

At I.A.S. Part 35 of the Supreme Court of the State of New York, held in and for the County of Erie, at the Courthouse located at 25 Delaware Avenue, Buffalo, New York 14202, on the 12 day of November, 2019.

P R E S E N T:

HONORABLE K. JEANNETTE DGDEN

Justice.

ALI HAMIDEH individually and on behalf of his minor child A.H., and OROOBA HAMIDEH individually and on behalf of her minor child A.H.,

Plaintiffs,

-against-

JANICE GENTZ, in her Official Capacity as Executive Director of the CHC Learning Center, and CHC LEARNING CENTER,

Defendants.

Index No. 814893/209

**ORDER TO SHOW CAUSE**

Upon reading and filing the annexed Complaint, dated November 11, 2019, the Affidavits of Orooba Hamideh and Ali Hamideh, sworn to November 11, 2019, and the exhibits annexed thereto, the Affirmation of Emergency of Aaron Siri, Esq., dated November 11, 2019, and the exhibits annexed thereto, and the accompanying Memorandum of Law, dated November 11, 2019, and upon all prior pleadings and proceedings had herein, it is hereby

**ORDERED** that the Defendants Janice Gentz, in her Official Capacity as Executive Director of the CHC Learning Center, and CHC Learning Center (“CHC”), or their attorney show cause at the Supreme Court of the State of New York in and for the County of Erie, at I.A.S. Part 35 thereof at the County Courthouse located at 25 Delaware Avenue, Buffalo, New York, on the 3 day of December 2019, at 2:30 o'clock P.m., or as soon thereafter as counsel may be heard, why an Order should not be entered pursuant to CPLR § 6301:

*oral argument of the motion on 12/3/19 EJ*

- i. Directing that CHC re-admit A.H. during the pendency of ~~this action~~;
- ii. Directing that during the pendency of this action A.H. receive all services he was receiving prior to his exclusion from CHC on October 4, 2019;
- iii. And such other and further relief as the Court may direct; and it is further

**ORDERED** that pursuant to CPLR § 6313, pending the hearing ~~and determination~~ of the Plaintiffs' motion for a preliminary injunction, *on 12/3/19 EJ*

- i. CHC is directed to re-admit A.H.;
- ii. CHC shall ensure that A.H. resume attending school as soon as practicable, but under no circumstances later than 2 school days following service of this order on CHC;
- iii. CHC shall ensure that A.H. receives all services he was receiving prior to his exclusion from CHC on October 4, 2019; and it is further

**ORDERED** that all affidavits and other papers in opposition to this motion, if any, shall be served so as to be received by the attorneys for the Plaintiffs, Siri & Glimstad LLP, no later than November ~~15~~ *21 EJ*, 2019 at 5:30 p.m.; and it is further

**ORDERED** that a copy of this Order to Show Cause, together with the papers upon which it is based, and the Summons and Complaint, be served by overnight delivery service, upon the following addresses, on or before November 15, 2019, which shall be deemed good and sufficient service:

- i. For defendant Janice Gentz, at CHC Learning Center, 1085 Eggert Road, Amherst, New York 14226;
- ii. For defendant CHC Learning Center, 1085 Eggert Road, Amherst, New York 14226.

ENTER:

*J. Jeannette Coffey*  
\_\_\_\_\_  
J.S.C.

*Nov. 12, 2019*

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ERIE**

ALI HAMIDEH individually and on behalf of his minor child A.H., and OROOBA HAMIDEH individually and on behalf of her minor child A.H.,

Plaintiffs,

-against-

JANICE GENTZ, in her Official Capacity as Executive Director of the CHC Learning Center, and CHC LEARNING CENTER,

Defendants.

Index No. \_\_\_\_\_

Motion Sequence No. 1

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
THEIR MOTION FOR A PRELIMINARY INJUNCTION & TEMPORARY  
RESTRAINING ORDER**

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TABLE OF CONTENTS

	Page
<b>PRELIMINARY STATEMENT</b> .....	<b>1</b>
<b>BACKGROUND</b> .....	<b>4</b>
A. A.H. has Attended CHC for Five Years and All Parties Agree He Thrived There.....	4
B. Dr. Finnegan a Leading Pediatric Neurologist has Treated A.H. his Entire Life .....	5
C. A.H. Experienced Extreme Seizures Following Prior Vaccinations.....	6
D. A.H.’s Treating Physician, Dr. Finnegan, Writes a Medical Exemption for A.H.....	8
E. CHC Improperly Accepts the NYSDOH’s Recommendation that it Deny A.H.’s Valid Medical Exemption and CHC Expels A.H.....	9
F. Dr. Rausch-Phung had no Basis to Reject A.H.’s Valid Medical Exemption .....	10
<b>ARGUMENT</b> .....	<b>12</b>
<b>I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR         CLAIMS BECAUSE CHC’S DENIAL OF A.H.’S MEDICAL EXEMPTION         VIOLATED BOTH NEW YORK LAW AND THE NYSDOH’S OWN         REGULATIONS</b> .....	<b>12</b>
A. CHC’s Rejection of A.H.’s Medical Exemption is a Violation of the Plain Terms of PHL Section 2164(8).....	13
B. CHC’s Rejection of A.H.’s Medical Exemption is a Violation of the NYSDOH’s Own Regulations .....	14
C. CHC’s Abdication of its Duty to Evaluate and Accept A.H.’s Valid Medical Exemption Further Violated PHL § 2164.....	17
<b>II. A.H. WILL BE IRREPARABLY INJURED IN ABSENCE OF AN         INJUNCTION BECAUSE IF NOT ALLOWED TO RETURN TO SCHOOL         HE WILL SUFFER SIGNIFICANT MEDICAL AND EDUCATIONAL         REGRESSION</b> .....	<b>18</b>
<b>III. THE BALLANCE OF THE EQUITIES TIPS DECIDEDLY IN A.H.’S         FAVOR BECAUSE HIS ABSENCE FROM SCHOOL CAUSES         SIGNIFICANT HARM WHILE HIS PRESENCE IN SCHOOL WILL         CAUSE NO HARM</b> .....	<b>21</b>
A. The Irreparable Injuries A.H. Will Suffer from Missing School Create a Significant Burden for Him and his Family.....	21
B. CHC will Experience no Harm by Re-Admitting A.H. During the Pendency of this Action.....	22
<b>CONCLUSION</b> .....	<b>25</b>

TABLE OF AUTHORITIES

**Cases**

*Bowden v. Iona Grammar Sch.*,  
284 A.D.2d 357 (2d Dep't 2001) ..... 12, 13

*Bruesewitz v. Wyeth LLC*,  
562 U.S. 223 (2011)..... 11

*Felix v Brand Serv. Group LLC*,  
101 A.D.3d 1724 (4th Dep't 2012) ..... 21

*Lewis v. Sobol*,  
710 F.Supp. 506 (S.D.N.Y.1989) ..... 19

*Morales v. Sec'y of HHS*,  
2019 U.S. Claims LEXIS 1039 (Fed. Cl. July 30, 2019)..... 16

*Olean Med. Group LLP v Leckband*,  
32 A.D.3d 1214 (4th Dep't 2006) ..... 19

*Price v. Sec'y of HHS*,  
2018 U.S. Claims LEXIS 1779 (Fed. Cl. December 4, 2018)..... 16

*Vitale v. Secretary of the Dept. of Health and Human Services*,  
No. 94-0060V, 1997 WL 39498, at \*14 (Fed Cl Jan. 16, 1997)..... 16

*W.D. on behalf of A. v County of Rockland*,  
63 Misc. 3d 932, 934 (Sup. Ct. 2019)..... 12, 19

**Statutes**

42 U.S.C. § 300aa-11 ..... 11

PHL § 2164 ..... 10, 13, 14, 18

**Regulations**

10 NYCRR § 66-1 ..... 10, 14, 17

Plaintiffs Ali Hamideh and Orooba Hamideh, on behalf of themselves and their minor child A.H., by and through their undersigned counsel, respectfully submit this Memorandum of Law in support of their order to show cause for a temporary restraining order and preliminary injunction directing (1) that Defendant CHC Learning Center (“**CHC**”) re-admit A.H. during the pendency of this action, (2) that A.H. resume attending school as soon as practicable, but under no circumstances no later than 2 school days following service of this order on CHC, and (3) that during the pendency of this action A.H. receive all services he was receiving prior to his exclusion from that school on October 4, 2019.

### **PRELIMINARY STATEMENT**

Plaintiffs bring this action in order to correct a terrible error made by Defendant CHC, which caused a young boy with severe disabilities to be expelled from school and denied the desperately needed services he receives there. The boy, A.H., is a charming nine-year old. Like most boys his age, he loves to play with his father and brothers, and he thrives on social interaction.

Unlike most other boys, A.H. has numerous neurological impairments, including cerebral palsy, generalized tonic clonic epilepsy, and a drug resistant seizure disorder known as Intractable Lennox Gastaut Syndrome (“**LGS**”). A.H. cannot walk or talk, does not toilet independently and cannot care for himself. Despite his physical limitations, A.H. is bright and enjoys attending school. For the past five years A.H. attended the CHC Learning Center. CHC provided A.H. with special education classes as well as multiple therapy sessions every week.

A.H. has been under the close care of pediatric neurologist Dr. Sarah Finnegan at the Oishei Children’s Hospital since he was an infant. Dr. Finnegan is a leading pediatric neurologist who sees A.H. several times a year. As his treating neurologist, Dr. Finnegan is in the best position to judge his medical needs, as she has done for most of his life.

A.H. has received all the vaccinations required to attend school, with the exception of a fifth dose of a pertussis vaccine known as Tdap. A.H. experienced numerous adverse reactions to his prior rounds of vaccination, including triggering uncontrollable seizures following every round of vaccinations. These seizures worsened with each round of vaccinations and ultimately resulted in the worst grand mal seizures of his life wherein he experienced full body jerking, uncontrollable screaming, his skin turned blue, and he had to be rushed to the emergency room.

Due to A.H.'s medical history and current medical condition, including his seizure disorders, Dr. Finnegan determined that A.H. cannot receive additional vaccines because doing so will be detrimental to his health. On August 15, 2019, Dr. Finnegan faxed a medical exemption form, exempting A.H. from vaccinations, to the Frontier Central School District, the district in which CHC is located. CHC accepted this exemption and A.H. started school at CHC on September 4, 2019.

Nevertheless, on September 12, 2019, Dr. Elizabeth Rausch-Phung, Director of the Bureau of Immunizations at the New York State Department of Health ("NYSDOH") sent a letter to the School District informing them that the NYSDOH recommended against accepting A.H.'s medical exemption. The School District forwarded that letter to CHC who then accepted Dr. Rausch-Phung's recommendation, and rejected the medical exemption prepared by Dr. Finnegan. As a result, CHC expelled A.H. on October 4, 2019.

CHC's decision was incorrect. First, CHC had no valid basis to accept Dr. Rausch-Phung's opinion over A.H.'s treating physician. To the contrary, New York state law allows any doctor to provide a valid medical exemption, and does not allow the NYSDOH any authority to overrule that exemption. Furthermore, Dr. Rausch-Phung is not a neurologist, and did not review A.H.'s medical records, did not examine A.H., and never consulted with Dr. Finnegan. Thus, she was not



in a reasonable position to question Dr. Finnegan's medical judgment, and CHC should not have rejected A.H.'s medical exemption. Second, to the extent that the NYSDOH has some involvement in the process, it is to establish interstitial regulations. A.H.'s seizure disorder more than adequately meets the requirements of the NYSDOH's regulations for allowing a medical exemption. For those reasons, CHC's decision to capitulate to Dr. Rausch-Phung's so called recommendation violated New York law and regulations.

A.H.'s parents are merely seeking to correct CHC's mistaken reliance on Dr. Rausch-Phung's uninformed opinion, and to have A.H. re-admitted to the school. However, every day that A.H. is absent from school he is irreparably harmed. School is extremely important for any nine-year-old boy, but for A.H. it is critical that he attend school. The services he receives at CHC not only allow him to learn, they relieve ongoing physical pain, and teach him to interact with the world around him. CHC has acknowledged that A.H. experiences noticeable regression, both physically and mentally, when he does not attend school. Preserving the status quo by returning him to CHC during the pendency of this action will ensure that he does not suffer further regression while the adults work to resolve the legal issues presented by his inability to be further vaccinated. Given the vaccinations he has already received, and the nature of the one vaccine he is missing, his return to school will not present a health risk to the students and faculty.

For these reasons, as explained further below, Plaintiffs request a temporary restraining order and preliminary injunction to preserve the status quo by directing (1) that CHC re-admit A.H. during the pendency of this action, (2) that A.H. resume attending school as soon as practicable, but under no circumstances no later than 2 school days following service of this order on CHC, and (3) that during the pendency of this action A.H. receive all services he was receiving prior to his exclusion from that school on October 4, 2019.



## BACKGROUND

### **A. A.H. has Attended CHC for Five Years and All Parties Agree He Thrived There**

A.H. is described by CHC as “a sweet 9 year old boy.” (Ex. A.)<sup>1</sup> He loves to horseplay with his father and brothers, and gets a special thrill when his father imitates different voices. (Aff. ¶ 2.) A.H. thrives on social interaction and relishes taking trips out of his home. (Aff. ¶ 2; Ex. A.) He has a contagious smile whenever he gets to visit public places, especially the zoo, aquarium, the mall, and the grocery store. (Aff. ¶ 2.)

A.H. has numerous neurological impairments and disorders, including cerebral palsy, generalized tonic clonic epilepsy, and a rare seizure disorder known as Intractable Lennox Gastaut Syndrome. (Aff. ¶ 3; Ex. A.) The latter condition causes refractory seizures which are drug resistant and uncontrollable. (Aff. ¶ 3; Ex. E.) A.H. requires twenty-four-hour care and assistance. (Aff. ¶ 3; Ex. A.) He cannot walk or talk, does not toilet independently and cannot care for himself in anyway. (*Id.*) He requires a special “ketogenic diet” to control his seizures. (Ex. A.)

Despite his physical limitations, A.H. is a bright and socially engaging boy who enjoys attending school. (Aff. ¶ 4.) Until this year, A.H. attended a specialized school called the CHC Learning Center located in Amherst, New York. (*Id.*) He had attended CHC for approximately five years and was thriving there. (*Id.*) In an October 2019 letter, CHC described A.H. as “a delightful child that clearly enjoys interacting with others” and stated that he is “typically very alert” and “is quite social.” (Ex. A.)<sup>2</sup>

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<sup>1</sup> Citations in the form “Aff. ¶ \_\_\_” refer to the Affidavit of Oroobah Hamideh and the Affidavit of Ali Hamideh, both dated November 11, 2019. Citations in the form “Ex. \_\_\_” refer to exhibits attached thereto. And citations in the form “Compl. ¶ \_\_\_” refer to the Complaint in this action.

<sup>2</sup> Exhibit A is a letter from CHC, dated October 18, 2019 and copy of same is also appended to this Memorandum of Law.

CHC provided A.H. with special education classes as well as more than ten therapy sessions a week including: physical therapy without which A.H. is in constant pain; occupational therapy primarily for the limited movement he has in one of his hands; and speech therapy to train him on an auditory scanning communication device operated using a single switch. (Aff. ¶ 5; Ex. A.) A.H. received the communication device just a few months ago. (*Id.*) That device, for the first time in his life, allowed him to communicate with his parents and others and when he was expelled A.H. was beginning to learn to effectively use the device in conversation. (Aff. ¶ 5.)

Attending CHC is a crucial part of ensuring A.H.'s quality of life, health, and development. (Aff. ¶¶ 3-16, 26-31; Ex. A.) As CHC described it: "The consistency and anticipated structure that school attendance provides A.H., assists in the development and achievement of his academic goals." (Ex. A.) Moreover, CHC seems to truly enjoy having A.H. as a student: "At CHC we consider ourselves very blessed to know A.H. and his family, observe his ongoing progress at school, and be witness to the joy he brings to others daily!" (*Id.*)

**B. Dr. Finnegan a Leading Pediatric Neurologist has Treated A.H. his Entire Life**

Given A.H.'s extensive and complex neurological conditions, he has been under the close care of pediatric neurologist Dr. Sarah Finnegan at the Oishei Children's Hospital in Buffalo, New York since he was an infant. (Aff. ¶ 6.) Oishei Children's Hospital is the premier children's hospital in the region. (Ex. B.) Dr. Finnegan is licensed in New York and has practiced medicine for over 25 years. (Ex. C.) She is a leading pediatric neurologist in the region. (*Id.*) Among her many credentials, she received a PhD in physiology and an MD from the University of Buffalo School of Medicine, completed two residences in neurology and one in pediatrics, and is a long-time Associate Professor of Neurology, the Director of the Child Neurology Residence Program, and Clinical Associate Professor in the Department of Neurology at the University of Buffalo.

(*Id.*) Dr. Finnegan is board certified in “Neurology with Special Qualification in Child Neurology” and a subspecialty in Epilepsy. (Ex. D.)

A.H. visits Dr. Finnegan at least two to three times a year for routine check-ups. (Aff. ¶ 6.) Among other things, Dr. Finnegan oversees A.H.’s therapies, including emerging forms of treatment for his neurological condition, and has also been his attending physician when he had to be admitted to the hospital for serious neurological related events. (*Id.*) Dr. Finnegan is intimately familiar with A.H.’s medical condition and is in the best position to make clinical judgments regarding his medical care. (*Id.*)

### **C. A.H. Experienced Extreme Seizures Following Prior Vaccinations**

A.H. has received all vaccinations he is required to receive in New York State in order to attend school with the exception of a fifth dose of a vaccine called Tdap. (Aff. ¶ 7.) Following each of his prior rounds of vaccination, A.H. suffered numerous adverse reactions, including triggering uncontrollable seizures, which worsened following each round of vaccination. (*Id.*)

On August 16, 2010, A.H. was 11 weeks old and received a vaccine dose of diphtheria, tetanus, and pertussis (“**DTaP**”), Haemophilus influenza type b (“**Hib**”), inactivated polio (“**IPV**”), pneumococcal (“**PCV13**”), rotavirus (“**RV5**”), and Hepatitis B (“**HepB**”). (Ex. Q.) Following this vaccination, A.H. reacted with fever, was irritable, cried incessantly and was very jumpy. (Aff. ¶ 8.)

On October 21, 2010, when A.H. was 20 weeks old, he received a second round of these vaccines and again had fever, irritability, and incessant crying. (Ex. Q; Aff. ¶ 8.) In addition, Ms. Hamideh noticed that A.H. would stare and have a blank look on his face. (Aff. ¶ 8.) While she did not realize it then, she now knows that when A.H. was staring blankly, he was experiencing absence seizures. (*Id.*)

A.H.'s absence seizures continued and became progressively worse after each round of vaccinations he received. (Aff. ¶ 9.) On December 15, 2010, A.H. was 30 weeks old and received a third dose of DTaP, Hib, IPV, and PCV13, and again had fever, incessant crying, irritability and absence seizures. (Ex. Q; Aff. ¶ 9.) At the same time, A.H. was developing very slowly and not meeting typical milestones. (Aff. ¶ 9.)

On April 13, 2011, A.H. was 10 months old and received a third dose of HepB, and A.H.'s seizures continued to worsen and was shortly thereafter prescribed phenobarbital for his absence seizures. (Ex. Q; Aff. ¶ 10.) By one year of age, A.H. underwent an electroencephalogram ("EEG") to find a treatment for his seizures. (Aff. ¶ 10.) Many more EEG's followed over the first few years of his life. (*Id.*)

On September 16, 2011, A.H. was 1 year and 3 months old and received a fourth dose of DTaP, Hib, IPV, and PCV, and a dose of measles, mumps, and rubella ("MMR"). (Ex. Q; Aff. ¶ 11.) Following these vaccines, A.H. had a serious adverse reaction. (Aff. ¶ 11.) In addition to absence seizures he also started to have tonic clonic (*i.e.*, "grand mal") seizures wherein he experienced full body jerking, uncontrollable screaming and shouting, and his skin would turn blue, and the first such seizure following these vaccines required him to be rushed to the emergency room. (*Id.*)

On December 23, 2011, A.H. was 1 year and 6 months old and received a vaccine dose of chickenpox ("VAR") and Hepatitis A ("HepA"), and soon after was diagnosed with failure to thrive. (Ex. Q; Aff. ¶ 12.)

On September 4, 2012, A.H. was 2 years and 3 months old and received an influenza vaccine. (Ex. Q; Aff. ¶ 13.) That day, A.H. had the worse seizure that Mr. Hamideh and Ms. Hamideh had ever witnessed. (Aff. ¶ 13.) This vaccination again demonstrated that upon

vaccination, A.H. experienced not only uncontrollable seizures, but that they worsened in intensity and frequency. (*Id.*)

Due to the severe, chronic and refractory nature of A.H.'s seizures he was followed closely by Dr. Finnegan and underwent many diagnostic studies to identify the specific areas of the brain that were producing electronic signals that resulted in the seizures, to pinpoint a specific diagnosis, and identify treatments that could reduce the severity and frequency of his seizures. (Aff. ¶ 14.)

After A.H.'s first year of life, he was diagnosed with cerebral palsy and at four years old he was diagnosed with Lennox-Gastaut Syndrome with refractory seizures. (Aff. ¶ 15.) A.H. also received a diagnosis of generalized tonic clonic epilepsy. (*Id.*)

According to the National Organization for Rare Disorders, Lennox-Gastaut is a severe form of epilepsy. (Ex. E at 1.) Affected children experience several different types of seizures including atonic, tonic and atypical absence seizures. (*Id.*) Lennox-Gastaut is resistant to most anti-seizure medications. (*Id.*) The International League Against Epilepsy Task Force has classified the disorder as an epileptic encephalopathy (the term "encephalopathy" means damage to the brain), which means seizure activity leads to progressive cognitive dysfunction. (*Id.*) ("The International League Against Epilepsy (ILAE) Task Force most recently classified the disorder as an epileptic encephalopathy. Epileptic encephalopathies are a group of disorders in which seizure activity leads to progressive cognitive dysfunction.")

**D. A.H.'s Treating Physician, Dr. Finnegan, Writes a Medical Exemption for A.H.**

On August 6, 2019, during a regular appointment, Dr. Finnegan told Mr. Hamideh that A.H. should not receive any further vaccinations given his medical condition. (Aff. ¶ 33.) That same day, Dr. Finnegan wrote a medical exemption for A.H., stating in part, "[t]he above named patient is exempt from vaccines for medical reasons for one year, (until August 2020)." (Ex. F.)

On August 8, 2019, Gail Lewis, Assistant Director at the Frontier Central School District, requested that Dr. Finnegan complete the state-issued medical exemption form. (Ex. I.) Dr. Finnegan complied with the request and completed the state-issued medical exemption form and sent it to Ms. Lewis on August 15, 2019. (Ex. G.)

Dr. Finnegan explained in the medical exemption form that the reason A.H. cannot receive the required vaccinations is because:

patient carries a diagnosis of Lennox Gastaut w/refractory seizures. Pt [patient] has a hx [history] of hospitalization following immunizations in the past for seizure activity triggered by these immunizations.

(*Id.*) Because all medical exemptions must be renewed annually, Dr. Finnegan again noted that this exemption would expire in August 2020. (*Id.*)

Ms. Lewis confirmed to Ms. Hamideh that she received the medical exemption from Dr. Finnegan. (Aff. ¶ 17.) She told Ms. Hamideh that the exemption “looked good” and that A.H. could begin the school year at CHC. (*Id.*) On September 4, 2019, A.H. began school with his peers, teachers, and therapists. (*Id.*)

**E. CHC Improperly Accepts the NYSDOH’s Recommendation that it Deny A.H.’s Valid Medical Exemption and CHC Expels A.H.**

Despite CHC admitting A.H. with his medical exemption, the school district still forwarded the medical exemption form to the NYSDOH without obtaining permission from A.H.’s parents. (Aff. ¶ 18.) On or about September 12, 2019, Dr. Elizabeth Rausch-Phung, Director of the Bureau of Immunizations at the NYSDOH sent a letter to Ms. Lewis asserting that

Lennox Gastaut with refractory seizures is not a valid contraindication to ... Tdap vaccines pursuant to Public Health Law ("PHL") § 2164 and the accompanying regulations at 10 NYCRR Subpart 66-1. **Therefore, I recommend against accepting this medical exemption.**

(Ex. H) (bold in original.) Dr. Rausch-Phung made clear, however, that “the principal or person in charge of the school [*i.e.*, CHC] is responsible for making the final determination.” (Ex. H.)

The following day, on September 13, 2019, Ms. Lewis wrote Ms. Hamideh stating that she forwarded A.H.’s vaccination records “to our Frontier school district nurses” and that they advised that A.H. still required, *inter alia*, his Tdap vaccination.<sup>3</sup> (Ex. J at 1.) Four days later, Ms. Lewis told A.H.’s mother that A.H. could “continue to attend school now until October 4.” (*Id.*)

However, on October 4, 2019, despite the medical exemption from Dr. Finnegan, CHC expelled A.H. from school for failure to receive the vaccinations required under state law. (Aff. ¶ 19.) Apparently, after receiving Dr. Rausch-Phung’s letter, the Frontier Central School District and CHC chose to accept Dr. Rausch-Phung’s recommendation, and rejected A.H.’s medical exemption certification, thereby overruling the medical judgment of Dr. Finnegan, A.H.’s life-long treating pediatric neurologist.

#### **F. Dr. Rausch-Phung had no Basis to Reject A.H.’s Valid Medical Exemption**

Dr. Rausch-Phung, a state bureaucrat, made her recommendation from her office in Albany. (Ex. H.) She never reviewed any of A.H.’s medical records. (Aff. ¶ 20.) She never examined A.H. (*Id.*) She has never treated A.H. (*Id.*) She is not a neurologist. (*Id.*) She nonetheless chose to make her recommendation without ever even consulting Dr. Finnegan, who

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<sup>3</sup> Ms. Lewis stated in relevant part that “A.H. still needs his MMR, his Varicella, and his Tdap.” (Ex. J at 1.) Prior to that notification, A.H. had already received one dose of MMR and Varicella. (Ex. Q.) As permitted under New York law, a second dose of these vaccines is not needed if a child can show that the first dose was effective at generating antibodies sufficient to consider the child immune. 10 NYCRR § 66-1.6 (“The certificate of immunization ... shall specify the products administered ... or positive serologic tests for measles, mumps, rubella, varicella, and/or Hepatitis B.”) A.H. has since had bloodwork which demonstrated he is immune for measles, mumps, rubella and varicella, exempting him from needing to obtain an additional dose of MMR or Varicella. (Ex. P.) For this reason, A.H. has received the requisite number of doses or has demonstrated immunity for each immunization required by PHL § 2164 with the exception of an additional dose of Tdap. Therefore, as reflected in the email from Ms. Lewis, the only vaccine he is currently required to receive pursuant to PHL § 2164 to attend school is a dose of Tdap.



specializes in treating children with neurological conditions similar to A.H. and has treated A.H. his entire life. (*Id.*) Dr. Rausch-Phung was in no position to make a clinical decision regarding A.H.'s medical care. (*Id.*) Worse, she recommended A.H.'s medical exemption be denied and that he therefore be expelled from school even though his medical exemption meets the standard for such an exemption under the current New York law, and the NYSDOH's own regulations.

Dr. Rausch-Phung is and has been the Director of the Bureau of Immunizations for the NYSDOH since September 2010. (Ex. K at 1.) While Dr. Rausch-Phung never reviewed any of A.H.'s medical records nor met or spoke with A.H.'s physician, Dr. Rausch-Phung has had the time to, *inter alia*, enjoy expensive lunches paid for by Sanofi Pasteur Inc. and make a promotional video funded by Sanofi to increase vaccine uptake and sales. (Ex. K at 5-7.) Sanofi is a pharmaceutical company with over \$5 billion in annual vaccine revenue, which sells the Tdap vaccine Dr. Rausch-Phung says A.H. must receive or be barred from school.<sup>4</sup> Dr. Rausch-Phung also has time to be the New York Program Manager for the Association of Immunization Managers (“AIM”) which receives “critical support” from Merck, Sanofi, and Pfizer, which combined sell a majority of the vaccines used in the United States, including those Dr. Rausch-Phung insists that A.H. receive. (Ex. K at 2.) Thus, Dr. Rausch-Phung apparently believed that her zeal for

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<sup>4</sup> The pharmaceutical companies which manufacture and sell all DTaP and Tdap vaccines in the United States – GSK and Sanofi – have immunity from liability for injuries caused by these products, thereby eliminating the financial incentive companies normally have to assure the safety of their products either pre-or-post licensure. 42 U.S.C. § 300aa-11 (“**No person may bring a civil action for damages in the amount greater than \$1,000 or in an unspecified amount against a vaccine administrator or manufacturer in a State or Federal court for damages arising from a vaccine-related injury or death.**”). In addition, irrespective of advances in technology or medical science, no design defect claim can ever be asserted against vaccine manufacturers like GSK and Sanofi for failing to improve the safety of their tetanus, diphtheria, or pertussis containing vaccines. *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 243 (2011) (“we hold that the National Childhood Vaccine Injury Act preempts all design-defect claims against vaccine manufacturers brought by plaintiffs who seek compensation for injury or death caused by vaccine side effects”). As such, these companies have enormous incentives to encourage states and state actors like Dr. Rausch-Phung to mandate use of these vaccines, but lack the usual guardrails that the courts place on them to ensure the safety of their products.

vaccination and close ties to the pharmaceutical industry qualified her to overrule A.H.'s life-long treating physician without bothering to conduct even a basic review of his medical history or to consult with his treating physician.

### ARGUMENT

The well settled standard for a temporary restraining order and preliminary injunction are (1) likelihood of success on the merits, (2) irreparable injury, and (3) a balancing of the equities in the movant's favor. See *Bowden v. Iona Grammar Sch.*, 284 A.D.2d 357, 358-59 (2d Dep't 2001) ("The Supreme Court properly granted the plaintiffs' motion for a preliminary injunction. The plaintiffs established a likelihood of success on the merits. . . . [and] irreparable injury."). New York courts have previously granted preliminary injunctions when reviewing claims that a child was improperly denied a statutory exemption to the New York school vaccination requirements. *Id.* ("In denying the plaintiffs . . . exemption . . . the appellants disregarded the statutory criteria . . . of Public Health Law § 2164 . . . Consequently, a preliminary injunction was properly granted."). "Whether to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court." *W.D. on behalf of A. v County of Rockland*, 63 Misc. 3d 932, 934 (Sup. Ct. 2019) (internal quotations omitted) (issuing injunction where County had barred unvaccinated children from school).

**I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS BECAUSE CHC'S DENIAL OF A.H.'S MEDICAL EXEMPTION VIOLATED BOTH NEW YORK LAW AND THE NYSDOH'S OWN REGULATIONS**

New York courts have long held that when a school wrongly rejects one of the vaccination exemptions established in the New York State Public Health Law ("PHL") Section 2164, the parents of the excluded child can bring a "a cause of action to enforce their right to" that exemption. *Bowden v Iona Grammar School*, 284 AD2d 357, 358 (2d Dep't 2001). Here, CHC's acceptance of Dr. Rausch-Phung's recommendation to reject A.H.'s medical exemption, and his resulting

expulsion from school, are clear violations of PHL Section 2164 and the NYSDOH's own regulations implementing that section.

**A. CHC's Rejection of A.H.'s Medical Exemption is a Violation of the Plain Terms of PHL Section 2164(8)**

PHL Section 2164 provides that a child must receive certain vaccinations in order to attend school. Included in that section is a medical exemption in paragraph 8, which provides that:

If *any* physician licensed to practice medicine in this state certifies that such *immunization may be detrimental to a child's health*, the requirements of this section shall be inapplicable until such immunization is found no longer to be detrimental to the child's health.

(Emphasis added). The requirements of this section are simple and straightforward: to qualify for an exemption to 2164's vaccination requirements, (1) any physician licensed in New York, (2) can certify that the vaccination might be "detrimental to a child's health." Nothing more is required, the doctor need not have a specific specialty in vaccinology, nor does the doctor need to prove that the vaccination will inevitably damage the child's health, or certify that the vaccination will be highly damaging to the child or fatal. The doctor just needs to certify that in his or her medical opinion it *may* be detrimental to the patient's health. Thus, the state legislature made a decision that in balancing the needs of the community against the health risks of the individual child, it would leave the determination up to the child's doctor as the person most familiar with that child's specific medical needs.

Dr. Finnegan is a physician licensed in New York who certified that, in her medical opinion based on his particular medical history, further immunization of A.H. would be detrimental to his health. (Exs. F and G.) This certification, therefore, satisfied all of the requirements of PHL Section 2164(8).

CHC had the authority and obligation to accept Dr. Finnigan's valid certification. (*Id.*) It could not just arbitrarily choose to ignore Dr. Finnigan's certification in favor of Dr. Rausch-Phung's unexamined opinion.<sup>5</sup> Nonetheless, this is exactly what CHC did. Therefore, CHC violated PHL Section 2164(8) when it arbitrarily accepted Dr. Rausch-Phung's recommendation, rejected Dr. Finnigan's certification, and expelled A.H. (Compl. at Count I.) As such, Plaintiffs have a high likelihood of success on their first cause of action for violation of PHL Section 2164.

**B. CHC's Rejection of A.H.'s Medical Exemption is a Violation of the NYSDOH's Own Regulations**

Even under the NYSDOH's own narrowly written regulations, Dr. Rausch-Phung is wrong that A.H.'s condition does not qualify as a valid basis for a medical exemption.

In 10 NYCRR 66-1, the NYSDOH established regulations setting forth the school immunization requirements, which it enacted ostensibly to implement PHL § 2164. On August 16, 2019, the NYSDOH issued new regulations entitled "Emergency Regulations to Strengthen Medical Exemption Process for School Vaccinations" (the "**Emergency Regulation**"). These new regulations amended 10 NYCRR 66-1.1 to provide that the phrase "may be detrimental to the child's health" appearing in PHL § 2164(8) means "that a child has a medical contraindication or *precaution* to a specific immunization consistent with ACIP guidance or other nationally recognized evidence-based standard of care." 10 NYCRR 66-1.1(l) (emphasis added). ACIP guidelines referenced in the Emergency Regulation define a precaution as "a condition in a recipient that might increase the risk for a serious adverse reaction, might cause diagnostic

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<sup>5</sup> If the NYSDOH has an issue with a medical exemption, it should address that issue to the physician writing the medical exemption. What it and CHC cannot do is re-write PHL § 2164(8) to make someone other than the physician certifying the exemption the arbiter of what is "detrimental to the child's health."

confusion, or might compromise the ability of the vaccine to produce immunity.” Those guidelines recommend that “[i]n general, vaccinations should be deferred when a precaution is present.”

Dr. Rausch-Phung stated in her letter that “Lennox Gastaut with refractory seizures is not a valid contraindication to the student receiving...Tdap[.]” (Ex. H.) However, the ACIP guidelines state that a “[p]rogressive or unstable neurological disorder, uncontrolled seizures, or progressive encephalopathy until a treatment regimen has been established and the condition has stabilized” is a *precaution* to vaccination with Tdap. (Ex. M.)

Lennox Gastaut is a severe form of epilepsy. (Ex. E at 1.) Affected children experience several different types of seizures including atonic, tonic, and atypical absence seizures. (*Id.*) Lennox Gastaut also causes A.H. to have refractory seizures, meaning seizures that are resistant to anti-seizure medications. (*Id.*) Lennox Gastaut is classified as an epileptic encephalopathy, which means seizure activity leads to progressive cognitive dysfunction. (*Id.*) Stated simply: A.H. has a progressive and unstable neurological disorder, uncontrolled seizures, and progressive encephalopathy. (Exs. E, G; Aff ¶ 21.) He does not have a treatment regimen because his condition is uncontrolled and resistant to medication and his condition is not stabilized. (*Id.*) There is therefore a clear precaution against A.H. receiving Tdap under the ACIP guidelines. (*Id.*)

In fact, one need look no further than the Federal Court’s own Vaccine Injury Compensation Program to see that Dr. Finnegan’s association between Lennox Gastaut and pertussis containing vaccinations is not surprising. *Vitale v. Secretary of the Dept. of Health and Human Services*, No. 94-0060V, 1997 WL 39498, at \*14 (Fed Cl Jan. 16, 1997) (awarding compensation for Lennox-Gastaut syndrome, which began with the minor petitioner's first seizure conceded to be due to the diphtheria, tetanus and pertussis vaccination). Similarly, the Vaccine Injury Compensation Program has multiple examples of cases where DTaP or other pertussis

containing vaccinations cause children to suffer grand mal seizures. *See, e.g., Morales v. Sec'y of HHS*, 2019 U.S. Claims LEXIS 1039 (Fed. Cl. July 30, 2019) (entitlement to compensation where vaccinations, including DTaP and IPV, caused epileptic encephalopathy resulting in epilepticus, which lowered the threshold for further seizures); *Price v. Sec'y of HHS*, 2018 U.S. Claims LEXIS 1779 (Fed. Cl. December 4, 2018) (vaccinations, including DTaP, caused grand mal seizure and subsequently a seizure disorder). As such, it makes perfect sense that ACIP cautions against a child receiving such vaccinations if the child is already susceptible to seizures.

The medical exemption that Dr. Finnigan prepared for A.H. explains these exact diagnoses that cause A.H.'s condition to fall within the ACIP guidelines. (Ex. G.) She explained that A.H. has "a diagnosis of Lennox Gastaut" and suffers from "refractory seizures", *i.e.*, seizures that cannot be controlled. (*Id.*) She also described how A.H. already has a history "of hospitalization following immunizations in the past for seizure activity triggered by these immunizations." (*Id.*)

Furthermore, ACIP guidance are a set of generalized recommendations, do not account for every medical situation, and by their terms are not intended to replace a physician's clinical judgment. (Ex. G.) Hence requiring A.H.'s parents to act contrary to A.H.'s life-long treating doctor's judgment that an additional vaccination will likely harm him also runs contrary to the ACIP guidance.

Thus, because the ACIP guidelines precaution against his receiving the Tdap vaccine, A.H. plainly qualifies for a medical exemption under the NYSDOH's regulations, and Dr. Finnegan's exemption provided all the evidence required to identify this fact. As such, CHC should have accepted the medical exemption that Dr. Finnegan wrote. Nonetheless, Dr. Rausch-Phung still wrongly recommended that CHC deny A.H.'s medical exemption and CHC accepted this recommendation. Neither Dr. Rausch-Phung nor CHC ever spoke to Dr. Finnegan, or even sought

additional information regarding the reasons for the medical exemption. For this reason, not only was Dr. Rausch-Phung's recommendation wrong under the NYSDOH's regulations, and CHC's decision to follow that recommendation in error, but the process they undertook to reach that conclusion was arbitrary and capricious. Therefore, when CHC unquestioningly accepted Dr. Rausch-Phung's recommendation, it violated 10 NYCRR 66-1.1. (Compl. at Count II.) As a result, Plaintiffs are likely to succeed in their second cause of action for violation of that regulation.

**C. CHC's Abdication of its Duty to Evaluate and Accept A.H.'s Valid Medical Exemption Further Violated PHL § 2164**

A.H.'s parents were distraught that CHC expelled their son from his special education classroom and prohibited him from attending his numerous weekly therapies that are essential to his health and well-being. (Aff. ¶ 22.) They understandably were extremely concerned that their son would experience another life-threatening seizure if they administered another vaccination. (*Id.*) They could not understand why A.H.'s critical services provided at CHC were being held hostage to the demand that they inject him with another dose of Tdap in direct opposition to the medical advice of Dr. Finnegan, A.H.'s treating pediatric neurologist. (*Id.*)

A.H.'s parents sought answers to their questions, but CHC and the Frontier Central School District refused to speak with them regarding the denial. (Aff. ¶ 23.) A.H.'s parents were, therefore, justifiably shocked when, on October 7, 2019, they watched a news story in which Richard J. Hughes, Superintendent of the School District, discussed details regarding the denial of A.H.'s medical exemption on a news program broadcast to millions of people. (Aff ¶ 23; Ex. N.)

After A.H.'s parents expressed disappointment at Mr. Hughes' conduct, he and CHC finally became responsive to their requests to meet and discuss A.H.'s medical exemption. (Aff. ¶ 24.) What followed, however, was a circle of finger pointing. Mr. Hughes told Mr. Hamideh that only CHC, and not the school district, decides on accepting or rejecting A.H.'s medical



exemption. (Aff. ¶ 34.) In turn CHC's Director, Nancy Godson, told Ms. Hamideh that CHC had to follow the decision of the school district and the school district made clear to CHC that it must follow the recommendation of the NYSDOH. (Aff. ¶ 24.) In the meantime, the NYSDOH made clear that they only provide recommendations on whether to accept or deny a medical exemption and that the final decision was entirely in the hands of the school – CHC. (Ex. H.)

While the NYSDOH, CHC and the school district point fingers at each other, A.H. is suffering serious irreparable harm. Nobody apparently is willing to accept final responsibility for requiring an injection that could cause A.H. to have uncontrollable seizures and potentially die. The NYSDOH was, however, correct about one thing: New York law plainly provides that it is CHC that has to decide whether to accept or reject A.H.'s medical exemption. (Ex. H.) Nothing in the record indicates that CHC conducted any investigation or analysis on its own prior to rejecting A.H.'s medical exemption, instead it claims it was forced by the School District to follow the NYSDOH's recommendation. When CHC improperly outsourced the decision making to the school district and the NYSDOH, it further violated PHL § 2164, which rendered the rejection of A.H.'s medical exemption, and resulting expulsion from school, *ultra vires*. (Compl. at Count III.) For this reason, Plaintiffs are likely to succeed on their third cause of action.

**II. A.H. WILL BE IRREPARABLY INJURED IN ABSENCE OF AN INJUNCTION BECAUSE IF NOT ALLOWED TO RETURN TO SCHOOL HE WILL SUFFER SIGNIFICANT MEDICAL AND EDUCATIONAL REGRESSION**

Plaintiffs easily meet the irreparable injury prong of the injunction standard. An irreparable injury is one “that money damages could not make . . . whole[.]” *Olean Med. Group LLP v Leckband*, 32 AD3d 1214, 1215 (4th Dep't 2006). A school aged child being excluded from classes is a clear example of the type of injury that is irreparable. *See, e.g., Lewis v. Sobol*, 710 F.Supp. 506, 507 (S.D.N.Y.1989) (noting that “it was clear that [plaintiff's daughter] would suffer irreparable harm if barred from attending school”); *W.D.*, 63 Misc. 3d at 936 (issuing an injunction

returning unvaccinated children to school, holding that irreparable harm results when “children will continue to miss school”). Here, though, both parties agree that A.H.’s injury goes beyond simply missing classes, he is also deprived of critical development and treatment that he receives through the services provided by CHC.

Due to his disabilities, “A.H. requires a 12-month school program to maintain his educational levels and physical abilities.” (Ex. A.) As CHC noted, “[w]ithout the consistency of attending summer school this year to work on his educational goals, A.H. showed substantial regression upon his brief return to school in the fall. It then required several weeks for A.H. to regain the progress he had made during the school year.” (*Id.*)

A.H. had a major hip replacement surgery earlier this year to replace his left hip and also to stretch the inner groin muscles because they were not growing properly. (Aff. ¶ 26.) A.H. received three physical therapy sessions a week while attending CHC. (Aff. ¶ 26; Ex. A.) A.H. is still recovering from his surgery and the stretching and working out of his leg are essential for proper healing and use of this extremity. (*Id.*) A.H. has a great deal of pain in his leg at times and the physical therapy helps him to be able to straighten his leg to lessen or avoid this pain. (*Id.*) “While at [CHC], A.H. also ha[d] access to and use[d] therapy balls, bolsters, swings, wedges, a heated musical stereo waterbed, . . . a supine stander, hand splints, bilateral ankle foot orthotics, a thoracic lumbar sacral orthotic, . . . and much more[.]” (Ex. A.) Without this special equipment, it has not been possible to provide the form of physical therapy A.H. needs for his leg and hip to properly heal. (Aff. ¶ 26.)

Missing these physical therapy sessions significantly impacts A.H.’s body, and he is already experiencing almost daily pain. (Aff. ¶ 27.) As CHC observed “A.H.’s muscle tone is greatly impacted even over the short time period of weekends, as well as during longer breaks

from school. With the high muscle tone he experiences and reduced mobility opportunities, A.H. displays increased difficulty using classroom materials, lesson manipulatives and accessing his speech generating device.” (Ex. A.)

CHC also provided A.H. with speech therapy four times per week. (Ex. A.) A.H. received a dedicated speech generating communication device just a few months ago so that he can “express his needs, desires, make choices and have functional interaction with his environment.” (Ex. A.) Using this device, A.H. was able to communicate independently with his parents and others for the first time in his life. (Aff. ¶ 28.) CHC was working with A.H. on how to use this device when he was expelled. Beyond his dedicated device, CHC also gave A.H. access to other special communication equipment such as “adaptive switches, eye gaze devices, . . . [and] TapIt Smartboards[.]” (Ex. A.) When he misses school, CHC has observed that A.H.’s communications skills regress, he “requires an increase in verbal, visual and physical prompting to remain on task, and/or to complete the task, or provide an answer using his speech generating device[.]” (Ex. A.)

A.H. also received three sessions of occupational therapy per week at CHC. (Ex. A.) In his occupational therapy sessions, A.H. was working on his fine motor skills such as using his communication device and purposeful movements rather than involuntary movements and jerking. (Aff. ¶ 29; Ex. A.) A.H. has already begun to regress, and his movements are becoming more and more erratic. (Aff. ¶ 29.) A.H. thrives in the school’s structured environment. (Aff. ¶ 29; Ex. A.) Excluding him has had a significant negative impact on his mental status and physical ability. (*Id.*)

As this discussion makes clear, for A.H., missing school, and the resulting regression CHC observed, constitute irreparable harm. Absent an immediate injunction, he will continue to suffer such harm, which will set him back significantly in his development.

**III. THE BALLANCE OF THE EQUITIES TIPS DECIDEDLY IN A.H.'S FAVOR BECAUSE HIS ABSENCE FROM SCHOOL CAUSES SIGNIFICANT HARM WHILE HIS PRESENCE IN SCHOOL WILL CAUSE NO HARM**

Plaintiffs are merely seeking to restore the status quo from before CHC wrongfully expelled A.H. As a result, the balance of the equities tips decidedly in Plaintiffs' favor. "Such a balancing involves an inquiry whether the irreparable injury to be sustained ... is more burdensome [to the plaintiff] than the harm caused to defendant through imposition of the injunction[.]" *Felix v Brand Serv. Group LLC*, 101 A.D.3d 1724, 1726 (4th Dep't 2012). Here, as shown, attending CHC is extremely important for A.H., educationally, socially, and physically. On the other hand, his re-attendance will place little to no burden on CHC due to the nature of A.H.'s missing Tdap vaccination.

**A. The Irreparable Injuries A.H. Will Suffer from Missing School Create a Significant Burden for Him and his Family**

As noted, both parties agree that A.H.'s exclusion from school causes him to regress both educationally and physically. In addition, his absence from school is also taking a severe mental toll on A.H. He was forced to leave an environment in which he has thrived and where he created bonds with his classmates. He loves school, his friends and teachers, and learning, and has become depressed over not being able to attend school. (Aff. ¶ 30.) Since being excluded from school, A.H. with increasing frequency and distress has been repeatedly pressing the button on his communication device for "school, school, school." (*Id.*) His depression and anxiety resulting from his exclusion from school have correlated with A.H.'s relapse into frequent seizures. (*Id.*) After being seizure free for months, A.H. has been having seizures nearly every day for the last three weeks. (*Id.*) Thus, both A.H. and his family continue to suffer significantly every day that he is not in school.

Alternatively, requiring A.H. to receive the Tdap vaccination just to go back to school during the pendency of this action is untenable for multiple reasons. Foremost among them is that there is no pertussis containing vaccine licensed in the United States for a child his age. DTaP is not licensed for use after age 6. (Ex. O at 2.) This is because health agencies and pharmaceutical companies found that the full dose of DTaP results in an unacceptable level of immediate adverse reactions, and in particular seizures, in those over 6 years of age. On the other hand, the lower dose version, Tdap, is only licensed for children ten years and older. (Ex. O at 4.) As explained by the CDC: “Tdap is not indicated for children aged <10 years ... [and] DTaP is not indicated for persons aged >7 years; the increased diphtheria toxoid content is associated with higher rates of adverse reactions in older persons.” (Ex. R.) A.H. is nine years old. Thus there is no licensed pertussis containing vaccine he can take.

Even if such a licensed vaccine existed, if A.H. were injected, based on her years of experience with him, Dr. Finnegan believes he runs the significant risk of experiencing more life-threatening seizures. (Ex. G.) No child should willingly have to risk such a reaction. Moreover, a vaccination and the attenuating seizures are not something that can be taken back if it is later determined that Plaintiffs and Dr. Finnegan are correct in this action and that A.H.’s medical exemption was valid.

For these reasons, the only alternative that will not place an undue burden on A.H. and his family is to re-admit him to CHC during the pendency of this action.

**B. CHC will Experience no Harm by Re-Admitting A.H. During the Pendency of this Action**

In contrast to the burden placed on A.H. and his family in the absence of an injunction, CHC will suffer no real harm if the Court grants the injunction and A.H. is re-admitted during the pendency of this action.

*First*, as the CHC's glowing October 2019 letter shows, they loved having him in class earlier this year. CHC stated that "it has been a real pleasure to observe his progress in many skill areas. He is a very happy child with a loving, caring and supportive family. His smile can brighten any room. At CHC we consider ourselves very blessed to know A.H. and his family, observe his ongoing progress at school, and be witness to the joy he brings to others daily!" (Ex. A.)

*Second*, CHC's admission of A.H. in September 2019, after receiving his medical exemption, demonstrates that the school had little to no concern about having a child attend who was missing some required vaccinations. Indeed, in enacting the medical exemption, the New York State legislature has already made a policy decision that children in certain medical circumstances can still safely attend school even if they do not have all the required immunizations. A.H. is precisely the child that this exemption is intended to protect. Dr. Rausch-Phung's September 12, 2019 letter noted that Lennox-Gastaut is not a contraindication for Tdap, but it did nothing to change CHC's determination that having A.H. in its classrooms while missing certain vaccinations was safe and raised no concerns for other students.

*Third*, federal government funded medical studies have shown that allowing A.H. back in school without receiving the Tdap vaccination poses absolutely no increased risk to his teacher or his peers.<sup>6</sup> The Tdap vaccine that Dr. Rausch-Phung and CHC insist A.H. receive does not prevent infection and transmission of tetanus, diphtheria or pertussis. The tetanus vaccine does not prevent the spread of tetanus from person-to-person because tetanus is not contagious from person-to-person. *See, e.g.*, <https://www.cdc.gov/vaccines/pubs/pinkbook/tetanus.html> ("Tetanus is not

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<sup>6</sup> According to NYSDOH and CDC data, the incidence of tetanus and diphtheria have remained at or near zero in the years before and after requiring vaccination for these infections to attend school under New York State law, and the incidence of pertussis has not declined after requiring vaccination for this infection to attend school under New York State law.

contagious from person to person.”) The diphtheria vaccine does not prevent a person from becoming infected with and transmitting the diphtheria bacteria because this vaccine does not contain any portion of the diphtheria bacteria; rather, it is designed to only create antibodies to a toxin sometimes released by the diphtheria bacteria that can cause the symptoms associated with the infection. Thus, even a person who is vaccinated with Tdap can still contract diphtheria, but he/she will simply not experience the adverse symptoms. *See, e.g.,* American Journal of Diseases of Children (1972) <https://www.ncbi.nlm.nih.gov/pubmed/5026197> (“Diphtheria toxoid helps prevent symptomatic disease but does not prevent the carrier state nor stop the spread of infection.”) Likewise, the pertussis vaccine also does not prevent the vaccinated child from becoming infected with and transmitting pertussis, it simply prevents the recipient from experiencing the ill effects of the infection. *See, e.g.,* Vaccine (2018) <https://www.ncbi.nlm.nih.gov/pubmed/29180031> (“neither DTP, nor DTaP or Tdap prevent asymptomatic infection and silent transmission of the [pertussis] pathogen”).<sup>7</sup>

Hence, even assuming A.H. is not already “immune” to pertussis, diphtheria or tetanus from the four prior doses of DTaP (each of which caused him to have seizures), having another

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<sup>7</sup> The NYSDOH requires four doses of inactivated polio vaccine (“IPV”) to attend school and A.H. has received four doses. To the extent CHC claims he needs a fifth dose of IPV, the same arguments regarding DTaP also apply to this vaccine. IPV has been the only vaccine used in the United States since 2000 for polio and this vaccine, like DTaP, does not prevent transmission of an infection from student-to-student. IPV only potentially prevents a person injected with this vaccine from potential complications from the polio virus. This is because polio proliferates in the intestines and is transmitted through fecal to oral contamination, but IPV generates antibodies in the blood, not in the intestinal tract. See <http://polioeradication.org/polio-today/polio-prevention/the-vaccines/ipv/> (“IPV induces very low levels of immunity in the intestine. As a result, when a person immunized with IPV is infected with wild poliovirus, the virus can still multiply inside the intestines and be shed in the feces ... IPV does not stop transmission of the virus.”) The only IPV vaccine used in the United States is sold by Sanofi and was licensed in 1990 based on a clinical trial that had a safety review period of 3 days after injection. To be clear, this is not the polio vaccine created by Jonas Salk or Albert Sabin – this is something very different as Sanofi makes clear on the IPV’s package insert. Moreover, according to the CDC, there were zero cases of polio in New York in 1966, the year before the New York State legislature first enacted a requirement to receive the polio vaccine to attend school.



dose of this vaccine in the form of Tdap will do nothing to prevent him or any other student in his class from becoming infected with and transmitting the pertussis, diphtheria or tetanus bacteria.<sup>8</sup>

### CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court issue a temporary restraining order and preliminary injunction directing (1) that Defendant CHC Learning Center (“CHC”) re-admit A.H. during the pendency of this action, (2) that A.H. resume attending school as soon as practicable, but under no circumstances no later than 2 school days following service of this order on CHC, and (3) that during the pendency of this action A.H. receive all services he was receiving prior to his exclusion from that school on October 4, 2019.

Dated: November 11, 2019

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<sup>8</sup> As even more evidence that the equities decidedly tip in A.H.’s favor, Plaintiffs have detailed certain facts regarding the history and risks of the Tdap vaccine, along with supplying supporting citations, in Section VII of the Complaint in this action.