STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

F.F. on behalf of her minor children Y.F., E.F., Y.F., et al.,

Plaintiffs,

-against-

STATE OF NEW YORK; ANDREW CUOMO, GOVERNOR; LETITIA JAMES, ATTORNEY GENERAL,

Defendants.

DECISION & ORDER

Index # 4108-19

(Albany County Supreme Court, Part 1)

(Justice L. Michael Mackey, Presiding)

APPEARANCES:

SUSSMAN & ASSOCIATES
Attorneys for Plaintiffs
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Attorney for Defendants
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Mackey, J.:

This matter came before the undersigned as Acting Part 1 Justice on July 10, 2019 for consideration of plaintiffs' application for a temporary restraining order ("TRO") in a plenary action challenging the constitutionality of a recently-enacted amendment to N.Y. Public Health

Law §2164. This statute requires parents to have their children vaccinated against certain diseases and requires the children to demonstrate evidence of such immunization in order to attend most schools. School officials are prohibited from permitting any child without proof of required immunization to attend school, except where a physician certifies that such immunization may be detrimental to a child's health. Plaintiffs allege that they hold bona fide and sincerely-held religious beliefs against vaccinating their children, which previously entitled them to seek exemption from the otherwise mandatory obligation to demonstrate immunization of their children as a condition to admission to and attendance at schools. The challenged enactment, which was passed by the Legislature and approved by the Governor on June 13, 2019, repealed Public Health Law §2164 (9), which set forth the "religious exemption" from the obligation of schools to require students to demonstrate proof of immunization. The statute went into effect upon approval of the Governor.

On July 10, 2019, plaintiffs commenced an action seeking an order (1) declaring that the statute violates provisions of the federal and state constitutions and (2) "temporarily, preliminarily and permanently enjoin[ing] the repeal legislation." Thus, plaintiffs seek the same relief in the application for TRO as they seek in the action. The application for TRO was considered immediately after the action was filed and before joinder of issue (or service of initiatory papers). The Court heard oral argument on July 10, 2019. Defendants opposed the TRO request at oral argument and filed papers in opposition. Defendants' opposition includes the transcript of proceedings in Mermigis v. Cuomo (Nassau County Supreme Court, Index No. 608729/2019, 6/28/2019) in which a TRO was denied to the plaintiff whose claim for relief and supporting arguments were similar to those before this Court. The Court has considered the

arguments of counsel, both at argument and in their papers. For reasons set forth below, plaintiffs' application for TRO is **DENIED**.

"A temporary restraining order may be granted pending a hearing for preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had." CPLR 6301. Pursuant to CPLR 6313 (a), a temporary restraining order may not be granted against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties. In order to prevail in obtaining provisional relief in the form of a TRO, plaintiffs must demonstrate irreparable injury absent the grant of the TRO, a likelihood of success on the merits, and that the balance of equities favors plaintiffs and outweighs the public interest. *See, Grumet v. Cuomo*, 162 Misc2d 913, 929 (Albany County Supreme Court 1994) *citing Kuttner v. Cuomo*, 147 AD2d 215 (3d Dep't 1989) aff'd 75 NY2d 596 (1990) (other citations omitted). A TRO should be issued sparingly, especially when the preliminary relief sought by the movant is identical to the ultimate relief demanded. *Id. citing Russian Church of Our Lady of Kazan v. Dunkel*, 34 AD2d 799 (2d Dep't 1970).

Plaintiffs have not shown a likelihood of success on the merits sufficient to sustain their heavy burden at this stage of the newly-filed action. The complaint alleges that the challenged statute violates the federal and state constitutions. The parties will be afforded an opportunity to brief their arguments concerning the constitutionality of the repeal of the religious exemption under the United State Constitution and New York State Constitution, allowing for due deliberation of their claims. However, other courts have stated that "New York could constitutionally require that all children be vaccinated in order to attend public school." *Phillips*

v. City of New York, 775 F3d 538 (2d Cir.) cert. den. 136 S.Ct. 104 (2015); *Jacobson v. Commonwealth of Massachusetts*, 197 US 11 (1905); *Fosmire v. Nicoleau*, 75 NY2d 218, 226 (1990) ("There is no question that the State can adopt compulsory vaccination laws to protect the public from the spread of disease"). The contours or claimed inapplicability of this precedent may be argued as this action proceeds, but longstanding decisional law portends insufficient likelihood of success on the merits presently. The precedent suggesting that defendants may constitutionally require vaccination as a condition to attend school also militates in favor of finding that defendants may not lawfully be restrained under CPLR 6313 (a) because the duties performed under the presumptively valid statute by public officers constitute statutory, not ultra vires, duties.

Plaintiffs have not demonstrated that a balance of equities favors them and outweighs the public interest. The new law's stated purpose is to protect the public, including immunocompromised children who cannot be immunized for health reasons, amid an outbreak of contagious disease. Though plaintiffs allege substantial potential harm, they have not met the stringent burden required to preliminarily restrain the state from exercising its powers to protect public health through legislative enactments.

The foregoing reasons require denial of plaintiffs' TRO application. While the irreparable nature of the alleged legal harm is debated by the parties in their submissions, like Nassau County Supreme Court, this Court finds that early consideration of the merits of the application for preliminary injunction may ameliorate the claimed harm, particularly when at least some of the children affected by the statutory amendment are not attending school during the summer recess. The Court notes that plaintiffs must conform with the filing and service requirements of

the CPLR for commencement of an action and must file a Request for Judicial Intervention in order to obtain assignment of an IAS justice.

For all the foregoing reasons, plaintiffs' request for TRO is **DENIED**, without costs. The original decision/order is being sent to the Attorney General for filing and prompt service upon plaintiffs' counsel.

SO ORDERED.

ENTER.

Dated: Albany, New York
July 12, 2019

L. MICHAEL MACKEY
Supreme Court Justice

Papers Considered:

1. Plaintiff's Complaint: Plaintiffs' Brief in Support of TRO; Affirmation of Michael Sussman, Esq. with Ex. 1-10; Affidavit in Support of TRO by William (Zev) Epstein; Affidavit of Mary S. Holland, Esq., all filed July 10, 2019;
2. Affirmation in Opposition of Helena Lynch, Esq. with Ex. 1-2; Defendants' Memorandum of Law in Opposition, all filed July 11, 2019.