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Trials&TRIBULATIONS

Deciding whether to vaccinate or educate

The implications of obtaining exemptions to New York's mandatory vaccination law

It is general knowledge that before our children can begin school, they must receive vaccinations for certain communicable diseases. However, what happens if, as a parent, you do not wish to have your child vaccinated? For example, what if you object to vaccinations because of your religious beliefs? Does this mean your child will be prevented from attending school? The answer is yes, sometimes, according to the recent case of *Phillips v. The City of New York* out of the Eastern District of New York, ruling in line with other decisions on that issue.

To attend public school in New York, children must receive vaccinations for certain communicable diseases, such as tetanus, polio, measles, mumps, etc. However, New York's Public Health Law and New York City's Regulations of the Chancellor provide for two exceptions to this mandate.

The first excuses a child from these vaccinations where the parent "holds genuine and sincere religious beliefs" opposing such vaccinations, Public Health Law §2164(9) and Chancellor's Regulation A-701(III)(A)(4)(b). The second exception applies where the vaccinations could be a health risk for the child, Public Health Law §2164(8) and Chancellor's Regulation A-701(III)(A)(4)(a).

To demonstrate entitlement to a religious exemption, a parent must write a letter to the child's school detailing the basis for the requested exemption. The decision of whether to grant the exemption is made by the Office of School Health (a joint program of the New York City Department of Education and the New York City Department of Health and Mental Hygiene), which is tasked with promulgating and monitoring school health policies.

Although exemptions under Public Health Law §2164 effectively permit a child to attend school without receiving the various immunizations, schools in New York City can still prevent a child who has not been vaccinated from attending school where "another student is diagnosed with a vaccine preventable disease," see 10 NYCRR 66-1.10 and Chancellor's Regulation A-701(III)(A)(4)(c). A child can be excluded from school "for a

period up to three (3) weeks after the student with a vaccine preventable illness is no longer contagious," Chancellor's Regulation A-701(III)(A)(4)(c).

The plaintiffs in the Phillips case, Dina Check, Nicole Phillips and Fabian Mendoza-Vaca, are parents of minor children who seek to attend, or are presently attending, public schools operated by the City of New York. Despite the fact that the Public Health Law provides a statutory exemption for religious and medical purposes, and that the plaintiffs obtained such exemptions, the plaintiffs assert that their children were still excluded from school in violation of their constitutional rights, including freedom of religion under the First Amendment.

The children of both plaintiff Philips and plaintiff Medoza-Vaca were allegedly excluded from school on several occasions when classmates became sick with a disease that may have been prevented by vaccinations — in their case, the chicken pox. Plaintiff Check's child apparently had previously been granted a religious exemption to the vaccinations. However, plaintiff Check asserts that her child's exemption was revoked after the city tested the validity of Check's religious beliefs and found them to be insincere. In addition to seeking a religious exemption, plaintiff Check also sought an exemption on medical grounds, asserting that her child's doctor believed that receiving such vaccinations could be life-threatening to her daughter.

Based upon these exclusions, the plaintiffs brought seven claims against the City of New York, the New York State Attorney General and the Commissioner of the Department of Health, including but not limited to alleging statutory violations of Public Health Law §2164, violations of freedom of religion under the First and Fourteenth amendments, violations of the right to make decisions about one's own body under the Ninth and Fourteenth amendments, and violations of substantive due process and equal protection under the Fourteenth Amendment.

Plaintiffs sought an invalidation of the applicable Chancellor's Regulation and 10 NYCRR 66-1.10 on the grounds of preemption, because the Public Health Law does not include a provision permitting public schools to exclude unimmunized children when there is an outbreak of a "vaccine preventable illness." Essen-

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tially, the plaintiffs argue that the legislature could have included a provision in the Public Health Law that provided for an exclusion of unvaccinated children from school during an “outbreak,” but it did not. The plaintiffs also sought a ruling that the Chancellor’s Regulation and 10 NYCRR 66-1.10 are unconstitutional or, in the alternative, unconstitutional as applied. Additionally, the plaintiffs sought an invalidation of Public Health Law §2164 as unconstitutional, or, in the alternative, unconstitutional as applied.

All defendants sought accelerated judgment through motions to dismiss and/or for summary judgment. The court granted defendants’ motions to dismiss the amended complaint in its entirety.

In reaching its decision with respect to the plaintiffs’ First Amendment claims, the court concluded that there is no constitutional right to an exemption from vaccinations. The court relied upon a line of cases entitled *Caviezel v. Great Neck Public Schools*, which were based upon similar facts as those present here. In *Caviezel v. Great Neck Public Schools*, 701 F Supp 2d 414 (EDNY 2010) (hereinafter *Caviezel I*), after having been denied a religious exemption from vaccinations for their four-year-old daughter because the principal did not believe that their beliefs were “religious,” the plaintiffs commenced an action seeking a preliminary injunction compelling the school to register their child.

They asserted that the Public Health Law and the First Amendment entitled them to the vaccination exemption. When asked to describe her religious beliefs, the mother said she was a pantheist, meaning a belief that “God is in everything.” Interestingly, the parents’ three other children had received their immunizations.

To determine whether plaintiffs were entitled to the exemption, the court in *Caviezel I* outlined a three-part test. First it must determine whether plaintiffs’ beliefs against inoculation are “religious.” It must then decide whether these beliefs are “genuine” and “sincere,” as required for such an exemption.

The court began its analysis by stating that freedom of religion under the First Amendment is not an absolute right, as it does not apply when there is a health risk to children or the public. It also noted that only those with sincere religious beliefs are entitled to the exemption, as opposed to those who object to immunizations based upon medical, personal, philosophical or moral reasons.

The court denied the plaintiffs’ preliminary injunction on the basis that their beliefs were not religious, but rather philosophical, and also because the mother’s testimony indicated that she did not want her child vaccinated because she did not believe it was safe.

In the follow-up case of *Caviezel v. Great Neck Public Schools*, 739 F Supp 2d 273 (EDNY 2010) (hereinafter *Caviezel II*), in

which plaintiffs moved to amend the complaint and defendants moved to dismiss, the court specifically addressed whether there is a constitutional right to a religious exemption from vaccinations, which had not been previously addressed by either the United States Supreme Court or the Second Circuit.

In concluding that “the free exercise clause of the First Amendment does not provide a right for religious objectors to be exempt from New York’s compulsory inoculation law,” the court in *Caviezel II* drew some guidance from other district court decisions, as well as the very old Supreme Court case of *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).

In *Jacobson*, the Supreme Court upheld a Massachusetts law requiring compulsory smallpox vaccinations for local residents on the ground that such a requirement was within the state’s police power and thus constitutional. Interestingly, plaintiffs in the both the *Caviezel* and *Phillips* cases argued that the respective courts should declare the *Jacobson* case as unconstitutional — which, of course, a district court cannot do.

In sum, the Phillips court reaffirmed previous decisions holding that excluding unvaccinated children from school does not violate the First Amendment.

After dismissing the plaintiffs’ First Amendment claim, the court in *Phillips* next addressed the plaintiffs’ substantive due process claim. This time the court relied upon *Caviezel v. Great Neck Public Schools*, 500 Fed. Appx. 16 (2d Cir. 2012) (hereinafter *Caviezel III*) in dismissing the plaintiffs’ due process claim. In *Caviezel III*, the Second Circuit reiterated that New York’s immunization requirement is constitutional because it is within New York’s police power, and cited to *Jacobson* in support.

The Phillips court did not reach the merits of the plaintiffs’ Fourteenth Amendment equal protection claim, as it dismissed that claim for failure to state a cause of action. The court explained that plaintiffs failed to allege facts to support such a claim, such as whether they were part of a protected class, or how they were being treated differently from members of other religious affiliations. Similarly, the court dismissed the plaintiffs’ remaining federal claims alleging violations of the Ninth and Fourteenth amendments for failure to state a cause of action.

The plaintiffs filed a notice of appeal last month, and The New York Times recently reported that the plaintiffs’ attorney has asked the District Court to rehear the case. Only time will tell whether New York City’s policy of excluding unimmunized children during “outbreaks” will continue to be permissible. But in the meantime, those holding religious exemptions to New York’s mandatory immunization law better make sure they have a good babysitter on call.

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