UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

V.D., individually and on behalf of J.M.D. and N.M.D., minor children; T.S., individually and on behalf of C.S., a minor child; S.K., individually and on behalf of A.K., a minor child; P.E.T. and H.T., individually and on behalf of D.T., a minor child; and B.C., individually and on behalf of D.C., a minor child,

Plaintiffs,

vs.

STATE OF NEW YORK; ANDREW M. CUOMO, GOVERNOR (in his official capacity); LETITIA JAMES, ATTORNEY GENERAL (in her official capacity); NEW YORK STATE EDUCATION DEPARTMENT; MARYELLEN ELIA, COMMISSIONER OF NEW YORK STATE EDUCATION DEPARTMENT (in her official capacity); and ELIZABETH BERLIN, EXECUTIVE DEPUTY COMMISSIONER OF NEW YORK STATE EDUCATION DEPARTMENT (in her official capacity),

Defendants.

Case No. 2:19-cv-4306-ARR-RML

PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

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PLAINTIFFS' REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Plaintiffs and their minor children, by and through counsel, respectfully submit this Reply Memorandum of Law in Further Support of their Motion for a Preliminary Injunction asking the Court to stay the implementation of N.Y. Public Health Law § 2164 ("Section 2164") that will otherwise exclude from students with disabilities from school notwithstanding their rights under federal law pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq*. ("IDEA") and in violation of the Supremacy Clause of the United State Constitution (Art. VI, Cl. 2) (the "Supremacy Clause").

PRELIMINARY STATEMENT

Defendants' Opposition fails to overcome Plaintiffs' clear showing that they are entitled to a preliminary injunction. As Plaintiffs have demonstrated herein and in their moving papers, Section 2164 as amended cannot be implemented based on the IDEA and U.S. Department of Education guidance, which is entitled to this Court's deference. Under the guidance and the IDEA, it is clear that because Section 2164 as amended forces schools and districts to impermissibly permanently bar students with disabilities from accessing FAPE in the least restrictive environment without notice, due process, and other procedural protections which are required by IDEA it is preempted by IDEA. Moreover, Plaintiffs have shown that an automatic "stay put," keeping them in their current placements is appropriate while the validity of Section 2164 as amended and implemented is litigated. Additionally, the homeschooling option proposed by Defendants strips students of their rights under their current IEPs because the State has chosen to disregard IDEA on the basis of an unsubstantiated public health "crisis" with no notice or procedural protections. Defendants fail to adequately provide any support, although it is within their ken, that the schools in this State have the ability or a plan in place to provide adequate

homeschooling services that would rise to the level required by IDEA. Even if the State could divert or had a plan in place to divert these children to homeschooling, they have not demonstrated that they can do so within the bounds of IDEA by September. Plaintiffs also have shown that they will suffer irreparable harm to children and their families should an injunction not issue and Defendants have failed to address Plaintiffs' irreparable harm. Finally, Plaintiffs have demonstrated that Defendants' have no evidence of any public interest let alone one outweighing the rights of children with disabilities to attend school and that the balance of hardships favors Plaintiffs.

In short, Plaintiffs have clearly met and exceeded the standards to grant stay put which is appropriate where, as here, there is a systemic violation of IDEA, or to grant a preliminary injunction and ask the Court to preserve the *status quo*, *i.e.*, Section 2164 prior to the June 13, 2019 amendments, ordering that under the IDEA, all disabled children with rights under IDEA must be permitted to attend school during the pendency of this litigation and, further, compelling Defendants to issue appropriate notices to all schools and districts clearly stating that children with IEPs can attend school without regard to Section 2164 as amended.

STATEMENT OF FACTS

In the interest of avoiding unnecessary repetition, Plaintiffs respectfully refer the Court to their Statement of Facts in their moving memorandum of law and will address the many misstatements of facts, admissions and omissions in Defendants' Opposition, which compel a ruling in Plaintiffs' favor and the issuance of their requested preliminary injunctive relief.

A. Defendants' Admissions and Concessions Support Issuance of a Preliminary Injunction

Defendants' Opposition, dated August 13, 2019 ("Defs.' Opp.") makes numerous admissions that support Plaintiffs' arguments in favor of the issuance of a preliminary injunction, including admitting that:

- The State is obligated to comply with the requirements of IDEA. *Id.*, at 8.
- Section 2164 as amended is directed and related to education, including, for example, that Section 2164 as amended results in a change in placement for all students, including those protected by IDEA. *Id*., at 29.
- Section 2164 as amended does not contain any requirement of notice and due process and went into effect immediately. *Id*., at 6-7.
- A systemic violation of IDEA exists, as indicated that Defendants' admission that:
    - Section 2164 as amended requires school districts – with no discretion – and are obligated to change children's placement regardless of their agreed-upon placements in their IEPs and the notice, due process and other requirements of IDEA. *Id*., at 25
    - Administrative hearing processes would be overwhelmed if all affected IEP students filed for due process. *Id*., at 29-30
    - Requiring students to file for due process would be futile because administrative hearing officers lack authority to override state law. *Id*., at 29.

Moreover, despite the fact that Defendants' are the purported experts on education and the purported health crisis in New York, which allegedly caused the repeal of Section 2164, Defendants' failed to respond to the cognizable evidence referenced in Plaintiffs' motion to the contrary, thus conceding that:

- There is no evidence that transmission of measles occurred in schools as a result of children with religious exemptions let alone in special education students with religious exemptions. Plaintiffs' Memorandum of Law in Support of Motion for a Preliminary Injunction dated August 5, 2019 ("Pl. Mem."), at 4.

- The vast majority of cases of measles were not in school aged children. *See* https://www1.nyc.gov/site/doh/health/health-topics/measles.page, last visited August 13, 2019; http://rocklandgov.com/departments/health/measles-information/, last visited August 13, 2019.

- The CDC materials referenced by Plaintiffs indicate that the relevant measles outbreak underlying the repeal of Section 2164 relates to international travelers, not students and particularly not students with disabilities. https://www.cdc.gov/measles/cases-outbreaks.html, last visited August 13, 2019. *Id*.

- Prior to June 13, 2019, New York State had in place adequate means of controlling outbreaks, such as temporary school exclusion and quarantine. *See, e.g.*, 10 NYCRR § 66-1.10 (temporary exclusion); N.Y. Public Health Law § 2100 (isolation and quarantine). (Pl. Mem., at 5-7) or that New York State failed to even attempt to implement those measures to control the spread of measles, instead allowing the disease to spread. *Id.*

- Rather than focusing on students with religious exemptions, the State is, in fact, able to take less restrictive measures to focus on the higher percentage of unvaccinated/partially vaccinated students without either religious or medical exemptions. *See, e.g.*, Dkt. No. 14-4 (Governor's signing statement on Section 2164, noting that through outreach "more than 49,000 doses of the MMR vaccine have been administered" in three counties since Fall 2018).

In sharp contrast, Defendants fail to respond to or submit any cognizable evidence in response to Plaintiffs' evidence that by June 2019 , when the law was passed and signed, the measles outbreak had substantially receded. In fact, as demonstrated by Plaintiffs' initial submission and not denied or even referenced by Defendants in the Opposition, there was no measles crisis at the time Section 2164, as amended, was passed and signed into law. Pl. Mem., at 5. Defendants also do not dispute that the bills lingered without action in the Legislature for months, the measles outbreaks had dwindled to almost nothing by June 2019 (for example, twenty-two cases in New York City in June, six in July, and none thus far in August (https://www1.nyc.gov/site/doh/health/health-topics/measles.page, last visited August 13, 2019). Nor do Defendants dispute or submit any cognizable evidence that any allegedly "pressing public health" concerns had dissipated by June 13, 2019, when the Section 2164 was officially amended, or that when measles cases were at their highest

earlier in 2019, the proposed bills amending Section 2164 went nowhere in the Legislature.[1] Moreover, Defendants do not dispute that neither the New York State Department of Health nor any county health department utilized available and legal means of controlling any outbreak, including quarantine and isolation, to stop the virus from spreading and thus allowed disease to spread, creating more cases where they could have prevented them. This failure to act again is indicative of the lack of a health crisis, asserted by Defendants but not supported in their Opposition.

B. The Blog Declaration Demonstrates That the Religious Exemption Was Not a Public Health Threat, Undermining Defendants' Argument Regarding the State's Interest

Moreover, Defendants offer the Declaration of Dr. Debra Blog (Dkt. 15) but it too provides no evidentiary support for proposition that that New York State has any legitimate state interest in **permanently** excluding children with disabilities protected by IDEA from school, regardless of their vaccination status. The Blog Declaration fails to analyze the data necessary to reach any conclusions about whether students with IDEA protection and religious exemptions create any sort of health risk, particularly with respect to measles, the focus of her declaration. As a result, the Blog Declaration simply cannot overcome the evidence submitted by Plaintiffs that these children are no risk to schools or the community.

The Blog Declaration does not provide an iota of data concerning students in New York with disabilities protected by IDEA who also have and religious exemptions nor does it provide any analysis of how that (heretofore unknown) percentage of children might somehow cause a risk to others. Rather than provide a detailed analysis based on the actual number of children with religious exemptions who are protected under IDEA in comparison to the population, Blog

[1] As further evidence that the measles cases were a pretext, similar exemption repeal bills have been introduced but failed in previous years when no outbreaks existed. *See, e.g.,* https://www.nysenate.gov/legislation/bills/2015/s6017 (2015-16), https://www.nysenate.gov/legislation/bills/2017/S52 (2017-18), each site last visited August 13, 2019.

concludes – based on no discernable evidence – that these children have caused low vaccination rates or are driving measles outbreaks in New York State. Blog Dec. ¶ 15.

Blog's Declaration actually shows the opposite. Her data show that only 0.795% – less than 1% – of New York State students had religious exemptions in the 2017-18 school year, the most recent data she provided. Blog Dec. ¶ 15. The number of IDEA protected students are an even smaller subset of this already tiny population but she fails to provide that information. She goes on to explain that it is necessary vaccinate 95% of children to "optimize protection" against vaccine targeted inflections but admits that the New York State overall MMR vaccination rate, for example, is 98% among schoolchildren. Blog Dec. ¶¶ 20-21. With only a small percentage of religious exemptions, 0.795% based on her data, she fails to explain how those with such exemptions impact are impacting this already protective level (by her own admission). Nonetheless, Dr. Blog concludes – despite her own evidence to the contrary and lack of evidence generally – that "[a]s a result of non-medical vaccination exemptions, many communities across New York have low rates of vaccination." Blog Dec. ¶ 15.

Even in counties where she claims religious exemption rates are high, rates do not seem to be having an impact on the purportedly protective level she has identified, particularly in light of others who are unvaccinated but do not have any exemption. For example, in Rockland County, where she states that the MMR vaccination rate is 94%, the religious exemption rate is only 2.2% and the medical exemption rate is only 0.1% - neither of which drops the rate below 95%. Dr. Blog makes no attempt to explain the other 3.7% of unvaccinated students who were not religiously or medically exempt, and which cause the County's rate to drop to 94%. Blog Dec. ¶ 17.

Dr. Blog's attempt to obfuscate that religious exemptions are not actually driving down vaccination rates across the State by discussing what appear to be instances of non-vaccination

unrelated to exemptions.[2] For example, she points to a zip code in Orange County with a 53.8% MMR immunization rate for children 4-18. Blog Dec. ¶ 18. She fails to provide the religious exemption rate for that zip code but admits that the overall rate of religious exemptions for students in Orange County is only 1.6% (with a medical exemption rate of 0.1% to 0.2%). Blog Dec. ¶ 19. She does not offer any explanation for this enormous 52% gap between exempted and unvaccinated but without exemption students. There is no evidence to suggest that those rates are low because of religious exemptions (in fact Dr. Blog's declaration suggests the opposite) and, particularly, no evidence of low rates due to IEP students with exemptions.

With no citation to any evidence, Dr. Blog claims that "many" measles cases are among school aged children (Blog Dec. ¶ 12) but disingenuously omits that the vast majority of measles cases have not been in children enrolled in K-12 schools. For example, New York City and Rockland County had the most reported measles cases during fall 2018 through spring 2019. Yet in New York City, 77.8% of cases were in individuals other than 5 though 17 year-olds, and in Rockland County, 73.8% of cases occurred in individuals other than students ages 7 through 18 (even including 4-6 year olds in Rockland County, over 60% of cases are attributable to other age groups).[3] *See* https://www1.nyc.gov/site/doh/health/health-topics/measles.page, last visited August 13, 2019; http://rocklandgov.com/departments/health/measles-information/, last visited

[2] Dr. Blog also fails to acknowledge that some children with religious exemptions have been partially vaccinated, and thus fails to include in vaccination rates children with religious exemptions who may have received one or more doses of MMR vaccine (or any other vaccine). She further recognizes an issue of underreporting of vaccinations inherent in the system upon which she relies. Blog Dec., at fn 2.

[3] Dr. Blog provides almost no support and not a single citation to a scientific publication or text to support her statements concerning the measles and measles transmission. The 1 or 2 in 1,000 death rate claimed by Dr. Blog (Blog Dec. ¶ 7) is likely incorrect and exaggerated based on an underreporting of measles cases when the disease was still endemic and considered a common childhood illness. https://www.cdc.gov/measles/downloads/measlesdataandstatsslideset.pdf .Critically, not only has no one died of measles during the current spate of measles cases, the last confirmed measles death in the United States was in 2015, in a vaccinated adult, and prior to that the last confirmed death prior to that was more than a decade earlier. *See* https://www.forbes.com/sites/tarahaelle/2015/07/02/first-u-s-measles-death-in-more-than-a-decade/#a7db99ea196e, last visited August 13, 2019.

August 13, 2019. Finally, Dr. Blog fails to address, as raised in Plaintiffs' moving memorandum, that New York State had in place prior to June 13, 2019, adequate measures to protect people in the event of an outbreak, including temporary exclusion from school and quarantine. Nor does she explain why these measures were never put into place to stop the spread of measles in New York.

C. California Law Recognizes That Children Protected by IDEA Must Be Exempt From Vaccination Requirements

Moreover, in a 180-degree turnabout and apparently wanting to avoid a comparison with the IEP exception under the California law, where New York's law comes up woefully short, Defendants assert that "New York State amended PHL § 2164 based on its own reasoning and public health crisis, not those of the California legislature." Defs.' Opp., at 24. However, Defendants make this statement without any affidavit, declaration or certification, and it directly conflicts with statements by both the Legislature and the Governor.

In the Senate justification for the bill, the sponsor stated:

> For guidance in dealing with this epidemic**, we need only look to California which repealed all non-medical exemptions** to vaccination requirements under their state law . . . .

https://www.nysenate.gov/legislation/bills/2019/s2994; *see also* Mack Rosenberg Dec. Ex. 1 (emphasis added).

In a June 2019 interview, the Governor similarly stated:

> I'm not going to wager anything with this Supreme Court, but **California passed a bill that we basically modeled in our bill**. The bill was challenged, the bill was upheld. So I feel good about the bill that we have signed.

https://www.lohud.com/story/news/politics/elections/2019/07/11/dozens-file-lawsuit-repeal-new-yorks-vaccination-mandate/1703016001/; *see also* Mack Rosenberg Dec. Ex. 5 (emphasis added). To now suggest that the California bill was ***not*** a model for the New York bill strains credulity. That the law is intended to allow children to attend school is apparent from the legislative history:

> Special education students must have access to services. As previously discussed, under federal and state law disabled children are guaranteed the right to a free, appropriate public education, including [any] necessary services for a child to benefit from his or her education. **An amendment should be taken to clarify that students with an IEP will still have access to special education related services as directed by their IEP.** http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150617_130902_asm_comm.html, at 29, *see* Mack Rosenberg Dec. Ex. 6 (emphasis supplied).

Post-implementation FAQs issued by the state, also are clear:

> Students who have an individualized education program (IEP) should continue to receive all necessary services identified in their IEP regardless of their vaccination status. However, parents or guardians must continue to provide immunization records for these students to their schools, and schools must continue to maintain and report records of immunizations that have been received for these students.

Reply Declaration of Kimberly Mack Rosenberg, dated August 15, 2019 ("Mack Rosenberg Reply Dec."), at Ex. 1.

Of course, the California law upon which the amendments to Section 2164 were purportedly based, bears no resemblance to New York's law and Section 2164 suffers by comparison. California law limiting personal belief exemptions (which were the non-medical exemptions available under California law) not only specifically excluded children with IEPs from the state's vaccination mandates (Cal. Health & Saf. Code § 120335(h)), it provided a number of other safeguards absent from New York's hastily enacted law:

- The California law was signed on June 30, 2015 but did not exclude children until July 1, 2016 (https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160SB277; https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201520160SB277) (effective 1/1/16, but children not excluded until 7/1/16);

- The law applied only to vaccines required under California law at the time; personal belief exemptions remain available for new vaccines added to the state's schedule (Cal. Health & Safety Code § 120338);

- Implementation was phased in for children at key checkpoint years: preschool, kindergarten, and 7th grade entry. Children maintain personal belief exemptions until they reached a checkpoint year, and, as a result, some children still have PBEs (Cal. Health & Safety Code § 120335(g));

- Even after the law was signed in June 2015, parents still could exercise a new personal belief exemption for their child(ren) before January 1, 2016 (Cal. Health & Safety Code § 120335(g));
- The medical exemption was broadened (Cal. Health & Safety Code § 120370(a))

Defendants freely admit that the New York law does not contain a carve out for IEP students. As Plaintiffs have repeatedly pointed out, the lack of such an exception is the very problem of which Plaintiffs complain.

D. Defendants' Representations Regarding Homeschooling

Defendants claim that there need not be a carve out for IEP students under Section 2164 as amended because parents can simply homeschool and obtain FAPE or secure their rights under IDEA. Once again, even though Defendants are the experts in education, this argument is not supported by any certification, declaration or affidavit explaining how homeschooling would comply with IDEA and meet the individualized educational and related service needs of students recognized in their agreed-upon IEPs with their districts. Moreover, these bald allegations with no support simply cannot overcome the Declarations submitted on Plaintiffs' behalf, indicating that they are not choosing to homeschool their children with disabilities, who have been deprived of FAPE, their agreed upon placements and IEPs; and that they provided not notice or right to due process as required by the IDEA. Nor have Defendants overcome or submitted any cognizable evidence in response to Plaintiffs' Declarations that Plaintiffs are not special educators and do not have the skills, training, and experience to educate their children with disabilities pursuant to their IEPs (or even an IESP, an individualized education services program). T.S. Dec., at ¶ 16; P.E.T. Dec., at ¶ 12; S.K. Dec., at ¶ 14; B.C. Dec., at ¶ 12. Nor do Defendants respond to the fact Plaintiffs do not have the money or ability to hire the required special education teachers/providers of related services or that at home, they simply cannot provide their children with the needed socialization

or communication opportunities that they are required to receive under their IEPs pursuant to IDEA. Even if districts were able provide related services like speech and occupational therapy, many – if not most – students with IEPs would lose the benefits of a special education teacher and other classroom supports which make up the majority of their hours at school and thus the majority of their IEP. As a result, in no way is homeschooling in a situation like those faced by families here any sort of equitable equivalent to what they would receive in school.

While Defendants claim that the State and districts will provide students with disabilities equivalent services to what they would receive in school, Defendants make this claim without submitting any evidence, including fact affidavits or declarations, to support this contention. Defendants SED and its employees are educational experts and should have provided support for these bald allegations and in response to the detailed declarations from Plaintiffs explaining why homeschooling would not provide their children with FAPE. Notably, Defendants have failed to make anything more than a bald assertion based on no cognizable evidence that schools can and will be able to provide the needed level of services to all of these children. We presume that Defendants fail to so support their arguments because they have no real plan on how to provide services required of formerly exempted children such as Plaintiff, because the cost and logistics of immediately hiring the additional service providers required by the immediate as opposed to a staged implementation of the amendments to Section 2164 has not been adequately considered by Defendants and could be devastating to districts, which have likely not accounted for same in district budgets for this school year. The fact that the logistics and costs of a workable homeschool option has not been contemplated is supported by the Declarations of M.L. and A.F., submitted herewith, demonstrating that parents are being told by districts that even if they homeschool, their children will not receive related services from the district if the children are not vaccinated

pursuant to state mandates or will receive very limited and not adequate services. *See* M.L. Dec., at ¶ 12; A.F. Dec., at ¶¶ 11-12. Moreover, the Empire State Supervisors and Administrators Association (ESSAA), reported that at its August 6, 2019 meeting SED Commissioner MaryEllen Elia told them "The law [Section 2164 as amended] also applies to special education students who are homeschooled but receive certain supports such as speech therapy or physical therapy from their home district as part of their IEP requirements." Mack Rosenberg Reply Dec., Ex. 2. If the ESSAA report is accurate, then parents have absolutely zero educational options for their children who are entitled to FAPE in the least restrictive environment.

Finally, the 2008 memorandum indicates that families had to provide notice of intent to homeschool by June 1, 2019. Because this law was not passed until June 13, 2019, families may have already missed this deadline and the State has not yet indicated what modifications are being made to that deadline should a family have no alternative but to homeschool.

The 2008 memorandum (Dkt. No. 14-5) on which Defendants rely to support their claims that homeschooling is an adequate substitute does not address the critical issue of whether homeschool related services will be provided to students who are not vaccinated in compliance with state vaccination mandates. While we understand that guidance is forthcoming about this issue (Mack Rosenberg Reply Dec. ¶ 5) and, while Defendants are alleging that related services will be available to students regardless of vaccination status if parents are forced to homeschool, Defendants have made these statements without any cognizable evidentiary support or any real plan on how such educational benefits will be implemented, how services will be provided to children, which services will be provided, and how key elements of Plaintiffs' IEPs, such as group services, and social, communication and emotional goals can be met.

ARGUMENT

PLATIFFS MEET OR EXCEED PRELIMINARY INJUNCTION REQUIREMENTS AND ARE ENTITLED TO STAY PUT PLACEMENT

POINT I

Plaintiffs Have Demonstrated a Likelihood of Success on the Merits

As Plaintiffs demonstrated in their verified complaint and moving papers, this case is about the conflict between federal law under IDEA and New York law, Section 2164, as amended, which erroneously requires vaccination as a condition precedent and impermissible barrier to disabled children accessing their rights under the IDEA. Notwithstanding the Defendants' Opposition, Plaintiffs demonstrate a likelihood of success on the merits of their claims.

A. IDEA Preempts Section 2164

To begin, Defendants assert that Section 2164 as amended did not intend to "single out" students with disabilities to exclude them from school, it applies to all students, and thus, somehow does not violate IDEA. Defendants also erroneously assert that the parents here have chosen not the vaccinate their children, which somehow translates into a choice to entirely forgo their children's' rights under IDEA. As demonstrated below, these arguments miss the mark. First, whether the amendment to Section 2164 singled out disabled students or was directed at all student is irrelevant. The question presented to this Court is whether the effect and implementation of Section 2164 as it relates to children with disabilities is contrary to requirements of IDEA. Defendants admit in their moving papers that they are obligated to comply with IDEA, and as set forth in our moving papers, Plaintiffs have clearly demonstrated that IDEA and Section 2164 as amended and implemented are in conflict because Section 2164 requires schools and districts to absolutely and permanently bar children from protections afforded to them under IDEA, including but not limited access to FAPE in the least restrictive environment, educational and related

services, notice, due process and other rights. 20 U.S.C. § 1400(d). Second, the issue here is not whether parents choose to vaccinate or not, it is whether students who are not vaccinated have federally protected educational rights which prohibit schools and districts states such as New York, from permanently barred children from accessing their agreed upon placements and other rights under the IDEA.

B. Federal Guidance and the IDEA Demonstrate that Section 2164 as As Amended Cannot Be Implemented

Defendants wrongly claim that because IDEA does not address directly address vaccination status, and that somehow this silence allows the State to end run around IDEA and deprive students who are not vaccinated permanently of their rights under IDEA. In making this argument, Defendants try to ignore guidance from the United States Department of Education ("DOE"), such as the OCR and OSEP guidance in this matter (*see* Mack Rosenberg Dec. Exs. 3 and 4), which demonstrate that children protected by IDEA and Section 504 who are not fully vaccinated should be excluded from school only temporarily (providing services pursuant to the law) and only on a limited basis during a safety issue, such as an outbreak in the school, arises, and then they should be returned to their classroom as soon as practicable. *Id.*

Reading the OCEP and OCR guidance in tandem with the IDEA and its regulations demonstrates that preemption is appropriate here because Section 2164 directly frustrates IDEA's purposes, as memorialized in the DOE's guidance that during public health emergencies disabled children with IEP may be excluded from school, but only temporarily until the safety issue has passed and during such time, the services at home should as closely approximate services in school and under the IEP as possible. Mack Rosenberg Dec. Exs. 3 and 4. This Court should give the DOE guidance and the IDEA controlling weight, where, as here, the guidance is interpreting the agency's own regulations. *See Carcano v. McCrory*, 203 F. Supp. 3d 615 (M.D.N.C. 2016). For

example, in *Carcano*, the Court interpreted a state law unrelated to education, which barred transgender individuals from using multi-occupancy bathrooms based solely on the sex listed on their birth certificates. While this law was not related to education, its blanket application nonetheless affected schools in its extensive reach. As a result, Title IX was implicated and had to be considered and examined by the court hearing challenges to the state law. Based on DOE guidance under Title IX, the court held that DOE's guidance, which defined "sex" to mean gender identity, controlled and thus, led to the conclusion that the statute "necessarily" violated "DOE's guidance" and could not "be enforced." *Id*. at 653. *See also Domane v. Kumar*, 872 F. Supp. 2d 237, 244 (2012) (stating "In the instant case, because the [United States Merchant Maritime] Academy's policy of transferring to a national list on April 1 … does involve an agency's interpretation of its own regulations, *Auer* deference is warranted"); *Mullins v. City of New York*, 653 F.3d 104 (2011) (finding that Secretary of Labor's interpretation was due "controlling" *Auer* deference because it was "not plainly erroneous or inconsistent with her regulations and there is nothing to suggest that her interpretation reflects anything but the Secretary's 'fair and considered judgment on the matter in question.'").

Under the *Auer* analysis a court should defer to a federal department's interpretation of its own regulations, unless the party seeking to overcome it can "demonstrate that the interpretation is plainly erroneous or inconsistent with the regulation or statute." *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *vacated and remanded*, 137 S. Ct. 1239, 197 L. Ed. 2d 460 (2017) ("*Grimm*") vacated and remanded due to withdrawal of DOE guidance upon arrival of a new presidential administration.). The *Grimm* case involved a transgender boy using the boys' restrooms at his high school initially without incident, with the consent of the school administration, and with no objection from his classmates. As a result of the uproar from

some of his peers' parents, the school board passed a policy forbidding G.G. from continuing to use the appropriate restroom for his gender identity and instead forced him to choose between the girls' bathroom or no restroom at all. G.G. filed suit alleging "that the school board impermissibly discriminated against him in violation of Title IX and the Equal Protection Clause of the Constitution." *Id.,* at 715. The Court set out the *Auer* standard, deferring to agency guidance because, although the school board asserted safety concerns, the concerns were vague, unfounded, and not supported by evidence in the record. Rather, the Court viewed these concerns as an argument constructed after the passage of the school board's bathroom policy in an effort to justify the need for such a policy. The Court held that "the Department's interpretation of its own regulation, § 106.33, as it relates to restroom access by transgender individuals, is entitled to *Auer* deference and is to be accorded controlling weight in this case." *Id.*, at 723. (internal citations omitted) *Id.* at 724 (stating that "In a case such as this, where there is no constitutional challenge to the regulation or agency interpretation, the weighing of privacy interests or safety concerns – fundamentally questions of policy – is a task committed to the agency, not to the courts."). The Court, in fact, dismissed the Board's "invocation of [an] amorphous safety concern" due to a lack of any evidence in the record supporting it and the Board's, perhaps deliberate, vagueness in delineating the actual, specific concerns. *Id.*, at 723-24, n.11.

The same analysis applies here and supports the conclusion that Section 2164 as amended is preempted when it is applied to students with disabilities protected by IDEA.

First, as demonstrated in our moving memorandum of law, Section 2164 as amended inexorably conflicts with the IDEA and creates a bar to students with disabilities attending school, the core purpose of Congress in enacting IDEA. *See Catanzano by Catanzano v. Dowling*, 847 F. Supp. 1070, 1085-86 (W.D.N.Y. 1994) (when a state law conflicts with and is preempted by

federal law, injunction is appropriate); *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 155 (2d Cir. 2016) (local laws enacted without complying with federal procedures are preempted). While IDEA itself is silent as to vaccination status and school entry, the United States Department of Education has clearly contemplated the issue of vaccination status and exclusion and has guided schools according to the IDEA's purpose of providing access to educational and related services to students in the least restrictive environment, but taking into account those situations where temporary exclusion and not permanent exclusion from school of such children, while providing FAPE is permitted to address state safety concerns when they arise but also requires return to school and FAPE, once the danger to the student and community is no longer present. While the DOE guidance does not directly address non-medical exemptions and focuses on children unable to attend school because of medical issues, the reasoning is applicable to children who have not been fully vaccinated for whatever the reason. The DOE guidance clearly indicates that children who are not fully vaccinated in accordance with a state's laws and who are protected under federal education laws such as IDEA or Section 504 of the Rehabilitation Act of 1973, may only be temporarily excluded from school until the risk has passed, during which time IEP programs must be honored at home. The guidance unequivocally states that students who are required to stay home for an extended period of time must receive FAPE during their temporary exclusion. *See* Mack Rosenberg Dec. Ex. 3, at 3 (noting that students with IEPs (covered by IDEA) and 504 plans (Rehabilitation Act) must be provided FAPE during exclusion.[4] Generally, if

[4] While Defendants' now claim that the OCR guidance only covers section 504 students, this is again contrary to the position taken by the State in guidance issued to district and parents. See Mack Rosenberg Dec., Ex. 8, at 4. Moreover, students with IEPs protected under IDEA are conferred greater rights than those with 504 Plans, not fewer rights. See https://www.wrightslaw.com/info/sec504.index.htm: "Under Section 504, fewer procedural safeguards are available to the child with a disability and the child's parents than under IDEA." Section 504 bars public schools and institutions from discrimination against children with disabilities, prohibiting the denial of educational benefits on the basis of disability, See 34 C.F.R. §104.4(b)(1) & (2). It is intended to require disabled children receive equal access to programs and services enjoyed by non-disabled students. Id. Although section 504 requires FAPE in the least restrictive environment, as well as some limited procedural protections, 34 C.F.R. §104.33, those requirements are

exclusion is 10 days or less, "the provision of services . . . is not considered a change in placement. During this time period, a child's parent or other IEP team member may request an IEP meeting to discuss the potential need for services if the exclusion is likely to be of long duration (generally more than 10 consecutive school days). For long-term exclusions, an LEA must consider placement decisions under the IDEA's procedural protections of 34 CFR §§300.115 –300.116, regarding the continuum of alternative placements and the determination of placements." Mack Rosenberg Dec., at 4-5. The guidance also contemplates notice and other procedural rights attaching in the event of even a temporary exclusion because of a safety issues that causes the temporary exclusion of a student. Thus, because Section 2164 as amended and implemented requires a total and permanent bar and no notice or other procedural rights, it frustrates that clear purpose of IDEA as set out in the DOE guidance, and is preempted by the IDEA.

As set forth in our moving papers, while states are permitted to provide greater protections to students with disabilities than provided by IDEA they cannot implement laws and regulations that impede access to FAPE, as Section 2164 as amended does by creating a condition precedent for students with IEPs to obtain FAPE. *See Evans v. Evans*, 818 F. Supp. 1215, 1223 (N.D. Ind. 1993) (change in administrative process resulting in significant delay violates IDEA; citing additional cases); *Sarah M. v. Weast*, 111 F. Supp. 2d 695, 703-04 (D. Md. 2000) (notice period conflicted with and was preempted by IDEA). This requirement is not limited to education laws

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intended to solely prevent discrimination in access so that children protected by Section 504 typically only receive accommodations and modifications that allow them to access an education. *See* 42 U.S.C. 12131(2); 34 C.F.R. 104.4(b), *see Alexander v. Choate*, 469 U.S. 287, 300-01 (1985). In comparison IDEA, as set out more fully in our moving papers, mandates a much broader protection, and is intended to require schools to create programs and placements so that each disabled child can not only access but can benefit from their education. As a result, IDEA provides much broader FAPE and other procedural protections, including but not limited to notice and other processes, it also requires extensive services and benefits set out in IEPs, etc., with the intent to require compliance with the mandate of IDEA to more broadly allow disabled children to benefit from their education.

only. As demonstrated by *Grimm* and the aforementioned cases, that the state action at issue here is couched as a public health law is of no moment because it has the effect of depriving children of their rights under the IDEA. The fact that this is a public health law is of no moment, because as admitted by Defendant, the subject of the statute relates to and deprives children access to an education, including children with rights under the IDEA. Thus, the assertion on Defendants' part that somehow a state public health law is subject to a different standard and cannot be preempted by IDEA is a red herring. In fact, Defendants admit that the impact of Section 2164 as amended is directly on the education placement of students: "it was a change in state law that altered Plaintiff's educational placement options." Defs.' Opp., at 29.

Interestingly, Defendants' Opposition does not challenge the constitutionality of the IDEA or their obligation to comply with IDEA statutory provisions, regulations, or related DOE guidance. Nor does Defendants Opposition assert any privacy concerns to overcome the DOE guidance in this matter. Although Defendants do not mention *Auer* deference, we presume it is because of that deference that Defendants' papers refer to safety concerns arising out of a purported measles epidemic which caused the Section 2164 amendments. However, as demonstrated in our moving papers, provisions in New York law were and continue to be in place to address such outbreaks, including temporary exclusion from school of unvaccinated children, which comports with the DOE guidance allowing such temporary exclusion and limited quarantine. Defendants do not deny that these safety measures were never invoked in New York during the height of the purported measles outbreak, thereby belying that the amendments to Section 2164 arose out of any real safety concern at all.

Defendants also attempt to rely on the declaration of an epidemiologist, which is not based on relevant data, to support the need for the state's exclusion and permanent ban of children from

school even if disabled children are protected under the IDEA and despite DOE guidance to the contrary. However, that expert declaration should be disregarded by the Court because as detailed above, it is bereft of evidence supporting her own and Defendants' conclusion about public safety. *In re Agent Orange Product Liability Litig.*, 611 F. Supp. 1223, 1250 (E.D.N.Y. 1985) (stating "the conclusions Doctors Singer and Epstein reach are also insufficient as a basis for a finding of causality because they fail to consider critical information, such as the most relevant epidemiologic studies and the other possible causes of disease."); *Hilaire v. DeWalt Indus. Tool Co.*, 54 F. Supp. 3d 223, 243 (E.D.N.Y. 2014). Here, Blog's Declaration does not provide or appear to rely on any specific data concerning the number or percentage students with disabilities protected by IDEA who also had religious exemptions and no information concerning the role or risk allegedly created by this specific, yet likely miniscule group of students in transmission of measles to other children or the population as a whole. Without such evidence, Blog's Declaration, and the Defendants' conclusions concerning public health based on her opinion are irrelevant. In fact, as set forth more fully in the Facts, above, Blog's opinion generally contradicts the data upon which she purports to rely, fails to explain critical inconsistencies in that data, and ignore the fact that the State has failed to utilize other methods available to it to control the spread of infection, thereby belying the fact that there was a health crisis caused by children with IEPs who were unvaccinated that would warrant their permanent exclusion from school contrary to the IDEA. Moreover, since Blog's Declaration provides a conclusory opinion without any reliance or citation to scientific evidence to support those opinions, her opinion should be afforded no weight by this Court. *See Boyles by Boyles v. American Cyanamid Co.*, 796 F. Supp. 704, 709 (E.D.N.Y. 1992) (precluding unreliable expert testimony).

Simply stated, in their Opposition, Defendants have failed to point to any reliable evidence

indicating that a public emergency existed or exists currently that would allow it to overcome the DOE guidance to which this Court should defer under *Auer*. All of the submissions by Defendants in support of safety concern bely the existence of an emergency that would necessitate permanent exclusion of disabled children from school despite protection under the IDEA, including the fact that: 1) Defendants do not deny the CDC and other data in Plaintiffs' moving papers (*i.e.*, only 22 cases of measles in New York City in June 2019) shows a lack of public safety issue; 2) the Blog Declaration fails to establish such an emergency; and 3) the state's failure to use temporary avenues of exclusion of children during the relevant time frame do not provide any support to overcome the DOE guidance, nor does it does contradict the data from the CDC, New York City, Rockland County, and others, and lack of action by the state in using then existing law to temporarily exclude children in the face of a purported health emergency. Thus, *Auer* deference is an appropriate course of action in the present matter.

C. An Automatic Stay Should Issue

Defendants have not shown that the automatic injunction provided for by 20 U.S.C. § 1415(j) should not apply. *See* Defs.' Opp., at 30-32. Defendants acknowledge that this procedural safeguard applies "whenever the local educational agency . . . proposes to . . . change . . . a child's educational placement." Defs.' Opp. at 29. They further admit that the effect of the amendments to Section 2164 is to change the placement of every child not fully compliant with the amended law, including students protected by IDEA; and that administrative agencies or hearing officers could not override the new law. *Id.* Schools and districts have no choice but to change students' placements under the new law, with no discretion. Thus, by the Defendants' own admission, the appropriate place to litigate this issue is in federal court and pendency or "stay put" should apply, with this Court ordering that while this litigation continues, schools and districts are may not apply

Section 2164's exclusionary provisions as it relates to all students with rights under the IDEA per Section 2164.

In this case, Plaintiffs allege that Section 2164 as amended is contrary to, and prohibited by, the IDEA because it prevents certain children from accessing their agreed-upon public school placements and related services. Defendants claim that because the instant action is not a "due process hearing," it is not "a proceeding conducted pursuant to [20 U.S.C. § 1415]" as required by 20 U.S.C. § 1415(j). Defs.' Opp., at 31. Their argument overlooks the fact that Plaintiffs have asserted a cause of action arising under § 1415, *see, e.g.,* Verified Compl. (Mack Rosenberg Dec. Ex. 11) ¶ 80, and § 1415 explicitly authorizes judicial proceedings as well as due process hearings. Moreover, Defendants, even while claiming Plaintiffs have not alleged systemic violations, admit that Plaintiffs in fact have made such allegations, *i.e.*, that the new law has resulted in a change of placement for every child with an IEP and formerly valid religious exemption and that it is the result of a decision that affects many children, not just an individual child. Defs.' Opp., at 29, 31. However, the cases cited by Defendants for the proposition that stay is unavailable for general policy decisions do not support their claim. For example, in *N.D. ex rel. Parents Acting as Guardians Ad Litem v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1117 (9th Cir. 2010), rather than concluding that stay put is never appropriate in instances of general policy decisions, the Court specifically noted that "Our conclusion does not mean, however, that States and school boards can make any administrative change, in terms of cutting school days, without triggering the stay-put provisions. Our holding is that under the facts of this case [where the children stayed in the same educational program among other things] § 1415(j) is not triggered." (also noting that stay put could be implemented where it is futile to exhaust administrative remedies).

Since this dispute is "a proceeding conducted pursuant to [20 U.S.C. § 1415]," an automatic injunction in favor of the *status quo* applies. *See* 20 U.S.C. § 1415(j); *Arlington Cent. Sch. Dist. v. L.P.*, 421 F. Supp. 2d 692, 696 (S.D.N.Y. 2006). Thus, children who are protected by IDEA and are not vaccinated in compliance with the state mandates are automatically entitled to "stay put" in their current placements and attend school. The IDEA's "stay-put" requirement is mandatory. The Supreme Court has stated that the *See Honig v. Doe*, 484 U.S. 305, 323 (1988) (stay put provision is "unequivocal" and represents "a clear directive."). Thus, where – as here – a child's IEP or FAPE in the least restrictive environment is threatened, IDEA creates an absolute rule favoring retaining the *status quo*. *See, e.g.*, *Drinker v. Colonial School District*, 78 F.3d 859 (3d Cir. 1996); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78 (3d Cir. 1996)).

Defendants admit that Section 2164 as amended changed the placements of all students not vaccinated according to State mandates. Defs.' Opp., at 29. However, Defendants suggest somehow that Plaintiffs' rights to notice and due process are averted because the statute applies not only to IDEA-protected students but to all students. Simply because a law has general applicability does not mean that a State is relieved of its IDEA obligations. As a case in point we refer the Court back to the H1N1 guidance. Mack Rosenberg Dec., Ex. 4. Under general state law in New York, students not vaccinated against an illness could be temporarily excluded from school for safety reasons. However, if a student has an IEP and is out more than ten days as a result of the exclusion, that student is entitled to certain rights and procedural safeguards under IDEA that are not available to general education students.

D. Homeschooling Is Not a Substitute for the Classroom

Notwithstanding the DOE guidance that exclusions of children from school who have rights under federal education laws should be temporary, however, and that longer exclusions

(more than 10 days – not permanent) require consideration of change of placement with all the due process considerations, Defendants now assert that that forcing families into homeschooling is sufficient for the State to comply with the IDEA. Defendants submit no Certifications or Declarations in response to Plaintiffs', which support this assertion or their assertion that Plaintiffs are wrong when in asserting that homeschooling is a viable alternative to parents of children barred from school. Without submitting any evidence to the contrary indicating how they would satisfy their obligations under IDEA to Plaintiffs' children or any other children in a homeschool environment, Defendants downplay that fact Plaintiffs' are not equipped to and cannot homeschool and that homeschooling will not provide FAPE, instead, claiming instead that parents merely complain that homeschooling is "unsatisfactory." Defendants' attempts to minimize the problems with homeschooling cannot be ignored. Moreover, as indicated by Plaintiffs' affidavits and the most recent Declarations submitted by Plaintiffs with this reply, parents in New York are being advised by school districts that if their children are unvaccinated and even if they had IEPs, they would be provided with minimal or no services if homeschooled. If there were an immediate guidance issued indicating otherwise, Defendants have not submitted a single certification or declaration indicating that the State has put together a plan on how schools and districts are supposed to find educators and providers at this late date with September looming to be able to provide those children with their rights under the IDEA, or whether those affected districts have the budgets to provide those services to home schooled children with previous IEPs.

Additionally, not only have procedural safeguards not been noticed to change IEP students' placements but families have not been given the opportunity to participate as they should be in any change of placement. Particularly, where, as here, despite Defendants' arguments to the contrary, it is clear that homeschooling will not provide FAPE. Defendants suggestion that these families

are willingly agreeing to homeschool is a false construct and Plaintiffs' declarations show clearly why homeschooling is not an appropriate substitute for classroom-based, school-based education here. Plaintiffs have not consented to give up their IEPs and the right to stay put and other rights and in fact the school/district and the families agree that the IEP placement provides FAPE in the least restrictive environment. The schools are not suggesting that homeschooling would be a better option to provide FAPE. Rather, some families are being told it is not an option at all, while others are being advised it is the only option – despite their children having an agreed upon placement and IEP that says otherwise. Instead, Defendants argue that Plaintiffs should abandon their IEPs, in the hopes that somehow all the school and districts in New York will get the word and magically be prepared to handle an untenable situation with no budget and develop and provide children with adequate homeschooling programming before the September school year begins. As shown above, there are many questions concerning whether any such program can be developed to provide FAPE that Defendants simply have failed to address. Defendants' argument that Plaintiffs have due process rights if they are not happy with the homeschool program is simply not sufficient and begs the question since Plaintiffs never gave up their rights under their current IEPs, which this Court can address right now by overturning those Section 2164 which violate IDEA.

Defendants' argument that Plaintiffs' claim that they did not receive notice of due process rights conflicts with the Plaintiffs' claim that an administrative proceeding would be futile simply misapprehends Plaintiffs' argument. The State cannot unilaterally decide that it will not provide notice of rights mandated by federal law. The fact that in a particular instance, as here, it would be futile and a party can proceed directly to federal court does not obviate the need for notice. It is not for the state to determine when notice is required or not – IDEA has made that determination. A change in placement, to which Defendants admit here, requires notice under IDEA. It is a

separate analysis to determine if the administrative process will be futile. Moreover, as set forth above, a judicial proceeding is also conducted in accordance 20 U.S.C. § 1415 and, therefore, in any event, triggers notice and other safeguards.

POINT II

PLAINTIFFS WILL SUFFER IMMEDIATE, IRREPARABLE HARM AND LEGAL REMEDIES WILL NOT SUFFICE

Plaintiffs have shown in their moving papers and here that Section 2164 as amended violates their rights to education protected by the Constitution (Supremacy Clause) and federal law, including the right to FAPE in the least restrictive environment as agreed to by parents and districts as well as notice and due process rights under IDEA. As shown in Plaintiffs' moving papers in greater detail irreparable harm will ensue if the *status quo* is not preserved while this case is pending. Section 2164 as amended will bar thousands of students with disabilities from school in September. Contrary to Defendants' misplaced argument, Plaintiffs are harmed by the amended law which requires schools and districts to permanently bar their children from school despite the children's rights under IDEA, not by a family's decision not to vaccinate when their children have a right to go to school regardless of vaccination status.

Plaintiffs' children with disabilities will be irreparably harmed by being excluded from school, as they will continue to suffer regressions, failure to progress, worsening behaviors, and in some cases becoming increasingly dangerous to themselves and others. S.K. Dec., at ¶ 10, B.C. Dec., at ¶ 9; P.E.T. Dec., at ¶ 9; V.D. Dec., at ¶ ¶ 11, 12, 14; A.F. Dec., at ¶¶ 6, 7, 9. They also will be missing out on crucial social, communication, and emotional growth opportunities. B.C. Dec., at ¶ 9; P.E.T. Dec., at ¶ 9; S.K. Dec., at ¶ 6; T.S. Dec., at ¶ 12; V.D. Dec., at ¶ 12. As demonstrated above, Defendants have offered no evidence to counter that of Plaintiffs that homeschooling is not an acceptable alternative for these students. *See Lewis v. Sobol*, 710 F. Supp. 506, 507 (S.D.N.Y.

1989) ("Courts considering this issue routinely assume that a child prevented from school would suffer irreparable harm.") Exclusion from school alone is irreparable harm, however, as demonstrated in our moving papers and declarations, Plaintiffs' families are suffering and will continue to suffer as well. Parents jobs and income are affected, they are unable to meet their children's needs without school and related services, homeschooling is unworkable for most, and despite deep family ties and professional ties to New York State, many families will be forced to leave if this issue resolved expeditiously by this Court in their favor. B.C. Dec., at ¶¶ 13, 14. P.E.T. Dec., at ¶¶ 12-13; S.K. Dec., at ¶¶ 11, 15; T.S. Dec., at ¶¶ 13, 17; V.D. Dec., at ¶¶ 15-, 21. These hardships simply cannot be remedied by monetary damages.

POINT III

THE BALANCE OF THE HARDSHIPS DECISIVELY FAVORS PLAINTIFFS

As set forth in their moving papers, Plaintiffs seek to preserve pending the outcome of this case the *status quo* that has existed in New York for over fifty years. Absent an injunction, the New York will deprive children with disabilities of significant rights protected by IDEA and cause great harm to these children and their families, as shown above and in our moving papers. Conversely, the State faces no hardship if an injunction is issued. Delaying implementation of the amendments to Section 2164 will not negatively impact public health. Not only is there no current public health threat from any vaccine targeted disease (nor was there at the time the law was enacted), Defendants have submitted absolutely no evidence that students with IEPs and previously valid religious exemptions are creating any sort of public health issue at all. In fact, as shown above, Defendants' limited information supports that students with religious exemptions pose no threat to public health in New York State. The lack of evidence from Defendants on this issue is the death knell to their argument that there is a public health risk here. Moreover, as we

have shown, there are measures already in place under New York law which would protect public health and comport with IDEA, including temporary (not permanent) exclusion from a school in the event of an outbreak at a child's school.

POINT IV

THE PUBLIC INTEREST IS SERVED IN PROTECTING THE RIGHTS OF DISABLED CHILDREN TO ATTEND SCHOOL

While the State generally has a public interest in ensuring the education of its children, this is particularly true with respect to students with disabilities, an historically underserved and neglected class of students warranting protection, the very reason the IDEA and its predecessor statute were enacted. *See, e.g.*, *Whitlow v. California*, 203 F. Supp. 3d 1079, 1088 (S.D. Ca. 2016) (IEP exemption to vaccination mandates "ensures that right of access, and furthers the State's legitimate interest in providing special education and related services to those students."); *Honig v. Doe*, 484 U.S. 305, 309 (1988). For this reason, California enacted an exemption from State vaccination mandates for children protected by IDEA. Cal. Health & Saf. Code § 120335(h).

Defendants now try to distance themselves from the California law exempting IEP students from that state's vaccination mandates upon which both the Governor and Legislature purported to rely. As shown in our moving papers and above, California, provides the ultimate example of how IDEA-protected students should have been insulated under New York law as well. California included in its law (which incidentally is also codified under public health laws, further weakening Defendants' argument that this distinction is meaningful) a clear exception to state vaccination mandates to specifically address concerns of preemption and the clear right of students with IEPs to attend school regardless of vaccination status. Yet, Defendants now make a somewhat convoluted argument here that by including general education students in Section 2164 and not

having a specific exclusion for IDEA-protected students, New York's law is a better solution and does not run afoul of IDEA. This is simply not the case.

Rather, the State is not relieved of its obligation to IDEA students simply because others are also impacted by the law. Moreover, contrary to Defendants' assertion that "[t]here was no adjudication or judicial determination on California's law, and thus, there is no legal basis for Plaintiffs' reliance on it." (Defs.' Opp., at 23-24)). In fact, while not conceding that the decisions were correct, there have been several challenges to the California law and, even if there had not been, Defendants cite no authority for their proposition that a law that has not been litigated is somehow less effective or enforceable. As one District Court has recognized in *dicta*, acknowledging the clear IEP exception allowing children to attend school:

> [T]he IDEA is designed to provide disabled students with **access to special education and related services in schools.** *Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 818 (9th Cir. 2007) (quoting *Bd. of Educ. of Hendrick Hudson Central Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 200, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982)). **The exemption for students with IEPs ensures that right of access**, and **furthers the State's legitimate interest in providing special education and related services to those students**.

Whitlow v. California, 203 F. Supp. 3d 1079, 1088 (S.D. Ca. 2016) (emphasis added).[5] Similarly, the Court here should conclude that for children with IDEA rights, an exception from Section 2164 is required.

As discussed above and in our moving papers, Defendants, despite having ample opportunity to do so have utterly failed to demonstrate any competing public health interest impacted by these students. Moreover, they have failed to show that existing, less invasive

[5] Defendants allude to implementation questions surrounding the law but point to no sources for this allegation. Regardless, the law on its face is clear. Defendants are aware of litigation concerning the California law including *Whitlow*, having cited to these cases in *F.F., et al. v. New York, et al.*, another challenge to Section 2164 as amended now pending in New York State Supreme Court in Albany County (Index No. 4108-19).

procedures than a permanent ban from school would not adequately address any alleged risks here. This is particularly true where, as here, the State failed to use any of those measures available to it when it claimed there was a public health issue caused by measles cases.

In sum, Plaintiffs have shown that they meet and indeed exceed all requirements to support the issuance of a preliminary injunction here based on analysis of the traditional elements required as well as the automatic stay put provision. In either case, Plaintiffs have demonstrated that issuance of a preliminary injunction is appropriate to protect the interests of these vulnerable students with disabilities.

POINT V

DEFENDANTS' RELIANCE ON RELIGIOUS EXEMPTION CASES IS INAPPOSITE

Finally, Defendants also try to refashion Plaintiffs' claims here as an argument in favor of religious exemptions, which is wrongfooted and should be disregarded by this Court. Plaintiffs' claims are and always have been that Section 2164 as amended creates a barrier to children accessing IDEA-protected services and thus is preempted. In trying to unilaterally and improperly reshape Plaintiffs' claims, Defendants rely on cases concerning religious exemptions. This litigation is not about whether or not the religious exemption is constitutional. The issue before the Court here is whether requiring children with IEPs protected under IDEA to be vaccinated in accordance with Section 2164 conflicts with and violates the IDEA. That being said, on their face, none of Defendants' cases relate to children with IEPs protected by IDEA.[6] Defendants' first case does not reference IDEA and was also decided more than seventy years before the IDEA's predecessor statute was enacted in 1975. *See Viemester v. White*, 179 N.Y. 235 (1904); *see also*

[6] Defendants' other cases also are unavailing, including several in which a mention of vaccination laws is made in dicta because the cases are about religious practices unrelated to vaccination. *See Fosmire v. Nicoleau*, 75 N.Y.2d 218 (1990) (blood transfusion); *Employment Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872 (1990) (religious use of peyote)

Prince v. Massachusetts, 321 U.S. 158 (1944) (relied on by Defendants and decided more than 30 years before IDEA predecessor statute). Defendants' remaining cases relate to litigations where religious exemptions still were available to New York families under Section 2164 prior to June 13, 2019 and addressed whether temporary exclusion in the event of an outbreak was allowed (*Phillips v. City of New York*, 775 F.3d 538 (2d Cir. 2015)) and/or the validity of individual religious exemptions (*Phillips*; *Watkins-El v. Dep't of Educ.*, 2016 WL 5867048 (E.D.N.Y. Oct. 6, 2016) (individual exemption); *Caviezel v. Great Neck Public Schools*, 739 F. Supp. 2d 273 (E.D.N.Y. 2010) (individual exemption denial); *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 99 (E.D.N.Y. 1987) (unconstitutional for religious exemption to require membership in a recognized religious organization). *Phillips*, in fact, supports Plaintiffs arguments, as it demonstrates that the State had in its arsenal in the law to fight spread of infection a less restrictive means, *i.e.*, temporary exclusion, which still recognizing valid religious exemptions.

As set forth more fully above, thus, this Court should disregard Defendants' attempt to divert it from the real issues at bar in this matter, which is whether the permanent exclusion of children with disabilities from school under New York law, without notice or due process violates IDEA. While Defendants would ask this Court to simply ignore the extensive protections the U.S. Congress has afforded to children with disabilities in enacting the IDEA pursuant to inapposite case law and an unsubstantiated opposition, we respectfully request that this Court should decline to do so.

In sum, Plaintiffs have made a clear showing of likelihood of success on the merits of their claim that Section 2164 as amended violates Plaintiffs' rights under IDEA. Consequently, Defendants should be enjoined from enforcing the amendments to Section 2164 during the

pendency of this litigation and children with IEP should be allowed to return to their classrooms regardless of vaccination status.

CONCLUSION

For the aforementioned reasons and those raised in Plaintiffs' moving papers, while this litigation is pending, Plaintiffs respectfully request that this Court grant Plaintiffs' motion for a preliminarily injunction and grant all such other and further relief as the Court deems just and appropriate.

Dated: August 15, 2019

Respectfully Submitted,

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