

APPENDIX

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21-2343

Maniscalco v. N.Y.C. Dep't of Educ.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

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 15th day of October, two thousand twenty-one.

PRESENT: JOHN M. WALKER, JR.,
ROBERT D. SACK,
SUSAN L. CARNEY,
Circuit Judges.

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, David
Chokshi, In His Official Capacity As The Commissioner of The Department
of Health and Mental Hygiene, No. 21-2343
Defendants-Appellees.

For Appellants:

LOUIS M. GELORMINO (Mark J.
Fonte, *on the brief*), F & G Legal Group,
Staten Island, NY.

For Appellees:

SUSAN PAULSON (Richard Dearing,
Devin Slack, *on the brief*), for Georgia M.
Pestana, Corporation Counsel of the City
of New York, New York, NY.

Appeal from an order of the United States District Court for the Eastern District of New York (Cogan, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that, for substantially the reasons stated in the district court's thoughtful memorandum decision of September 23, 2021, the order entered on that date, in which the district court denied plaintiffs' motion for a preliminary injunction, is **AFFIRMED**. The case is remanded and shall proceed as the district court deems necessary or advisable.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of the Court

Second Circuit Court Stamp
/s/ Catherine O'Hagan Wolfe

A True Copy

Catherine O'Hagan Wolfe, Clerk of the Court

United States Court of Appeals,
Second Circuit Court Stamp
/s/ Catherine O'Hagan Wolfe

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,

Plaintiffs,

- 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.

MEMORANDUM
DECISION AND
ORDER

21-cv-5055 (BMC)

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 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

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*.

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 Supreme Court, [the Second] Circuit, and the other Circuits addressing the issue have all indicated that

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

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

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.

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.

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 “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

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>.

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 the United States alone, over 380 million doses of all three vaccines have been

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>.

administered.⁷ There is evidence that vaccines provide more robust protection than antibodies from a previous COVID-19 infection⁸ 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.

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 MORBIDITY 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 MORBIDITY MORTAL WEEKLY REP., 1306-11 <http://dx.doi.org/10.15585/mmwr.mm7037a7>.

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 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.

Digitally signed
by Brian M. Cogan

U.S.D.J.

Dated: Brooklyn, New York
September 23, 2021

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF NEW YORK

3 RACHEL MANISCALCO, 21-CV-5055
4 individually, and for all (BMC)
5 others similarly situated,

6 Plaintiff,

7 - against -

8 New York City Department of
9 Education, Meisha Porter,
10 Schools Chancellor of The
11 New York City Department of
12 Education, in Her Official
13 Capacity, The City of New
14 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.

United States
Courthouse
Brooklyn,
New York

Wednesday,
September
22, 2021
2:30 p.m.

15x

16 TRANSCRIPT OF CIVIL CAUSE FOR ORAL
ARGUMENT BEFORE THE HONORABLE
BRIAN M. COGAN

17 UNITED STATES DISTRICT JUDGE

18

19 APPEARANCES:

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8 Proceedings recorded by Stenographic Machine
9 shorthand, transcript produced by Computer-
10 Assisted Transcription.

11

12 PROCEEDINGS

13

14 (All participants appearing via video
15 conference.)

16 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

17 Plaintiffs, Louis Gelormino on behalf of the
18 Gallucci Legal

Group. Good afternoon, again.

19 THE COURT: Good afternoon.

20 MS. MINICUCCI: For the defendants, Lori
21 Minicucci

with procuracy counsel.

22 THE COURT: All right. Good afternoon.

23 Okay. This is argument on Plaintiffs' Motion for

24 a Preliminary Injunction. The first thing I want
to ask

25 about is, does anybody know what happened in
state court

1 this morning?

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

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

12 MS. MINICUCCI: I believe that the TRO
13 expires
14 today.

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

19 Are you guessing --

20 MS. MINICUCCI: No, Your Honor --

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

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

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

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

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

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

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

14 MR. GELORMINO: No, Judge. I can't say that
I am
15 requesting something more that is being
requested in the
16 state court. I've reviewed the state court's --
the request

17 from the municipal credit people, and I believe
they're
18 requesting similar relief as we are.

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

22 But is it Mini-chuchi (phonetic)?

23 MS. MINICUCCI: Minicucci.

24 THE COURT: Minicucci, okay.

25 Do you see any reason why if the plaintiffs

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

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

8 THE COURT: Okay.

9 MS. MINICUCCI: I mean –

10 THE COURT: I just want to make sure that

11 Mr. Gelormino -- Gelor –

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

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

18 MS. MINICUCCI: As far as I know, Your
19 Honor,
20 they're asking for an injunction for -- against
21 the order of
22 the DOHMH from September 15. And to the
23 extent that the
24 State Court does enjoin that order, then that
25 would be –

16 would be the proceeding, I guess, then -- yeah.

17 THE COURT: Okay. Now, let me ask
something else.

18 In that proceeding -- that's an Article 78 State
Court,
19 right?

20 MS. MINICUCCI: That's correct.

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

24 MS. MINICUCCI: I believe there is a

25 First Amendment claim raised.

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

2 MS. MINICUCCI: That's correct.

3 THE COURT: Okay. Got it.

4 Okay. So my next question is -- and let's get

5 into the substance, now that I understand the
6 procedural

7 posture of this case in relation to the state
8 court case.

9 Mr. Gelormino, I'm not really seeing why any
10 kind of

11 fundamental liberty or property interest is
12 even at issue

13 here. You know, the way you've written your
14 brief, it looks

15 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,

16 but like something that's enumerated in the
constitution, or
17 so well established by tradition that it's as if it
were
18 enumerated in the constitution. And while I
agree with you
19 that there's some kind of abstract right to
pursue a
20 profession and have a job, I'm not sure it rises
to the
21 level of substantive due process.

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

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

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

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

14 Let me ask Ms. Minicucci. Ms. Minicucci, if the
15 States or the City cannot unilaterally suspend
a license of

16 a doctor, cannot say, We're pulling your license,
why can
17 they effectively do that for a teacher in this
instance who
18 doesn't get vaccinated?

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

22 THE COURT: There is.

23 MS. MINICUCCI: -- in the State Court
proceeding.
24 But no one is talking about pulling anybody's
25 teaching license. We have set forth a
vaccination mandate

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

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

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

16 THE COURT: Okay.

17 MR. GELORMINO: Judge, may I quickly –

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

20 MR. GELORMINO: All right.

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

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

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

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

4 THE COURT: Okay.

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

7 THE COURT: Okay.

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

11 THE COURT: Okay. I get it.

12 All right. Go ahead, Mr. Gelormino.

13 MR. GELORMINO: Thank you, Your Honor.

14 Judge, effectively -- what this mandate

15 effectively does, the teachers -- and I'm using
the word

16 "teachers" now for all the Department of
Education
17 employees -- they're not electing to do
anything, all right,
18 the Government, the mayor, the DOE they're
going to suspend
19 them. None of these teachers want to be
suspended. So to
20 use the word "elect" is misused. The word
"elect" is
21 misused here.

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

25 MR. GELORMINO: No, I get that.

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

2 MR. GELORMINO: I get that.

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

16 private school.

17 Furthermore, and I'd like to make this last
18 point,
19 Judge, about this. The teaching profession,
20 like I said,
21 requires advanced degrees, but to deprive them
22 of something,
23 like I said in the last days of the year, it seems
24 rather –
25 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.

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

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

9 MR. GELORMINO: Right.

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

14 MR. GELORMINO: Right.

15 THE COURT: But I understand what you're
saying,

16 it's late in the year to do that.

17 MR. GELORMINO: But they can't go anywhere
for the

18 last year, unless they want to give up their
DOE job, right.

19 THE COURT: Okay.

20 Another question I want to ask you. I think

21 you've acknowledged that the test basically for
a

22 substantive due process violation includes a
finding that

23 there's a shot to the conscience, right? It's
something

24 that is absolutely intolerable, no rational
person would

25 have it. Let's just assume for the sake of
argument that I

1 have some sympathy for the teachers' position
that, you
2 know, We really don't know what the effects of
the vaccines
3 are going to be in 10 or 20 years, and there has
not been
4 enough data, and that's a rational position for
them to
5 take. Let assume that I find that to be the
case.
6 Is it really so shocking to the conscience in
7 light of the evidence the other way, not on long-
term
8 consequences, but on short-term protection
that the City –
9 that the DOE is making? I mean, isn't it at
least rational
10 to the DOE to say, On balance, you know, while
some people
11 might not want to have a vaccination, we really
think that
12 the fact of the matter is to protect people right
now, this
13 is the best way to do it. Does that shock the
conscience
14 that they are balancing it differently than your
clients?
15 MR. GELORMINO: Judge, I have two
responses to

16 that question. First, the vaccinated and the
unvaccinated,
17 it's been equally shown that the vaccinated and
the
18 unvaccinated can equally spread the virus.

19 THE COURT: Got it.

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

23 The second thing that is irrational is, I

24 understand there's some history of vaccination
in this
25 country. But most of the vaccinations, if not all
of the

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

8 THE COURT: But if you're right, if you're right
9 that, you know, your argument is strong that
there is no
10 reliable data, people should not get this, is it
still
11 rising to the level -- I tell you what would shock
my
12 conscience. If the DOE had said, We will not
admit anyone
13 to school that has had a vaccination for this
disease
14 because we, at the DOE, believe that the only
way to protect
15 students is to cull those vulnerable people who
haven't been

16 vaccinated and are getting really sick, you
know, let them
17 get sick. Now, that would shock my
conscience. I am not
18 sure the converse is true.

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

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

25 MR. GELORMINO: No, I --

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

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

16 teachers in the state, only New York City
17 teachers are
18 required to do something against their beliefs.

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

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

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

8 THE COURT: Okay.

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

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

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

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

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

1 they go before arbitrators who very frequently
overrule the
2 DOE.

3 Is that available to them here?

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

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

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

15 THE COURT: I know you would fight against
it, but

16 doesn't that arbitrator have the ability to
impose that on
17 the DOE under your collective bargaining
agreement?
18 MS. MINICUCCI: I'm not a hundred percent
sure.
19 But I would also say that it's probably unlikely
that the
20 arbitrator will reverse himself.

21 THE COURT: Okay.

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

1 that's an argument for a different story.

2 But it's my understanding that going forward
that

3 once this is in place and these teachers get
suspended, that

4 there is no arbitration process available to
them.

5 THE COURT: Okay.

6 MS. MINICUCCI: Your Honor, I would just
like to

7 say that the teachers who apply for the -- who
are taking

8 unpaid leave are not being suspended, they are
on unpaid

9 leave.

10 THE COURT: Right.

11 MS. MINICUCCI: There is --

12 THE COURT: Well, they're practically
suspended,

13 right? They can't go to school and teach?

14 MS. MINICUCCI: Oh, they cannot go to school

15 unvaccinated and have contact with children,
no.

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

17 MS. MINICUCCI: No. Because they are still

18 maintaining their health insurance, and they
could come back

19 from the suspension -- or not the "suspension" -
- now I'm

20 saying it -- from the unpaid leave whenever
they get

21 vaccinated.

22 THE COURT: Okay.

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

24 semantics.

25 THE COURT: No, I understand. I understand.

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

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

5 THE COURT: Unless they --

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

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

9 MR. GELORMINO: Right.

10 THE COURT: Okay. Understood.

11 Anything else either side would like to say on
12 this?

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

14 MS. MINICUCCI: No, Your Honor.

15 THE COURT: All right. I'm going to reserve

16 decision. We'll see what the State Court
does. And if a
17 decision is issued by the State Court, obviously,
it's not
18 binding on me, but it's something I, of course,
will
19 consider in reaching a final decision here.

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

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

24 THE COURT: We're adjourned.

25 (Matter concluded.)

**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

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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

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- 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:

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- 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 /s/ Dave A. Chokshi

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

E-1

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
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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.

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Sincerely,

/s/ Martin F. Scheinman

Martin F. Scheinman, Esq.
Arbitrator

In the Matter of the Arbitration

between

BOARD OF EDUCATION OF THE
CITY SCHOOL DISTRICT OF THE
CITY OF NEW YORK

“Department”

- and -

UNITED FEDERATION OF
TEACHERS, LOCAL 2, AFT,
AFL-CIO

“Union”

Re: Impact
Bargaining

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 directed the parties to draft language reflecting those rulings. Even though I am very familiar with the language of the current

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.

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:
- o Within the isolation period after a COVID-19 infection;
 - o Within ninety (90) days of monoclonal antibody treatment of COVID-19;
 - o 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;
 - o 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 alltimes relevant, herein.

September 10, 2021

/s/ Martin F. Scheinman

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 /s/ Martin F. Scheinman
 Martin F. Scheinman, Esq.
 Arbitrator

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Attorneys for Plaintiffs and the Class

**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,

Plaintiffs,

- 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.

Case No.
1:21-CV-05055

**NOTICE OF
APPEAL**

Notice is hereby given that Plaintiffs Rachel Maniscalco, Evelyn Arancio, Diana Salomon, and Corinne Lynch hereby appeal to the United States Court of Appeals for the Second Circuit from the Memorandum Decision and Order (Dkt. No. 16) entered on September 23, 2021, and all opinions and orders that merge therein

Dated: New York, New York
September 23, 2021

s/ Mark J. Fonte

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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,

Plaintiffs,

- against -

THE NEW YORK CITY
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official capacity, DEPARTMENT OF
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HYGIENE, and DAVE 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 (“Maniscalco”), 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. Alarming, 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

Plaintiff

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 bringing 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 same 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 related 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

s/ Mark J. Fonte

Mark J. Fonte

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