No. ____

In the Supreme Court of the United States

RACHEL MANISCALCO, EVELYN ARANCIO, DIANA SALOMON, and CORINNE LYNCH,

Applicants,

against

NEW YORK CITY DEPARTMENT OF EDUCATION, MEISHA PORTER, in her official capacity as Schools Chancellor of the New York City Department of Education, CITY OF NEW YORK, BILL DE BLASIO, DEPARTMENT OF HEALTH AND MENTAL HYGIENE, and DAVID CHOKSHI, in his official capacity as the Commissioner of the Department of Health and Mental Hygiene,

Respondents.

To the Honorable Sonia Sotomayor, Justice of the United States and Circuit Justice for the Second Circuit

EMERGENCY APPLICATION FOR WRIT OF INJUNCTION

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September 30, 2021

QUESTION PRESENTED

In attempting to combat the COVID-19 virus, the City of New York, the Department of Education, and the Department of Health and Mental Hygiene created an Executive Order that places an unconstitutional burden on public-school teachers. Instead of providing public-school employees with the choice to opt out of the vaccine mandate through weekly testing—an option provided for other municipality employees—the Executive Order forces unvaccinated public-school employees to go on unpaid leave for nearly a year. The Executive Order threatens the education of thousands of children in the largest public-school system in the country and violates the substantive due process and equal protection rights afforded to all public-school employees. The question presented is as follows:

Is an emergency injunction warranted to stop the Executive Order from violating the substantive due process and equal protection rights of public-school employees, thereby permitting all New York City public-school teachers to continue to educate over one-million students?

PARTIES TO THE PROCEEDING

All parties listed in the caption.

RELATED PROCEEDINGS BELOW

United States Court of Appeals for the Second Circuit

- *Maniscalco, et al. v. New York City Dept. of Educ., et al.*, No. 21-2343 (2d Cir.) — appeal pending; emergency motion for injunction pending appeal was denied September 27, 2021.

United States District Court for the Eastern District of New York

- *Maniscalco, et al. v. New York City Dept. of Educ., et al.*, No. 1:21-CV-05055 (E.D.N.Y.) — judgment entered September 23, 2021 denying preliminary injunction.

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To the Honorable Sonia Sotomayor, Justice of the United States Supreme Court and Circuit Justice for the Second Circuit:

Absent intervention from this Court, in less than two days, thousands of public-school employees will be forced out of work by the New York City Department of Education (the "DOE"), the City of New York (the "City"), and the Department of Health and Mental Hygiene (the "DOHMH") (collectively, "Respondents"). Respondents' August 23 Order, which will now be enforced on October 1, 2021, at 5 P.M., allows the City and DOE to implement a COVID-19 vaccine mandate for public-school employees. If permitted to take effect, the August 23 Order will force thousands of unvaccinated public-school employees to lose their jobs—while other municipal employees, including those who have significant contact with children, are allowed to opt-out of the vaccine mandate through weekly COVID-19 testing. This obvious and immediate harm is a violation of the substantive due process and equal protection rights of Rachel Maniscalco, Evelyn Arancio, Diana Salomon, and Corinne Lynch and the Class of hundreds of teachers they seek to represent (collectively, "Applicants"), who have a fundamental right to their respected professions as public-school teachers and paraprofessionals. Accordingly, and pursuant to Rules 20, 22, and 23 of the Rules of this Court, and 28 U.S.C. § 1651, Applicants respectfully request that the Court issue an injunction preventing enforcement of the August 23 Order pending appeal.

DECISIONS BELOW

The district court's Memorandum Decision and Order (the "Order") denying Applicants' emergency motion for a preliminary injunction is attached hereto as

Exhibit A. The Second Circuit's denial of an injunction pending appeal is attached hereto as Exhibit B. The docket number in the United States District Court for the Eastern District is 21-cv-05055, and the docket number in the United States Court of Appeals for the Second Circuit is 21-2343.

JURISDICTION

On September 23, 2021, the United States District Court for the Eastern District of New York denied Applicants' request for a preliminary injunction, finding Applicants' substantive due process and equal protection claims under the Fourteenth Amendment of the United States Constitution are unlikely to succeed on the merits. Ex. A. The same day, Applicants filed their notice of appeal under 28 U.S.C. § 1292(a)(1). On September 24, 2021, Applicants filed an emergency motion for an injunction pending appeal in the Second Circuit. On the same day, the Second Circuit granted Applicants' request for a temporary restraining order pending review of the motion. Ex. C. On September 27, 2021, the Second Circuit dissolved the September 24 injunction and denied the motion for injunction pending appeal. Ex. B. Applicants have a pending appeal in the Second Circuit, pursuant to 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

A. Respondents' Designed an Executive Order to Discriminate Against Public-School Workers

On July 26, 2021, de Blasio announced that the City would require all municipal workers—including teachers and custodians employed by the DOE, police officers, and firefighters—to receive one dose of the COVID-19 vaccination by the

time schools reopen in mid-September. Ex. D ¶ 30. The July 26 Order allows municipal workers to opt out of the vaccine mandate if they are tested weekly for COVID-19. The City announced that the July 26 Order would go into effect on September 13, 2021, the same day the City's public schools re-open for the year. *Id.* ¶ 31.

Less than one month later, however, on August 23, 2021—five weeks before public school would open to over a million students throughout the City—de Blasio, in consultation with all of the other Respondents, announced that DOE employees would no longer be able to opt out of the vaccine mandate through weekly COVID-19 tests. *Id.* ¶ 32 (citing Ex. E thereto). Instead, the City's August 23 Order requires all DOE employees—which includes 148,000 school-based staff and central staff, as well as DOE contractors who work in school-based settings—to provide proof of a first dose of vaccination by September 27, 2021. *Id.* ¶ 33. The August 23 Order is supported by the DOE's Schools Chancellor Porter, who is responsible for implementing the August 23 Order across the DOE, and the DOHMH's Chokshi, who helped craft the August 23 Order. *Id.* ¶ 34. Notably, the August 23 Order does not provide an exception to the vaccine for those with antibodies to COVID-19, thereby indicating natural immunity and not needing a vaccine. *Id.* ¶ 35.

B. Arbitral Award Clarifies the August 23 Order's Imminent Harm to Public-School Workers

On September 10, 2021, an arbitrator issued an award in a dispute between the DOE and the teachers' unions that protested the DOE's August 23 Order. Ex. F. The award carved out certain medical and religious exemptions for the August 23

Order. *Id.* at 7–13. The award also set forth the following guidelines for unvaccinated teachers who did not meet the new exemptions:

> A. "Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, which is later, through November 30, 2021."
>
> B. "Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes."
>
> C. "As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period."

Id. at 14–15.

ARGUMENT

I. ISSUANCE OF AN INJUNCTION IS NECESSARY TO MAINTAIN CLEARLY ESTABLISHED LEGAL RIGHTS AND TO PREVENT IRREPERABLE HARM

The Circuit Justices of this Court have authority to issue injunctions under the All Writs Act, 28 U.S.C. § 1651(a), when applicants' claims "are likely to prevail," the denial of injunctive relief "would lead to irreparable injury," and "granting relief would not harm the public interest." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 65–66 (2020) (per curiam) (granting emergency injunctive relief to prevent likely constitutional violations from state law); *see also Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regul. Comm'n.*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (injunctive relief under All Writs Act appropriate where the legal rights at issue are "indisputably clear," the circumstances are "critical and exigent," and

injunctive relief is "necessary or appropriate in aid of the Court's jurisdiction" (citations and alterations omitted)).

An application for an injunction may be granted without serving "as an expression of the Court's views on the merits," *Little Sisters of the Poor Home for the Aged v. Sebelius*, 571 U.S. 1171, 1171 (2014) (mem.), to prevent enforcement of a potentially unconstitutional statute. The Court has thus granted emergency injunctions pending appeal when there is a "fair prospect" of reversal and a likelihood of "irreparable harm . . . from the denial of equitable relief." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *see also, e.g., Wheaton Coll. v. Burwell*, 134 S. Ct. 2806, 2807 (2014) (granting injunction enjoining enforcement of challenged provisions of the Affordable Care Act "pending final disposition of appellate review"); *Roman Cath. Diocese*, 141 S. Ct. at 66 (granting injunction enjoining enforcement of executive order limiting attendance at religious services).

Applicants satisfy the standard for an emergency injunction. First, this appeal presents an indisputably clear case for relief. The Second Circuit has denied an injunction pending appeal. Second, Applicants' request is both extraordinarily time sensitive and solely within this Court's power to redress. In just two days, on Friday, October 1, at 5 P.M., New York City public-school teachers will be prohibited from exercising fundamental rights consistently protected by this Court. Third, the balance of equites weighs heavily in favor of maintaining the status quo by enjoining Respondents as irreparable harm will flow from the deprivation of rights protected by the United States Constitution. Fourth and finally, injunctive relief is appropriate

in aid of the Court's jurisdiction. Given the vaccine mandates upcoming deadline and the typical length of appellate proceedings, this Court will lose the opportunity to provide meaningful relief to public-school workers at 5 P.M., October 1 if it does not enter an injunction now.

A. Applicants Are Likely to Succeed on the Merits

1. Applicants Have Stated a Viable Due Process Claim Because of Their Inability to Pursue Their Profession

Applicants have adequately shown the likelihood of a violation of a substantive due process claim because there will be a complete or partial inability to pursue their profession. A violation of one's fundamental right to pursue an occupation exists and gives rise to a due process claim where there is less than a complete inability to practice one's profession. *See Valmonte v. Bane,* 18 F. 3d 992, 1001 (2d Cir. 1994) (plaintiff stated substantive due process claim by alleging that she would be unable to get a job in the child-care field if her name was listed—as required by statute—on a register of child abusers, even though employers retained the ability to hire plaintiff); *see also San Jacinto Say & Loan v. Kacal,* 928 F. 2d 697, 702 (5th Cir. 1991) (plaintiff has a liberty right to operate a legitimate business, free from arbitrary deprivation by state officials and finding a viable substantive due process claim where state officials' conduct sought to significantly alter plaintiffs liberty interests in her business).

The August 23 Order provides that Applicants will be "placed on leave by the DOE without pay [on October 1 because of this litigation]" (Ex. F at 13), raising Applicants' due process claim. As Applicants have argued in the district court, public

school teaching and private school teaching are not comparable professions. With respect to private schools, work in both is not the same. The DOE—unlike any private school in New York City—is the nation's largest public-school system in the United States, with over 1.1 million students taught in more than 1,800 separate schools. Moreover, New York has different licensing requirements for public school and private school teachers. *See* N.Y. Educ. Law. § 5004. While the district court's order made clear that there is no right to public employment, it failed to acknowledge the right to a profession. Applicants are not seeking employment with a particular employer, however, because the DOE is simply the sole employer of the profession of public-school teachers.

While a temporary interruption of work is not actionable, the mandate here would have a permanent effect: it is open-ended, where if a teacher never gets vaccinated, he or she will never be able to return to work. The district court failed to address the permanent effect on Applicants. The only thing temporary is that they will receive health care benefits for a year until September 2022, after which they will lose even that and be fully separated from the DOE. The district court's Order identified alternative occupations that Applicants may pursue—such as adult or continuing education or private tutoring—but these are fundamentally different occupations than that of a public-school teacher. Ex. A at 5. In fact, when asked whether Respondents are depriving public-school teachers of the substantive right to pursue their profession, Respondents conceded that "there is a right practice your

profession" as public-school teachers. Ex. G, 8:9–9:4. Applicants have stated a viable substantive due process claim.

2. Applicants Have Stated a Viable Equal Protection Claim Because of Respondents' Discrimination Between Municipality Employees

The August 23 Order is subject to—and cannot satisfy—strict scrutiny review as the right to pursue a lawful occupation is a fundamental right. As the Second Circuit has recognized, "the right to pursue a lawful calling has long been recognized as a fundamental right." *Connecticut ex rel. Blumenthal v. Crotty*, 346 F.3d 84, 95 (2d Cir. 2003). Further, this Court has recognized that the City's past COVID-19 orders cannot satisfy strict scrutiny review. *See Roman Cath. Diocese of Brooklyn,* 141 S. Ct. at 67 (applying strict scrutiny standard to COVID-19 restrictions and rejecting them as "far more severe than has been shown to be required to prevent the spread of the virus" and thus not "narrowly tailored" to achieve the policy goal at issue). In addition to narrow tailoring, strict scrutiny requires Respondents to prove its regulations were the "least restrictive means." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

As Respondents have conceded, public school teachers have a "right to practice [their] profession." Ex. G, 8:9–9:4. There is no rational and non-discriminatory basis for treating Applicants differently than other municipal workers. While DOE workers maintain close indoor contact with children who are dramatically less susceptible to illness from COVID-19, firefighters, and police officers—who routinely deal with the public—are exempt from the vaccine mandate. Respondents failed to provide a justification for why DOE workers could not also test weekly in lieu of the vaccine while these other municipality workers can. In fact, every study "shows that children

are less susceptible to the virus and pass the virus along at a [lower] rate than adults." Ex. G, 15:5–7. Moreover, as the number of unvaccinated is small compared to that of the vaccinated, there is no basis to mandate vaccines in lieu of weekly testing. Critically, the overwhelming number of children will remain safe in school with vaccinated or unvaccinated adults, many of whom have natural immunity. Applicants have stated a viable equal protection claim.

B. Applicants Will Be Irreparably Harmed by the August 23 Order

Applicants will suffer irreparable harm if their request for injunctive relief is denied. To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money cannot provide adequate compensation. *Kamerling v. Massanari*, 295 F.3d 206, 214 (2d Cir. 2002) (quoting *N.Y. Pathological & X–Ray Labs., Inc. v. INS*, 523 F.2d 79, 81 (2d Cir. 1975)). Applicants have established such irreparable harm.

Applicants identified at least three irreparable harms in their Amended Complaint: losing their livelihoods; their inability to pursue their professions; and their seniority. The August 23 Order, as it applies to Applicants, states "[n]o later than September 27, 2021 [now amended to October 1 due to this litigation], or prior to beginning employment, the following individuals must provide proof of vaccination as described below: (a) DOE staff must provide proof of vaccination to the DOE." Ex. E at 3. Moreover, the Arbitrator's Award provides that:

A. "Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has

been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, which is later, through November 30, 2021."

B. "Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes."

C. "As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period."

Ex. F at 14–15. While the Arbitrator's Award carves out certain exceptions to the vaccine mandate, it does not address either of Applicants' grievances with the August 23 Order. Specifically, there is no exception to the vaccine for those who have developed antibodies to COVID-19 and thus have natural immunity. Indeed, all four Applicants will, *at the very least*, lose their livelihoods if they are without pay and cannot work anywhere else, their ability to serve the children of New York City, and, of course, their ranking as teachers. The harm is not remote nor speculative, but, as the Arbitrator's Award supports, actual and imminent. *See Tom Doherty Assoc. v. Saban Entm't, Inc.,* 60 F. 3d 27, 29 (2d Cir. 1995). Applicants will be irreparably harmed by the City's August 23 Order.

C. The Injunction Is in the Public Interest

The requested injunction is in the public interest because it would permit Applicants and many other teachers like them to continue to serve the City and DOE as teachers, maintain their employment and related benefits, all while teaching public school students. "[T]he court must ensure that the 'public interest would not be disserved' by the issuance of a preliminary injunction." *Salinger v. Colting*, 607 F.3d 68, 80 (2d Cir. 2010) (quoting *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388,

391 (2006)). Already, just days away from Respondents implementing the August 23 Order, New York public schools are preparing for large staffing shortages. As of September 23, 2021, only 80% of the DOE's 148,000 employees had uploaded proof of vaccination, meaning that the August 23 Order will bar as many as 10,000 public-school teachers from the classrooms. This Court should grant the injunction after nearly two years of lockdowns, to prevent the largest public-school system in the country from further disrupting the education of hundreds of thousands of students who desperately need in-person teachers. Applicants' injunction is in the public interest.

CONCLUSION

This Court has continually recognized the importance of enjoining enforcement of drastic COVID-19 mandates, pending later review. For the foregoing reasons, the Court should do the same here and join enforcement of the August 23 Order.

Dated: New York, New York
September 30, 2021

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RACHEL MANISCALCO, EVELYN ARANCIO, DIANA SALOMON and CORINNE LYNCH, individually and for all others similarly situated,	:	**MEMORANDUM DECISION AND ORDER**
Plaintiffs,	:	21-cv-5055 (BMC)
- against -	:	
THE NEW YORK CITY DEPARTMENT OF EDUCATION, MEISHA PORTER, Schools Chancellor of the New York City Department of Education, in her official capacity, THE CITY OF NEW YORK, BILL DE BLASIO, Mayor of New York City, in his official capacity, DEPARTMENT OF HEALTH AND MENTAL HYGIENE, and DAVE CHOKSHI, Commissioner of the Department of Health and Mental Hygiene, in his official capacity,	:	
Defendants.	:	

COGAN, District Judge.

Defendants are city entities and officials responsible for enacting and enforcing an Order mandating vaccination for New York City Department of Education ("DOE") employees as well as employees and contractors who work in-person in DOE school settings or buildings. Plaintiffs, a group of such employees, seek a preliminary injunction enjoining defendants from enforcing the Order. Plaintiffs claim that the Order violates their substantive due process and equal protection rights under the Fourteenth Amendment of the United States Constitution. Additionally, plaintiffs allege that the Order is an arbitrary and capricious action, made in violation of lawful procedure, under N.Y. C.P.L.R. § 7803(3). Because plaintiffs have not

shown a likelihood of success on the merits, and for the other reasons set forth below, plaintiffs' motion for a preliminary injunction is denied.

BACKGROUND

I. Factual Background

In August 2021, the Commissioner of the New York City Department of Health and Mental Hygiene ("DOHMH") issued an Order requiring that all DOE staff, City employees, contractors who "work in-person in a DOE school setting or DOE building", and "[a]ll employees of any school serving students up to grade 12 and any UPK-3 or UPK-4 program that is located in a DOE building who work in-person, and all contractors hired by such schools or programs to work in-person" ("DOE employees") submit proof of at least one dose of vaccination for COVID-19 by September 27, 2021. The Order does not permit DOE employees to undergo weekly testing in lieu of vaccination, although DOHMH orders applicable to other City employees allow such an opt-out.

On September 15, 2021, the DOHMH rescinded and restated its prior Order. The updated Order provides clarity on a few issues, including its application to both charter schools and certain categories of visitors. Additionally, it states that "[n]othing in this Order shall be construed to prohibit any reasonable accommodations otherwise."[1]

II. Procedural Background

Plaintiffs are teachers and paraprofessionals employed by the DOE who bring suit challenging the Order on behalf of themselves and similarly situated DOE employees. Plaintiffs assert a variety of reasons for not wishing to be vaccinated, including concern over the long-term

[1] The September 15, 2021 update to the Order was likely made in response to the New York Supreme Court's Order temporarily restraining the DOHMH's vaccine mandate. New York City Municipal Labor Comm., et al. v. City of New York, et al., Index No. 158368/2021, Dkt No. 17 (Sup. Ct. N.Y. Cnty. Sep. 14, 2021) (order granting temporary restraining order). That court has since denied injunctive relief *pendente lite*.

effects of a newly developed vaccine. A subclass of plaintiffs allege that they have developed antibodies and therefore should not be required to be vaccinated on that basis.

Plaintiffs bring three claims. First, they maintain that the Order violates their right to substantive due process under the Due Process Clause of the Fourteenth Amendment. Specifically, plaintiffs allege that the Order interferes with their right to pursue their chosen profession and that they stand to lose their "health benefits, their jobs, or their seniority" if the mandate is enforced. Second, plaintiffs maintain that the Order violates the Equal Protection Clause of the Fourteenth Amendment, as it is based on a distinction between DOE employees and other municipal employees who may opt out of the vaccine mandate through weekly testing. Third, plaintiffs ask that the Court vacate the Order pursuant to N.Y. C.P.L.R. § 7803(3).

DISCUSSION

In this Circuit, "[a] party seeking a preliminary injunction must generally show a likelihood of success on the merits, a likelihood of irreparable harm in the absence of preliminary relief, that the balance of equities tips in the party's favor, and that an injunction is in the public interest." Am. C.L. Union v. Clapper, 804 F.3d 617, 622 (2d Cir. 2015) (quotations and citations omitted). "In the Second Circuit, it is well-settled that an alleged constitutional violation constitutes irreparable harm." Ferreyra v. Decker, 456 F. Supp. 3d 538, 549 (S.D.N.Y. 2020); see also Statharos v. New York City Taxi & Limousine Comm'n, 198 F.3d 317, 322 (2d Cir. 1999). Because plaintiffs allege that their substantive due process rights have been violated, "no further showing of irreparable injury is necessary." Mitchell v. Cuomo, 748 F.2d 804, 806 (2d Cir. 1984). Therefore, I will focus my analysis on the other factors, namely the likelihood of success on the merits.

I. Plaintiffs' Substantive Due Process Claim

a. Likelihood of Success on the Merits

"Substantive due process rights safeguard persons against the government's exercise of power without any reasonable justification in the service of a legitimate governmental objective." Southerland v. City of New York, 680 F.3d 127, 151 (2d Cir. 2012) (internal quotation marks and citation omitted). To analyze a claim under substantive due process, courts perform a two-step analysis. Hurd v. Fredenburgh, 984 F.3d 1075, 1087 (2d Cir. 2021).

"The first step in substantive due process analysis is to identify the constitutional right at stake." Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995). Not all rights are entitled to protection. Only rights that are fundamental or implicit in the concept of ordered liberty are accorded protection under substantive due process. See generally Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997); Hurd, 984 F.3d at 1088.

Plaintiffs assert that the Order deprives them of their "right to pursue their profession."[2] The Supreme Court "has indicated that the liberty component of the Fourteenth Amendment's Due Process Clause includes some generalized due process right to choose one's field of private employment." Conn v. Gabbert, 526 U.S. 286, 291-92 (1999). This right is "subject to reasonable government regulation." Id. at 92; see, e.g., Dent v. West Virginia, 129 U.S. 114 (1889) (upholding a requirement of licensing before a person can practice medicine). To "rise to the level of a violation of the Fourteenth Amendment's liberty right to choose and follow one's calling," government regulation must result in more than a "brief interruption." Id. "Instead, the

[2] Plaintiffs focus their arguments here on the teaching profession specifically. However, many of the 148,000 persons subject to the Order are paraprofessionals.

Supreme Court, [the Second] Circuit, and the other Circuits addressing the issue have all indicated that the right of occupational choice is afforded Due Process protection only when a plaintiff is completely prohibited from engaging in his or her chosen profession." Hu v. City of New York, 927 F.3d 81, 102 (2d Cir. 2019) (quotations and citations omitted). Courts in this Circuit have held that unless the defendants denied plaintiff "all opportunities to practice" in a chosen profession, then there was no substantive due process violation, even if the defendants' "actions made it more difficult" to do so. Marino v. City Univ. of New York, 18 F. Supp. 3d 320, 340 (E.D.N.Y. 2014).[3]

Here, the Order may ultimately disqualify plaintiffs from employment in their positions at public schools in New York City, but "the Due Process Clause secures the liberty to pursue a calling or occupation, and not the right to a specific job." Parsons v. Pond, 126 F. Supp. 2d 205, 207 (D. Conn. 2000) (citations and quotations omitted). Plaintiffs' contention that they may not find alternative means of pursuing their profession as appealing or convenient for a variety of reasons is well taken. However, although defendants may render it more difficult for them to pursue their calling, plaintiffs are not absolutely being barred from doing so. For example, plaintiffs may pursue teaching or paraprofessional jobs at private schools in New York City, public and private schools outside of New York City, daycares or early childhood education centers, tutoring centers, adult or continuing education centers, virtual institutions, or within home settings. Therefore, plaintiffs are not being denied their fundamental right to pursue their profession.

[3] Citing Valmonte v. Bane, 18 F. 3d 992, 1001 (2d Cir. 1994), plaintiffs claim in their reply briefing that "[a] violation of one's fundamental right to pursue an occupation exists and gives rise to a due process claim where there is less than a complete inability to practice one's profession." However, plaintiffs' characterization of the claim at issue in that case is incorrect. That case analyzed the litigant's right under procedural due process, not substantive due process.

Further, any property right to employment that plaintiffs may claim does not rise to the level of a fundamental right protected by substantive due process. Generally, property interests related to employment are not among protected fundamental rights, nor are "simple, state-law contractual rights, without more." Walker v. City of Waterbury, 361 F. App'x 163, 165 (2d Cir. 2010) (summary order) (quotations omitted). Neither is there a fundamental right to continued public employment. Martin v. Town of Brattleboro, No. 07-cv-260, 2008 WL 4416283, at *2 (D. Vt. Sept. 24, 2008) (noting that "most Circuit Courts of Appeal have declined to find that a right to continued public employment is a fundamental property interest entitled to substantive due process protection").

Even if I agreed that plaintiffs' rights to pursue their profession or to continued employment were fundamental rights, plaintiffs' arguments still fail at the second step of the analysis. Here, plaintiffs "must demonstrate that the state action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience" such that the Due Process Clause "would not countenance it even were it accompanied by full procedural protection." Hurd, 984 F.3d at 1087 (internal quotation marks and citation omitted). Plaintiffs cannot meet that burden.

In Jacobson v. Massachusetts, 197 U.S. 11, 26-27 (1905), the Supreme Court held that a vaccine mandate enacted by state of Massachusetts without any exceptions for adults – including for medical or religious reasons – was constitutional, and not a deprivation of any right secured by the U.S. Constitution. Applying "Jacobson, the state may curtail constitutional rights in response to a society-threatening epidemic so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'" Columbus Ale House, Inc. v. Cuomo, 495

F. Supp. 3d 88, 92 (quoting Jacobson, 197 U.S. at 38). Requiring that DOE employees take a dose of ivermectin as a condition of employment might qualify as "a plain, palpable invasion" of such rights, not having any real relation to the public health crisis. However, mandating a vaccine approved by the FDA does not.

Ultimately, even if plaintiffs disagree with it, the Order at issue represents a rational policy decision surrounding how best to protect children during a global pandemic. Although plaintiffs argue that there are other proven means of preventing the spread of COVID-19 in schools, among them frequent testing and mask wearing, it is not shocking for the City to conclude that vaccination is the best way to do so, particularly at a time when viral transmission rates are high. To support this proposition, defendants note that the CDC has recommended vaccination of schoolteachers and staff "as soon as possible" because vaccination is "the most critical strategy to help schools safely resume full operations. . . [and] is the leading public health prevention strategy to end the COVID-19 pandemic." Further, defendants point to the recent exponential increase in pediatric cases since schools have resumed elsewhere in the country where vaccination rates among those eligible are low.[4]

b. Balance of Equities and the Public Interest

As I find plaintiffs' arguments unavailing on the likelihood of success on the merits, I will only briefly address the remaining two factors. There is no doubt that DOE employees who refuse vaccination may be harmed by the mandate. Plaintiffs may face difficulty finding another job while the school year is already underway due to the cyclical nature of hiring at schools. Yet

[4] See e.g., Yoree Koh, Where Schools Opened Earliest, WALL ST. J. (Sept. 5, 2021), https://www.wsj.com/articles/child-covid-19-cases-rise-in-states-where-schools-opened-earliest11630834201; Ernie Mundell & Robin Foster, Covid Cases Rise Sharply Among Kids as School Year Starts, U.S. NEWS AND WORLD REPORT (Sept. 3, 2021), https://www.usnews.com/news/health-news/articles/2021-09-03/covid-cases-rise-sharplyamong-kids-as-school-year-starts.

"courts must balance the competing claims of injury on each party of either granting or withholding the requested relief, paying particular regard to the public consequences." Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008). Reasonable minds may disagree on what these public consequences are. However, "where good faith arguments can be made on both sides of the many issues raised by the pandemic," it is up to local government, "not the courts, to balance the competing public health and business interests." Columbus Ale House, 495 F. Supp. 3d at 95.

As the pandemic is now well into its second year, all are more than familiar with the severity of COVID-19 from a public health perspective. Since its emergence, COVID-19 has killed over 4.5 million people worldwide, with over 670,000 of those deaths taking place in the United States.[5]

Unlike the first several uncertain months after COVID-19's discovery, state and local officials have since acquired more knowledge and equipped themselves with better tools to reduce viral transmission. Of these new tools, one of the most highly regarded is vaccination. The Food and Drug Administration approved the Pfizer-BioNTech vaccine for individuals 16 years of age and older, after reviewing data that supported the conclusion that the vaccine was both safe and effective.[6] Two additional vaccines, including a traditional viral vector vaccine developed by Johnson & Johnson, have been made available under FDA emergency use authorization, as has the Pfizer-BioNTech vaccine for individuals 12 through 15 years of age. In

[5] WHO Coronavirus (COVID-19) Dashboard, WORLD HEALTH ORGANIZATION (updated Sept. 23, 2021), https://covid19.who.int/.

[6] FDA Approves First COVID-19 Vaccine, FDA.GOV (Aug. 23, 2021), https://www.fda.gov/news-events/press-announcements/fda-approves-first-covid-19-vaccine.

the United States alone, over 380 million doses of all three vaccines have been administered.[7] There is evidence that vaccines provide more robust protection than antibodies from a previous COVID-19 infection[8] and to reduce the potential for hospitalization as compared to the unvaccinated population.[9]

In denying plaintiffs' motion, this Court is not impugning either the integrity or the validity of plaintiffs' concerns. No one will get the last laugh if it turns out that 10 or 20 years from now, plaintiffs' fear of long-term deleterious effects from the vaccination proves to have been well-founded. The Court acknowledges their argument that there simply hasn't been enough time to generate long-term data. However, the Court cannot reasonably conclude that the defendants' arguments in favor of vaccination were not made in good faith, or that they are irrational. Substantive due process therefore requires the Court to afford deference to defendants' weighing of the competing concerns.

II. Plaintiffs' Equal Protection Claim

Plaintiffs' equal protection claim fails for the same reason as their substantive due process claim. Unless a statute or state action provokes "strict judicial scrutiny because it interferes with a fundamental right or discriminates against a suspect class, it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to

[7] Tracking Coronavirus Vaccinations Around the World, N.Y. TIMES (updated Sep. 23, 2021), https://www.nytimes.com/interactive/2021/world/covid-vaccinations-tracker.html.

[8] Alyson M. Cavanaugh et al., Reduced Risk of Reinfection with SARS-CoV-2 After COVID-19 Vaccination — Kentucky, May–June 2021, 70 MMWR MORBITY MORTAL WEEKLY REP., 1081-3 http://dx.doi.org/10.15585/mmwr.mm7032e1.

[9] Eli S. Rosenberg et al., New COVID-19 Cases and Hospitalizations Among Adults, by Vaccination Status — New York, May 3–July 25, 2021, 70 MMWR MORBITY MORTAL WEEKLY REP., 1306-11 http://dx.doi.org/10.15585/mmwr.mm7037a7.

a legitimate governmental purpose." Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 (1988) (citations and quotations omitted).

Plaintiffs concede that they do not purport to be identify a "legally protected class" here. And, as I explained above, no fundamental right is implicated. Therefore, we will review the Order under rational basis review. Under such review, a court will uphold the state action "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that" the actions "were irrational." Id. at 462-3 (citations and quotations omitted). This heavy burden is on the challenger. Id.

To prevail, plaintiffs must demonstrate that there is no rational basis for the difference in treatment between them and other municipal employees. See Village of Willowbrook v. Olech, 528 U.S. 562, 564 (2000). They have not done so. Although permitting opt-out testing may be appropriate for other municipal employees, defendants are not unreasonable in requiring vaccination of DOE employees without such an opt-out. Unlike other municipal employees, these DOE employees are necessarily in close contact for long hours with children below twelve – who cannot be vaccinated – in indoor, congregate settings. Social distancing, mask wearing, and testing may be sufficient to protect other municipal employees in different contexts, particularly because at least a portion of these employees are vaccinated.

It is not irrational to conclude that such measures would not adequately protect unvaccinated children in a school setting, especially as some of these children will have preexisting conditions that make them especially vulnerable. And, as mentioned above, there is also scientific evidence suggesting that any protection afforded by antibodies may not be as

strong as that of vaccination. The Court neither accepts nor rejects that evidence; it is sufficient to note that its existence lends rationality to defendants' decision.

Further, if defendants are correct and vaccination does in fact reduce COVID-19 infections in schools, then a vaccine mandate would minimize the need for both students and teachers to miss class due to either infection or quarantine. Public school students have already endured two school years that were mired by disruption, leaving many students far behind. Minimizing interruption by providing a safe environment for these students is also a legitimate and important governmental purpose. Although plaintiffs argue that masks and testing adequately can advance this objective, it is not irrational for defendants to conclude the vaccine mandate better enhances this purpose.

III. Plaintiffs' Article 78 Claim

Plaintiffs also seeks an injunction under its state law claim pursuant to N.Y. C.P.L.R. Article 78. However, CPLR 78 is principally a state law procedural remedy. Federal courts have routinely declined to exercise supplemental jurisdiction over Article 78 claims pursuant to 28 U.S.C. § 1367(c), citing the special solicitude afforded to this "purely state procedural remedy." Camacho v. Brandon, 56 F. Supp. 2d 370, 380 (S.D.N.Y. 1999); see also Birmingham v. Ogden, 70 F. Supp. 2d 353, 372 (S.D.N.Y. 1999) ("[F]ederal courts are loath to exercise jurisdiction over Article 78 claims."); Herrmann v. Brooklyn Law School, 432 F. Supp. 236, 240 (E.D.N.Y. 1976) ("[T]his special proceeding designed to accommodate to the state court system is best suited to that system.").

Further, as the issues in this case are also currently and properly before the New York Supreme Court in an ongoing Article 78 proceeding, the reasons for denying supplemental jurisdiction are especially compelling. See New York City Municipal Labor Comm., et al. v.

City of New York, et al., Index No. 158368/2021 (Sup. Ct. N.Y. Cnty. Sep. 2021); see also Kent v. New York, No. 11-cv-1533, 2012 WL 6024998, at *11 (N.D.N.Y. Dec. 4, 2012) ("[T]his Court declines to exercise supplemental jurisdiction over plaintiffs' Article 78 claim because to do so would require this Court to interpret state law before the New York State courts have an opportunity to analyze and resolve the issues."). Because I decline to exercise supplemental jurisdiction over plaintiff's Article 78 claim, it cannot provide a basis for plaintiffs' preliminary injunction.

CONCLUSION

Plaintiffs' motion for a preliminary injunction is denied.

SO ORDERED.

_____
U.S.D.J.

Dated: Brooklyn, New York
September 23, 2021

EXHIBIT B

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 27th day of September, two thousand twenty-one.

Before: Pierre N. Leval,
Robert D. Sack,
Michael H. Park,
Circuit Judges.

Rachel Maniscalco, Evelyn Arancio, Diana Salomon, Corine Lynch,

Plaintiffs-Appellants, 21-2343

v.

New York City Department of Education, Meisha Porter, in her official capacity as Schools Chancellor of the New York City Department of Education, City of New York, Bill de Blasio, Department of Health and Mental Hygiene, Dave A. Chokshi, in his official capacity as the Commissioner of the Department of Health and Mental Hygiene,

Defendants-Appellees.

This Court entered a temporary injunction in the above-captioned case on Friday, September 24, 2021 for administrative purposes pending decision by a three-judge panel. IT IS HEREBY ORDERED that the September 24 injunction is DISSOLVED. IT IS FURTHER ORDERED that the motion for an injunction pending appeal is DENIED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 24th day of September, two thousand twenty-one.

Before: Joseph F. Bianco,
Circuit Judge.

Rachel Maniscalco, Evelyn Arancio, Diana Salomon, Corine Lynch,

Plaintiffs - Appellants,

v.

New York City Department of Education, Meisha Porter, in her official capacity as Schools Chancellor of the New York City Department of Education, City of New York, Bill de Blasio, Department of Health and Mental Hygiene, Dave A. Chokshi, in his official capacity as the Commissioner of the Department of Health and Mental Hygiene,

Defendants - Appellees.

ORDER

Docket No. 21-2343

Appellants move for an expedited injunction pending appeal. Appellants seek an injunction of Appellees' Executive Order that requires all New York City Department of Education workers to submit proof of the first dose of COVID-19 vaccination by September 27, 2021. Appellees oppose the motion.

IT IS HEREBY ORDERED that, to the extent Appellants seek a temporary injunction pending review of their motion by a three-judge panel, that request is GRANTED. The request for an injunction pending appeal is REFERRED to a three-judge motions panel on an expedited basis.

For the Court:
Catherine O'Hagan Wolfe,
Clerk of Court

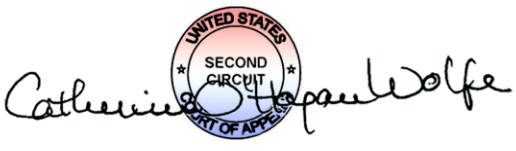

EXHIBIT D

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RACHEL MANISCALCO, **EVELYN ARANCIO**, **DIANA SALOMON,** and **CORINNE LYNCH**, individually, and for all others similarly situated,

Plaintiff,

-against–

THE NEW YORK CITY DEPARTMENT OF EDUCATION, MEISHA PORTER, SCHOOLS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, IN HER OFFICIAL CAPACITY, THE CITY OF NEW YORK, **BILL** de **BLASIO, MAYOR OF NEW YORK CITY, IN HIS OFFICIAL CAPACITY, DEPARTMENT OF HEALTH AND MENTAL HYGIENE,** and **DAVE A. CHOKSHI, COMMISSIONER OF THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE, IN HIS OFFICIAL CAPACITY**

Defendants.

Case No.: 1:21-CV-05055

AMENDED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiffs Rachel Maniscalco ("Maniscalo"), Evelyn Arancio ("Arancio"), Diana Salomon ("Salomon"), and Corinne Lynch ("Lynch") (collectively, "Plaintiffs") on behalf of themselves and a class of similarly situated individuals, by their attorneys, F&G Legal Group, for their

Complaint against the New York City Department of Education (the "DOE"), Meisha Porter, in her official capacity as Schools Chancellor of the DOE, the City of New York (the "City"), Bill de Blasio, Mayor of New York City, in his official capacity as Mayor of New York City ("de Blasio"), the Department of Health and Mental Hygiene (the "DOHMH"), and Dave A. Chokshi, Commissioner of the DOHMH, in his official capacity ("Chokshi") (collectively, the "Defendants"), respectfully alleges as follows.

PRELIMINARY STATEMENT

1. Plaintiffs and members of the Classes are New York City Public School Teachers who are at risk of losing their livelihoods, their health insurance, and their ability to pursue their profession under a New York City Executive Order announced on August 23, 2021 (the "August 23 Order").

2. The August 23 Order requires Plaintiffs and the Classes to submit proof of at least one dose of vaccination for the Covid-19 virus by September 27, 2021. Unlike the vaccine mandate for federal workers announced on September 9, 2021, the August 23 Order includes no provision for DOE workers to opt-out of the mandate through testing.

3. All can agree that safety in New York City's public schools, where almost a million students are educated, and many tens of thousands of teachers and employees work, is essential. Neither Plaintiffs nor members of the Class oppose any legitimate steps to make their own workplace, and the place where they educate their students, a safer place to work and in which to learn.

4. But pursuant to the August 23 Order, any teachers who do not comply stand to lose their health benefits, their jobs, or their seniority (which consequence or consequences of the August 23 Order that Defendants shall impose on Plaintiffs and the Class shifts from day to day).

5. Such an ongoing, draconian punishment shocks the conscience, violates constitutional rights, and not only should not be permitted, but must be restrained immediately to prevent irreparable harm.

6. Alarmingly, the August 23 Order violates the Due Process Clause of the United States Constitution, which provides no State can "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV.

7. The substantive component of the Due Process Clause limits what the government may do in both its legislative and its executive capacities. *Cnty. of Sacramento v. Lewis,* 523 U.S. 833, 846 (1988). Specifically, substantive due process protection prohibits government from taking action that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

8. Liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). The right to pursue a profession—particularly one as important to the public good and as revered in civil society as teaching children in public schools—is a liberty interest for which one enjoys substantive due process protection.

9. The August 23 Order shocks the conscience and interferes with Plaintiffs' and members of the putative Classes' deeply rooted liberty interests, including the right to work as teachers, their chosen profession.

10. If Defendants enforce the August 23 Order, Plaintiff and members of the putative Classes may lose their income, their seniority, and/or their health benefits. Termination of teachers at the beginning of the school year, with mere weeks of warning, will result in Plaintiffs and Class members' being irreparably harmed.

11. While the goal of providing safe schools is a valid one, the DOE's history in the last year, as well as that of Catholic schools in New York City and throughout the United States, shows that with proper safety procedures, in particular the use of masks, it is possible to maintain a safe environment without vaccines.

12. Indeed, schools in the Brooklyn Diocese (covering Brooklyn and Queens) and the Archdiocese of New York (which includes Staten Island, Manhattan, and the Bronx) were open, in person, full time or virtually full time, all of the last year school year without any reported so-called super spreader events or even reports of high infection rates.

13. While it may be a hardship for Defendants to require other safety procedures like masks, the benefit to the public is great, and such hardship is far outweighed by that suffered by Plaintiffs and the Classes, who stand to lose their livelihood.

14. In fact, on September 14, 2021, a court in the Northern District of New York recently blocked the State of New York from forcing medical workers to be vaccinated, recognizing the possible violation of the workers' Constitutional rights. *Dr. A, et al. v. Hochul, et al.*, No. 1:21-cv-01009-DNH-ML (N.D.N.Y. Sept. 14, 2021).

15. The public needs to have any qualified teachers who are available to teach in the public schools—as those teachers very often were in the last year when there was no vaccine and transmission rates were much higher than they are now. With alternative proper safety procedures, transmission rates can be kept low while all teachers can fulfill their profession and teach students, advancing the public interest.

JURISDICTION AND VENUE

16. Pursuant to 42 U.S.C. § 1983, this Court has jurisdiction to enforce the provisions of the U.S. Constitution.

17. This Court has subject matter jurisdiction over the claims asserted by Plaintiffs under 28 U.S.C. § 1331 as this action involves claims based on Fourteenth Amendment of the U.S. Constitution and seeks to prevent Defendants from interfering with federal rights secured by the U.S. Constitution.

18. Pursuant to 28 U.S.C. § 1343(a)(3) and (4), this Court has subject matter jurisdiction over the claims asserted by Plaintiffs as this action is brought to redress deprivations under color of State law, statute, executive order, ordinance, regulation, custom or usage of rights, privileges, and immunities secured by the U.S. Constitution.

19. This Court has supplemental jurisdiction over this action under 28 U.S.C. § 1367 because the claims that arise under the laws of New York are so related to claims in this action within such original jurisdiction that they form part of the same controversy under Article III of the United States Constitution.

THE PARTIES

Plaintiffs

20. Plaintiff Maniscalco is a public-school teacher in Staten Island, New York. During all times relevant and material to this case, Plaintiff was employed by Defendants City and DOE.

21. Plaintiff Arancio is a paraprofessional in Staten Island, New York who has developed antibodies following exposure to a Covid-19 infection. During all times relevant and material to this case, Plaintiff was employed by Defendants City and DOE.

22. Plaintiff Salomon is paraprofessional in Queens, New York who has developed antibodies following exposure to a Covid-19 infection. During all times relevant and material to this case, Plaintiff was employed by Defendants City and DOE.

23. Plaintiff Lynch is a public-school teacher in Queens, New York who has developed antibodies following exposure to a Covid-19 infection. During all times relevant and material to

this case, Plaintiff was employed by Defendants City and DOE.

Defendants

24. Defendant DOE is a corporate body, created by Article 52 of the New York State Education Law, that manages and controls the educational affairs of New York City public schools. DOE is the "local educational agency" as defined by 14 U.S.C. § 1401(19) and 34 C.F.R. § 300.28 responsible for providing public education.

25. Defendant Porter is and was Schools Chancellor of the DOE and is and was acting under color of the DOE and in her official capacity, at all times relevant to the allegations made by Plaintiff herein.

26. Defendant City is a municipal corporation within the State of New York.

27. Defendant de Blasio is and was Mayor of the City of New York and is and was acting under color of City law and in his official capacity, at all times relevant to the allegations made by Plaintiff herein.

28. Defendant DOHMH is responsible for public health in New York City.

29. Defendant Chokshi is and was Commissioner and is and was acting under color of the DOHMH and in his official capacity, at all times relevant to the allegations made by Plaintiff herein.

FACTUAL ALLEGATIONS

The City Announces a Vaccine Mandate for all Municipal Workers

30. On July 26, 2021, de Blasio announced that the City would require all municipal workers—including teachers and custodians employed by the DOE, cops, and firefighters—to receive one dose of the Covid-19 vaccination by the time schools reopen in mid-September (the "July 26 Order").

31. The July 26 Order allows municipal workers to opt out of the vaccine mandate if they are tested weekly for Covid-19. The City announced that the July 26 Order goes into effect on September 13, 2021, the same day the City's public schools re-open for the year.

32. Less than one month later, however, on August 23, 2021, de Blasio, in consultation with all of the other Defendants, announced that DOE employees would no longer be able to opt out of the vaccine mandate through weekly Covid-19 tests.

33. Instead, the City's August 23 Order requires all DOE employees—which includes 148,000 school-based staff and central staff, as well as DOE contractors who work in school-based settings—to provide proof of first dose of vaccination by September 27, 2021.

34. The August 23 Order is supported by the DOE's Schools Chancellor Porter, who is responsible for implementing the August 23 Order across the DOE, and the DOHMH's Chokshi, who helped craft the August 23 Order.

35. Notably, the August 23 Order does not provide an exception to the vaccine for those with antibodies either.

CLASS ACTION ALLEGATIONS

36. Plaintiffs represent two Classes prosecuting the claims here, which are the Main Class and the Subclass, as defined below, all brining their claims pursuant to Federal Rule of Civil Procedure ("Rule") 23(a) and (b).

The Class

37. Plaintiff Maniscalco brings this class action on behalf of herself and the class of DOE employees and contractors affected by Defendants' August 23 Order.

The Subclass

38. Plaintiffs Arancio, Salomon, and Lynch bring this class action on behalf of

themselves and the class of DOE employees and contractors who have developed antibodies following exposure to a Covid-19 infection and are affected by Defendants' August 23 Order.

All Requirements of a Class Action are Met Here

39. This action meets the following prerequisites of Rule 23(a):

a. **Numerosity**: The Classes includes thousands of members. Due to the high number of class members, joinder of all members is impracticable and, indeed, virtually impossible.

b. **Ascertainable**: The proposed Classes are ascertainable. Every Plaintiff is either employed directly or indirectly by the DOE and City.

c. **Commonality**: A substantial pool of common questions of law and fact exists among the Class, including but not limited to:

i. The actions taken by Defendants to advance the August 23 Order;

ii. Implementation of the August 23 Order;

iii. The irrationality and arbitrariness of particular provisions of the August 23 Order.

d. **Typicality**: Plaintiffs' claims are typical of the claims of the Classes. Plaintiffs' are all directly or indirectly employed by the DOE. The harm suffered by Plaintiffs' and the cause of such harm is representative of the respective Classes. The claims or defenses of the Plaintiff and the Classes arise from the save events and actions by Defendants and are based on the same legal theory.

e. **Adequacy**: Plaintiffs will fairly and adequately protect the interests of the Classes. Plaintiffs do not have any interests that conflict with the interests of the members of the Classes. Plaintiffs have engaged competent counsel who are

experienced in complex litigation, including class action litigation.

f. **Superiority**: A class action is superior to alternatives, if any, for the timely, fair, and efficient adjudication of the issues alleged herein. A class action will permit numerous similarly situated individuals to prosecute their common claims in a single forum simultaneously without duplication of evidence, expense, and resources. This action will result in uniformity of decisions and avoid risk of inconsistency and incompatible standards of conduct in the judicial system.

g. **Maintainability:** This action is properly maintainable as a class action for the above-mentioned reasons and under Rule 23(b):

   i. The individual amount of restitution involved is often so insubstantial that the individual remedies are impracticable and individual litigation too costly;

   ii. Individual actions would create a risk of inconsistent results and duplicative litigation;

   iii. Defendants have acted or refused to act on grounds generally applicable to the Classes, thereby rendering final injunctive relief or declaratory relief appropriate for the Classes as a whole; and

   iv. Individual actions would unnecessarily burden the courts and waste judicial resources.

h. **Predominance**: The questions of law or fact common to Class Members predominate over any questions affected only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating

the controversy.

CLAIMS FOR RELIEF

FIRST CLAIM

Violation of the Due Process Clause of the U.S. Constitution

40. Plaintiffs reallege and incorporates into this cause of action the allegations of the of the Complaint set out above.

41. The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution provides that no State can "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV.

42. The substantive component of the Due Process Clause "limits what the government may do in both its legislative. . .and its executive capacities." *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 846 (1988). Specifically, substantive due process protection prohibits the government from taking action that "shocks the conscience" or "interferes with rights implicit in the concept of ordered liberty." *United States v. Salerno*, 481 U.S. 739, 746 (1987).

43. Where the challenged conduct is legislative in nature the Plaintiffs must show both (1) a valid property interest, [liberty] or fundamental right and (2) that the defendants infringed that [liberty or] property interest in an arbitrary or irrational manner." *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 503 (2d Cir. 2001).

44. Liberty "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972).

45. The right to pursue a profession—particularly one as important to the public good and as revered in civil society as teaching children in public schools—is a liberty interest for which one enjoys substantive due process protection. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)

(holding that "the 'liberty' mentioned in th[e] [Fourteenth Amendment] . . . is deemed to embrace the right of the citizen . . . to earn his livelihood by any lawful calling"). *See also Marino v. City Univ. of N. Y*, 18 F. Supp. 3d 320, 339 (E.D.N.Y. 2014) (noting that "a person's right to pursue the profession of his choice is recognized as a constitutionally protected liberty interest").

46. The August 23 Order shocks the conscience and interfere with Plaintiffs' and members of the putative Classes' deeply rooted liberty interests, including the right to work as teachers, their chosen profession.

47. If Defendants enforce the August 23 Order, Plaintiffs' and members of the putative Classes' may lose their income, their seniority, and/or their health benefits. Termination of teachers at the beginning of the school year, with mere weeks of warning, will result in Plaintiffs' and Class members' being irreparably harmed.

SECOND CLAIM

Violation of the Equal Protection Clause of the U.S. Constitution

(Against the City and de Blasio)

48. Plaintiffs realleges and incorporates into this cause of action the allegations of the Complaint set out above.

49. The Equal Protection Clause of the Fourteenth Amendment requires that every regulation be at a minimum rationally related to a legitimate governmental interest.

50. The City and de Blasio may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985).

51. The vaccine mandate imposed on Plaintiffs and the Classes of teachers by the City and de Blasio is arbitrary and irrational.

52. The vaccine mandate is based on a distinction between DOE employees and contractors and other municipality employees. For example, the July 26 Order allows non-DOE employees and contractors to opt out of the vaccine mandate through weekly Covid-19 tests.

53. The August 23 Order, however, does not allow 148,000 school-based staff and central staff, as well as DOE contractors who work in school-based settings, to opt out of the vaccine mandate.

54. The arbitrary distinction between DOE employees and contractors and other municipality workers is not rationally released to the City's legitimate interest in curtailing the spread of the disease.

55. The mandate imposed on Plaintiffs and the Classes interferes with fundamental rights, including the right to pursue a lawful profession.

THIRD CLAIM

Vacating the DOHMH's Order Pursuant to CPLR § 7803(3)

56. Plaintiffs realleges and incorporates into this cause of action the allegations of the Complaint set out above.

57. Pursuant to CPLR § 7803(3), this Court has jurisdiction to vacate the Defendants' August 23 Order if it "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion."

58. The August 23 Order violates Plaintiffs and the Classes due process rights by denying their right to employment, resulting in a deprivation of their vested property rights without due process.

59. The August 23 Order does not include certain exceptions to the vaccine mandate, such as weekly testing, as permitted for other City employees, or for those with existing antibodies.

60. The August 23 Order is therefore arbitrary, capricious, and should be vacated.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request judgment as follows:

A. Certifying the proposed Class pursuant to Rule 23;

B. On the First Claim, awarding Plaintiff and the Class damages from Defendants' violation of their constitutional right to substantive due process;

C. On the Second Claim, awarding Plaintiff and the Class damages from Defendants' violation of their constitutional right to equal protection;

D. On the Third Claim, vacate the August 23 Order as arbitrary and capricious;

E. Costs of suit herein;

F. Investigation costs;

G. Payment of reasonable attorneys' fees;

H. Declaratory relief;

I. Injunctive relief;

J. Such other and further relief as the Court may deem just and proper.

DEMAND FOR JURY TRIAL

Plaintiffs respectfully demand a trial by jury for all issues so triable in this action.

Dated: New York, New York
September 15, 2021

By: *s/ Mark J. Fonte*

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Attorneys for Plaintiff and the Class

EXHIBIT E

ORDER OF THE COMMISSIONER OF HEALTH AND MENTAL HYGIENE TO REQUIRE COVID-19 VACCINATION FOR DEPARTMENT OF EDUCATION EMPLOYEES, CONTRACTORS, AND OTHERS

WHEREAS, on March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98 declaring a state of emergency in the City to address the threat posed by COVID-19 to the health and welfare of City residents, and such order remains in effect; and

WHEREAS, on March 25, 2020, the New York City Commissioner of Health and Mental Hygiene declared the existence of a public health emergency within the City to address the continuing threat posed by COVID-19 to the health and welfare of City residents, and such declaration and public health emergency continue to be in effect; and

WHEREAS, pursuant to Section 3.01(d) of the New York City Health Code ("Health Code"), the existence of a public health emergency within the City as a result of COVID-19, for which certain orders and actions are necessary to protect the health and safety of the City of New York and its residents, was declared; and

WHEREAS, pursuant to Section 558 of the New York City Charter (the "Charter"), the Board of Health may embrace in the Health Code all matters and subjects to which the power and authority of the Department of Health and Mental Hygiene (the "Department") extends; and

WHEREAS, pursuant to Section 556 of the Charter and Section 3.01(c) of the Health Code, the Department is authorized to supervise the control of communicable diseases and conditions hazardous to life and health and take such actions as may be necessary to assure the maintenance of the protection of public health; and

WHEREAS, the U.S. Centers for Disease Control ("CDC") reports that new variants of COVID-19, identified as "variants of concern" have emerged in the United States, and some of these new variants which currently account for the majority of COVID-19 cases sequenced in New York City, are more transmissible than earlier variants; and

WHEREAS, the CDC has stated that vaccination is an effective tool to prevent the spread of COVID-19 and benefits both vaccine recipients and those they come into contact with, including persons who for reasons of age, health, or other conditions cannot themselves be vaccinated; and

WHEREAS New York State has announced that, as of September 27, 2021 all healthcare workers in New York State, including staff at hospitals and long-term care facilities, including nursing homes, adult care, and other congregate care settings, will be required to be vaccinated against COVID-19 by Monday, September 27; and

WHEREAS, section 17-104 of the Administrative Code of the City of New York directs the Department to adopt prompt and effective measures to prevent the communication of infection diseases such as COVID-19; and

WHEREAS, in accordance with section 17-109(b) of such Administrative Code, the Department may adopt vaccination measures in order to most effectively prevent the spread of communicable diseases; and

WHEREAS, pursuant to Section 3.07 of the Health Code, no person "shall do or assist in any act which is or may be detrimental to the public health or to the life or health of any individual" or "fail to do any reasonable act or take any necessary precaution to protect human life and health;" and

WHEREAS, the CDC has recommended that school teachers and staff be "vaccinated as soon as possible" because vaccination is "the most critical strategy to help schools safely resume] full operations… [and] is the leading public health prevention strategy to end the COVID-19 pandemic;" and

WHEREAS the New York City Department of Education ("DOE") serves approximately 1 million students across the City, including students in the communities that have been disproportionately affected by the COVID-19 pandemic and students who are too young to be eligible to be vaccinated; and

WHEREAS, a system of vaccination for individuals working in school settings or other DOE buildings will potentially save lives, protect public health, and promote public safety; and

WHEREAS, pursuant to Section 3.01(d) of the Health Code, I am authorized to issue orders and take actions that I deem necessary for the health and safety of the City and its residents when urgent public health action is necessary to protect the public health against an existing threat and a public health emergency has been declared pursuant to such section; and

WHEREAS, on July 21, 2021, I issued an order requiring staff in public healthcare and clinical settings to demonstrate proof of COVID-19 vaccination or undergo weekly testing; and

WHEREAS, on August 10, 2021, I issued an order requiring staff providing City operated or contracted services in residential and congregate settings to demonstrate proof of COVID-19 vaccination or undergo weekly testing;

NOW THEREFORE I, Dave A. Chokshi, MD, MSc, Commissioner of Health and Mental Hygiene, finding that a public health emergency within New York City continues, and that it is necessary for the health and safety of the City and its residents, do hereby exercise the power of the Board of Health to prevent, mitigate, control and abate the current emergency, and hereby order that:

1. No later than September 27, 2021 or prior to beginning employment, all DOE staff must provide proof to the DOE that:
    a. they have been fully vaccinated; or
    b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
    c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

2. All City employees who work in-person in a DOE school setting or DOE building must provide proof to their employer no later than September 27, 2021 or prior to beginning such work that:
    a. they have been fully vaccinated; or
    b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or

c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

3. All staff of contractors of DOE and the City who work in-person in a DOE school setting or DOE building, including individuals who provide services to DOE students, must provide proof to their employer no later than September 27, 2021 or prior to beginning such work that:
   a. they have been fully vaccinated; or
   b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
   c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

   Self-employed independent contractors hired for such work must provide such proof to the DOE.

4. All employees of any school serving students up to grade 12 and any UPK-3 or UPK-4 program that is located in a DOE building who work in-person, and all contractors hired by such schools or programs to work in-person in a DOE building, must provide proof to their employer, or if self-employed to the contracting school or program, no later than September 27, 2021 or prior to beginning such work that:
   a. they have been fully vaccinated; or
   b. they have received a single dose vaccine, even if two weeks have not passed since they received the vaccine; or
   c. they have received the first dose of a two-dose vaccine, and they must additionally provide proof that they have received the second dose of that vaccine within 45 days after receipt of the first dose.

5. For the purposes of this Order:

   a. "DOE staff" means (i) full or part-time employees of the DOE, and (ii) DOE interns (including student teachers) and volunteers.

   b. "Fully vaccinated" means at least two weeks have passed after a person received a single dose of a one-dose series, or the second dose of a two-dose series, of a COVID-19 vaccine approved or authorized for use by the Food and Drug Administration or World Health Organization.

   c. "DOE school setting" includes any indoor location, including but not limited to DOE buildings, where instruction is provided to DOE students in public school kindergarten through grade 12, including residences of pupils receiving home instruction and places where care for children is provided through DOE's LYFE program.

d. "Staff of contractors of DOE and the City" means a full or part-time employee, intern or volunteer of a contractor of DOE or another City agency who works in-person in a DOE school setting or other DOE building, and includes individuals working as independent contractors.

e. "Works in-person" means an individual spends any portion of their work time physically present in a DOE school setting or other DOE building. It does not include individuals who enter a DOE school setting or other DOE location only to deliver or pickup items, unless the individual is otherwise subject to this Order. It also does not include individuals present in DOE school settings or DOE buildings to make repairs at times when students are not present in the building, unless the individual is otherwise subject to this Order.

6. This Order shall be effective immediately and remain in effect until rescinded, subject to the authority of the Board of Health to continue, rescind, alter or modify this Order pursuant to Section 3.01(d) of the Health Code.

Dated: August 24th, 2021

Dave A. Chokshi, M.D., MSc
Commissioner

EXHIBIT F

SCHEINMAN
ARBITRATION & MEDIATION SERVICES

September 10, 2021

Via E-Mail Only
Renee Campion, Commissioner
Steven H. Banks, Esq.
New York City Office of Labor Relations
The Office of Labor Relations
22 Cortlandt Street, 14th Floor
New York, NY 10007

Alan M. Klinger, Esq.
Stroock & Stroock & Lavan, L.L.P.
180 Maiden Lane, 33rd Floor
New York, NY 10038

Beth Norton, Esq.
Michael Mulgrew, President
United Federation of Teachers
52 Broadway, 14th Floor
New York, NY 10004

Re: Board of Education of the City School District of the City of New York
and
United Federation of Teachers, Local 2, AFT, AFL-CIO
(Impact Bargaining)

Dear Counsel:

Enclosed please find my Award in the above referenced matter.

Thank you.

Sincerely,

Martin F. Scheinman

MFS/sk
BOE.UFT.Impact Bargaining.awd

In the Matter of the Arbitration		
between		
BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK		Re: Impact Bargaining
"Department"		
-and-		
UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO		
"Union"		

APPEARANCES

For the Department
Renee Campion, Commissioner of Labor Relations
Steven H. Banks, Esq., First Deputy Commissioner and General Counsel of Labor Relations

For the Union
STROOCK & STROOCK & LAVAN, L.L.P.
Alan M. Klinger, Esq.

Beth Norton, Esq., UFT General Counsel
Michael Mulgrew, UFT President

BEFORE: Martin F. Scheinman, Esq., Arbitrator

BACKGROUND

The Union ("Union" or "UFT") protests the Department of Education's ("Department" or "DOE") failure to reach agreement on the impact of its decision mandating all employees working in Department buildings show proof they started the Covid-19 vaccination protocols by September 27, 2021. The Union contends the Department failed to adequately provide, among other things, for those instances where employees have proof of a serious medical condition making the vaccine a danger to their health, as well as for employees who have a legitimate religious objection to vaccines.

Most of the basic facts are not in dispute.

For those in the New York City ("NYC" or "City") metropolitan area, we are now in the 18th month of the Covid-19 pandemic. During that time, we have seen substantial illness and loss of life. There have been periods of significant improvement and hope, but sadly, we have seen resurgence with the Delta variant. Throughout this period, NYC and its municipal unions have worked collaboratively to provide needed services for the City's 8.8 million residents in as safe an environment as possible. Yet, municipal employees have often borne great risk. The Department and the UFT are no exception. The DOE and the UFT immediately moved to remote instruction and then later a hybrid model of both in-person and remote learning for the 2020-2021 school year. Educators at all levels strove to deliver the best experience possible under strained circumstances. For this

coming school year, both the DOE and the UFT have endeavored to return, as much as possible, to in-person learning. They have developed protocols regarding masking and distancing to effectuate a safe environment for the City's students and educators.

To this end, the Delta resurgence has complicated matters. In recognition of increased risk, there have been various policies implemented at City agencies and other municipal entities. Mayor de Blasio in July 2021 announced a "Vaccine-or-Test" mandate which essentially requires the City workforce, including the UFT's educators, either to be vaccinated or undergo weekly testing for the Covid-19 virus effective September 13, 2021.

Most relevant to this matter, on August 23, 2021, the Mayor and the NYC Commissioner of Health and Mental Hygiene, David A. Chokshi, MD, announced a new policy for those workforces in NYC DOE buildings. Those employees would be subject to a "Vaccine Only" mandate. That is, such employees would need to show by September 27, 2021, they had at least started the vaccination protocol or would not be allowed onto DOE premises, would not be paid for work and would be at risk of loss of job and benefits. This mandate was reflected in an Order of Commissioner Chokshi, dated August 24, 2021. That Order, by its terms, did not expressly provide for exceptions or accommodations for those with medical contraindications to vaccination or sincerely-held religious objections to inoculation. Nor did it address matters of due process with regard to job and benefits protection.

The UFT promptly sought to bargain the impact and implementation of the Vaccine Only mandate. A number of discussions were had by the parties but important matters remained unresolved.

On September 1, 2021, the UFT filed a Declaration of Impasse with the Public Employment Relations Board ("PERB") as to material matters. The City/DOE did not challenge the statement of impasse and PERB appointed me to mediate the matters. Given the exigencies of the imminent start of the school year and the coming of the September 27, 2021, mandate, together with the importance of the issues involved to the workforce, mediations sessions were held immediately on September 2, 3, 4 and 5, 2021, with some days having multiple sessions. Progress was made, and certain tentative understandings were reached, but significant matters remained unresolved. By agreement of the parties, the process moved to arbitration. They asked I serve as arbitrator.[1]

Arbitration sessions were held on September 6 and 7, 2021. During the course of the hearings, both sides were given full opportunity to introduce evidence and argument in support of their respective positions. They did so. Both parties made strenuous and impassioned arguments reflecting their viewpoints on this entire issue.

During the course of these hearings, I made various interim rulings concerning the impact of the "Vaccine Only" mandate. I then

[1] My jurisdiction is limited to the issues raised during impact bargaining and not with regard to the decision to issue the underlying "Vaccine Only" order.

directed the parties to draft language reflecting those rulings. Even though I am very familiar with the language of the current Collective Bargaining Agreement, as well as the parties' relationship since I am a member of their permanent arbitration panel and have served as a fact-finder and mediator during several rounds of bargaining, I concluded the parties are more familiar with Department policy and how leave and entitlements have been administered in accordance with prior agreements. As such, my rulings reflect both the understandings reached during the negotiations prior to mediation, those reached in the mediation process and the parties' agreed upon language in response to my rulings. All are included, herein.

I commend the parties for their seriousness of purpose and diligence in addressing these complicated matters. The UFT made clear it supports vaccination efforts and has encouraged its members to be vaccinated. Nonetheless, as a Union, it owes a duty to its members to ensure their rights are protected. The City/DOE demonstrated recognition of the importance of these issues, particularly with regard to employees' legitimate medical or religious claims. I appreciate both parties' efforts in meeting the tight timeline we have faced and the professionalism they demonstrated serving the citizens of the City and what the million plus students deserved. They have invested immense effort to insure such a serious issue was litigated in such a thoughtful way.

Yet, in the end, it falls to me, as Arbitrator, to arrive at a fair resolution of the matters at hand.

This matter is one of the most urgent events I have been involved with in my forty (40) plus years as a neutral. The parties recognized the complexity of the issues before me, as well as the magnitude of the work that lies ahead to bring this conflict to completion in a timely manner. For this reason, they understood and accepted the scope and complexity of this dispute could not be handled by me alone. They agreed my colleagues at Scheinman Arbitration and Mediation Services ("SAMS") would also be involved.

I want to thank my colleagues at SAMS, especially Barry J. Peek, for their efforts and commitment to implementing the processes to resolve this matter. This undertaking could not be accomplished by any single arbitrator.

Opinion

After having carefully considered the record evidence, and after having the parties respond to countless inquiries. I have requested to permit me to make a final determination, I make the rulings set forth below. While some of the language has been drafted, initially, by the parties in response to my rulings, in the end the language set forth, herein, is mine alone. I hereby issue the following Award:

I. Exemption and Accommodation Requests & Appeal Process

As an alternative to any statutory reasonable accommodation

process, the City, the Board of Education of the City School District for the City of New York (the "DOE"), and the United Federation of Teachers, Local 2, AFT, AFL-CIO (the "UFT), (collectively the "Parties") shall be subject to the following Expedited Review Process to be implemented immediately for full-time staff, H Bank and non-pedagogical employees who work a regular schedule of twenty (20) hours per week or more inclusive of lunch, including but not limited to Occupational Therapists and Physical Therapists, and Adult Education teachers who work a regular schedule of twenty (20) or more hours per week. This process shall only apply to (a) religious and medical exemption requests to the mandatory vaccination policy, and (b) medical accommodation requests where an employee is unable to mount an immune response to COVID-19 due to preexisting immune conditions and the requested accommodation is that the employee not appear at school. This process shall be in place for the 2021-2022 school year and shall only be extended by mutual agreement of the Parties.

Any requests to be considered as part of this process must be submitted via the SOLAS system no later than Monday, September 20, 2021, by 5:00 p.m.

A. Full Medical Exemptions to the vaccine mandate shall only be considered where an employee has a documented contraindication such that an employee cannot receive any of the three (3) authorized vaccines (Pfizer, Moderna, J&J)—with contraindications delineated in CDC clinical

considerations for COVID-19 vaccination. Note that a prior immediate allergic reaction to one (1) type of vaccine will be a precaution for the other types of vaccines, and may require consultation with an allergist.

B. Temporary Medical Exemptions to the vaccine mandate shall only be based on the following valid reasons to defer or delay COVID-19 vaccination for some period:

- Within the isolation period after a COVID-19 infection;
- Within ninety (90) days of monoclonal antibody treatment of COVID-19;
- Treatments for conditions as delineated in CDC clinical considerations, with understanding CDC guidance can be updated to include new considerations over time, and/or determined by a treating physician with a valid medical license responsible for the immunosuppressive therapy, including full and appropriate documentation that may warrant temporary medical exemption for some period of time because of active therapy or treatment (e.g., stem cell transplant, CAR T-cell therapy) that would temporarily interfere with the patient's ability to respond adequately to vaccination;
- Pericarditis or myocarditis not associated with COVID-19 vaccination or pericarditis or myocarditis associated with COVID-19 vaccination.

Length of delay for these conditions may vary, and the employee must get vaccinated after that period unless satisfying the criteria for a Full Medical Exemption described, above.

C. Religious exemptions for an employee to not adhere to the mandatory vaccination policy must be documented in writing by a religious official (e.g., clergy). Requests shall be denied where the leader of the religious organization has spoken publicly in favor of the vaccine, where the documentation is readily available (e.g., from an online source), or where the objection is personal, political, or philosophical in nature. Exemption requests shall be considered for recognized and established religious organizations (e.g., Christian Scientists).

D. There are cases in which, despite an individual having sought and received the full course of the vaccination, he or she is unable to mount an immune response to COVID-19 due to preexisting immune conditions. In these circumstances, each individual case shall be reviewed for potential accommodation. Medical accommodation requests must be documented in writing by a medical doctor.

E. The initial determination of eligibility for an exemption or accommodation shall be made by staff in the Division of Human Capital in the Office of Medical, Leaves and Benefits; the Office of Equal Opportunity; and Office of Employee

Relations. These determinations shall be made in writing no later than Thursday, September 23, 2021, and, if denied, shall include a reason for the denial.

F. If the employee wishes to appeal a determination under the identified criteria, such appeal shall be made in SOLAS to the DOE within one (1) school day of the DOE's issuance of the initial eligibility determination. The request for appeal shall include the reason for the appeal and any additional documentation. Following the filing of the appeal, any supplemental documentation may be submitted by the employee to the Scheinman Arbitration and Mediation Services ("SAMS") within forty eight (48) hours after the filing of the appeal. If the stated reason for denial of a medical exemption or accommodation request is insufficient documentation, the employee may request from the arbitrator and, upon good cause shown, the arbitrator may grant an extension beyond forty eight (48) hours and permit the use of CAR days after September 27, 2021, for the employee to gather the appropriate medical documentation before the appeal is deemed submitted for determination.

G. A panel of arbitrators identified by SAMS shall hear these appeals, and may request the employee or the DOE submit additional documentation. The assigned arbitrator may also request information from City and/or DOE Doctors as part of the review of the appeal documentation. The assigned

arbitrator, at his or her discretion, shall either issue a decision on the appeal based on the documents submitted or hold an expedited (virtual) factual hearing. If the arbitrator requests a factual hearing, the employee may elect to have a union representative present but neither party shall be required to be represented by an attorney at the hearing. The expedited hearing shall be held via Zoom telecommunication and shall consist of brief opening statements, questions from the arbitrator, and brief closing statements. Cross examination shall not be permitted. Any documentation submitted at the arbitrator's request shall be provided to the DOE at least one (1) business day before the hearing or the issuance of the written decision without hearing.

H. Appeal decisions shall be issued to the employee and the DOE no later than Saturday September 25, 2021. Appeal decisions shall be expedited without full Opinion, and final and binding.

I. While an appeal is pending, the exemption shall be assumed granted and the individual shall remain on payroll consistent with Section K below. However, if a larger number of employees than anticipated have a pending appeal as of September 27, 2021, as determined by SAMS, SAMS may award different interim relief consistent with the parties' intent. Those employees who are vaccinated and have applied for an

accommodation shall have the ability to use CAR days while their application and appeal are pending. Should the appeal be granted, these employees shall be reimbursed any CAR days used retroactive to the date of their initial application.

J. The DOE shall cover all arbitration costs from SAMS under this process. To the extent the arbitrator requests additional medical documentation or information from the DOE, or consultation with City and/or DOE Doctors, arranging and paying for such documentation and/or consultation shall be the responsibility of the DOE.

K. An employee who is granted a medical or religious exemption or a medical accommodation under this process and within the specific criteria identified above shall be permitted the opportunity to remain on payroll, but in no event required/permitted to enter a school building while unvaccinated, as long as the vaccine mandate is in effect. Such employees may be assigned to work outside of a school building (e.g., at DOE administrative offices) to perform academic or administrative functions as determined by the DOE while the exemption and/or accommodation is in place. For those with underlying medical issues granted an accommodation under Section I(D), the DOE will make best efforts to ensure the alternate work setting is appropriate for the employee's medical needs. The DOE shall make best efforts to make these assignments within the same borough as

the employee's current school, to the extent a sufficient number of assignments exist in the borough. Employees so assigned shall be required to submit to COVID testing twice per week for the duration of the assignment.

L. The process set forth, herein, shall constitute the exclusive and complete administrative process for the review and determination of requests for religious and medical exemptions to the mandatory vaccination policy and accommodation requests where the requested accommodation is the employee not appear at school. The process shall be deemed complete and final upon the issuance of an appeal decision. Should either party have reason to believe the process set forth, herein, is not being implemented in good faith, it may bring a claim directly to SAMS for expedited resolution.

II. Leave

A. Any unvaccinated employee who has not requested an exemption pursuant to Section 1, or who has requested an exemption which has been denied, may be placed by the DOE on leave without pay effective September 28, 2021, or upon denial of appeal, whichever is later, through November 30, 2021. Such leave may be unilaterally imposed by the DOE and may be extended at the request of the employee consistent with Section III(B), below. Placement on leave without pay for these reasons shall not be considered a disciplinary action for any purpose.

B. Except as otherwise noted, herein, this leave shall be treated consistent with other unpaid leaves at the DOE for all purposes.

C. During such leave without pay, employees shall continue to be eligible for health insurance. As with other DOE leaves without pay, employees are prohibited from engaging in gainful employment during the leave period.

D. Employees who become vaccinated while on such leave without pay and provide appropriate documentation to the DOE prior to November 30, 2021, shall have a right of return to the same school as soon as is practicable but in no case more than one (1) week following notice and submission of documentation to the DOE.

E. Pregnancy/Parental Leave

i. Any soon-to-be birth mother who starts the third trimester of pregnancy on or before September 27, 2021, (e.g. has a due date no later than December 27, 2021), may commence UFT Parental Leave prior to the child's birth date, but not before September 27, 2021.

ii. No documentation shall be necessary for the early use of Parental Leave, other than a doctor's written assertion the employee is in her third trimester as of September 27, 2021.

iii. Eligible employees who choose to start Parental Leave prior to the child's birth date, shall be required to first use CAR days until either: 1) they exhaust CAR/sick days,

at which point the Parental Leave shall begin, or 2) they give birth, at which point they shall be treated as an approved Parental Leave applicant for all purposes, including their prerogative to use additional CAR days prior to the commencement of Parental Leave.

iv. Eligible employees who have a pregnancy disability or maternity disability outside of the regular maternity period may, in accordance with existing rules, borrow CAR/sick days and use a Grace Period. This eligibility to borrow CAR/sick days does not apply to employees during the regular maternity recovery period if they have opted to use Parental Leave.

v. In the event an eligible employee exhausts CAR/sick days and parental leave prior to giving birth, the employee shall be placed on a leave without pay, but with medical benefits at least until the birth of the child. As applicable, unvaccinated employees may be placed in the leave as delineated in Section II(A).

vi. If not otherwise covered by existing Family Medical Leave Act ("FMLA") or leave eligibility, an employee who takes Parental Leave before the birth of the child shall be eligible to be on an unpaid leave with medical benefits for the duration of the maternity recovery period (i.e., six weeks after birth or eight weeks after a birth via C-Section)

vii. All other eligibility and use rules regarding UFT Parental Leave as well as FMLA remain in place.

III. Separation

A. During the period of September, 28, 2021, through October 29, 2021, any employee who is on leave without pay due to vaccination status may opt to separate from the DOE. In order to separate under this Section and receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's involuntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. If an employee opts to separate consistent with this Section, the employee shall be eligible to be reimbursed for unused CAR days on a one (1) for one (1) basis at the rate of 1/200th of the employee's salary at departure per day, up to 100 days, to be paid following the employee's separation with documentation including the general waiver and release. Employees who elect this option shall be deemed to have resigned involuntarily effective on the date contained in the general waiver as determined by the DOE, for non-disciplinary reasons. An employee who separates under this Section shall continue to be eligible for health insurance through September 5, 2022, unless they are eligible for health insurance from another source (e.g., a spouse's coverage or another job).

B. During the period of November 1, 2021, through November 30, 2021, any employee who is on leave without pay due to vaccination status may alternately opt to extend the leave through September 5, 2022. In order to extend this leave pursuant to this Section, and continue to receive the commensurate benefits, an employee must file a form created by the DOE which includes a waiver of the employee's rights to challenge the employee's voluntary resignation, including, but not limited to, through a contractual or statutory disciplinary process. Employees who select this option shall continue to be eligible for health insurance through September 5, 2022. Employees who comply with the health order and who seek to return from this leave, and so inform the DOE before September 5, 2022, shall have a right to return to the same school as soon as is practicable but in no case more than two (2) weeks following notice to the DOE. Existing rules regarding notice of leave intention and rights to apply for other leaves still apply. Employees who have not returned by September 5, 2022, shall be deemed to have voluntarily resigned.

C. Beginning December 1, 2021, the DOE shall seek to unilaterally separate employees who have not opted into separation under Sections III(A) and III(B). Except for the express provisions

contained, herein, all parties retain all legal rights at all times relevant, herein.

September 10 , 2021.

Martin F. Scheinman, Esq.
Arbitrator

STATE OF NEW YORK)
) ss.:
COUNTY OF NASSAU)

I, MARTIN F. SCHEINMAN, ESQ., do hereby affirm upon my oath as Arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

September 10 , 2021.

Martin F. Scheinman, Esq.
Arbitrator

DOE.UFT.Impact Bargaining.awd

EXHIBIT G

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RACHEL MANISCALCO, individually, and for all others similarly situated, Plaintiff, -against- THE NEW YORK CITY DEPARTMENT OF EDUCATION, MEISHA PORTER, SCHOOLS CHANCELLOR OF THE NEW YORK CITY DEPARTMENT OF EDUCATION, IN HER OFFICIAL CAPACITY, THE CITY OF NEW YORK, BILL DE BLASIO, MAYOR OF NEW YORK CITY, IN HIS OFFICIAL CAPACITY, DEPARTMENT OF HEALTH AND MENTAL HYGIENE, AND DAVE A. CHOKSHI, COMMISSIONER OF THE DEPARTMENT OF HEALTH AND MENTAL HYGIENE, Defendants.	21-CV-5055 (BMC) United States Courthouse Brooklyn, New York Wednesday, September 22, 2021 2:30 p.m.

TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE BRIAN M. COGAN
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiff:
HELBOCK, NAPPA & GALLUCCI
2550 Victory Boulevard, Suite 306
Staten Island, New York 10314
BY: LOUIS M. GELORMINO, ESQ.

For the Defendant:
NEW YORK CITY LAW DEPARTMENT
ASSISTANT CORPORATE COUNSEL
LABOR AND EMPLOYMENT DIVISION
100 Church Street
New York, New York 10007
BY: LORA MINICUCCI, ESQ.
AMANDA CROUSHORE, ESQ.

A P P E A R A N C E S (CONTINUED)

Court Reporter: DAVID R. ROY, RPR
225 Cadman Plaza East
Brooklyn, New York 11201
drroyofcr@gmail.com

Proceedings recorded by Stenographic machine shorthand, transcript produced by Computer-Assisted Transcription.

P R O C E E D I N G S

--oo0oo--

(All participants appearing via video conference.)

THE COURTROOM DEPUTY: Rachel Maniscalco versus New York City Board of Education, et al., Docket Number 21-CV-5055.

Counsel, please state your appearances, starting for the plaintiffs.

MR. GELORMINO: Good afternoon. On behalf of the Plaintiffs, Louis Gelormino on behalf of the Gallucci Legal Group. Good afternoon, again.

THE COURT: Good afternoon.

MS. MINICUCCI: For the defendants, Lori Minicucci with procuration counsel.

THE COURT: All right. Good afternoon.

Okay. This is argument on Plaintiffs' Motion for a Preliminary Injunction. The first thing I want to ask about is, does anybody know what happened in state court

this morning?

MS. MINICUCCI: Yes, Your Honor, I do. The argument was held but no decision was made. The decision should be made -- or Judge Love said either this afternoon or tomorrow morning.

THE COURT: Okay. And in the meantime, the injunction remains -- or the TRO remains in effect; is that right?

MS. MINICUCCI: I believe that the TRO expires today.

THE COURT: Really? That's unusual in state court. I thought their TROs continue until such time as they're vacated?

Are you guessing --

MS. MINICUCCI: No, Your Honor --

THE COURT: -- isn't that a Federal TRO?

MS. MINICUCCI: No, Your Honor, I'm not guessing. That is what the judge said today. He didn't clarify what would happen if the decision ended up coming out tomorrow morning.

THE COURT: Okay. I mean, I guess if it comes out before the 27th and it is favorable to the City, then that answers that question.

But let me ask Plaintiffs' Counsel. I'm hesitant to start making rulings based on the United States

Constitution when there is a state law proceeding pending that can get you all the relief that you are looking for, and so far, at least, has. Why would I go there?

MR. GELORMINO: Judge, to be honest, I wasn't anticipating that question. But if Your Honor would prefer to wait until tomorrow, that's completely acceptable to us. But I don't know when the judge's -- the State Court Judge's decision is going to come out.

THE COURT: Okay. But it goes a little further than just waiting. What I'm really asking you is, if the State Court either continues the TRO or issues a preliminary injunction, there is really nothing more that you want from me, is there?

MR. GELORMINO: No, Judge. I can't say that I am requesting something more that is being requested in the state court. I've reviewed the state court's -- the request from the municipal credit people, and I believe they're requesting similar relief as we are.

THE COURT: Okay. You know, both of you, I have a hard time pronouncing your names, so please pardon me if I botch them.

But is it Mini-chuchi (phonetic)?

MS. MINICUCCI: Minicucci.

THE COURT: Minicucci, okay.

Do you see any reason why if the plaintiffs

prevail in the state court proceeding, the plaintiffs before me would need anything else based on what you've read they're asking me for?

MS. MINICUCCI: I don't think so, Your Honor.

THE COURT: Okay.

MS. MINICUCCI: I mean --

THE COURT: I just want to make sure that Mr. Gelormino -- Gelor --

MR. GELORMINO: No, Gelormino. Very good, Judge.

THE COURT: Okay. That Mr. Gelormino is not missing anything that you might know something about.

MS. MINICUCCI: As far as I know, Your Honor, they're asking for an injunction for -- against the order of the DOHMH from September 15. And to the extent that the State Court does enjoin that order, then that would be -- would be the proceeding, I guess, then -- yeah.

THE COURT: Okay. Now, let me ask something else. In that proceeding -- that's an Article 78 State Court, right?

MS. MINICUCCI: That's correct.

THE COURT: Okay. In that proceeding, are there any federal constitutional claims raised, or is it just the arbitrary and capricious standard of Article 78?

MS. MINICUCCI: I believe there is a First Amendment claim raised.

THE COURT: Okay. Which I don't have.

MS. MINICUCCI: That's correct.

THE COURT: Okay. Got it.

Okay. So my next question is -- and let's get into the substance, now that I understand the procedural posture of this case in relation to the state court case. Mr. Gelormino, I'm not really seeing why any kind of fundamental liberty or property interest is even at issue here. You know, the way you've written your brief, it looks to me like you've confused procedural due process with substantive due process. And the procedures are one thing, but you don't have a procedural due process claim, you've emphasized the substantive due process claim. And to have a right that's protectable by substantive due process, you're talking about something very fundamental, not just a right, but like something that's enumerated in the constitution, or so well established by tradition that it's as if it were enumerated in the constitution. And while I agree with you that there's some kind of abstract right to pursue a profession and have a job, I'm not sure it rises to the level of substantive due process.

MR. GELORMINO: Well, Judge, I believe -- and if you allow me, I'll send citations to that effect later on. I believe that --

THE COURT: Okay. I'll allow that, certainly.

MR. GELORMINO: I believe that previous jurisprudence gives rise to the fundamental aspect of the fundamental right for one to pursue a profession. I don't think anybody would argue that teaching is a profession, particularly here in New York when advanced degrees, not just college degrees, advanced degrees are required. They teach our children -- I believe the teaching profession is due the same rights as doctors, lawyers, and me, and any other profession. So I do think that the right to pursue one's profession, especially one so esteemed and important as teaching is, should be considered a fundamental right.

THE COURT: Okay. That's an interesting perspective.

Let me ask Ms. Minicucci. Ms. Minicucci, if the States or the City cannot unilaterally suspend a license of a doctor, cannot say, We're pulling your license, why can they effectively do that for a teacher in this instance who doesn't get vaccinated?

MS. MINICUCCI: Okay. First, Your Honor, I wanted to correct myself. There's also a substantive due process claim being --

THE COURT: There is.

MS. MINICUCCI: -- in the State Court proceeding.

But no one is talking about pulling anybody's teaching license. We have set forth a vaccination mandate

and a framework by which the mandate will be enforced. Now, if teachers decide not to get vaccinated, they can elect to take an unpaid leave of absence. But they can also elect to leave the DOE and work in private schools or in Long Island or in New Jersey or in a Catholic school. So the DOE is not preventing anybody from exercising their profession, they are just preventing unvaccinated staff from working in DOE schools.

THE COURT: Okay. But are you conceding that, in fact, the right to be a teacher is a substantive due process right, or are you saying we're not depriving them of that right?

MS. MINICUCCI: We're saying we're not depriving them of a substantive due process right to practice their profession.

THE COURT: Okay.

MR. GELORMINO: Judge, may I quickly --

THE COURT: I'll get back with you in just a minute.

MR. GELORMINO: All right.

THE COURT: I just want to debate this a little with Ms. Minicucci.

But what I'm asking you is, are you saying you're not depriving them of the substantive right because there is no substantive right; or are you saying because you're just

not, based on what you're doing; or both?

MS. MINICUCCI: No, there is a right to practice your profession.

THE COURT: Okay.

MS. MINICUCCI: I don't think that's what we're saying.

THE COURT: Okay.

MS. MINICUCCI: We're not contesting that there is a right to practice your chosen profession. But what we're saying is there's no substantive due process violation here.

THE COURT: Okay. I get it.

All right. Go ahead, Mr. Gelormino.

MR. GELORMINO: Thank you, Your Honor.

Judge, effectively -- what this mandate effectively does, the teachers -- and I'm using the word "teachers" now for all the Department of Education employees -- they're not electing to do anything, all right, the Government, the mayor, the DOE they're going to suspend them. None of these teachers want to be suspended. So to use the word "elect" is misused. The word "elect" is misused here.

THE COURT: Well, what she's saying is there is an election if, in fact, they don't get vaccinated and they get suspended, then there's a --

MR. GELORMINO: No, I get that.

THE COURT: That's where the election comes in.

MR. GELORMINO: I get that.

And to claim when the New York City Public School System is the biggest public school system in the entire world, I believe, or at least the United States, with over a million students, with other 1800 schools, and there are different requirements and licensing. The New York City Public School System requires Master's Degrees, from what I understand, after five years. Almost all of the New York City Public Schoolteachers have Masters's Degrees and post-college degrees, to claim that they're not depriving them of that right, particularly on September 27th when the school year started already and they probably couldn't get a job anywhere else. But even if they could get a job, it's not the same job, Judge, as teaching in a private school.

Furthermore, and I'd like to make this last point, Judge, about this. The teaching profession, like I said, requires advanced degrees, but to deprive them of something, like I said in the last days of the year, it seems rather -- rather egregious. I mean, they're not going to be -- get a job. Even if they could get a job, even if they wanted to lower their standards and try to get a job at a public school -- or a private school, I don't think they'd be able to.

And the last point I would like to make, Judge -- it just crossed my mind. The last point I'd like to make is they're not allowed to get a job. According to the arbitration -- or according to the mandate, not the arbitration, the mandate they cannot go get gainful employment while they're suspended.

THE COURT: No, I understand, unless they want to give up their teaching job --

MR. GELORMINO: Right.

THE COURT: -- and do a different kind of teaching or go into some other profession, right? I mean, they can go teach at a Catholic school, which doesn't have a mandate, for example.

MR. GELORMINO: Right.

THE COURT: But I understand what you're saying, it's late in the year to do that.

MR. GELORMINO: But they can't go anywhere for the last year, unless they want to give up their DOE job, right.

THE COURT: Okay.

Another question I want to ask you. I think you've acknowledged that the test basically for a substantive due process violation includes a finding that there's a shot to the conscience, right? It's something that is absolutely intolerable, no rational person would have it. Let's just assume for the sake of argument that I

have some sympathy for the teachers' position that, you know, We really don't know what the effects of the vaccines are going to be in 10 or 20 years, and there has not been enough data, and that's a rational position for them to take. Let assume that I find that to be the case.

Is it really so shocking to the conscience in light of the evidence the other way, not on long-term consequences, but on short-term protection that the City -- that the DOE is making? I mean, isn't it at least rational to the DOE to say, On balance, you know, while some people might not want to have a vaccination, we really think that the fact of the matter is to protect people right now, this is the best way to do it. Does that shock the conscience that they are balancing it differently than your clients?

MR. GELORMINO: Judge, I have two responses to that question. First, the vaccinated and the unvaccinated, it's been equally shown that the vaccinated and the unvaccinated can equally spread the virus.

THE COURT: Got it.

MR. GELORMINO: Even the vaccinated people -- and I'm vaccinated, just public disclosure -- everybody, vaccinated/unvaccinated can spread the virus.

The second thing that is irrational is, I understand there's some history of vaccination in this country. But most of the vaccinations, if not all of the

vaccinations that have been mandated down through time, have had this spread, this time of review and evaluation between the time the vaccination came down and the time that it was legally mandated. This, this shocks the conscience in the fact that this thing was just -- this vaccination was just approve and was mandated, for argument's sake, a week later, not ten years later, not eight years later.

THE COURT: But if you're right, if you're right that, you know, your argument is strong that there is no reliable data, people should not get this, is it still rising to the level -- I tell you what would shock my conscience. If the DOE had said, We will not admit anyone to school that has had a vaccination for this disease because we, at the DOE, believe that the only way to protect students is to cull those vulnerable people who haven't been vaccinated and are getting really sick, you know, let them get sick. Now, that would shock my conscience. I am not sure the converse is true.

MR. GELORMINO: Judge, while I certainly appreciate the question and the shocking of your conscience, I think that would go beyond shocking of the conscience. That would just --

THE COURT: What is the -- but my point is, What is beyond shocking of the conscience?

MR. GELORMINO: No, I --

THE COURT: That's the ultimate test, right? And if that's not it... Sure, there can be more than one fact pattern that shocks the conscience, but it's got to be a real shock, not just a reason, disagreement. That's what I'm pushing back against.

MR. GELORMINO: Judge, the City's about to fire or suspend 28,000 employees because they made the conscious decision not to put a vac -- an untried vaccination in their arm when there is a viable alternative, which they have in place for the hundreds -- millions of other municipal employees, and thousands -- hundreds of thousands of other teachers throughout the state. The only option is simply a testing option. That's not unreasonable. But it's shocking the conscience that only New York City teachers, not the rest of the municipal employees, not the rest of the teachers in the state, only New York City teachers are required to do something against their beliefs.

THE COURT: Who else interfaces with such a large population that is unvaccinated as children under 12? What other city agencies or departments have that right of exposure to children?

MR. GELORMINO: Judge, I'm -- first of all, teachers -- I mean firemen and police officers are dealing with the public all the time. City clerks at different agencies are dealing with the public all the time. Teachers

throughout the rest of the state are dealing with children that are unvaccinated -- or children in the classroom also. And, furthermore, every study shows, even though we're having a little bump right now in children getting the virus, every single study shows that children are less susceptible to the virus and pass the virus along at a less rate than adults.

THE COURT: Okay.

MR. GELORMINO: Particularly people that young, children that young.

THE COURT: Okay. I have one other question on the point of irreparable harm. You know, I understand what the DOE is going to do if I don't grant an injunction and the State Court doesn't grant an injunction. It's going to immediately suspend these teachers.

Right, Ms. Minicucci? There is going to be an immediate suspension, right?

MS. MINICUCCI: That's correct. If teachers apply to one of the two options in the intervening time between September 27th and December 1st.

THE COURT: Okay. Is that the last word on the subject, putting aside the Court's -- in other words, what I'm used to with teachers is if the DOE takes some disciplinary action, there's this whole complicated grievance possess that the teachers are able to follow and

they go before arbitrators who very frequently overrule the DOE.

Is that available to them here?

MS. MINICUCCI: My understanding is that it is, and the arbitrator made the decision that we have annexed to our papers, but that there could be further decision to the extent there's more disagreement and one of the parties goes to impact arbitration.

THE COURT: So an arbitrator could say, for example, that while we understand the DOE suspending these people, we think they should only be suspended on a paid basis, not on unpaid basis. That could happen, couldn't it?

MS. MINICUCCI: I would -- I don't know what an arbitrator would do.

THE COURT: I know you would fight against it, but doesn't that arbitrator have the ability to impose that on the DOE under your collective bargaining agreement?

MS. MINICUCCI: I'm not a hundred percent sure. But I would also say that it's probably unlikely that the arbitrator will reverse himself.

THE COURT: Okay.

MR. GELORMINO: Judge, it's my brief that these are final decisions and they cannot be arbitrated. The medical and the religious exemptions are currently being arbitrated, and pretty much being rejected at hand. But

that's an argument for a different story.

But it's my understanding that going forward that once this is in place and these teachers get suspended, that there is no arbitration process available to them.

THE COURT: Okay.

MS. MINICUCCI: Your Honor, I would just like to say that the teachers who apply for the -- who are taking unpaid leave are not being suspended, they are on unpaid leave.

THE COURT: Right.

MS. MINICUCCI: There is --

THE COURT: Well, they're practically suspended, right? They can't go to school and teach?

MS. MINICUCCI: Oh, they cannot go to school unvaccinated and have contact with children, no.

THE COURT: Right. Isn't that like suspended?

MS. MINICUCCI: No. Because they are still maintaining their health insurance, and they could come back from the suspension -- or not the "suspension" -- now I'm saying it -- from the unpaid leave whenever they get vaccinated.

THE COURT: Okay.

MR. GELORMINO: Judge, semantics -- it's semantics.

THE COURT: No, I understand. I understand.

Look, she's being technical. I think technically they are not suspended. But practically, they can't do their job and they can't get paid, so...

MR. GELORMINO: And they can't get another job --

THE COURT: Unless they --

MR. GELORMINO: -- and they can't go to work either.

THE COURT: -- unless they give up this job.

MR. GELORMINO: Right.

THE COURT: Okay. Understood.

Anything else either side would like to say on this?

MR. GELORMINO: No, Judge. No, thank you.

MS. MINICUCCI: No, Your Honor.

THE COURT: All right. I'm going to reserve decision. We'll see what the State Court does. And if a decision is issued by the State Court, obviously, it's not binding on me, but it's something I, of course, will consider in reaching a final decision here.

Okay. Decision reserved. Thank you all for calling in.

MR. GELORMINO: Thank you very much, Your Honor, for hearing us.

THE COURT: We're adjourned.

(Matter concluded.)