C.F. v New York City Dept. of Health and Mental Hygiene
2019 NY Slip Op 31047(U)
April 18, 2019
Supreme Court, Kings County
Docket Number: 508356/19
Judge: Lawrence S. Knipel
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At an IAS Term, Part 57 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of April, 2019

PRESENT:

HON. LAWRENCE KNIPEL,

Justice.

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C.F., ON HER OWN BEHALF AND ON BEHALF OF HER MINOR CHILDREN; M.F. ON HER OWN BEHALF AND ON BEHALF OF HER MINOR CHILDREN; B.D, ON HER OWN BEHALF AND ON BEHALF OF HER MINOR CHILDREN; M.N. ON HER OWN BEHALF AND ON BEHALF OF HER MINOR CHILD; AND A.L. ON HER OWN BEHALF AND ON BEHALF OF HER MINOR CHILD,

Petitioners,

- against -

Index No. 508356/19

THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, AND DR. OXISRIS BARBOT, M.D., IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE,

Respondents.

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The following papers numbered 1 to 5 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1 - 8
Opposing Affidavits (Affirmations) (Memorandum)	9 - 10
Reply Affidavits (Affirmations) (Affirmation in Opposition Memorandum of Law)	11 - 12
Affidavit (Affirmation) (Reply Memorandum of Law)	13
Other Papers	

In an Order dated April 9, 2019, respondent Dr. Oxiris Barbot, Commissioner of the New York City Department of Health and Mental Hygiene, declared a public health emergency pursuant to section 3.01 of the New York City Health Code, and ordered any person who lives or works in designated zip codes who has not received the MMR vaccine, to be vaccinated unless such person can demonstrate immunity. The order stated that failure to comply with the Order was a violation of section 3.05 of the Health Code, and subjected the violator to civil and/or criminal fines and penalties.

In a hybrid proceeding brought pursuant to CPLR Articles 78 and 30, petitioners, parents of unvaccinated children, seek to vacate the Order as arbitrary and capricious and contrary to law. The Petition alleges that respondents' actions "are disproportionate to the provable factual circumstances" and 'fail to use the least restrictive means that would likely control measles yet balance the rights to individual autonomy, informed consent and free exercise of religion." Respondents, on the other hand, contend that the Order is entirely reasonable and rational, and that petitioners cannot show it is arbitrary or capricious, or that it was made in excess of the Commissioner's authority, or that it violated petitioners' due process, equal protection or any other State or Federal Constitutional right.

At the hearing held on April 18, 2019, Respondents' attorney handed up a new Resolution of the Board of Health dated April 17, 2019, which made clear that, unlike the prior order which stated that a violation of Section 3.05 of the New York City Health Code could subject the violator to criminal fines and penalties, a violator would be "subject to the fines authorized by applicable"

law and regulation. The parties agreed to deem this proceeding a challenge to the Respondent's order as indicated in the April 17, 2018 resolution. Thus, to the extent Petitioners' challenge to the Order is based on the possible imposition of criminal penalties, that branch of the challenge is dismissed as academic.

The pivotal question posed for this court's determination is whether Respondent Commissioner has a rational, non-pretextual basis for declaring a public health emergency and issuing the attendant orders challenged herein. The evidence in this regard is largely uncontroverted. The unvarnished truth is that these diagnoses represent the most significant spike in incidences of measles in the United States in many years and that the Williamsburg section of Brooklyn is at its epicenter. It has already begun to spread to remote locations[1]. While Petitioners choose to characterize the situation as a mere "measles outbreak", exhibits annexed to their own moving papers amply demonstrate the gravity of the situation. Petitioner's Exhibits 4, 18 and 22 document that through April 8, 2019 there have been 285 diagnoses during the current outbreak in the affected area, as compared to 85 diagnoses nationwide during all calendar year 2016.[2] Adjusting for time and geography, this appears to constitute a dramatic spike, demanding immediate attention. Although petitioners proffer an affidavit from Dr. Orient wherein she opines that "the current measles outbreak is not a clear and present danger", she fails to provide any basis for this opinion. As such, this unsupported, bald faced opinion cannot be credited by this court.

Accordingly, this court can only conclude that there presently exists an emergent measles epidemic in the area codes in or bordering the Williamsburg neighborhood of Brooklyn, sufficient to warrant the declaration of a public health emergency.[3]

Having found the declaration to be well founded, it is incumbent upon the court to examine the remedy provided in the orders, namely directing MMR vaccination and imposition of various penalties, for a failure to do so.

CPLR 7803 provides for limited review only where the body or officer exceeded their authority or acted irrationally in an arbitrary, capricious or abusive manner *(see Pell vs. Bd of Education* 34 NY2d 222 (1974); CPLR 7803). Petitioners contend that the remedy imposed in the orders fails to use the least restrictive legally available means to control the outbreak. Yet, when asked at oral argument what actions would be better and less restrictive, Petitioners' attorney could not offer a demonstrably better, safer, or more efficient alternative, and thus Petitioners have not satisfied their burden of showing that the Order is arbitrary or capricious or otherwise unlawful on this basis.

Petitioners' remaining contentions fall into three general categories: scientific, religious and moral.

Scientific Objections

Petitioners' medical experts opine, variously, that the MMR vaccine is ineffective, is of greater risk than non-vaccination and that the MMR vaccine itself propagates the very disease it was designed to prevent. These contentions are completely unsupported by studies, medical literature

or other acceptable evidence. Indeed, Dr. Fitzpatrick concedes that "it is virtually impossible to find 'mainstream literature' on the risk of the MMR". This lack of foundation reduces the opinions of these doctors to little more than speculation.

Religious Objections

The religious objection exemption contained in Public Health Law §2164(a) applies only to the certificate of immunization required to admit a child to school, not to remedies attendant upon declaration of a public health emergency. Even if it did apply, the affidavits provided herein are insufficient to raise this issue. The affidavits merely state, in essence, that in the individual opinion of each of the affiants, taking the vaccine is violative of their religion. These opinions are entirely unsupported by an affidavit of a religious official (priest, rabbi, etc.) or other doctrinal documentation tending to support their opinion. As such, the affidavits are insufficient to raise a religious exemption under PHL 2164(9). *See Caiezel v. Great Neck Public Schools* 814 F Supp 2d 209 (2011), *affd* 500 Fed Appx 16 (2012), cert. denied, 569 US 947 (2013).

Moral Objections

Petitioners have raised various moral objections seemingly centered around a claim that the order(s) would compel forced vaccination. An examination of the orders indicates, and respondents concede that they do not require forcible vaccination. Accordingly, this court need not address the issue of forcible vaccination.

Petitioner raise the issue of informed consent and "medical ethics, tort law and internationally accepted human rights principles such as the Nuremberg Code" (See affidavit of Dr. Orient). These issues are inappropriately raised in this context. A fireman need not obtain the informed consent of the owner before extinguishing a house fire. Vaccination is known to extinguish the fire of contagion.

It is worthwhile to note that in enacting changes to Public Health Law §2164 in 1968 our legislature issued the following findings and declaration:

> "Among the truly great medical advances of this generation have been the development of proved methods of reducing the incidence of smallpox and measles, the once great cripplers. Public health statistics show clearly that immunization is effective and safe."

To the extent Petitioners are seeking injunctive relief, they have failed to demonstrate entitlement thereto.

For the foregoing reasons, the relief requested in the instant Order to Show Cause is denied, and the hybrid proceeding/action is dismissed.

ENTER FORTHWITH,

J. S. C.
HON. LAWRENCE KNIPEL
Administrative Judge

1. Most recently 39 cases have been diagnosed in Michigan which have been traced to an individual traveling from Williamsburg.

2. Department of Health records indicate 267 cases in Williamsburg alone.

3. Epidemic is commonly defined as an outbreak of disease that spreads quickly and affects many individuals at the same time (Merriam-Webster Dictionary). This court notes, but takes exception to the recent decision of the Supreme Court in Rockland County wherein the court looks to the percentage of overall population affected to determine whether there is an epidemic. The appropriate measure is rather the sudden percentage rise in infection experienced by the subject population. If one were to wait till a significant percentage of overall population were infected, disaster would inevitably ensue. *See WD vs. County of Rockland*, Index No. 31785/2019 (April 5, 2019).