UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

**ADRIANA AVILES**, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,

Plaintiffs,

Against

**BILL de BLASIO**, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,

Defendants.

**FIRST AMENDED COMPLAINT**

Civil No.: 1:20–cv–09829–PGG

James G. Mermigis, Esq.
**THE MERMIGIS LAW GROUP, P.C.**
85 Cold Spring Road, Suite 200
Syosset, New York 11791
516-353-0075
James@MermigisLaw.com

Ray L. Flores II (CA State Bar No.: 233643)
**Law Offices of Ray L. Flores II**
11622 El Camino Real Suite 100
San Diego, CA 92130
858-367-0397
Rayfloreslaw@gmail.com
(Subject to admission Pro Hac Vice)

Robert F. Kennedy, Jr., Esq.
Mary S. Holland, Esq.
Children's Health Defense
1227 N. Peachtree Pkwy, Suite 202
Peachtree City, GA 30269
mary.holland@childrenshealthdefense.org

*Attorneys for Plaintiffs*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**Federal Cases**



**United States Constitution**



**New York Constitution**

**Federal Statutes**



**State Statutes**



**Code of Federal Regulations**



**Miscellaneous Authorities**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| **ADRIANA AVILES**, Individually and as Parent and Natural Guardian of N.A., N.A. and A.A., **STEPHANIE DENARO**, Individually and as Parent and Natural Guardian of D.D. and H.D., **CHRISTINE KALIKAZAROS,** Individually and as Parent and Natural Guardian of Y.K., **GAETANO LA MAZZA**, Individually and as Parent and Natural Guardian of R.L., **CRYSTAL LIA**, Individually and as Parent and Natural Guardian of F.L., and **CHILDREN'S HEALTH DEFENSE**,<br><br>Plaintiffs,<br><br>Against<br><br>**BILL de BLASIO**, in his Official Capacity as Mayor of the City of New York, **DR. DAVID CHOKSHI**, in his Official Capacity of Health Commissioner of the City of New York, **NEW YORK CITY DEPARTMENT OF EDUCATION, RICHARD A. CARRANZA**, in his Official Capacity as Chancellor of the New York City Department of Education and **THE CITY OF NEW YORK**,<br><br>Defendants. | **FIRST AMENDED COMPLAINT**<br><br>Civil No.: 1:20–cv–09829–PGG |

1. Plaintiffs, by their attorneys, **The Mermigis Law Group, P.C.**, for their Complaint against Defendants Mayor Bill de Blasio ("Mayor de Blasio"), Dr. David Chokshi ("Chokshi"), New York City Department of Education ("NYCDOE"), Richard Carranza ("Carranza") and the City of New York ("NYC"), allege as follows:

## NATURE OF THIS ACTION

2. This civil action challenges the blatant abuse of discretion by Defendant Mayor de Blasio, Defendant New York City Department of Education, Defendant Carranza and Defendant Chokshi (hereinafter sometimes known collectively as "Defendants") and the unconstitutional,

arbitrary shutdown of New York City Public Schools on Thursday, November 19, 2020, sending 1.1 million students packing and back to full-time remote learning. On December 7, 2020 and December 10, 2020, respectively, Defendants permitted elementary and special needs children back to school on the condition that their parents "consent" to random, medically invasive testing at school over the course of the next ten months. Such testing is both unreliable and unconstitutional. Defendants still bar middle and high school students from returning to school.

## INTRODUCTION

3. On December 7, 2020 and December 10, 2020, respectively, Defendants allowed NYC elementary and District 75 schools to re-open with random, mandatory polymerase chain reaction (PCR) testing (hereinafter "Mandatory Testing") as a condition of entry, while middle and high schools remain shuttered (hereinafter "School Action").

4. As a result of the School Action, Defendants have subjected children to indefinite, isolating, and ineffective remote learning, putting children at risk for further academic regression and significant mental health problems.

5. Defendants ordered the Mandatory Testing for all students and teachers without scientific basis and with no prospect of accurate, actionable information deriving from the tests. (See Exhibit 1.)

6. Governor Cuomo's Executive Order 202, signed on March 7, 2020, declaring a state of emergency for the State of New York, justified school closures.

7. Defendants then announced that they would open schools in fall 2020 with more rigorous testing, even though Defendant Mayor de Blasio had said that schools were "extraordinarily safe" and that "Schools are some of the safest places to be right now in New York City."

8. On November 19, 2020, after schools had been open for the better part of two months, Defendant Mayor de Blasio again ordered them shut.

9. Ten days later, with yet another dizzying course correction, on November 29, 2020, Defendant Mayor de Blasio called on the school to reopen. Defendants announced that students in 3-K, Pre-K, and K through 5th grade could return to schools on December 7, 2020. (See Exhibit 2.)

10. Defendants further announced that schools serving students with significant disabilities, known as District 75, could return on December 10, 2020. (See Exhibit 2.)

11. Defendants also announced that middle school (6th through 8th grades) and high school would remain closed except for remote learning until some point in 2021.

12. But there was a catch: to return to in-person schooling, parents must sign a consent form (see Exhibit 3) to allow the schools to administer random genetic COVID-19 testing to children through September 2021 on threat of no in-person learning. When students returned to school without a signed consent form, they were branded trespassers and forced to leave. Middle and high school students will be subjected to the same Mandatory Testing when and if they return to in-person schooling.

13. The so-called "positivity rate," the number of positive cases based on PCR testing in any given region, is cause of great concern to New York City residents as well as the nation as a whole.

14. In most cases, however, "positivity rates" are based either on "presumptive positives" or PCR testing according to NYC Heath. (See Exhibit 4.)

15. PCR testing is not diagnostic. "Positive tests" do not equal COVID-19 infection cases; they include many false positives, i.e., when people are not actually sick but simply "test positive."

16. Additionally, varying numbers of cycles or amplifications make it easy to manipulate the number of positives. After 40 cycles, 100% of the people tested likely would be positive. (See Decl. Sin Lee, MD, Paragraph 21.)

17. The PCR test is a faulty diagnostic test, depending on the test setting. (See Decl. Sin Lee, MD, Paragraph 22.)

18. The endpoint of an RT-qPCR (PCR) test is arbitrarily set by the test kit manufacturer. It is "incomprehensible "that this simple decision frames "the results of PCR testing for the positive case numbers upon which virtually all public health measures are being based." (See Decl. Sin Lee, MD, Paragraph 16.)

19. The Department of Education (DOE) has not disclosed the number of cycles it is using in its PCR testing. (See Decl. Kevin McKernan, Paragraph 21.)

20. This is because PCR testing after a cycle threshold (Ct) value of 35 cycles is completely unreliable (See Decl. Kevin McKernan, Paragraph 9d) and detects only non-infectious (dead) viral material. (See Decl. Kevin McKernan, Paragraph 9e.)

21. The PCR test is "useless" as a specific diagnostic tool to identify the SARS-CoV-2 virus. (See Decl. Kevin McKernan, Paragraph 9f.) False positives often lead to isolation and quarantine of healthy people, causing economic, academic, social, legal and psychological harm.

22. At the PCR cycle levels generally in use in the United States, false positives outnumber true positives. Above a 35-cycle threshold, PCR testing is worthless in detecting active infections, thus leading to purposeless disruptions in communities' and individuals' lives.

23. Defendants are coercing parents and children to "consent" to PCR testing on threat of losing all access to in-person education in blatant violation of New York State law. Under New York Health and Safety Code §§ 2440 et seq., voluntary consent to medical intervention is required and codified in law.

24. The DOE has misrepresented the very nature of the testing it provides. (See Decl. Kevin McKernan, Paragraph 20.) Furthermore, there is no way to challenge the accuracy of the Mandatory Testing. (See Decl. Kevin McKernan, Paragraph 22.)

25. Among all people in society, children are at lowest risk of COVID-19. There is no scientific basis to require PCR testing of all asymptomatic children.

26. There is no evidence to suggest that this testing, without additional laboratory verification, is in any way meaningful or diagnostic. A two-phased test with DNA sequencing would "guarantee no false positive results however that is not being done." (See Decl. Sin Lee, MD, Paragraph 6.)

27. Despite being required to "consent," families do not know the number of cycles at which their children's samples are being tested (above a cycle threshold of 35, the test results are meaningless); they don't know what is being done with the samples; they don't know with whom the data is being shared or why; and they have no means to retest allegedly positive tests, yet these tests determine severe isolation and quarantine measures.

28. Defendants are forcing children to participate in a massive medical experiment without lawful consent.

**COVID-19 POSES LOW RISK TO CHILDREN COMPARED TO THE IRREPARABLE HARM OF THEIR LOSING LONG PERIODS OF IN-PERSON SCHOOLING**

29. There is no evidence that school-aged children are at higher risk of COVID-19 in a school setting than anywhere else in the community. In fact, having come to that conclusion, several countries have kept schools open or reopened them fully. (See Exhibits 5-11.)

30. There is little to no evidence that students transmit COVID-19 to teachers or adults in a school setting or elsewhere in the community.

31. The COVID-19 infection fatality rate (IFR) of children between 0-19 years old is .00003%. (See Exhibit 12.) Although COVID-19 has a minimal impact on school-aged children, Defendants' School Action is having an overwhelmingly negative impact on them.

32. Acting CDC Director Dr. Robert Redfield has stated that schools are among the safest places for children to be during the coronavirus pandemic, arguing that "there is extensive data that confirms .... K-12 schools can operate with face-to-face learning and they can do it safely and responsibly." (See Exhibit 13.)

33. Mayor DeBlasio has confirmed that the schools are using PCR testing. (See Exhibit 14.)

34. Chancellor Carranza said getting kids back in school is one of the single most important things they can do. (See Exhibit 15.)

35. Instead of coerced testing of the student population, voluntary testing of the adult teacher population would be a more appropriate solution. (See Decl. Kevin McKernan, Paragraph 34.)

36. Temperature testing would be a better and less invasive solution as well. (See Decl. Kevin McKernan, Paragraph 34.)

37. A study found that SARS-CoV-2 transmission in children in schools appears considerably less than the transmission for other respiratory viruses, such as influenza. Further, there is no gold standard for PCR testing of COVID-19. (See Exhibit 20.)

38. There is no evidence of child to adult transmission. (See Exhibit 7.)

39. These data suggest that children are not the primary drivers of COVID-19 spread in schools or the community. (See Exhibit 10.)

40. A recent McKinsey report makes clear that school shutdowns cause irreparable harm to students; "the hurt could last a lifetime." (See Exhibit 17.) The June 2020 report depicts learning loss and higher dropout rates that will lead to lower earnings in later life. Poor quality remote instruction widens the existing achievement gap for Black and Hispanic students, who make up the majority in New York City schools. (See Exhibit 17.)

41. 41. Remote learning also leads to decreased teacher interaction with students. (See Exhibit 16 (There are concerning signs that many teachers have had no contact at all with a significant portion of students . . . only 39% of teachers reported interacting with their students at least once a day, and most teacher-student communication occurred over electronic mail.).)

42. The McKinsey report suggests that if in-classroom instruction resumes by January 2021, students would have already lost almost seven months of learning. If it resumes only in fall 2021, they would have lost over a year of learning. (See Exhibit 17, page 8.)

43. Plaintiffs complain that chaos has engulfed children, parents, teachers, school administrators and staff, as they all struggle with school shutdowns. At best, remote learning is inconsistent. At worst, it is disastrous, leading to truancy and mental health disorders stemming from isolation and depression.

44. Defendants' arbitrary actions deprive Plaintiffs' children, and all New York City school children, of the opportunity for a meaningful education, including appropriate academic instruction, extra-curricular activities, and social support, all of which are critical for later success in life. Defendants' arbitrary and capricious actions put at risk the future of an entire generation of New York City children. These actions have long-term implications for New York City's economic stability, which has already suffered serious harm from recent lockdowns.

## PARTIES

45. Plaintiffs are parents of children enrolled in New York City public schools.

46. Plaintiff, Christine Kalikazaros is the parent of Y.K. who had attended P.S. 79 in Queens, New York. Y.K. has been removed from school because Plaintiff refuses to consent to Mandatory Testing. Y.K. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing.

47. Plaintiff, Stephanie Denaro is the parent of D.D. and H.D., both of whom were attending P.S. 2 in Manhattan. D.D. and H.D., have been removed from P.S. 2 because Plaintiff refuses to consent to Mandatory Testing. D.D. and H.D. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing.

48. Plaintiff, Gaetano La Mazza is the parent of R.L., who was attending P.S. 14 in the Bronx. R.L. has been removed from school because Plaintiff refuses to consent to Mandatory Testing. R.L. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing.

49. Plaintiff, Amanda Aviles is the parent of N.A., who was attending P.S. 221 in Queens, New York. N.A. has been removed from school because Plaintiff refuses to consent to Mandatory Testing. Plaintiff took N.A. for a COVID-19 test a day before school opened. The

test was negative, yet the school refused to accept the results. N.A. will not be welcomed back to school unless Plaintiff signs the consent form to Mandatory Testing. Plaintiff, Amanda Aviles, is also the parent of and A.A. who was attending M.S. 67. Middle School 67 was shut down on November 19, 2020 by Defendants and remains closed, depriving A.A. of a basic minimum education.

50. Plaintiff Crystal J. Lia is the parent of F.L., who was attending P.S. 36 on Staten Island, New York. Plaintiff applied for a medical exemption to the Mandatory Testing because F.L. is a severe asthmatic. Defendants denied the medical exemption and removed F.L. from P.S. 36. F.L. will not be welcomed back into school unless Plaintiff signs the consent form to Mandatory Testing. Plaintiff will not sign the consent form because she believes Mandatory Testing is unethical and because F.L.'s licensed physician advised against it.

51. Attached to this 1st Amended Complaint are each of their sworn declarations, which are incorporated as though fully set forth herein.

52. Plaintiff Children's Health Defense ("CHD") is a national not-for-profit membership organization of parents, advocates for children, and attorneys. CHD's mission is to safeguard children's health and to advocate for children and families to prevent and stop environmental harms and to change policies that place children at undue risk.

53. CHD accomplishes its mission by, among other things, providing resources, training, and information to members to assist them in protecting the rights and health of their children; educating the public and policymakers about the experiences of children and their families that have suffered environmental harms; and educating members about developments in laws and policies affecting the health of children.

54. CHD has over 100,000 members located across the United States and reaches nearly two million readers per month through its website. Membership is open to all persons who are interested in furthering CHD's purposes and who pay a small fee for lifetime membership. The Board of Directors is composed exclusively of CHD members. CHD has active members in New York City, including parents of children named in this lawsuit.

55. Defendant Bill de Blasio is the Mayor of New York City and has issued a series of executive orders since the COVID-19 pandemic began, including the shutdown of New York City public schools. The Mayor is being sued in his official capacity.

56. Defendant Richard A. Carranza is the Chancellor of the New York City Department of Education and is being sued in his official capacity. Defendant Carranza is responsible for enforcing education law and regulations in the City of New York. The Department of Education has issued directives, updates and supplemental guidance on instruction for the 2020-21 school year with recommendations from the Department of Health.

57. Defendant David Chokshi is the Commissioner for the New York City Department of Health and is being sued in his official capacity. Defendant David Chokshi and the Department of Health provide recommendations and consultation to Defendant de Blasio and Defendant Carranza of the New York City Department of Education.

## JURISDICTION & VENUE

58. This action arises under 42 U.S.C. § 1983 because of Defendants' deprivation of Plaintiffs' constitutional rights to due process and equal protection rights under the Fourth, Fifth, and Fourteenth Amendments to the U.S. Constitution. This Court has federal question jurisdiction under 28 U.S.C. § 1331 and § 1343 and has authority to award the requested

declaratory relief under 28 U.S.C. § 2201; the requested injunctive relief and damages under 28 U.S.C. § 1343(a) and 42 U.S.C. § 1983; and attorneys' fees and costs under 42 U.S.C. § 1988.

59. The Court has jurisdiction over Plaintiffs' federal law claims under 42 U.S.C. § 1331 and 28 U.S.C. § 1343.

60. The Court has jurisdiction over Plaintiffs' supplemental state court claims under 28 U.S.C. § 1367.

61. Venue is proper in the Southern District of New York under 28 U.S.C. § 1391(b) in that a substantial part of the events giving rise to Plaintiffs' claims occurred in this district.

## CONSTITUTIONAL ISSUES

62. New York State law recognizes the fundamental right to public education in a classroom setting. The New York Constitution plainly states: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State." N.Y. Const., Art. XI, § I. School being a physical school building is confirmed by this same Article, which addresses transportation to and from school.

63. In direct conflict with the New York Constitution, Defendant de Blasio halted all in-person instruction on November 19, 2020 and has only partially re-opened schools to a minority of students whose parents Defendants coerced into Mandatory Testing on their children.

64. Parents have a fundamental right to direct the care and upbringing of their children, and medical decisions fall squarely within that liberty interest. Parents with their chosen healthcare providers are in the best position to safeguard the health and safety of their children.

65. Those parents who prefer remote learning for their children have that option. Those who prefer in-person learning should be able to provide satisfactory documentation to Defendants regarding their children's health, just as they do for all other health considerations. *See Troxel v. Granville*, 530 U.S. 57, 58 (2000) ("There is normally no reason for the State to inject itself into the private realm of the family to further question fit parents' ability to make the best decisions regarding their children.")

## CLAIMS FOR RELIEF

### FIRST CLAIM FOR RELIEF

### 42 U.S.C. § 1983 "Violation of Due Process under the Fourteenth Amendment" Deprivation of Substantive Due Process

### (By All Plaintiffs Against All Defendants)

66. Plaintiffs hereby incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any State deprive any person of life, liberty, or property, without due process of law**; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., 14th Amend., § 1.

67. The Due Process Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). The Due Process Clause includes a substantive component that bars arbitrary, wrongful, government action "regardless of

the fairness of the procedures used to implement them." *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

68. The Due Process Clause recognizes that certain interests are so substantial that no process is enough to allow the government to restrict them absent a compelling state interest. *Washington v. Glucksberg*, 521 U.S. at 719-21.

69. Under the Due Process Clauses of the Fifth and Fourteenth Amendments, "no person may be deprived of life, liberty, or property without reasonable notice and an opportunity to be heard." *Karpova v. Snow*, 497 F.3d 262, 270 (2d Cir. 20007).

70. Plaintiffs have the right to direct their children's education. Access to a foundational level of literacy provided through public education has an extensive historical legacy and is so central to our political and social system as to be "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. at 720-21.

71. Nonetheless, Defendants have deprived Plaintiffs of the right to direct their children's education in violation of the Fourteenth Amendment, by effectively precluding the children from receiving a basic minimum education. This deprivation is real because (1) many students have limited or no access to the internet; (2) the quality of remote education is inferior to in-person instruction; (3) many students find computer-based learning difficult or impossible; and (4) remote learning has demonstrably increased truancy. Defendants' School Action has caused irreparable harm to children and their families.

72. PCR testing, clogs the system, burdens schools and children, does psychological harm, and is unproductive (Decl. Kevin McKernan, paragraph 30.)

73. Defendants lack any compelling, or even rational, interest to burden the right to a minimum education. Although COVID-19 represents a significant public health challenge, the

weight of the evidence shows that children's transmission and infection rates do not justify school closure. Data prove that the mortality and severe adverse health outcome risk to children from COVID-19 is virtually non-existent.

74. Defendants may manage risk to teachers just as other institutions manage risk to essential workers: by offering choices and providing protection to mitigate risk. Schools have already been providing temperature monitoring, masking, social distancing, deep cleaning and hand sanitizing. Defendants have already offered teachers the option to teach remotely. The risk that students present to one another and to teachers and staff pale compared to the undeniable and irreparable harm children now suffer.

75. Plaintiffs have no adequate remedy at law. They will continue to suffer irreparable harm unless Defendants are enjoined from shutting down the schools and coercing parents to submit to their children to Mandatory Testing.

76. Pursuant to 42 U.S.C. § 1983, Plaintiffs are entitled to temporary, preliminary, and permanent injunctive relief restraining Defendants' School Action and Mandatory Testing.

## SECOND CLAIM FOR RELIEF

### 42 U.S.C. § 1983 "Violation of Due Process under the Fourteenth Amendment" Deprivation of Procedural Due Process

### (By All Plaintiffs Against All Defendants)

77. Plaintiffs reallege and incorporate by reference all preceding paragraphs as if fully set forth herein.

78. Defendants' helter-skelter approach to opening and closing the schools has itself caused serious harm to students and their families.

79. Defendants have failed to provide families with adequate notice of when and how schooling will take place.

80. Similarly, they have failed to provide families with an appeals process from positive PCR tests that require isolation, quarantine, and disruption of many lives.

81. They have failed to provide a process to contest the denial of medical exemptions, directly affecting Plaintiff Crystal Lia and her son.

82. They have failed to tailor their requirement for PCR testing, denying certified test results from their partner agency Health and Hospitals without any rational basis.

**THIRD CLAIM FOR RELIEF**

**42 U.S.C. § 1983 Violation of the Equal Protection Clause under the Fourteenth Amendment**

**(By All Plaintiffs Against All Defendants)**

83. Plaintiffs incorporate by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

84. The equal protection doctrine prohibits governmental classifications that affect some groups of citizens differently than others. *Engquist v. Or. Dept. of Agric.*, 553 U.S. 591, 601 (2008) (citations omitted). The touchstone of this analysis is whether a state creates disparity between classes of individuals whose situations are arguably indistinguishable. *Ross v. Moffitt,* 417 U.S. 600, 609 (1974).

85. Denial of education to isolated groups of children poses an affront to one of the goals of the Equal Protection Clause, i.e., to abolish barriers presenting unreasonable obstacles to advancement on the basis of individual merit.

86. Similarly, denial of education to those children whose parents object to invasive, non-diagnostic testing violates equal protection. Because there is no rational basis to require in-school non-diagnostic testing, children whose parents object suffer unequal legal protection.

87. Paradoxically, by depriving children of disadvantaged groups an education, the society forecloses the means by which they may advance in the future.

88. Defendants' actions have disproportionately affected minority children of lower income households, whose families cannot provide high-speed internet access, computers, private tutors, and quiet learning environments.

89. Black, Hispanic and other minority racial and ethnic groups have been subjects of unethical and illegal medical experimentation in the past. Minority parents, who make up the majority of parents in New York City schools, are rightfully wary to hand over their children to medical interventions without their own supervision. The outrage of the decades-running Tuskegee syphilis experiment on Black men and their families still haunts them. They remember that the world's leading public health authority, the CDC, intentionally and knowingly caused disease and death to hundreds of innocent victims for the cause of "science." (See Exh. 19.) A CDC publication details the Tuskegee events but cannot convey the true pain the program inflicted and the anger it still arouses. (See Exh. 19.)

90. The children forced into remote learning are those at greatest risk. They are at risk of losing a minimal education and becoming dropouts.

91. Plaintiffs have no adequate remedy at law and will suffer serious and irreparable harm to their constitutional rights unless Defendants are enjoined from shutting down schools.

92. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating and restraining enforcement of Defendants' Orders and any associated guidance documents.

**FOURTH CLAIM FOR RELIEF**

**Violation of Parents' Right to Direct Education**

**(By All Plaintiffs Against All Defendants)**

93. Plaintiffs incorporate the foregoing paragraphs as though fully set forth herein.

94. Parents have the right to direct their children's education and upbringing. *Troxel v. Granville*, 530 U.S. at 58. Parents' ability to access to a foundational level of literacy for their children through public education has an extensive historical legacy and is so central to our political and social system as to be "implicit in the concept of ordered liberty." *Washington v. Glucksberg*, 521 U.S. at 720-21.

95. Overwhelming evidence shows that students are falling behind through online learning, especially Black and Hispanic children from lower income households, who make up most New York City school students. (See McKinsey Report, Exh. 17.)

96. New York taxpayers provide funding for education in schools, not for unwarranted medical testing. Because PCR testing alone is not diagnostic, it has no place in schools. If there is any place for testing, it is outside the school setting, supervised by parents and administered by healthcare providers of the parents' choosing.

97. Schools require certification of vaccination compliance and overall health; they do not require that students receive compulsory vaccinations or other medical care at school without true parental consent.

98. There is no rational basis to force children to submit to Mandatory Testing. If PCR testing continues to be a requirement, then parents must be able to obtain equivalent certification from licensed medical providers of their choosing.

**FIFTH CLAIM FOR RELIEF**

**Violation of Fundamental Parental Rights**

**(By All Plaintiffs Against All Defendants)**

99. Plaintiffs incorporate the foregoing as though fully set forth herein.

100. Under New York City's Parents' Bill of Rights, parents have the right to "information regarding all policies, plans and regulations which require parent consultation at the school, district and/or borough level"; and to "be informed about required health, cognitive and language screening examinations." (See Exhibit 21.)

101. Defendants' School Action is a violation of this Bill of Rights, which reflects parent-taxpayers' reasonable expectations of public schooling. Parents are best situated to assess their child's health, academic and social needs, as the Bill of Rights implies. The locus of decision-making for children rests with parents under well-established Supreme Court precedent; not with the Mayor or Commissioner of Education. Parents also have a right to privacy of their child's information. (See Exhibit 22.)

102. Defendants have failed to disclose critical information to Plaintiffs, including when they plan to resume 5-day/week education; when middle and high school classes will resume; and basic information regarding the Mandatory Testing, including how the children's genetic samples are being handled.

103. Parents are entitled to control the upbringing of children, including medical decisions. The CDC's guidance is unequivocal: in-school testing is "unethical and illegal." (Exh. 18.) If any kind of testing remains compulsory, it must occur under direct parental supervision outside school, not under coerced "consent."

**SIXTH CLAIM FOR RELIEF**

**Violations of the Fourth Amendment**
**Right to be free of unreasonable searches and seizures**

**(By All Plaintiffs Against All Defendants)**

104. Plaintiffs incorporate by reference the foregoing as though fully set forth herein.

> **The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated**, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., 4th Amend.

105. Defendants' Mandatory Testing violates the Fourth Amendment's prohibition against unreasonable searches and seizures. These tests are invasive and remove genetic material from minors as young as six years old without parental supervision and without true consent.

106. "[Y]oung people do not 'shed their constitutional rights' at the schoolhouse door." *Goss v. Lopez,* 419 U.S. 565, 574 (1975).

107. Defendants' Mandatory Testing is an unreasonable search and seizure: "[A] search is warranted only if the student's conduct creates a reasonable suspicion that a particular regulation or law has been violated, with the search serving to produce evidence of that violation." *Cornfield v. Consol. High Sch. Dist. No. 230,* 991 F.2d 1316, 1320 (7th Cir. 1993).

108. New York State permits certain testing in school, but with critical limitations: (1) testing is only permissible with voluntary parental consent; and (2) in-school testing occurs only for older students. Under New York Education Law § 912-A, parents may request in writing that their child be subject to drug testing, if the child is in the seventh grade or above.

109. The New York State legislature passed this law by democratic vote, unlike Defendants' executive orders. And this drug testing law involves no coercion. Furthermore, testing without direct parental oversight occurs only for middle school students and above, and thus is age-appropriate, unlike Defendants' Mandatory Testing, affecting children as young as six years old.

110. Defendants' Mandatory Testing violates the Fourth Amendment and is at odds with New York's voluntary testing options.

**SEVENTH CLAIM FOR RELIEF**
**Violation of Privacy under the Fourth Amendment**
**(By All Plaintiffs Against All Defendants)**

111. The foregoing paragraphs are repeated and incorporated as though fully set forth herein.

112. Plaintiffs assert the Privacy Clause of the Fourth Amendment that respects the fundamental right of an individual to a zone of privacy for medical decision making.

113. Plaintiffs and their children live in constant fear of a positive PCR test that could result in isolation, quarantine and profound disruption.

114. Defendants' School Action infringes on each Plaintiff's zone of privacy to make personal medical decisions. Defendants' School Action coerces parents to reveal highly personal information to a minimum of six separate agencies and organizations – including name, COVID-19 test results, date of birth, gender, race/ethnicity, school name, address, telephone, mobile number and email address. (Consent Form Exh. 2.) This unreasonable invasion of personal medical privacy violates Plaintiffs' and children's rights.

115. Defendants' School Action unreasonably limits each Plaintiff's parental supervision and choice of medical providers.

116. Defendants have failed to provide proof that the students' genetic material is not being stored for later use. Defendants' coerced, random testing of 20% of the school body on a weekly basis, with a 48-72 hour lag time in providing results, does not provide disease control. It constitutes an unwarranted violation of privacy, however.

**EIGHTH CLAIM FOR RELIEF**

**Violation of Privacy under the Fourth Amendment**

**(By All Plaintiffs Against All Defendants)**

117. Plaintiffs incorporate the foregoing paragraphs as though fully set forth herein.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property, without due process of law**; nor shall private property be taken for public use, without just compensation.

U.S. Const., 5th Amend.

118. Plaintiff parents or guardians are the sole people empowered to provide informed consent for their children to medical procedures.

119. No public official or agency has the authority to "consent" on behalf of children to participate in a mass infection detection program.

120. Plaintiffs do not consent that their children be subjects in a randomized experiment through September 2021, nor do they consent that Defendants should exile their children into "remote learning" because of informed refusal.

**NINTH CLAIM FOR RELIEF**

**Violation of N.Y. Constitution, Art. XI, § I, ¶ 1**
**Provide for the Maintenance and Support of thorough and efficient system of free public schools**

**(By All Plaintiffs Against All Defendants)**

121. Plaintiffs incorporate herein by reference each and every allegation contained in the preceding paragraphs of this Complaint as though fully set forth herein.

122. New York Constitution, Art. XI, § I, ¶ 1 provides for the Maintenance and Support of a thorough and efficient system of free public schools.

123. Defendants have failed to provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children.

124. Remote learning does not meet Defendants' obligation to provide children with the right to a minimal education.

125. Plaintiffs and their children have no adequate remedy at law and will suffer continuous, irreparable harm to their state constitutional rights unless Defendants are enjoined from shutting down schools and Mandatory Testing.

**TENTH CLAIM FOR RELIEF**

**Violation of N.Y. Pub. Health Law § 2440 *et seq***

**(By All Plaintiffs Against All Defendants)**

126. Plaintiffs incorporate the foregoing paragraphs as though fully set forth herein.

127. The voluntary consent of human subjects in any experiment or clinical study is absolutely "essential." N.Y. Pub. Health Law § 2441.

128. New York law directly incorporates the Nuremberg Code, requiring that the human subject be "so situated as to be able to exercise **free power of choice without undue inducement or any element of force, fraud, deceit, duress or other form of constrain or**

**coercion**." N.Y. Pub. Health Law § 2441.

129. New York law prohibits any human subject research without voluntary informed consent documented in writing. Parents must provide written consent for minors. N.Y. Pub. Health Law § 2442.

130. The CDC provides specific, unambiguous guidance for schools during the COVID-19 crisis:

> If a school is implementing a testing strategy, testing should be offered on a voluntary basis. **It is unethical and illegal to test someone who does not want to be tested, including students whose parents or guardians do not want them to be tested**.

(Exh. 18.)

131. Disregarding federal and state law as well as CDC guidance, Defendants attempt to unethically and unlawfully coerce parents into signing consent forms.

132. On information and belief, Defendants are using the data they collect from children in schools for an infection control study. The Mandatory Testing, consent forms, and engagement of multiple healthcare and medical testing organizations are all consistent with clinical study of human research subjects. Defendants have never disclosed such a research agenda to parents, but if true, would constitute yet another cardinal violation of law and ethics.

133. Plaintiffs have not and will not give consent to random testing of their children. There is no rational basis for Defendants to exclude children because of their parents' informed refusal. Defendants' decision to condition public school access on unethical and illegal PCR testing must stop.

134. Unambiguous Second Circuit authority establishes that informed consent to medical experimentation is a *jus cogens* norm. *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2009).

135. Informed consent means that the subject has a full understanding of the purpose, procedures, benefits, risks and alternatives available to enable him to make an informed decision about being a study participant.

136. Children in particular must be protected from participation in medical experiments or studies "unless essential." 21 CFR 56.111(b).

137. Defendants have breached their obligation to obtain voluntary and informed consent to Mandatory Testing. Coercion violates voluntariness. Incomplete, misleading and false information violates the information requirement. Defendants' randomized testing and analysis of collected data constitutes public health research that Defendants and their partners have concealed from Plaintiffs and others in violation of law.

## CONCLUSION

138. In the 1940's, in a time of great fear and anxiety, Japanese Americans faced internment in concentration camps because of imagined disloyalty. Those rounded up often uttered the phrase, "Shikata ga nai," meaning "it cannot be helped" or "nothing can be done about it." Over a powerful dissent from Justice Robert Jackson, the U.S. Supreme Court upheld the rounding up and detention of citizens under an emergency order. *Korematsu v. United States*, 323 U.S. 214 (1944). Nearly fifty years later, President Reagan apologized for the injustice and indignity they suffered and offered a small measure of compensation. In 1988, President Reagan signed the Civil Liberties Act that in part righted a grievous wrong.

139. While Defendants are fully empowered to enact rational measures to contain infectious disease under existing law, they do not have authority to invent irrational testing regimes, to punish families who refuse to participate in them, and to exile healthy children from

school based on color-coded positivity rates. New York City children are entitled to due process, equal protection, education, informed consent and related rights.

140. Plaintiffs and their children hope and pray that, in this instance, something can be done.

## REQUEST FOR JURY TRIAL

141. Plaintiffs request a jury trial on factual matters.

## PRAYER FOR RELIEF

**WHEREFORE,** Plaintiffs respectfully ask the Court to grant the following relief:

A. To declare Defendants' Order shutting down Public Schools unconstitutional;

B. To grant a preliminary injunction enjoining the shutdown of schools;

C. To permanently enjoin Defendants from shutting down Public Schools;

D. To order Defendants to issue new orders and guidance, reinstating in-person instruction in all schools without delay;

E. To award Plaintiffs reasonable attorneys' fees, costs, and expenses under applicable state and federal law; and

F. To grant any further relief which the Court determines to be just and proper.

Dated: Syosset, New York
December 16, 2020

Respectfully submitted,

**THE MERMIGIS LAW GROUP, P.C.**

/s/ James Mermigis

By: James G. Mermigis, Esq.
85 Cold Spring Road, Suite 200
Syosset, NY 11791
(516) 353-0075
(516) 682-0011 Facsimile

Robert F. Kennedy, Jr., Esq.
Mary S. Holland, Esq.
Children's Health Defense
1227 N. Peachtree Pkwy, Suite 202
Peachtree City, GA 30269
mary.holland@childrenshealthdefense.org

Ray L. Flores II (CA State Bar No.: 233643)
Law Offices of Ray L. Flores II
11622 El Camino Real Suite 100
San Diego, CA 92130
(858) 367-0397
(888) 336-4037
(Subject to admission Pro Hac Vice)

*Attorneys for Plaintiffs*