argue that “the precise meaning of what does, and what does not, constitute a ‘medical contraindication or precaution’ . . . are at the heart of the dispute.”

(Dkt. No. 54-14, at 23). The facts concerning Plaintiffs’ requests for medical exemptions to vaccination and the Defendant school district’s denials, including whether Plaintiffs’ medical conditions constitute “medical contraindications or precautions,” are certainly relevant to the inquiry of whether the denial constituted a deprivation of substantive due process or violated the Rehabilitation Act. However, no party has asserted that Plaintiff’s claims involve the “need to give one or another debatable construction to” the mandatory school vaccine law, the medical exemption, or the governing regulations, nor does there appear to be any such need.

Hachamovitch, 159 F.3d at 697; *see also Bethphage*, 965 F.2d at 1243 (“[T]he aim of *Burford* abstention is to avoid resolving difficult state law issues involving important public policies or avoid interfering with state efforts to maintain a coherent policy in an area of comprehensive regulation or administration.” (internal citation omitted)); *Cty. of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1308 (2d Cir. 1990) (“The fact that here *only* a federal claim was present raises the level of justification [needed for abstention] even more.”).

3. State Concern

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

Congress' recognition "that the establishment and review of reimbursement rates is a legitimate state concern"). This factor therefore weighs in favor of abstention

Having considered the relevant factors, the Court concludes that, on balance, this is not the "extraordinary case[]" that requires abstention. *Hachamovitch*, 159 F.3d at 693. "[T]here is little or no discretion to abstain in a case which does not meet traditional abstention requirements." *Bethphage*, 965 F.2d at 1245 (2d Cir. 1992) (quoting *Mobil Oil Corp. v. City of Long Beach*, 772 F.2d 534, 540 (9th Cir. 1985)). In this case, while the administration of the mandatory school vaccine law and issuance of medical exemptions are matters of legitimate concern to the state, it does not appear that interference with the state's administrative scheme or the interpretation of any regulatory provisions is embedded in the determination of whether due process was satisfied—a determination "[t]he federal courts are well-placed to undertake." *Hachamovitch*, 159 F.3d at 698; see also *Orozco by Arroyo v. Sobol*, 703 F. Supp. 1113, 1120 (S.D.N.Y. 1989) (citing *Alliance of Am. Insurers v. Cuomo*, 854 F.2d 591, 601 (2d Cir. 1988) (holding *Burford* abstention unwarranted in case involving due process attack on State's medical malpractice insurance scheme)). Accordingly, the Albany Defendants' motion to dismiss based on *Burford* abstention is denied. See *New Orleans Pub. Serv.*, 491 U.S. at 362 ("While *Burford* is concerned with protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process, or even in all cases where there is a 'potential for conflict' with state regulatory law or policy." (quoting *Colorado River*, 424 U.S. at 815–16)).

B. Exhaustion of Administrative Remedies

The School District Defendants seek dismissal on the ground that Plaintiffs failed to exhaust the administrative remedies available to them prior to bringing this action. (Dkt. No. 54-

14, at 19–24; Dkt. No. 78-4, at 29–30). Plaintiffs respond that exhaustion of administrative remedies is not a prerequisite to a constitutional claim. (Dkt. No. 83, at 28).

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

There is caselaw suggesting that exhaustion of administrative remedies is a prerequisite to a state law claim. *See Watkins-El v. Dep’t of Educ.*, No. 16-cv-2256, 2016 WL 5867048, at *3, 2016 U.S. Dist. LEXIS 139860, at *7–8 (E.D.N.Y. Oct. 7, 2016) (finding the plaintiff failed to show a likelihood of success on state law claim that the defendant Office of Student Health improperly denied the request for a vaccination exemption, on religious grounds, under Public Health Law § 2164 because the plaintiff “did not appeal the determination . . . thereby failing to exhaust his administrative remedies.” (citing *Watergate II Apts. v. Buffalo Sewer Auth.*, 46

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

N.Y.2d 52, 57 (1978) (“[O]ne who objects to the act of an administrative agency must exhaust available remedies before being permitted to proceed to litigate in a court of law[.]”). Plaintiffs, however, do not bring any state law claims. Further, exhaustion of state administrative remedies is not a prerequisite to bringing a federal claim under 42 U.S.C. § 1983. *See Patsy v. Bd. of Regents of Florida*, 457 U.S. 496, 516 (1982) (“[E]xhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983.”); *see also Caviezel v. Great Neck Pub. Sch.*, 701 F. Supp. 2d 414, 425 (E.D.N.Y. 2010) (“While a failure to exhaust state administrative remedies does not generally bar federal civil rights claims, the Court is aware of no authority providing that this state law claim may be pursued in federal court [without exhausting state administrative remedies].”), *aff’d*, 500 F. App’x 16 (2d Cir. 2012).

Defendants cite *S.C. v. Monroe Woodbury Central School District*, No. 11-cv-1672, 2012 WL 2940020, at *10, 2012 U.S. Dist. LEXIS 100622, at *39–40 (S.D.N.Y. July 18, 2012), in support of their argument that exhaustion of administrative remedies is required. (Dkt. No. 54-14, at 22). However, unlike the Plaintiffs in this case, who bring substantive due process claims, in *S.C.*, the court discussed administrative remedies in the context of a *procedural* due process claim. 2012 WL 2940020, at *10, 2012 U.S. Dist. LEXIS 100622, at *39–40. Moreover, in *S.C.*, the court granted the defendant’s motion to dismiss the procedural due process claim, not because the plaintiff failed to exhaust administrative remedies, but on the merits—concluding that the availability of an appeal to the Commissioner and an Article 78 proceeding was a “sufficient post-deprivation remedy” that constituted “adequate process.” *Id.*, 2012 U.S. Dist. LEXIS 100622, at *40.

Defendants also cite *Vandor, Inc. v. Militello*, 301 F.3d 37, 39 (2d Cir. 2002), for the proposition that “Article 78 of New York’s CPLR provides an adequate state law remedy for

alleged failures by public officials to take allegedly required or mandated action.” (Dkt. No. 54-14, at 22). In *Vandor*, the plaintiff alleged a property taking in violation of its substantive due process rights. 301 F.3d at 38. The Second Circuit affirmed dismissal of the complaint on the ground that the takings claim was unripe because, despite the expiration of the statute of limitations, there was a potential avenue for state court relief under Article 78. *Id.* at 39. *Vandor* is inapplicable here. Takings cases are unique and prior to 2019, under relevant Supreme Court law, a takings claim was not ripe for federal review until “the state regulatory entity has rendered a ‘final decision’ on the matter.” *Dougherty*, 282 F.3d at 88 (2d Cir. 2002) (quoting *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 194–94 (1985), *overruled in part by Knick v. Twp. of Scott*, 139 S. Ct. 2162 (2019)). Defendants cite no caselaw supporting a conclusion that such a requirement is applicable here. In any event, in 2019, the Supreme Court overruled *Williamson County’s* “state-litigation requirement.” *Knick*, 139 S. Ct. at 2167. Thus, *Vandor* does not allow a conclusion that Plaintiffs were required to exhaust administrative remedies prior to bringing their federal suit. For these reasons, Defendants’ exhaustion of administrative remedies argument does not provide a basis for dismissal of Plaintiffs’ federal claims.

C. Section 1983 Constitutional Claims

1. Substantive Due Process – Facial Challenge

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

to its mandatory vaccination requirements infringe “multiple fundamental rights,” in violation of their right to substantive due process and equal protection under¹⁴ the Fourteenth Amendment. (Dkt. No. 74, at 6). Specifically, Plaintiffs assert, the alleged narrow and burdensome nature of the medical exemption violates “the right to life, the right to informed consent, the right to refuse medical treatment, fundamental parental and educational rights, equal protection rights, [] privacy rights . . . [and] the . . . right to protection from infringement on the doctor-patient relationship”—all of which are embodied in the fundamental “right to a medical exemption from any [vaccination] . . . that a licensed physician has certified may cause a person harm or death.” (Dkt. No. 112, at 20–21).

“[T]he Due process Clause of the Fourteenth Amendment embodies a substantive component that protects against ‘certain government actions regardless of the fairness of the procedures used to implement them.’” *Immediato v. Rye Neck Sch. Dist.*, 73 F.3d 454, 460 (2d Cir. 1996) (quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986)). But “‘substantive due process,’ . . . does not stand as a bar to all governmental regulations that may in some sense implicate a plaintiff’s ‘liberty.’” *Id.* “Rather, the level of scrutiny” to which a governmental regulation is subject “turns on the nature of the right at issue.” *Id.* “Where the right infringed is fundamental, strict scrutiny is applied,” *Leebaert v. Harrington*, 332 F.3d 134, 140 (2d Cir. 2003), and to survive review, the “challenged regulation must be narrowly tailored to promote a compelling Government interest” and “must use the least restrictive means to achieve its ends.”

¹⁴ The Sixth Claim for Relief is subtitled “Violation of Rehabilitation Act of 1973” but, as Defendants observe, (Dkt. No. 38-1, at 20 n.1; Dkt. No. 54-14, at 31 n.1; Dkt. No. 78-4, at 28–29), it alleges that that “Defendants have violated the rights of medically fragile children to receive equal protection of the law by enacting and promulgating regulations which disparately impact medically fragile children.” (Dkt. No. 9-2, ¶¶ 406–14). As Plaintiffs have not corrected Defendants’ observation and have referred to Defendants’ alleged violation of equal protection throughout their substantive due process briefing and in arguing for rational basis review, the Court has also considered, in Section VI.C.3., whether Plaintiffs have alleged a plausible equal protection claim.

Evergreen Ass’n, Inc. v. City of New York, 740 F.3d 233, 246 (2d Cir. 2014) (citation omitted).

In contrast, “[w]here the claimed right is not fundamental,” rational basis review is applied, and “the governmental regulation need only be reasonably related to a legitimate state objective.”

Immediato, 73 F.3d at 461 (citing *Reno v. Flores*, 507 U.S. 292, 303–06 (1993)).

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

a. Whether Plaintiffs Have Asserted a Fundamental Right

“In assessing whether a government regulation impinges on a substantive due process right, the first step is to determine whether the asserted right is ‘fundamental.’” *Leebaert*, 332 F.3d at 140. “Rights are fundamental when they are implicit in the concept of ordered liberty, or deeply rooted in this Nation’s history and tradition.” *Immediato*, 73 F.3d at 460–61. Therefore, a “[s]ubstantive ‘due process’ analysis must begin with a careful description of the asserted right, for ‘[t]he doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.’” *Flores*, 507 U.S. at 302 (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)).

At the outset, the Court addresses Plaintiffs’ assertion that the mandatory vaccination law and medical exemption, which applies to public and private schools, “unconstitutionally burden[s] minors’ right to pursue an education at any public or private school in New York.” (Dkt. No. 99-2, at 83). It is well-established that there is no fundamental right to education, and thus the deprivation of a “right to pursue an education,” by itself, does not trigger strict scrutiny.

Plyler v. Doe, 457 U.S. 202, 223 (1982) (“Nor is education a fundamental right”); see *Phillips v. City of New York*, 775 F.3d 538, 542 n.5 (2d Cir. 2015) (holding that New York’s mandatory school vaccination requirement was within the State’s police power and that, in any event, substantive due process challenge to mandatory vaccination law would fail under traditional constitutional analysis because “there is no substantive due process right to public education”) (quoting *Bryant v. N.Y.S. Educ. Dep’t*, 692 F.3d 202, 217 (2d Cir. 2012)).¹⁵ Accordingly, the Court turns to Plaintiffs’ remaining arguments.

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

Plaintiffs also cite to their liberty interest in refusing unwanted medical treatment, and more specifically, to informed consent as part of that right. In *Cruzan v. Director, Missouri Department of Health*, the Supreme Court explained that a “person has a constitutionally

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

protected liberty interest in refusing unwanted medical treatment,” 497 U.S. 261, 278 (1990), and as the Second Circuit has explained, “an individual cannot exercise his established right to refuse medical treatment in a meaningful and intelligent fashion unless he has sufficient information about proposed treatment.” *Pabon v. Wright*, 459 F.3d 241, 249–50 (2d Cir. 2006). Therefore, “there exists a liberty interest in receiving such information as a reasonable patient would require in order to make an informed decision as to whether to accept or reject proposed medical treatment.” *Id.* The medical exemption regulations, however, do not directly infringe on any such right because they do not force parents to consent to vaccination of their children.

Plaintiffs argue that they have a fundamental right to a medical exemption to the state’s vaccination requirement upon submission of a state-certified physician’s opinion that vaccination would be harmful to the child. (Dkt. No. 74, at 9). Plaintiffs further argue that schools—and school principals, in particular—should have no discretion to “overrule treating physicians” with respect to their judgment about whether vaccination is in a child’s best interest. (*Id.*). Underlying this argument is Plaintiffs’ belief that the regulations “arbitrarily narrow the definition of ‘what may cause harm,’” which, they believe “exclude[s] hundreds of medically fragile children whose health and life may be at risk of serious harm” if they are vaccinated. (Dkt. No. 99-2, ¶ 383).

The Court does not find a basis for Plaintiffs’ asserted fundamental right. In this country there is a long history of disagreements—scientific and otherwise—regarding vaccinations and their risk of harm, and courts have repeatedly found that it is for the legislature, “in the light of all the information it had,” to “choose between” “opposing theories” within medical and scientific communities in determining the most “effective . . . way in which to meet and suppress” public health threats. *Jacobson*, 197 U.S. at 30–31 (discussing Jacobson’s offer of proof from “medical profession[als] who attach little or no value to vaccination as a means of

preventing the spread of smallpox, or who think that vaccination causes other diseases of the body”; explaining that the Court assumed that “the legislature . . . was not unaware of these opposing theories, and was compelled of necessity, to choose between them”; and holding that it is “no part of the function of a court or a jury to determine which one of two modes was likely to be the most effective for the protection of the public against disease”); *Viemeister v. White*, 179 N.Y. 235, 239, 242 (1904) (observing that “some laymen, both learned and unlearned, and some physicians of great skill and repute, do not believe that vaccination is a preventive of smallpox” but explaining that “[t]he possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive; for the Legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases”); *Phillips*, 775 F.3d at 542–43 (2d Cir. 2015) (noting that the “Plaintiffs argue that a growing body of scientific evidence demonstrates that vaccines cause more harm to society than good, but as *Jacobson* made clear, that is a determination for the legislature, not the individual objectors”); *Middleton v. Pan*, No. 16-cv-5224, 2016 WL 11518596, at *7, 2016 U.S. Dist. LEXIS 197627, at *20–21 (C.D. Cal. Dec. 15, 2016) (finding the plaintiffs’ allegation that the vaccine at issue “requires them to submit to ‘unwanted injections of poisons’ that constitute ‘felony assault with intent to do serious harm, including but not limited to maiming and or killing the individual’ without due process of law,” in violation of their “right of self defense” and due process “foreclosed by *Zucht*.” (citing *Zucht v. King*, 260 U.S. 174, 176 (1922))), *report & recommendation adopted*, 2017 WL 10543984, 2017 U.S. Dist. LEXIS 225573 (C.D. Cal. July 13, 2017). More generally, Justice Roberts has noted that “federal courts owe significant deference to politically accountable officials with the ‘background, competence, and expertise to

assess public health.” *S. Bay United Pentecostal Church v. Newsom*, No. 20A136, 2021 WL 406258, at *1 (Feb. 5, 2021) (Roberts, J., concurring).

It is well-settled that it is within a state’s police power to establish regulations implementing mandatory vaccine laws and vest local officials with enforcement authority. *Jacobson*, 197 U.S. at 25 (observing that “[i]t is equally true that the state may invest local bodies called into existence for purposes of local administration with authority in some appropriate way to safeguard the public health and the public safety”); *see also Zucht*, 260 U.S. at 176 (explaining that *Jacobson* and other cases, have “settled that a state may, consistently with the federal Constitution, delegate to a municipality authority to determine under what conditions health regulations shall become operative” and that “the municipality may vest in its officials broad discretion in matters affecting the application and enforcement of a health law” (citing *Laurel Hill Cemetery v. San Francisco*, 216 U.S. 358 (1910); *Lieberman v. Van de Carr*, 199 U.S. 552 (1902))).

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

Plaintiffs argue that “[m]edical exemption cases in the abortion context are illustrative of how courts should scrutinize medical exemptions even more strictly than other important fundamental rights.” They assert that under *Planned Parenthood v. Casey*, 505 U.S. 833 (1992)

and *Stenberg v. Carhart*, 530 U.S. 914 (2000), the regulation’s narrow definition of what is “detrimental” to a child’s health and reliance on ACIP guidance, 10 N.Y.C.R.R. § 66-1.1(l), instead of the “clinical judgment” of the child’s treating physician, is unconstitutional. (Dkt. No. 89, at 15–16 (citing *Stenberg*, 530 U.S. at 937 (“Doctors often differ in their estimation of comparative health risks and appropriate treatment. And *Casey*’s words ‘appropriate medical judgment’ must embody the judicial need to tolerate responsible differences of medical opinion.”))). However, *Casey*, *Stenberg*, and their progeny involved a right the Supreme Court recognized as “fundamental” in *Roe v. Wade*, 410 U.S. 113 (1973): the right to an abortion. Plaintiffs fail to cite any caselaw applying the standards utilized in the abortion context to vaccine requirement exemptions, or to any other context where, as here, the right being burdened is not a recognized fundamental right. Further, unlike the medical exemption cases involving abortion, where the denial of an exemption may endanger the life or health of the mother, here, if a medical exemption is denied and the parent continues to believe that vaccinating the child will endanger his or her health, the parent may forgo vaccination and homeschool their child. Therefore, the medical exemption at issue here does not directly implicate the same “unnecessary risk of tragic health consequences” that drives the abortion medical exemption jurisprudence. *Cf. Stenberg*, 530 U.S. at 937 (explaining that in view of division of medical opinion about banned abortion procedure, which “a significant body of medical opinion” believed provided “greater safety for some patients,” statute must contain health exception allowing the procedure because “the absence of a health exception will place women at an unnecessary risk of tragic health consequences”).

Citing *Whalen v. Roe*, 429 U.S. 589 (1977), Plaintiffs argue that the right or liberty “interest in independence in making certain kinds of important decisions” identified in the above

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

Thus, after considering a “careful description” of the rights Plaintiffs assert, the Court finds that Plaintiffs have failed to allege the infringement of “fundamental rights” that would trigger strict scrutiny. Accordingly, rational basis review applies, and the Court must determine whether the “the governmental regulation [is] reasonably related to a legitimate state objective.” *Immediato*, 73 F.3d at 461 (citing *Flores*, 507 U.S. at 303–06); *see also Molinari v. Bloomberg*, 564 F.3d 587, 606 (2d Cir. 2009) (“The law in this Circuit is clear that where, as here, a statute neither interferes with a fundamental right nor singles out a suspect classification, we will invalidate that statute on substantive due process grounds only when a plaintiff can demonstrate

that there is no rational relationship between the legislation and a legitimate legislative purpose.”) (citations, internal quotation marks, and brackets omitted).

b. Application of the Rational Basis Test

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

It is well-settled, as Plaintiffs acknowledge, (Dkt. No. 74, at 7), that New York’s mandatory vaccination law does not violate substantive due process. *See Phillips*, 775 F.3d at 542 (rejecting the plaintiffs’ argument that “New York’s mandatory vaccination requirement” for school children violates substantive due process, explaining that “[t]his argument is foreclosed by the Supreme Court’s decision in *Jacobson v. Commonwealth of Massachusetts*”). The issue here is Plaintiffs’ substantive due process challenge to medical exemption regulations that: (1) define what “[m]ay be detrimental to the child’s health” to warrant a medical exemption; and (2) enable schools, and more specifically, school principals, rather than the child’s doctor, to decide whether to grant a medical exemption to vaccination.

i. Definition of “May be Detrimental to the Child’s Health

Plaintiffs argue that the state “arbitrarily narrowed the allowable reasons to obtain a medical exemption” by “substituting a narrow set of circumstances, predefined by the CDC’s ‘ACIP guidelines’” as “the only basis to grant a medical exemption,” which excludes “hundreds of additional conditions that vaccine manufacturers acknowledge as potential adverse events.”

(Dkt. No. 74, at 8–9). As a preliminary matter, the Court notes that this argument ignores the full text of the definition. The regulation defines “[m]ay be detrimental to the child’s health” to mean that “a physician has determined that a child has a medical contraindication or precaution to a specific immunization *consistent with ACIP guidance or other nationally recognized evidence-based standard of care.*”¹⁶ 10 N.Y.C.R.R. § 66-1.1(l).

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

¹⁶ Plaintiffs argue that, in practice, Defendants limited their consideration of the medical exemption requests to whether the child’s contraindication or precaution fell within the four corners of the ACIP guidance and did not consider “other nationally recognized evidence-based standard of care.” (Dkt. No. 74, at 9). This issue, however, is best addressed in the context of Plaintiffs’ individual claims.

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

Plaintiffs allege that “[t]he CDC itself has clearly stated that the ACIP guidance is not meant to replace the clinical judgment of a treating physician.” (Dkt. No. 99-2, ¶ 11). Plaintiffs further allege that in a reply to an email “from plaintiff Jane Doe asking for clarification on the ACIP guidelines and their role in defining medical exemptions,” “Dr. Andrew Kroger from CDC’s Immunization Services Division” stated that: “The ACIP guidelines were never meant to

be a population-based concept The CDC does not determine medical exemptions. We define contraindications. It is the medical providers' prerogative to determine whether this list of conditions can be broader to define medical exemptions." (*Id.* ¶ 283). Plaintiffs further allege that "[h]undreds of additional reasons exist which could put some children at substantial risk of harm," citing "the long list of precautions and known adverse reactions listed in manufacturers' inserts," as well as "the long list of injuries and conditions compensated by the Vaccine Injury Compensation Program." (*Id.* ¶ 12). Plaintiffs also cite the "Institute of Medicine reports that clearly and expressly acknowledge subpopulations who have a pre-existing susceptibility to serious adverse reaction." (*Id.*).

As noted above, however, the definition of "may be detrimental to the child's health" is broader than medical contraindications and precautions defined in the ACIP guidance. "May be detrimental to the child's health means that a physician has determined that a child has a medical contraindication or precaution to a specific immunization *consistent with* the ACIP guidance *or other nationally recognized evidence-based standard of care.*" 10 N.Y.C.R.R. § 66-1.1(1). The medical exemption form itself refers to guidance beyond the ACIP recommendations. It states that "[g]uidance for medical exemptions for vaccination can be obtained from the contraindications, indications and precautions described in the vaccine manufacturers' package insert and by the most recent recommendations of the [ACIP]."

<https://www.health.ny.gov/forms/doh-5077.pdf> (last visited Feb. 17, 2021). Because, on its face, the regulation allows for a broader range of medical exemptions than the ACIP guidance alone would, Plaintiffs' arguments regarding the narrowness or inappropriateness of the ACIP guidance do not support their argument that the regulation is facially unconstitutional.

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

The ACIP "General Best Practices Guidelines for Immunization," states that the guidance is "intended for clinicians and other health care providers who vaccinate patients in varied settings, including hospitals, provider offices, pharmacies, schools, community health centers, and public health clinics." (Dkt. No. 28-7, at 2). The ACIP Guidelines are the product of the ACIP General Recommendations Work Group, which is a "diverse group of health care providers and public health officials," and "includes professionals from academic medicine (pediatrics, family practice, and pharmacy); international (Canada), federal, and state public health professionals." (*Id.* at 5). The revisions to the current ACIP Guidelines "involved consensus-building based on new evidence from the published literature and opinion from subgroups of subject matter experts consulted on specific topics." (*Id.*). The ACIP Guidelines define contraindication and precaution and provide a table delineating contraindications and precautions for each vaccine. (*Id.* at 49–52). "Severe allergic reaction (e.g. anaphylaxis) after a previous dose or to a vaccine component," is identified as a contraindication for every vaccine. (*Id.* at 53–56).

While Plaintiffs argue that the ACIP guidance is too narrow in view of their allegations regarding the numerous adverse reactions for which it fails to account, it cannot be said that the Legislature's use of the ACIP guidance, in furtherance of its objective of strengthening medical exemptions and ensuring they are not issued for non-medical reasons, was irrational. *See*

Sensational Smiles, LLC v. Mullen, 793 F.3d 281, 284–85 (2d Cir. 2015) (“While Sensational Smiles disputes this evidence, it is not the role of the courts to second-guess the wisdom or logic of the State’s decision to credit one form of disputed evidence over another.”).

ii. Authority of School Principals

Plaintiffs argue that the regulations improperly give school principals the authority to overrule the judgment of treating physicians and do not require the principals to consult medical professionals. (Dkt. No. 41-1, at 11). In support of their argument, Plaintiffs allege that “[t]wo members of the New York State Legislature sent correspondence to the Commissioner of Education supporting the Doe’s appeal on or about December 20, 2019,” and indicated in their letters “that the New York State Legislature did not intend for school districts to have unilateral power to overrule treating physicians.” (Dkt. No. 99-2, ¶ 116).

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

discretion in matters affecting the application and enforcement of a health law.” 260 U.S. 174 at 176 (citing *Laurel Hill Cemetery*, 216 U.S. 358; *Lieberman*, 199 U.S. 552).

As the Second Circuit previously recognized, in the context of the mandatory school vaccine law, “the Commissioner clearly has a rational basis for allowing individual school districts the autonomy to determine how to implement the regulations in light of the varying populations that live within different districts and the consequential variations in local health concerns.” *Friedman v. Clarkstown Cent. Sch. Dist.*, 75 F. App’x 815, 819 (2d Cir. 2003) (rejecting the plaintiffs’ argument that “the lack of standards in the regulation allowing unfettered discretion to the individual districts has resulted in unequal treatment of religious beliefs in different school districts” with respect to religious exemptions to vaccines (citing *Catlin v. Sobol*, 93 F.3d 1112, 1120 (2d Cir. 1996) (“we will uphold the statute [on rational basis review] as long as it is rationally related to a legitimate state interest”))). Thus, Plaintiffs have failed to allege “that there is no rational connection” between the delegation of authority to the local school districts, where the Plaintiff children reside, to decide requests for medical exemptions and “the promotion of public health, safety or welfare.”¹⁷ *Beatie v.*, 123 F.3d at 712; *see also Sensational Smiles*, 793 F.3d at 284 (“[W]e are required to uphold the [legislative decision] ‘if there is any reasonably conceivable state of facts that could provide a rational basis for the [decision].’” (quoting *Heller*, 509 U.S. at 320)).

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

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

2. Substantive Due Process – Individual Claims

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

Plaintiffs allege that by denying their requests for medical exemptions to vaccination and refusing to allow the minor Plaintiffs to attend school without vaccination, the individual School District Defendants violated their Fourteenth Amendment substantive due process rights (First Claim for Relief), liberty interest in parenting (Second Claim for Relief), and liberty interest in informed consent (Third Claim for Relief), as well as the Plaintiff “minors’ right to pursue an education at any public or private school in New York” (Fourth Claim for Relief). (Dkt. No. 99-2, at 78–83). Because none of these claims can “be analyzed under [a] more specific constitutional provision,” the Court “must assess them in terms of the Fourteenth Amendment’s substantive due-process guarantee.” *Kia v. McIntyre*, 235 F.3d 749, 758 (2d Cir. 2000) (evaluating liberty interest in parenting claim under substantive due process); *see Blouin ex rel. Estate of Pouliot v. Spitzer*, 356 F.3d 348, 359 (2d Cir. 2004) (addressing asserted violation of liberty interest in the right to bodily integrity and issues concerning the right to refuse consent to medical treatment under Fourteenth Amendment).

To allege a violation of substantive due process against a state actor, a plaintiff must allege a deprivation of a fundamental liberty interest,” *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 275 (2d Cir. 2011), or “a valid ‘property interest’ in a constitutionally-protected

benefit,” *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995). Further, “[f]or a substantive due process claim to survive a Rule 12(b)(6) dismissal motion, it must allege governmental conduct that ‘is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience.’” *Velez v. Levy*, 401 F.3d 75, 93 (2d Cir. 2005) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998)). A plaintiff must show that the government’s alleged acts were “arbitrary,” “conscience-shocking,” or “oppressive in the constitutional sense,” not merely “incorrect or ill-advised.” *Lowrance v. C.O. S. Achtyl*, 20 F.3d 529, 537 (2d Cir. 1994). Finally, the Second Circuit has instructed that “[i]n situations in which time for deliberation is available to the official, [courts] apply a ‘deliberate indifference’ standard, which requires demonstration of a ‘willful disregard’ of the ‘obvious risks,’ ‘serious implications,’ and ‘likelihood’ of harm.” *Spring v. Allegany-Limestone Cent. Sch. Dist.*, 655 F. App’x 25, 28 (2d Cir. 2016) (quoting *Okin v. Vill. of Cornwall-on-Hudson Police Dep’t*, 577 F.3d 415, 432 (2d Cir. 2009)).

As discussed at length above, Plaintiffs have failed to allege the infringement of any fundamental right. *See Votta ex rel. R.V. & J.V. v. Castellani*, 600 F. App’x 16, 18 (2d Cir. 2015). While the right to education does not rise to the level of a fundamental right, New York law “does appear to create a property interest in education protected by the Fourteenth Amendment.” *Handberry v. Thompson*, 446 F.3d 335, 352-53 (2d Cir. 2006) (citing New York Education Law § 3202(1)); *see also Goss v. Lopez*, 419 U.S. 565, 573-77 (1975) (holding that “on the basis of [Ohio] law, appellees plainly had legitimate claims of entitlement to a public education,” and that it is a property interest protected by the Due Process Clause). Courts have thus found the deprivation of education to be a valid basis for a substantive due process claim by a student expelled from school. *See, e.g., DeFabio v. E. Hampton Union Free Sch. Dist.*, 623 F.3d

71, 82 (2d Cir. 2010) (explaining “a student's substantive due process rights [may be implicated] upon a showing that an administrator’s decision to expel the student was ‘arbitrary or irrational or motivated by bad faith.’” (quoting *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989)); *Biswas v. City of New York*, 973 F. Supp. 2d 504, 525 (S.D.N.Y. 2013) (same). At the same time, Plaintiffs’ right to an education under New York State law is limited by the New York’s mandatory school vaccination requirement, and “[t]he case law clearly establishes that “[c]onditioning school enrollment on vaccination has long been accepted by courts as a permissible way for States to inoculate large numbers of young people and prevent the spread of contagious diseases.” *V.D. v. State of New York*, 403 F.Supp.3d 76, 87 (S.D.N.Y. 2019).

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

a. John Doe – Coxsackie-Athens School District

The Does assert their substantive due process claim against Defendants Randall Squier, Superintendent of Coxsackie-Athens School District, and Freya Mercer, High School Principal. Doe suffers “chronic, incurable, and at times completely debilitating” medical conditions and has never been vaccinated. His physicians have advised that he not receive immunizations because they “trigger” “regression of one or more auto-immune diseases and disorders.” (Dkt. No. 99-2, ¶¶ 95–96). Superintendent Squier twice denied Doe’s parents’ request for a medical exemption to vaccination for Doe. His first denial, in August 2019, was based on the opinion of the Coxsackie-Athens’ “paid consultant,” an emergency medical physician. (*Id.* ¶ 99). The

consultant evaluated the letters from two of Doe’s treating physicians, both of whom had indicated that immunization was “unsafe” for Doe “given his multiple chronic and serious conditions and the risk that immunization could trigger a regression.” (*Id.* ¶ 98). Ultimately, on the consultant’s recommendation, Squier denied the Does’ request because the treating physicians’ letters failed to specify how the exemption request qualified under the ACIP contraindications or precautions. (*Id.* ¶ 99–100). Superintendent Squier denied the Does’ second request, in which Doe’s pediatrician “detailed for each vaccine how the child’s conditions qualified under the ACIP guidance as a precaution or contraindication,” on the ground that the consulting doctor found the request “was ‘not supported.’” (*Id.* ¶ 104–05). When Doe’s mother called about the second denial, the consulting doctor “conceded” that the second request “followed the ACIP guidelines verbatim” but declined to “debate” with Doe’s mother or provide additional information. (*Id.* ¶¶ 106–07). Plaintiff alleges that Superintendent Squier “was made aware of these actions.” (*Id.* ¶ 107).

Doe appealed the denial to the Commissioner of Education, who concluded that Cocksackie-Athens’ determination was not arbitrary or capricious, and dismissed the appeal. (*Id.* ¶ 117; Dkt. No. 54-4). The Commissioner ruled, inter alia, that Does offered “no evidence such as an affidavit from the student’s physician, containing sufficient information to identify that the student has a precaution or contraindication to any of the eight required vaccinations,” and that even if Doe’s episodic “moderate or severe illness” constituted a precaution, under the ACIP Guidelines, “the precaution to vaccination only exists until such acute episode resolves.” (Dkt. No. 54-4, at 5).

The allegations that Superintendent Squier denied the Does’ request for a medical exemption twice based on the recommendation of the consulting doctor do not allow a plausible

inference of conscience-shocking conduct. The fact that Superintendent Squier “was made aware” of the consulting physician’s admission to Jane Doe, following the second denial, that Doe’s second request “followed the ACIP guidelines verbatim” does not, standing alone, render Squier’s decision to deny that request arbitrary. (Dkt. No. 99-2, ¶ 106). And even if the decision denying Doe’s second request could be deemed arbitrary, this decision to follow the consulting doctor’s recommendation does not rise to the level of conscience-shocking conduct, or even deliberate indifference. There are no allegations that Superintendent Squier acted outside the scope of authority, harbored personal animus, or was motivated by bad faith. *See Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 789 (2d Cir. 2007) (explaining that town board’s amendment of the plaintiff’s special use permit was “ultra vires and, as a result, sufficiently arbitrary to amount to a substantive due process violation”); *Velez*, 401 F.3d at 94 (explaining that the “intentional[] and malicious[] fabricat[ion] and disseminat[ion][of] falsehoods in a common effort to deprive the plaintiff of her job . . . might well be sufficiently ‘arbitrary’ and ‘outrageous,’ in a constitutional sense, to make out a valid substantive due process claim” (citing *Natale v. Town of Ridgefield*, 170 F.3d 258, 262 (2d Cir. 1999)); *Rosa R. v. Connelly*, 889 F.2d 435, 439 (2d Cir. 1989) (dismissing substantive due process claim, observing that there was no evidence that school board’s decision regarding disciplinary action “was arbitrary or irrational or motivated by bad faith”). Without such allegations, the allegation that Superintendent Squier’s decision was contrary to state law is not sufficient to establish a constitutional claim against him. *See, e.g., Kuck v. Danaher*, 600 F.3d 159, 167 (2d Cir. 2010) (concluding allegations that state officials allegedly imposed “arbitrary requirements contrary to state law” in connection with the plaintiff’s renewal of his pistol permit did not “‘shock[] the conscience’ or suggest[] a ‘gross abuse of governmental authority,’” explaining “substantive due process does not entitle federal

courts to examine every alleged violation of state law,” “especially” because plaintiff had “recourse to state forums to challenge the merits of the [state officials’] decisions”). To the contrary, to the extent Superintendent Squier’s denial was “arbitrary,” it was the type of state action that is “correctable in a state court lawsuit seeking review of administrative action”; it did not rise to the level of egregious official conduct that violates substantive due process standards. *Natale*, 170 F.3d at 263.

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

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

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

b. Jane Boe – Three Village Central School District

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

Three Village, through Superintendent Pedisich and Principal Keane, denied Boe’s medical exemption on the advice of the school district’s consulting doctor. (*Id.* ¶ 139). Even assuming Superintendent Pedisich and Principal Keane were aware that in recommending denial

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

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

Further, Superintendent Pedisich and Principal Keane were well within their authority to send Boe's second request for a medical exemption to the DOH for review. The school denied that request based upon the recommendation of Dr. Rausch-Phung. (Dkt. No. 99-2, ¶¶ 146–47). Dr. Rausch-Phung wrote that the death of Boe's sibling, "even if it was from an adverse reaction to the vaccine, was not a sufficient reason to grant an exemption." (*Id.* ¶ 146). The school officials' decision to accept the recommendation of the Director of the Bureau of Immunizations at DOJ over that of Boe's treating physicians, and their consequent denial of the request, cannot be called outrageous or conscience shocking.

Boe’s December 2019 medical exemption request based on “acute illness” was granted—though not until March 2020 and only for a period of one month. (*Id.* ¶¶ 148, 150). However, there is nothing irrational about Three Village’s determination, in reliance on the opinion of its consulting physician, that the one-month exemption began in December, when Boe was experiencing an acute illness, and not March, when Dr. Rausch-Phung issued her letter. (*Id.*; see also Dkt. No. 28-7, at 50 (ACIP Guidelines: “The presence of a moderate or severe acute illness with or without a fever is a precaution to administration of all vaccines . . . persons with moderate or severe acute illness should be vaccinated as soon as the acute illness has improved”). Moreover, there is no allegation that Superintendent Pedisich or Principal Keane excluded Boe from school at any point prior to Dr. Rausch-Phung’s letter; thus, Boe was effectively provided with a three-month exemption. The Boes allege that Three Village “was unable to provide clarity on whether the exemption in place had to be renewed immediately or in April, and how long it might take to get an answer on the follow up request” and “refused to consider allowing their principal or superintendent to approve the follow up requests,” but do not allege that they submitted any follow up requests—alleging instead that “defendants did not . . . bother to ask [Boe’s] family to submit the follow up exemption letter.” (Dkt. No. 99-2, ¶¶ 151–52). The Boes do not attribute this conduct to Superintendent Pedisich or Principal Keane, but even if they did, these Defendants’ purported failure to “provide clarity” regarding the renewal process does not shock the conscience. Nor was it irrational for Superintendent Pedisich or Principal Keane not to ask the Boes for additional medical exemption requests, as it is the responsibility of the “person in parental relation to the child” to “furnish[] the school” with the “medical exemption form,” 10 N.Y.C.R.R. § 66.1-3(c), with or without being asked by school officials.

There are two additional allegations the Court must address. First, the Boes allege that upon expiration of the one-month exemption, “the school demanded Jane Boe be immunized with the same immunization that killed her brother.” (Dkt. No. 99-2, ¶ 152). As they do not characterize this as a statement or attribute it to either individual Defendant, it does not allow a plausible inference of personal animus by either Defendant.¹⁹ Second, the Boes label Jane Boe’s March 2020 exclusion from school as expulsion. (*See id.* (“The school *expelled* Jane in March 2020.”)) (emphasis added). Expelling a student for not being vaccinated, as opposed to merely barring her from attending school while she remained unvaccinated, might rise to the level of conscience-shocking if there were “no rational relationship between the punishment and the offense.” *Rosa R.*, 889 F.2d at 439. There are, however, no accompanying factual allegations that would allow a plausible inference that Three Village subjected Jane Boe to punishment for not being vaccinated, as opposed to merely barring her from attending school while she remained unvaccinated.²⁰ *See Lawtone-Bowles*, 2017 WL 4250513, at *2, 2017 U.S. Dist. LEXIS 155140, at *5 (“Although a complaint need not contain detailed factual allegations, it may not rest on mere labels, conclusions, or a formulaic recitation of the elements of the cause of action, and the factual allegations ‘must be enough to raise a right to relief above the speculative level.’” (quoting *Twombly*, 550 U.S. at 555)).

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

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

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

to include individual substantive due process claims against Superintendent Pedisich or Principal Keane is denied as futile.

c. John and Jane Coe – Lansing Central School District

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

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

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

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

d. John Foe – Albany City School District

The Foes assert their substantive due process claims against Defendants Kaweeda Adams, Superintendent of the Albany City School District, and Michael Paolino, Principal of William S. Hackett Middle School. Foe, age eleven, has longstanding medical issues, severe allergies, and sensitivities to chemicals and metals, and must be hospitalized when antibiotics are necessary. (Dkt. No. 99-2, ¶ 53). Foe has received no immunization since age three on the advice of his pediatrician. (*Id.* ¶ 189). When their August 2019 request for a medical exemption was denied in September 2019, Assistant Superintendent Lori McKenna informed the Foes that the request had been denied on the advice of Albany's physician. (*Id.* ¶ 193). Albany “expelled” Foe on September 23, 2019. (*Id.* ¶ 194).

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

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

e. Jane Goe – Penfield Central School District²³

The Goes bring their substantive due process claim against Defendant Dr. Thomas Putnam, Superintendent of the Penfield Central School District. The proposed First Amended Complaint contains one specific factual allegation regarding Superintendent Putnam: that on September 18, 2019, he forwarded a denial of the Goes’ request for a medical exemption from Penfield’s consulting physician. (Dkt. No. 99-2, ¶ 219). Even inferring from this allegation that it was Superintendent Putnam who denied the request based on the doctor’s statement that he felt “strongly that this request does not meet the CDC contraindication or even a precaution from getting these specific vaccines,” there is no plausible inference that Superintendent Putnam’s

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

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

conduct was “arbitrary” or “outrageous.” *Velez*, 401 F.3d at 94. Accordingly, the proposed amendment to include and individual substantive due process claims against Superintendent Putnam is denied as futile.

f. John Loe – South Huntington School District

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

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

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

²⁵ “Under 42 U.S.C. § 1983, constitutional torts are only actionable against state actors or private parties acting ‘under the color of’ state law.” *Betts v. Shearman*, 751 F.3d 78, 84 (2d Cir. 2014) (quoting *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002)). While there is “no single test to identify state actions and state actors,” “[t]he fundamental question . . . is whether the private entity’s challenged actions are ‘fairly attributable’ to the state.” *Fabrikant v. French*, 691 F.3d 193, 207 (2d Cir. 2012) (first quoting *Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 491 (2d Cir. 2009)); then quoting *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982)). Given that the sole allegation in the proposed First Amended Complaint regarding Brother Migliorino is that he emailed Loe’s parents stating that due to South Huntington’s denial of the request for a medical exemption, Loe would be “unable to continue as a student” at St. Anthony’s High School, (Dkt. No. 99-2, ¶ 270), there is no plausible inference that Brother Migliorino’s conduct is attributable to the state.

South Huntington’s consulting doctor, even if the recommendation was erroneous, was “arbitrary” or “outrageous.” *Velez*, 401 F.3d at 94. Accordingly, the proposed amendment to include individual substantive due process claims against Superintendent Bennardo or Brother Migliorino is denied as futile.

g. John Joe – Ithaca City School District

The Joes bring their substantive due process claim against Defendants Dr. Luvelle Brown, Superintendent of Ithaca City School District and Susan Eschbach, Principal of Beverly J. Martin Elementary School. Joe, who had “a severe, life-threatening anaphylactic reaction to his hepatitis B vaccine given at birth,” submitted a medical exemption request from his pediatrician in the summer of 2019 seeking exemption to “all immunization on a permanent basis.” (Dkt. No. 99-2, ¶¶ 231, 235). According to the proposed First Amended Complaint, in November 2019, Superintendent Brown (1) “partially denied” the medical exemption request Joe’s mother had submitted from Joe’s pediatrician; (2) informed her that “she had to get her son immunized within a week or her son would be expelled from school”; and (3) in response to Joe’s mother’s explanation that Joe “had always had a medical exemption to all further immunization and that multiple physicians had indicated that further immunization would be unsafe for him,” stated that, “as far as he understood, [Joe] would need to have an anaphylactic reaction to each vaccine in order to be exempt from the additional mandates.” (*Id.* ¶¶ 238–40).

Crediting these allegations, the Court finds they fail to allow a plausible inference that Superintendent Brown’s conduct in partially denying the Joes’ medical exemption request on the ground that it did not assert Joe had an anaphylactic reaction to each vaccine was arbitrary or irrational. The regulations require that any request for exemption “contain[] sufficient information to identify a medical contraindication to a specific immunization.” 10 N.Y.C.R.R. § 66-1.3(c). And even if Superintendent Brown knew about and failed to consider Joe’s other

conditions—he is autistic, has a range of health problems, and a history of mercury, lead, and aluminum poisoning, (Dkt. No. 99-2, ¶ 232)—there is no allegation that Superintendent Brown did anything other than follow the regulation. There is no allegation that Joe had medical contraindications or precautions consistent with nationally recognized evidence-based standards of care that Superintendent Brown ignored. The Court cannot infer from these allegations a plausible claim of egregious government action in violation of substantive due process. *Cf. Velez*, 401 F.3d at 94 (explaining that the “intentional[] and malicious[] fabricat[ion] and disseminat[ion][of] falsehoods in a common effort to deprive the plaintiff of her job . . . might well be sufficiently ‘arbitrary’ and ‘outrageous,’ in a constitutional sense, to make out a valid substantive due process claim” (citing *Natale*, 170 F.3d at 262)).

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

Although the proposed First Amended Complaint names Principal Eschbach individually, there are no allegations that she had any involvement in the handling of the Joes’ medical exemption request. It alleges only that “Defendant Susan Esbasch [sic], the principal of the school who is by statute supposed to make this decision, did not contact the mother or the

doctor.” (Dkt. No. 99-2, ¶ 240). As the Court explained with respect to the Does’ claim against Principal Mercer, an analysis that applies equally here, *see supra* Section VI.C.2.a., this is insufficient to allege that “each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Tangreti*, 983 F.3d at 618 (quoting *Iqbal*, 556 U.S. at 676). Accordingly, the proposed amendment to include individual substantive due process claims against Superintendent Brown and Principal Eschbach is denied as futile.

3. Equal Protection

Plaintiffs contend that “due to their disabilities, which prevent them from being able to be safely immunized per the certifications of their licensed physicians,” Defendants have “denied their equal protection rights.” (Dkt. No. 100, at 47; Dkt. No. 112, at 23). Plaintiffs allege that “[m]edically fragile sub-populations . . . have not been adequately studied, and there is significant divergence of thought within the medical and scientific community about the risk that is posed to medically fragile subpopulations.” (Dkt. No. 99-2, ¶ 409). They further allege that “[t]here is no rational basis for discriminating against children who suffer from hundreds of recognized harms that do not fall on the ACIP contraindications and precautions list.” (*Id.* ¶ 411). Defendants assert that dismissal of Plaintiffs’ equal protection claim is required for the same reasons their substantive due process claims must be dismissed: the mandatory vaccination requirement and medical exemption survive rational basis review. (Dkt. No. 28-1, at 20 n.3; Dkt. No. 54-14, at 31 n.1; Dkt. No. 78-4, at 28–29)

The Equal Protection Clause of the Fourteenth Amendment “requires that the government treat all similarly situated people alike.” *Harlen Assocs. v. Incorporated Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). It is well settled that “[l]aws that discriminate on the basis of disability are subject to rational-basis review and upheld so long as there is a ‘rational relationship between the disparity

of treatment and some legitimate governmental purpose.” *Bryant*, 692 F.3d at 219 (quoting *Garcia v. S.U.N.Y. Health Scis. Ctr. Of Brooklyn*, 280 F.3d 98, 109 (2d Cir. 2001)). As the Court explained above, there is a rational basis to support the legislature’s selection of the ACIP guidance and other “nationally recognized evidence-based” reasons as the framework against which to assess the propriety of medical exemptions.

Plaintiffs argue that there is no rational basis for restricting the provision of medical exemptions to those students with contraindications or precautions identified in the ACIP Guidelines when there is an entire “sub-population” of medically fragile children whose conditions fall outside the listed contraindications and precautions and about whom there is “divergence of thought in the medical and scientific community.” (Dkt. No. 99-2, ¶ 409). However, to the extent the medical exemption allows classification between students with medical conditions that constitute a contraindication or precaution within the ACIP Guidelines, and students whose medical conditions do not, it does not violate principles of equal protection as there is no suspect classification at issue, *see Bryant*, 692 F.3d at 219 (explaining that classification of students with disabilities who had education plans authorizing aversives and classification of students with disabilities who did not have education plans permitting aversives was “a non-suspect classification subject to rational basis review”), and “must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” *Id.* Here the state’s framework for evaluating medical exemption requests was selected in order to provide “clear, evidence-based guidance to physicians” and “prevent medical exemptions being issued for non-medical reasons.” (Dkt. No. 28-6, at 16–17). There were, therefore, rational grounds for Defendants’ restriction of medical exemptions to contraindications or precautions consistent with the ACIP guidance or “other

nationally recognized evidence-based standard of care.” 10 N.Y.C.R.R. § 66-1.1(l). Accordingly, Plaintiffs’ equal protection claims are dismissed.²⁶

4. Unconstitutional Conditions

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

The “unconstitutional conditions doctrine” reflects “an overarching principle . . . that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013). “Pursuant to this ‘unconstitutional conditions’ doctrine, as it has come to be known, the government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient’s constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance.” *All. for Open Soc’y Int’l, Inc. v. U.S. Agency for Int’l Dev.*, 651

²⁶ Even assuming Plaintiffs intend to allege individual equal protection claims against the School District Defendants under a “class of one” or “selective enforcement” theory, such claims would fail as Plaintiffs allege no comparators. See *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (explaining that to state a “class-of-one” equal protection claim, a plaintiff must plausibly allege that they were “intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment”); *Harlen Assocs.*, 273 F.3d at 499 (explaining that to state an equal protection claim under a selective enforcement theory, a plaintiff must allege: (i) that they were “treated differently from other similarly situated individuals”; and (ii) “that such differential treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.”) (internal quotation marks omitted).

F.3d 218, 231 (2d Cir. 2011) (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)), *aff'd sub nom. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

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

5. Qualified Immunity

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

6. Municipal Liability Claims

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

The municipal liability allegations Plaintiffs assert against the Defendant School Districts fail to state a plausible claim for relief. It is well-established that a municipality may not be held liable under § 1983 on the basis of respondeat superior. *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 694-95 (1978). Rather, municipalities are responsible only for “their own illegal acts,” *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986), and are not vicariously liable for civil rights violations perpetrated by their employees, *see Monell*, 436 U.S. at 691. A municipality may be liable under Section 1983 only if “its ‘policy or custom . . . made by . . .

those whose edicts or acts may fairly be said to represent official policy, inflicts the [complained of] injury.” *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 128 (2d Cir. 2004) (quoting *Monell*, 436 U.S. at 694). In order to sustain a § 1983 claim for municipal liability, a plaintiff must show that he suffered a constitutional violation, and that the violation resulted from an identified municipal policy or custom. *Id.* at 694–95; *see also Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006) (“*Monell* does not provide a separate cause of action for the failure by the government to train its employees; it extends liability to a municipal organization where that organization's failure to train, or the policies or customs that it has sanctioned, led to an independent constitutional violation.”).

Here, the proposed First Amended Complaint fails to allege that any of the individual Defendants’ conduct was so arbitrary, conscience-shocking or oppressive as to implicate substantive due process. Nor are there any allegations that would allow a plausible inference that any Plaintiff suffered a constitutional violation. Accordingly, the Defendant School Districts are entitled to dismissal of the municipal liability claims against them. *See, e.g., Segal*, 459 F.3d at 219 (“Because the district court properly found no underlying constitutional violation, its decision not to address the municipal defendants’ liability under *Monell* was entirely correct.”).

D. Rehabilitation Act

1. Individual Capacity Claims

Section 504 “of the Rehabilitation Act [does not] provide[] for individual capacity suits against state officials.” *Garcia*, 280 F.3d at 107. Thus, to the extent Plaintiffs seek to assert Rehabilitation Act claims against the individual Defendants in their personal capacities, their motion to amend is denied as futile. Plaintiffs may, however, proceed against the individual Defendants in their official capacities to the extent they seek prospective injunctive relief. *See Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (“Rehabilitation Act suits for prospective

injunctive relief may, under the doctrine established by *Ex parte Young*, 209 U.S. 123 (1908), proceed against individual officers in their official capacity.”). Accordingly, all Rehabilitation Act claims against the individual School District Defendants²⁷ in their personal capacities are dismissed.

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

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

Section 504 of the Rehabilitation Act provides that “[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity” receiving federal financial support. 29 U.S.C. § 794(a). “Exclusion or discrimination [under Section 504] may take the form of disparate treatment, disparate impact, or failure to

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

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

make a reasonable accommodation.” *B.C. v. Mount Vernon Sch. Dist.*, 837 F.3d 152, 158 (2d Cir. 2016).

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

According to the proposed First Amended Complaint, the Plaintiff children suffer multiple medical conditions and their “disabilities significantly impair multiple major life functions, including . . . functions of [their] immune system[s],” (Dkt. No. 99-2, ¶¶ 93, 125, 166, 187, 208, 234, 246); *see* 42 U.S.C. § 12102(2)(B) (“[A] major life activity . . . includes the operation of a major bodily function, including but not limited to, functions of the immune system[.]”); *Grabin v. Marymount Manhattan Coll.*, No. 12-cv-3591, 2015 WL 4040823, at *10–14, 2015 U.S. Dist. LEXIS 86646, at *32–34 (S.D.N.Y. July 2, 2015) (discussing whether the plaintiff established disability under the Rehabilitation Act where the “major life activity that [the plaintiff] allege[d] to be limited [was] the functioning of her immune system” (citing 42 U.S.C. § 12102(2)(B)), *aff’d*, 659 F. App’x 7 (2d Cir. 2016)). Plaintiffs also allege that Defendants are recipients of “federal financial assistance.” (Dkt. No. 99-2, ¶ 405). For purposes of this motion, Defendants do not challenge the sufficiency of Plaintiffs’ allegations as to the first two elements of a Rehabilitation Act claim.

As to the third element, Plaintiffs argue that “the new regulations narrow the medical exemption so that most of the acknowledged potential harms are no longer covered” and that, as a result, those “with disabilities that fall outside of the non-exhaustive ACIP contraindications are discriminated against” and denied access to school.²⁹ (Dkt. No. 74, at 28). The proposed First Amended Complaint, however, fails to allege disability discrimination. The parties’ arguments center on *D.A.B. v. New York City Department of Education*, 45 F. Supp. 3d 400, 407 (S.D.N.Y. 2014). In *D.A.B.*, D.B.’s parents, the plaintiffs, sought a medical exemption from the mandatory vaccination requirements from the New York City Department of Education (“Department”) by submitting a letter from D.B.’s pediatrician stating “that D.B. has a ‘history of adverse reactions’ to vaccinations.” *Id.* The Department “denied the request because it found no medical basis for the exemption.” *Id.* at 403. In a June 2010 letter to the Department, D.B.’s mother “stated that the principal had told her that D.B. would require vaccination [to attend the public school], which she stated would be ‘contrary to the advice of his physicians.’” *Id.* “Prior to the 2010-2011 school year, D.B. still had not received the necessary vaccinations and the plaintiffs did not request an exemption.” *Id.* The plaintiffs did not enroll D.B. in public school, but placed him in “a non-public center.” *Id.*

The plaintiffs sued the Department, and asserted, along with their claims under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400 *et seq.*, that D.B.’s autism “prevent[ed] him from obtaining the required vaccinations”; that “D.B. had been excluded from the proposed placement based on his lack of vaccination”; and that “therefore the enforcement of the [vaccination] requirement constitutes discrimination” under the

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

Rehabilitation Act. *Id.* at 404, 407. The court dismissed based upon the plaintiffs' failure to exhaust administrative remedies, as required by the IDEA, and noted that it was "unclear" whether the plaintiffs could show that D.B. "was excluded from school at all" because they had rejected the proposed public school placement and enrolled D.B. elsewhere, but concluded that in any event the Rehabilitation Act claim was "without merit" because the plaintiffs could not "show that D.B. was excluded from school 'solely by reason' of his disability." *Id.* at 405–07 (quoting 29 U.S.C. § 794(a)).

In rejecting the Rehabilitation Act claim, the court observed that the "vaccination requirement, which allows the possibility of exemptions, is a . . . limited, generally applicable law intended to limit the spread of contagious disease." *Id.* at 407 (citing N.Y. Pub. Health Law § 2164; *New York State Ass'n for Retarded Children v. Carey*, 466 F. Supp. 479, 486 (E.D.N.Y. 1978) (stating that in contrast to complete exclusion, Section 504 allows "prophylactic measures" to limit the "risk of contagion")). And because of its limited and generally applicable nature, the court found the mandatory vaccination requirement, and medical exemption, did not fall within the category of cases where the conduct, which was found to be discriminatory in violation of the Rehabilitation Act, involved "sweeping, automatic exclusions of all children with a certain disease" *Id.* at 407 (citing *Carey*, 466 F. Supp. at 486 (holding that the exclusion of all mentally disabled children with Hepatitis B violated Section 504); *Dist. 27 Cmty. Sch. Bd. by Granirer v. Bd. of Educ. of City of New York*, 502 N.Y.S.2d 325, 335 (Sup. Ct. 1986) (holding that the automatic exclusion of all children with AIDS would violate the Rehabilitation Act)). The court therefore concluded that the plaintiffs failed to show that D.B. "was . . . excluded from public school solely because of his autism." *Id.* at 407. The Second Circuit agreed: in its decision affirming the district court, the Second Circuit noted that "for the reasons well stated by the

district court, no reasonable juror could conclude that [the Department of Education] discriminated against [the plaintiff] because of his disability.” *D.A.B. v. New York City Dep’t of Educ.*, 630 F. App’x 73, 79 (2d Cir. 2015).

Here, the disabilities alleged are impairments of the immune system. Plaintiffs argue that the narrow scope of the medical exemption discriminates against students with “disabilities that fall outside of the non-exhaustive ACIP contraindications.” (Dkt. No. 83, at 27–28). However, the language of the regulation limits medical exemptions to children who can demonstrate that they have “a medical contraindication or precaution to a specific immunization *consistent with ACIP guidance or other nationally recognized evidence-based standard of care.*” 10 N.Y.C.R.R. § 66-1.1(l) (emphasis added). The mandatory vaccination requirement and medical exemption are facially neutral, as they apply to all students—not just those with disabilities. Furthermore, although Plaintiffs strongly disagree with the state’s decision to limit medical exemptions to this class of medical contraindications or precautions, as discussed above, decisions as to what medical contraindications and precautions qualify for exemption, as well as decisions about whether a particular student’s condition qualifies for an exemption, are well within the authority of the legislature, state agencies, and local school administrators. *See Bryant*, 692 F.3d at 216 (dismissing claim that the New York Legislature’s banning of aversive interventions in education violates the Rehabilitation Act, explaining that “[t]he regulation applies to all students, regardless of disability” and acknowledging the plaintiffs’ argument that “there is no scholarly support for banning aversives” but concluding that “such a dispute (regarding which education policy is the most scientifically sound and effective approach that is least likely to present health, safety, and moral and ethical concerns) is best left for resolution by the policymakers and education administrators, not the judiciary”).

Further, the Court has reviewed the allegations of the individual Plaintiffs but has found none that allege a plausible inference of disability discrimination. Crediting their allegations, Plaintiffs allege that their requests for medical exemptions were denied in the course of the application of this facially neutral regulation because their medical exemption requests lacked the requisite detail or were otherwise insufficient; the conditions identified did not qualify under the ACIP guidance; or the doctors relied on by the schools disagreed with student's doctor's opinion that the student's condition qualified for exemption. The First Amended Complaint thus fails to allow a plausible inference that Defendants denied Plaintiffs access to education solely by reason of disability. *See, e.g., Flight v. Gloeckler*, 68 F.3d 61, 64 (2d Cir. 1995) (concluding that "Flight was not denied the additional subsidy 'solely by reason of . . . his disability' within the meaning of § 504" where "[t]he denial of the increased allowance was not based upon Flight's classification as a victim of multiple sclerosis, but rather upon the type of modification that he requested"). Thus, the Court concludes that the proposed First Amended Complaint fails to state a plausible claim for relief under the Rehabilitation Act.

3. Disparate Impact and Reasonable Accommodation Claims

In their briefing, Plaintiffs assert they are proceeding with their Rehabilitation Act claims "under theories of disparate treatment, disparate impact and failure to make a reasonable accommodation," (Dkt. No. 74, at 27), and reference regulations requiring covering entities to make reasonable modifications to their policies . . . to avoid discrimination on the basis of disability." (Dkt. No. 112, at 24 (citing, inter alia, 28 C.F.R. §§ 36.302, 35.130(b)(7)). However, they do not meaningfully address disparate impact or the reasonable accommodation theories except to allege that the medical exemption "disparately impacts medically fragile children," like the Plaintiff children whose immune systems are compromised and whose conditions "fall outside the narrow list of ACIP contraindications." (Dkt. No. 113, at 26). *See, e.g., B.C.*, 837

F.3d at 158 (“To establish a prima facie case under a disparate impact theory, plaintiff must demonstrate ‘(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant’s facially neutral acts or practices.’” (quoting *Tsombanidis v. W. Haven Fire Dep’t*, 352 F.3d 565, 574–75 (2d Cir. 2003) (emphasis omitted))). Indeed, no party has cited any law or advanced any specific arguments suggesting a belief that Plaintiffs have asserted a disparate impact or reasonable accommodation claims.

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

E. Motion to Transfer Venue

The Three Village and South Huntington Defendants, as well as Defendant Brother Migliorino, seek severance of their claims and transfer of venue under 28 U.S.C. § 1404(a) to the Eastern District of New York, where they are located. (Dkt. No. 54-14, at 32–35; Dkt. No. 91-1, at 20–22). Plaintiff responds that severance is unwarranted. (Dkt. No. 83, at 29–30). Under 28 U.S.C. § 1391(b)(1), a civil action may be brought in “a judicial district in which any defendant resides, if all defendants are residents of the State in which the district is located.” It is not disputed that many of the Defendants reside in the Northern District of New York, thus venue in the Northern District of New York is proper under § 1391. In light of the Court’s conclusion that this case must be dismissed, the Court does not reach the issue of whether transfer is warranted

under 28 U.S.C. § 1404(a), “[f]or the convenience of parties and witnesses, in the interest of justice.” Accordingly, Defendants’ motion to transfer is denied as moot.

VII. CONCLUSION³⁰

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

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

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

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

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

IT IS SO ORDERED.

Dated: February 17, 2021
Syracuse, New York


Brenda K. Sannes
U.S. District Judge

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

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

JUDGMENT IN A CIVIL CASE

JANE DOE on behalf of herself and her minor child; JANE BOE, Sr. on behalf of herself and her minor child; JOHN COE, Sr. and JANE COE, Sr. on behalf of themselves and their minor children; JOHN FOE, Sr. on behalf of himself and his minor child; JANE GOE, Sr. on behalf of herself and her minor child; JANE LOE on behalf of herself and her medically fragile child; JANE JOE on behalf of herself and her medically fragile child; CHILDREN'S HEALTH DEFENSE, and all others similarly situated,

Plaintiffs,

vs.

CASE NUMBER: 1:20-CV-0840 (BKS/CFH)

HOWARD ZUCKER, in his official capacity as Commissioner of Health for the State of New York; ELIZABETH RAUSCH-PHUNG, M.D., in her official capacity as Director of the Bureau of Immunizations at the New York State Department of Health; the NEW YORK STATE DEPARTMENT OF HEALTH; THREE VILLAGE CENTRAL SCHOOL DISTRICT; CHERYL PEDISICH, acting in her official capacity as Superintendent, Three Village Central School District; CORINNE KEANE, acting in her official capacity as Principal Paul J. Gelinis Jr. High School, Three Village Central School District; LANSING CENTRAL SCHOOL DISTRICT; CHRIS PETTOGRASSO, acting in her official capacity as Superintendent, Lansing Central School District; CHRISTINE REBERA, acting in her official capacity as Principal, Lansing Middle School, Lansing Central School District; LORRI WHITEMAN, acting in her official capacity as Principal, Lansing Elementary School, Lansing Central School District; PENFIELD CENTRAL SCHOOL DISTRICT; DR. THOMAS PUTNAM, acting in his official capacity as Superintendent, Penfield Central School District; SOUTH HUNTINGTON SCHOOL DISTRICT; DR. DAVID P. BENNARDO, acting in his official capacity as Superintendent, South Huntington School District; BR. DAVID MIGLIORINO, acting in his official capacity as Principal, St. Anthony's High School, South Huntington School District; ITHACA CITY SCHOOL DISTRICT; DR. LUELLE BROWN, acting in his official capacity as Superintendent, Ithaca City School District; SUSAN ESCHBACH, acting in her official capacity as Principal, Beverly J. Martin Elementary School, Ithaca City School District; COXSACKIE-ATHENS SCHOOL DISTRICT; RANDALL SQUIER, Superintendent, acting in his official capacity as Superintendent, Coxsackie-Athens School District; FREYA MERCER, acting in her official capacity as Principal, Coxsackie Athens

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High School, Coxsackie-Athens School District; ALBANY CITY SCHOOL DISTRICT; KAWEEDA G. ADAMS, acting in her official capacity as Superintendent, Albany City School District; MICHAEL PAOLINO, acting in his official capacity as Principal, William S. Hackett Middle School, Albany City School District; and all others similarly situated,

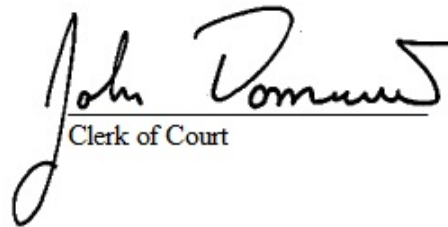
Defendants.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

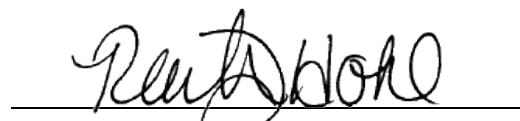
IT IS ORDERED AND ADJUDGED that Defendants' Motions to Dismiss are **GRANTED**, Plaintiffs' motion to amend is **DENIED** as futile and Defendants' request for transfer of venue is **DENIED** as moot. Plaintiffs' Complaint is **DISMISSED**.

All of the above in accordance with the Order of the Honorable Brenda K. Sannes dated February 17, 2021.

Dated: February 17, 2021


Clerk of Court




Renata Hohl
Deputy Clerk

Federal Rules of Appellate Procedure

Rule 4. Appeal as of Right

(a) Appeal in a Civil Case.

1. (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

- (i) the United States;
- (ii) a United States agency;
- (iii) a United States officer or employee sued in an official capacity; or
- (iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

- (i) for judgment under Rule 50(b);
- (ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;
- (iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;
- (iv) to alter or amend the judgment under Rule 59;
- (v) for a new trial under Rule 59; or
- (vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice

of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

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Current through 2021 released Chapters 1-58, 60-102

New York Consolidated Laws Service > Public Health Law (Arts. I — 50) > Article 21 Control of Acute Communicable Diseases (Titles I — 8) > Title VI Poliomyelitis and Other Diseases (§§ 2160 — 2168)

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

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

- a.The term “school” means and includes any public, private or parochial child caring center, day nursery, day care agency, nursery school, kindergarten, elementary, intermediate or secondary school.
- b.The term “child” shall mean and include any person between the ages of two months and eighteen years.
- c.The term “person in parental relation to a child” shall mean and include his father or mother, by birth or adoption, his legally appointed guardian, or his custodian. A person shall be regarded as the custodian of a child if he has assumed the charge and care of the child because the parents or legally appointed guardian of the minor have died, are imprisoned, are mentally ill, or have been committed to an institution, or because they have abandoned or deserted such child or are living outside the state or their whereabouts are unknown, or have designated the person pursuant to title fifteen-A of article five of the general obligations law as a person in parental relation to the child.
- d.The term “health practitioner” shall mean any person authorized by law to administer an immunization.

2.

- a.Every person in parental relation to a child in this state shall have administered to such child an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, Haemophilus influenzae type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.
- b.Every person in parental relation to a child in this state born on or after January first, nineteen hundred ninety-four and entering sixth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand seven, shall have administered to such child a booster immunization containing diphtheria and tetanus toxoids, and an acellular pertussis vaccine, which meets the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health council.
- c.Every person in parental relation to a child in this state entering or having entered seventh grade and twelfth grade or a comparable age level special education program with an unassigned grade on or after September first, two thousand sixteen, shall have administered to such child an adequate dose or doses of immunizing agents against meningococcal disease as recommended by the advisory committee on immunization practices of the centers for disease control and prevention, which meets

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the standards approved by the United States public health service for such biological products, and which is approved by the department under such conditions as may be specified by the public health and planning council.

- 3.**The person in parental relation to any such child who has not previously received such immunization shall present the child to a health practitioner and request such health practitioner to administer the necessary immunization against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B as provided in subdivision two of this section.
- 4.**If any person in parental relation to such child is unable to pay for the services of a private health practitioner, such person shall present such child to the health officer of the county in which the child resides, who shall then administer the immunizing agent without charge.
- 5.**The health practitioner who administers such immunizing agent against poliomyelitis, mumps, measles, diphtheria, Haemophilus influenzae type b (Hib), rubella, varicella, pertussis, tetanus, pneumococcal disease, meningococcal disease, and hepatitis B to any such child shall give a certificate of such immunization to the person in parental relation to such child.
- 6.**In the event that a person in parental relation to a child makes application for admission of such child to a school or has a child attending school and there exists no certificate or other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease, the principal, teacher, owner or person in charge of the school shall inform such person of the necessity to have the child immunized, that such immunization may be administered by any health practitioner, or that the child may be immunized without charge by the health officer in the county where the child resides, if such person executes a consent therefor. In the event that such person does not wish to select a health practitioner to administer the immunization, he or she shall be provided with a form which shall give notice that as a prerequisite to processing the application for admission to, or for continued attendance at, the school such person shall state a valid reason for withholding consent or consent shall be given for immunization to be administered by a health officer in the public employ, or by a school physician or nurse. The form shall provide for the execution of a consent by such person and it shall also state that such person need not execute such consent if subdivision eight of this section applies to such child.
- 7.**
 - (a)**[Expires June 30, 2020] No principal, teacher, owner or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate provided for in subdivision five of this section or some other acceptable evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella, hepatitis B, pertussis, tetanus, and, where applicable, Haemophilus influenzae type b (Hib), meningococcal disease, and pneumococcal disease; provided, however, such fourteen day period may be extended to not more than thirty days for an individual student by the appropriate principal, teacher, owner or other person in charge where such student is transferring from out-of-state or from another country and can show a good faith effort to get the necessary certification or other evidence of immunization or where the parent, guardian, or any other person in parental relationship to such child can demonstrate that a child has received at least the first dose in each immunization series required by this section and has age appropriate appointments scheduled to complete the immunization series according to the Advisory Committee on Immunization Practices Recommended Immunization Schedules for Persons Aged 0 through 18 Years.
 - (b)**A parent, a guardian or any other person in parental relationship to a child denied school entrance or attendance may appeal by petition to the commissioner of education in accordance with the provisions of section three hundred ten of the education law.

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

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

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

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

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

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

History

Add, L 1966, ch 994, § 1, eff Jan 1, 1967; amd, L 1968, ch 1094, § 4,5; L 1970, ch 265, § 1; L 1971, ch 974, § 1; L 1972, ch 145, § 1; L 1975, ch 633, § 1,2, eff Aug 5, 1975; L 1976, ch 926, § 1,2, eff March 1, 1977; L 1978, ch 550, § 37, eff July 24, 1978; L 1979, ch 443, § 2, eff July 1, 1980,3, eff July 1, 1980; L 1981, ch 116, § 1; L 1989, ch 405, § 2 (see 1989 note below); L 1989, ch 538, § 2, eff Jan 1, 1990,3, eff Jan 1, 1990; L 1990, ch 634, § 1, eff July 18, 1990; L 1994, ch 521, § 1 (see 1994 note below),2 (see 1994 note below),3 (see 1994 note below),4 (see 1994 note below),5 (see 1994 note below),6 (see 1994 note below),7 (see 1994 note below),8, eff July 26, 1994 (see 1994 note below); L 1999, ch 416, § 1, eff Aug 31, 1999 (see 1999 note below),2, eff Aug 31, 1999 (see 1999 note below),3, eff Aug 31, 1999 (see 1999 note below); L 2004, ch 157, § 1, eff Jan 1, 2005; L 2004, ch 207, § 1, eff July 20, 2004 (see 2004 note below),2, eff July 20, 2004 (see 2004 note below),3, eff July 20, 2004 (see 2004 note below); L 2004, ch 430, § 1, eff Jan 1, 2005; L 2005, ch 119, § 3, eff June 30, 2005; L 2006, ch 189, § 1, eff July 26, 2006 (see 2006 note below); L 2006, ch 506, § 1, eff Sept 1, 2007; L 2015, ch 401, § 1, effective October 26, 2015; L 2019, ch 35, §§ 1, 2, effective June 13, 2019.

10 NYCRR § 66-1.1

This document reflects those changes received from the NY Bill Drafting Commission through April 30, 2021

NY - New York Codes, Rules and Regulations > TITLE 10. DEPARTMENT OF HEALTH > CHAPTER II. ADMINISTRATIVE RULES AND REGULATIONS > SUBCHAPTER G. AIDS TESTING, COMMUNICABLE DISEASES AND POISONING > PART 66. * IMMUNIZATIONS AND COMMUNICABLE DISEASES > SUBPART 66-1. SCHOOL IMMUNIZATION REQUIREMENTS

66-1.1 .

As used in this Subpart unless the context otherwise requires:

- (a) School means and includes a public, private or parochial child-caring center, day-care agency providing day care of children as defined in this section, nursery school as defined in this section, kindergarten, and any elementary, intermediate or secondary class or school building.
- (b) Child means and includes any person between the ages of two months and 18 years.
- (c) Day care of children means:
 - (1) outside the City of New York, care provided to children away from the child's residence, for less than 24 hours per day in a licensed child day care center or a group family day care, for compensation or otherwise, for at least three hours a day.
 - (2) in the City of New York, any service which, during all or part of the day, regularly gives care to six or more children, not of common parentage, who are under six years of age, whether or not the care is given for compensation and whether or not it has a stated educational purpose. The total number of children receiving care shall be counted, including children or foster children of the owner or person in charge, in determining the applicability of this definition. The term shall not, however, include a service which gives care to children for five or less hours a week or a service which operates for one month a year or less.
- (d) Nursery school means a place, other than one providing day care of children as defined in this section, in which organized instruction is provided for children prior to entering any public or non-public school.
- (e) Health practitioner means any person authorized by law to administer an immunization. This includes a physician, nurse practitioner, nurse-midwife caring for a pregnant student, registered nurse, licensed practical nurse under the direction of a registered nurse, or physician's assistant.
- (f) Fully immunized means that an adequate dosage and number of doses of an immunizing agent licensed by the United States Food and Drug Administration has been received commensurate with the child's age, or the child has been demonstrated to have immunity as defined in this section.
 - (1) For those immunizations required by section 2164 of the Public Health Law only, the number of doses that a child shall have at any given age, and the minimum intervals between these doses, shall be in accordance with the Advisory Committee on Immunization Practices Recommended Child and Adolescent Immunization Schedule for ages 18 years or younger, issued by the Advisory Committee on Immunization Practices (ACIP) as referenced in chapter 35 of the Laws of 2019 and posted on the Centers for Disease Control and Prevention website. Any child who completed an immunization series following minimum intervals prescribed in an ACIP Recommended Immunization Schedule pre-dating February 2019 shall continue to be deemed in compliance as long as the number of

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vaccine doses the child received conforms to the current ACIP Recommended Immunization Schedule.

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

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

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

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

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

(iv)Four adequate doses of poliomyelitis vaccine. If, however, the third adequate dose of poliomyelitis vaccine was given at 48 months of age or older, only three adequate doses of vaccine are required. The final dose of vaccine must be received no sooner than 48 months of age. Beginning on or after September 1, 2016, children shall be assessed upon entry or attendance to child-caring centers, day-care agencies, nursery schools and pre-kindergarten programs and must be fully immunized against poliomyelitis commensurate with their age.

(v)Two adequate doses of varicella vaccine.

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

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

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

(g)Immunity means that:

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

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

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

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

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

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

(j)In process means that:

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

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

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

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

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

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

(m) Attend or admit means enrolled in, or admitted to, a school for the purpose of participating in or receiving services at such school, including but not limited to special education or related services,

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participating in intra-scholastic or interscholastic sports, or other school-sponsored events or activities; or being transported on a school bus or vehicle with other school children; except where such services, transportation, events, or activities are open to the general public.

Statutory Authority

Section statutory authority:

Public Health Law, § 2164 . Section 66-1.1 Definitions

History

Renumbered 66.1 to be 66-1.1 on 9/26/90; amended 66-1.1 on 9/26/90; amended 66-1.1 on 1/15/91; amended 66-1.1(a) on 3/18/92; amended 66-1.1(e) on 3/18/92; amended 66-1.1(e)(5) on 11/22/95; amended 66-1.1(e)(6) on 11/22/95; added 66-1.1(e)(7) on 11/22/95; added 66-1.1(e)(8) on 8/13/03; added 66-1.1(e)(9) on 8/13/03; repealed and added 66-1.1 on 2/19/14; amended 66-1.1(f) on 8/26/15; amended 66-1.1(f) opening paragraph on 8/17/16; amended 66-1.1(f)(1) on 8/17/16; amended 66-1.1(j) on 8/26/15; amended 66-1.1(effective 08, 16, 19) on 9/04/19, expired 90 days after filing; amended 66-1.1(effective 11, 14, 19) on 12/04/19, expired 60 days after filing; amended 66-1.1 on 12/31/19.

NEW YORK CODES, RULES AND REGULATIONS

SPA-96

NEW YORK STATE DEPARTMENT OF HEALTH
Bureau of Immunization/Division of Epidemiology

Immunization Requirements for School Attendance Medical Exemption Statement for Children 0-18 Years of Age

NOTE: THIS EXEMPTION FORM APPLIES ONLY TO IMMUNIZATIONS REQUIRED FOR SCHOOL ATTENDANCE

Instructions:

1. Complete information (name, DOB etc.).
2. Indicate which vaccine(s) the medical exemption is referring to.
3. Complete contraindication/precaution information.
4. Complete date exemption ends, if applicable.
5. Complete medical provider information. Retain copy for file. Return original to facility or person requesting form.

-
1. Patient's Name _____
 2. Patient's Date of Birth _____
 3. Patient's Address _____
 4. Name of Educational Institution _____
-

Guidance for medical exemptions for vaccination can be obtained from the contraindications, indications, and precautions described in the vaccine manufacturers' package insert and by the most recent recommendations of the Advisory Committee on Immunization Practices (ACIP) available in the Centers for Disease Control and Prevention publication, Guide to Vaccine Contraindications and Precautions. This guide can be found at the following website: <http://www.cdc.gov/vaccines/recs/vac-admin/contraindications.htm>.

Please indicate which vaccine(s) the medical exemption is referring to:

- | | |
|---|---|
| <input type="checkbox"/> Haemophilus Influenzae type b (Hib) | <input type="checkbox"/> Measles, Mumps, and Rubella (MMR) |
| <input type="checkbox"/> Polio (IPV or OPV) | <input type="checkbox"/> Varicella (Chickenpox) |
| <input type="checkbox"/> Hepatitis B (Hep B) | <input type="checkbox"/> Pneumococcal Conjugate Vaccine (PCV) |
| <input type="checkbox"/> Tetanus, Diphtheria, Pertussis (DTaP, DTP, Tdap) | <input type="checkbox"/> Meningococcal Vaccine (MenACWY) |

Please describe the patient's contraindication(s)/precaution(s) here: _____

Date exemption ends (if applicable)

A New York State licensed physician must complete this medical exemption statement and provide their information below:

Name (print) _____ NYS Medical License # _____

Address _____

Telephone _____

Signature _____ Date _____

For Institution Use ONLY: Medical Exemption Status Accepted Not Accepted Date: _____