

ARTICLE: SOCIAL DISTANCING IN NEW YORK SCHOOLS

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I. Introduction

Section 66-1.10, under Title 10 of the New York Codes, Rules, and Regulations states that in the event of a vaccine-preventable disease outbreak, the commissioner of Health of the New York City Department of Health and Mental Hygiene may order the appropriate school officials to exclude from attendance all students without documentation of immunity, including those who have been excluded from vaccination for religious purposes. ² Although excluding unvaccinated children from school during a vaccine-preventable disease outbreak appears to work in favor of public health, parents who opt out of vaccinating their children due to genuine and sincere religious beliefs argue New York's social distancing policy is discriminatory and a violation of their constitutional right to free exercise of religion. ³ That is the belief argued by parents in *Phillips v. City of New York* ⁴.

In *Phillips*, parent-plaintiffs challenged New York's social distancing policy on federal grounds, arguing their First Amendment right to free exercise of religion, as well as their Ninth and Fourteenth Amendment rights to due process and equal protection, were violated after their children were excluded from school following their schoolmates' reports of vaccine-preventable diseases. ⁵ Plaintiffs also raised various state law claims under Article I, Section 3 of the New York State Constitution; New York Public Health Law Section 2164(9); New York City Human Rights Law, Chapter 1, Section 8-107(4); New York City Chancellor's Regulation A701(III)(A)(4)(c), and 10 NYCCR 66-1.10. ⁶ However, plaintiffs' claims were

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² N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10 (2014).

³ Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ... " U.S. Const. amend. I.

⁴ *Phillips v. City of New York*, No.13-cv-791, 2014 U.S. Dist. LEXIS 77500, at 1 (E.D.N.Y. Jun. 4, 2014).

⁵ *Id.* at 6.

⁶ *Id.* at 4.

to no avail. ⁷ The court granted the school district's motion to dismiss, holding that New York's police power [*185] gives the state authority to implement vaccination policies as it sees fit. ⁸

This article analyzes the implications of New York's social distancing policy in accordance with the court's dismissal of *Phillips v. City of New York*. Furthermore, this article assesses New York's social distancing policy and strengthened public health protections from a public policy standpoint. It discusses why the New York statute implementing the state's social distancing policy is too vague for uniform interpretation. It will also discuss how clarification of the statute will allow it to be applied more broadly for the benefit of public health, despite the fact that those with sincere religious beliefs object to the statute's enactment.

II. Legal Background

This section discusses New York's immunization requirements and mandatory vaccination policies under the state's public health law. Additionally, this section discusses the most prominent claims in *Phillips v. City of New York* and the case law applied by the court when ruling to dismiss the case.

In accordance with New York's public health law, every person in a parental relation to a child shall have administered to such child an adequate dose or doses of an immunizing agent against the following diseases: poliomyelitis, mumps, measles, diphtheria, rubella, varicella, *Haemophilus influenza* type b, pertussis, tetanus, pneumococcal disease, and hepatitis B. ⁹ Further, the dose or doses of immunizing agents must meet the standards approved by the United States Public Health Service for such biological products and be approved by the department, under such conditions as may be specified by the Public Health Council. ¹⁰

Additionally, no principal, teacher, owner, or person in charge of a school shall permit any child to be admitted to such school, or to attend such school, in excess of fourteen days, without the certificate of immunization or evidence of the child's immunization against poliomyelitis, mumps, measles, diphtheria, rubella, varicella (chicken pox), *haemophilus influenza* type b, pertussis (whooping cough), tetanus, pneumococcal disease, and hepatitis B. ¹¹

[*186] However, Section 2164 of New York's Public Health Code shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs contrary to the mandatory vaccination requirements. ¹² Section 66-1.3(d) of New York's Codes, Rules, and Regulations states:

a principal or person in charge of a school shall not admit a child to school whose family holds a sincere religious belief against vaccination unless a person in a parental relation to the child has furnished the school with a New York State Education Department form, titled Request for Religious Exemption to Immunization, or a written and signed statement from the parent, parents, or guardian of such child stating the parent, parents, or guardian objects to their child's immunization because of sincere and genuine

⁷ Id. at 10.

⁸ Id. at 8-10.

⁹ N.Y. Pub. Health § 2164(2)(a) (Consol. 2014).

¹⁰ Id.

¹¹ N.Y. Pub. Health § 2164(7)(a) (Consol. 2014).

¹² N.Y. Pub. Health § 2164(9) (Consol. 2014).

religious beliefs which prohibit the immunization of their child, in which case the principal or person in charge of the school may require supporting documents.¹³

Thus, New York allows unvaccinated children to attend school if the reason for their noncompliance with the state's vaccination policy is rooted in genuine and sincere religious beliefs.¹⁴

Nonetheless, Section 66-1.10 of New York's Codes, Rules, and Regulations describes what has been regarded as New York's "social distancing policy."¹⁵ It states that in the event of a vaccine-preventable disease outbreak in a school, the Commissioner of Health of the New York City Department of Health and Mental Hygiene may order the appropriate school officials to exclude from attendance all students who have been exempt from immunization under Section 66-1.3(c)¹⁶ or (d),¹⁷ or are in the process of receiving [*187] required immunizations pursuant to Section 66-1.3(b).¹⁸ Therefore, although New York recognizes a religious exemption from its mandatory vaccination requirements and may admit children unvaccinated for religious purposes into its school system, the State may exclude such children from school during the outbreak of a vaccine-preventable disease.¹⁹ "The exclusion shall continue until the commissioner ... determines that the danger of transmission has passed"²⁰ or until the documentation specified in [*188] Section 66-1.3(a)²¹ or (b)²² of New York's Codes, Rules, and Regulations has been submitted.²³

¹³ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.3(d) (2014).

¹⁴ Id.

¹⁵ Ross D. Silverman, NY Court Upholds Social Distancing Policy Requiring Unvaccinated to Stay out of School, Bill of Health (Jun. 24, 2014), <http://blogs.law.harvard.edu/billofhealth/2014/06/24/ny-court-upholds-social-distancing-policy-requiring-unvaccinated-to-stay-out-of-school/>.

¹⁶ [a] principal or person in charge of a school shall not admit a child to school unless a person in a parental relation to the child has furnished the school with ... [a] signed, completed, sample medical exemption form issued by the [New York State Department of Health] or [New York State Department of Health and Mental Hygiene] or a signed statement from a physician licensed to practice medicine in New York State certifying that immunization may be detrimental to the child's health, containing sufficient information to identify a medical contradiction to a specific immunization and specifying the length of time the immunization is medically contradicted. The medical exemption must be reissued annually. The principal or person in charge of the school may require additional information supporting the exemption.

N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.3(c) (2014).

¹⁷ [a] completed sample form titled: Request for Religious Exemption to Immunization, created by the New York State Education Department or a written and signed statement from the parent, parents or guardian of such child, stating that the parent, parents or guardian objects to their child's immunization because of sincere and genuine religious beliefs which prohibit the immunization of their child, in which case the principal or person in charge of the school may require supporting documents.

N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.3(d) (2014).

¹⁸ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10(a) (2014).

¹⁹ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10 (2014).

²⁰ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10(b) (2014).

²¹ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.3(a) (2014). "A principal or person in charge of a school shall not admit a child to school unless a person in parental relation to the child has furnished the school with ... [a] certificate of immunization" Id.

²² N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.3(b) (2014). "A principal or person in charge of a school shall not admit a child to school unless a person in a parental relation to the child has furnished the school with ... documentation that the child is in the process of receiving immunizations" Id. See N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.1(j) (2014) which defines "in process [to] mean that [] a child has received at least the first dose in each immunization series required by [§] 2164"

Moreover, in addition to its social distancing policy, New York strengthened its public health protections further by expanding the range of vaccine-preventable diseases that may trigger an exclusion to include: varicella (chicken pox), Haemophilus influenza type b, pertussis (whooping cough), tetanus, pneumococcal disease, and hepatitis B.²⁴ The new regulations, effective July 1, 2014, also expanded the number of public health officials who may order schools to exclude "at risk" students from attendance during outbreaks.²⁵ The amended New York regulations also require schools to keep track of the population of vaccine-preventable disease-susceptible children in their care.²⁶ Section 66-1.10(c) of New York's Codes, Rules, and Regulations states, "Schools must maintain a list of susceptible students who should be excluded from attendance in the event of an outbreak of a vaccine preventable disease. This 'list must include all students who have been excused from immunization under section 66-1.3(c) or (d),'²⁷ including those students excused for religious purposes,²⁸ and students 'in the process of completing immunization series or awaiting the results of serologic testing for any vaccine preventable disease specified under Section 66-1.3(b).'"²⁹

Phillips v. City of New York was the first case to challenge New York's social distancing policy.³⁰ Plaintiffs Dina Check,³¹ [*189] Nicole Phillips, and Fabian Mendoza-Vaca are parents of minor children presently attending public schools operated by the City of New York.³² The children of plaintiffs Phillips and Mendoza-Vaca received religious exemptions from mandatory vaccinations.³³ Despite being granted religious exemptions, the children were excluded from school on several occasions during the outbreak of the chickenpox, a vaccine-preventable disease.³⁴ Angered by the school district's procedure, plaintiff's challenged New York's social distancing policy on federal grounds, arguing the policy denies their children the constitutional right to free exercise of religion provided by the First Amendment.³⁵ Citing Caviezel v. Great Neck Public Schools, however, the Court held that the Free Exercise Clause of the First Amendment does not provide a right for religious objectors to be exempt from New York's compulsory vaccination law.³⁶ The court subsequently cited Sherr v. Northport-East

²³ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10(b) (2014).

²⁴ Silverman, *supra* note 15.

²⁵ *Id.*

²⁶ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10(c) (2014).

²⁷ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10(c) (2014).

²⁸ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.13(d) (2014).

²⁹ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10(c) (2014).

³⁰ Phillips v. City of New York, No. 13-cv-791, 2014 U.S. Dist. LEXIS 77500, at 1 (E.D.N.Y. Jun. 4, 2014).

³¹ Dina Check's daughter was granted a religious exemption to vaccinations, but her exemption was revoked after the city tested the validity of Check's religious beliefs and found them to be insincere. This article will focus on Phillips and Mendoza-Vaca's claims against New York's social distancing policy, rather than Check's claim against the revocation of her daughter's vaccination exemption. Benjamin Mueller, Judge Upholds Policy Barring Unvaccinated Students During Illnesses, N. Y. Times (Jun. 22, 2014), http://www.nytimes.com/2014/06/23/nyregion/judge-upholds-policy-barring-unvaccinated-students-during-illnesses.html?emc=eta1&_r=1.

³² Phillips, 2014 U.S. Dist. LEXIS 77500, at 2-3.

³³ *Id.* at 3-4.

³⁴ Mueller, *supra* note 31.

³⁵ Phillips, 2014 U.S. Dist. LEXIS 77500, at 3-6.

Northport Union Free School District, for the proposition that the statutory vaccine exemption in New York goes beyond what the Supreme Court has declared the First Amendment to require.³⁷ Accordingly, the court dismissed plaintiffs' First Amendment claim³⁸ because religious exemptions to mandatory vaccination requirements are not required under the First Amendment.

Next, plaintiffs challenged New York's mandatory vaccination requirements under the Fourteenth Amendment's Substantive Due Process and Equal Protection Clauses.³⁹ The [*190] court, citing *McCartney v. Austin*, held New York's vaccine program, under Public Health Law Section 2164, is well within the State's police power and its constitutionality is too well established for discussion.⁴⁰ Additionally, the court dismissed plaintiffs' equal protection claim, holding that plaintiffs failed to assert facts tending to show they were part of a protected class or that the school district favored one religion over another.⁴¹ Having dismissed each of the plaintiffs' assertions, the court granted defendant's motion to dismiss the case.⁴²

III. Analysis

A. Brief History of Vaccination Laws

The practice of vaccinating individuals began in England in the late 1700s, when Dr. Edward Jenner attempted to control the epidemic spread of smallpox.⁴³ Vaccinations made their way to the United States in the early 1800s, when Dr. Benjamin Waterhouse engaged in his own vaccination experiments using Dr. Jenner's findings.⁴⁴ In 1827, with compulsory education on the rise, Boston became the first city to require all children entering public schools to provide evidence of vaccination.⁴⁵ Following Massachusetts, New York incorporated its own school vaccination law in 1862, and many other states followed suit by developing their own variation of school vaccination laws.⁴⁶

The first challenge to general vaccination requirements was brought forward in 1905 in *Jacobson v. Massachusetts*.⁴⁷ In *Jacobson*, a man objected to a compulsory smallpox vaccination.⁴⁸ The court held

³⁶ *Id.* at 7 (citing *Caviezel v. Great Neck Pub. Schs.*, 739 F. Supp. 2d 273, 285 (E.D.N.Y. 2010)).

³⁷ *Id.* at 7-8 (citing *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 88 (E.D.N.Y. 1987)).

³⁸ Phillips, 2014 U.S. Dist. LEXIS 77500, at 8.

³⁹ 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. amend. XIV, § 1.

⁴⁰ Phillips, 2014 U.S. Dist. LEXIS 77500, at 8 (citing *McCartney v. Austin*, 500 Fed. Appx. 16, 19 (2d Cir. 2012)).

⁴¹ Phillips, 2014 U.S. Dist. LEXIS 77500, at 8-9.

⁴² *Id.* at 9-10.

⁴³ James G. Hodge, Jr. & Lawrence O. Gostin, *School Vaccination Requirements: Historical, Social, and Legal Perspectives*, 90 Ky. L.J. 831, 838-39 (2001-02).

⁴⁴ *Id.* at 842.

⁴⁵ *Id.* at 850-51.

⁴⁶ *Id.* at 851.

⁴⁷ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

⁴⁸ *Id.* at 23.

that a community, consistent with a state's traditional police powers, had the right to protect itself against an [*191] epidemic or disease that threatened the safety of its members.⁴⁹ Using their police powers, states were free to implement vaccination requirements in conformity with: (1) public health necessity, (2) reasonable means, (3) proportionality, and (4) harm avoidance.⁵⁰

Early successes against legal challenges to school vaccination laws helped lay the foundation for modern immunization statutes, which are amended to proscribe mandatory immunization for additional diseases as new vaccines become available.⁵¹ Rather than having health departments require immunization in emergency conditions, legislatures act to prevent disease by implementing mandatory immunization as a condition for enrollment or attendance in schools.⁵²

Those in opposition to mandatory vaccination requirements have long objected to vaccinations on constitutional grounds, such as those debated in *Phillips*. Specifically, persons with strong religious beliefs argue that requiring individuals to conform to public health standards is inconsistent with their religious practices, violating both the Establishment and Free Exercise Clauses of the First Amendment.⁵³ Courts have timelessly held, however, that requiring a person to vaccinate against their religious beliefs is generally viewed as constitutional.⁵⁴ Nonetheless, while states are not constitutionally obliged to grant religious exemptions, the Establishment Clause suggests that states are permitted to do so, and legislatures are given the constitutional authority to create exemptions for religious beliefs as they see fit.⁵⁵ Like New York, states may strictly construe religious exemptions, insisting that the belief against compulsory vaccination be genuine, sincere, and an integral part of the [*192] religious doctrine.⁵⁶ However, religious exemptions differ from state to state.⁵⁷

B. Statistical Data

All fifty states mandate that children be vaccinated for certain diseases before entering school.⁵⁸ Depending on state and local regulations, a variety of vaccination exemptions, including medical,

⁴⁹ *Id.* at 27-28.

⁵⁰ Hodge & Gostin, *supra* note 43, at 856-57 (citing *Jacobson v. Massachusetts*, 197 U.S. 11 (1905)).

⁵¹ Hodge & Gostin, *supra* note 43, at 867-68.

⁵² Walter V. Orenstein & Alan R. Hinman, *The Immunization System in the United States - The Role of School Immunization Laws*, 17 *Vaccine* (Supp. 3) S19 (1999).

⁵³ Hodge & Gostin, *supra* note 43, at 858-59.

⁵⁴ See *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979) (holding the interests of school children in being protected against the horrors resulting from vaccine-preventable diseases prevails, although it may conflict with the religious beliefs of a parent); *Cude v. State*, 237 Ark. 927, 932 (1964) (holding the mandatory vaccination of school children does not violate the constitutional right of anyone, on religious grounds or otherwise).

⁵⁵ Hodge & Gostin, *supra* note 43, at 860.

⁵⁶ See *Brown v. City Sch. Dist.*, 104 Misc. 2d 796, 799 (N.Y. Sup. Ct. 1980) (holding that given the genuineness and sincerity of parent's religious beliefs and the absence of risk to the public, a parent was entitled to religious exemption); *In re Elwell*, 55 Misc. 2d 252, 259 (N.Y. Fam. Ct. 1967) (holding while parents were members of a recognized religion, their objections to the polio vaccine were not based on the tenets of their religion).

⁵⁷ Vaccination Exemptions, *The History of Vaccines*, <http://www.historyofvaccines.org/content/articles/vaccination-exemptions> (last updated Jul. 31, 2014).

⁵⁸ *Id.*

religious, and philosophical exemptions, are permitted amongst the states.⁵⁹ Forty-eight states, not including Mississippi and West Virginia, recognize religious exemptions to mandatory vaccination, although the extent to which parents' religious beliefs must be validated varies from state to state.⁶⁰

Over the last decade, New York's statewide mean religious exemption rate rose from .23 percent in 2000 to .45 percent in 2011.⁶¹ This increase in religious exemptions contrasts with a previously published study depicting exemption rates to be stable in states recognizing religious exemptions to mandatory vaccination.⁶² The increased rate of religious exemptions in New York is comparable to those states that permit easy, non-medical exemptions from mandatory vaccination.⁶³ However, New York's non-medical, religious exemption is granted only when a parent can support a genuine and sincere religious belief with documentation;⁶⁴ a standard considered to be of moderate difficulty when compared to the standards of other states.⁶⁵ The reasons for rising rates of religious exemptions in New York are [*193] unknown.⁶⁶ It is possible that the rising rates played a role in the state's development of its social distancing policy.

Health experts believe that disease outbreaks are limited when an immunization rate reaches a certain level. This is due to the fact that when a certain percentage of people are vaccinated, disease cannot spread to enough people to be sustained.⁶⁷ For example, according to Daniel Salmon, deputy director at the Institute for Vaccine Safety at the John Hopkins Bloomberg School of Public Health, an immunization rate of 95 percent is needed to prevent the spread of the measles.⁶⁸ According to New York State's Health Department, New York City schools alone granted 3,535 religious exemptions from 2012 to 2013.⁶⁹ According to the states' health department, though public and private city schools had an overall immunization rate of about 97 percent, thirty-seven private schools had immunization rates below 70 percent from 2012 to 2013.⁷⁰ Using the measles example, the thirty-seven private schools with an immunization rate below 70 percent would not have been able to prevent the spread of the measles in the occurrence of an outbreak.⁷¹

⁵⁹ Id.

⁶⁰ Id.

⁶¹ Aamer Imdad et al., Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000-2011, (Jun. 3, 2013), available at <http://pediatrics.aappublications.org/content/early/2013/05/29/peds.2012-3449.full.pdf>.

⁶² Id.

⁶³ Id.

⁶⁴ N.Y. Comp. Codes, R. & Regs. tit. 10, § 66-1.3(d) (2014).

⁶⁵ Imdad et al, *supra* note 61.

⁶⁶ Id.

⁶⁷ Mueller, *supra* note 31.

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ Id.

⁷¹ Id.

From January 1 to October 31, 2014, there have been 603 reported cases of the measles, representing the highest number of cases since measles were eliminated in 2000.⁷² In New York City alone, among the twenty-five people who contracted the measles, two were school-aged children unvaccinated due to parental refusal rooted in religious beliefs.⁷³ One of the children who contracted the measles was homeschooled and city health officials barred the child's sibling, who was not homeschooled or infected with the disease, from attending school.⁷⁴ The sibling eventually contracted the measles and health officials credited the decision to keep the sibling out of school with stopping the spread of the measles in that community.⁷⁵

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C. Discussion

As exemplified in *Caviezel*, freedom of religion under the First Amendment does not apply when a health risk is posed to the public.⁷⁶ The freedom to act according to religious beliefs is subject to reasonable regulation for the benefit of society as a whole.⁷⁷ This makes sense from a public health perspective. Requiring children to be vaccinated before entering school is beneficial to the health of a community. Schools inherently foster the transmission of infections from person to person because they are group settings in which people are in close contact and share supplies and equipment.⁷⁸ Without mandatory vaccinations in place, it is possible that less parents would vaccinate their children and disease would spread with more ease throughout schools and other group settings. But should a child's lack of vaccination prevent him or her from attending school? Moreover, should a child's lack of vaccination prevent him or her from attending school when his or her lack of vaccination was approved by the state in which the school is located?

As illustrated in *Phillips*, the children of Nicole Phillips and Fabian Mendoza-Vaca were not vaccinated because their parents held strong religious beliefs that contrasted with the state's vaccination requirements.⁷⁹ Although the state recognized Phillips and Mendoza-Vaca's religious beliefs and allowed their children to attend school without being vaccinated, when an outbreak of the chickenpox (a vaccine-preventable disease) spread through the facility, Phillips and Mendoza-Vaca's children were prohibited from attending school.⁸⁰ Using its police power, does the State of New York have the authority to exclude unvaccinated students from school? According to case law, the answer is yes.⁸¹ But is an unvaccinated child's exclusion from school problematic on non-constitutional grounds? For example, does the state's social

⁷² Measles Cases and Outbreaks, CDC, <http://www.cdc.gov/measles/cases-outbreaks.html> (last updated Nov. 4, 2014).

⁷³ Mueller, *supra* note 31.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Caviezel v. Great Neck Pub. Schs.*, 739 F. Supp. 2d 273, 283-84 (E.D.N.Y. 2010).

⁷⁷ *Wright v. De Witt Sch. Dist.*, 238 Ark. 906, 913 (1965).

⁷⁸ Adolescent and School Health - Infectious Diseases at School, CDC, <http://www.cdc.gov/Healthyyouth/infectious/index.htm> (last updated Nov. 17, 2011).

⁷⁹ Phillips, 2014 U.S. Dist. LEXIS 77500, at 3-4.

⁸⁰ *Id.* at 4.

⁸¹ *Id.* at 8.

distancing policy hinder students' education by preventing them from attending school for what can be prolonged periods of time?

[*195] New York is the only state that utilizes a social distancing policy, under which children unvaccinated for religious and other reasons may be excluded from school during vaccine-preventable disease outbreaks. Although a social distancing policy such as New York's seems advantageous in theory, Section 66-1.10 of New York's Codes, Rules, and Regulations, leaves many questions unanswered, concerning the statute's application.⁸² Because plaintiffs in *Phillips* focused a majority of their arguments on broad constitutional issues, and failed to challenge the statute specifically, the court was not required to address many potential problems with the statute.⁸³ Instead, the court upheld New York's authority via its police power to institute whatever policies the state deems necessary for the protection of public health.⁸⁴

The legislature implemented New York's social distancing policy with the intent to protect the health of the public.⁸⁵ A combination of factors, such as the increasing number of families obtaining vaccine exemptions, has weakened overall protection against vaccine-preventable disease outbreaks.⁸⁶ In response, New York employed its social distancing policy as a secondary method to defend against the spread of disease when families dodge the state's preemptive mandatory vaccination requirements.⁸⁷ On its face, however, the statute defining New York's social distancing policy is too ambiguous to allow for uniform interpretation.

First, the statute fails to define terms pertinent to a comprehensive understanding of the statute's functionality. Under Section 66-1.10 of New York's Codes, Rules, and Regulations, students exempt from vaccination for religious purposes, among other reasons, may be excluded from school "in the event of an outbreak of a vaccine-preventable disease."⁸⁸ The statute fails to define the term "outbreak."⁸⁹ Merriam-Webster defines "outbreak" to mean "a sudden rise in the incident of a disease," a definition that does little to clarify the term's meaning for statutory purposes.⁹⁰ If one child contracts a vaccine-preventable disease enumerated on the mandatory vaccination list in Section 2164 of [*196] New York's Public Health Code, does that constitute an "outbreak" sufficient to allow the school to exclude all of its unvaccinated students, or must multiple students contract the vaccine-preventable disease? If multiple students must contract the disease in order to constitute an outbreak sufficient for the school to prohibit unvaccinated students from attending, then exactly how many students need to become ill?

⁸² N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10 (2014).

⁸³ *Phillips*, 2014 U.S. Dist. LEXIS 77500, at 9-10.

⁸⁴ *Id.* at 8.

⁸⁵ Silverman, *supra* note 15.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10(a) (2014).

⁸⁹ *Id.*

⁹⁰ Definition of Outbreak, Merriam-Webster, <http://www.merriam-webster.com/dictionary/outbreak> (last visited Nov. 28, 2014).

The Center for Disease Control and Prevention defines an outbreak as "the occurrence of more cases of disease than normally expected within a specific place or group of people over a given period of time."⁹¹ This definition is also troublesome in that it requires further clarification as to what constitutes "more cases of disease than normally expected" and "over a given period of time."⁹² Is one case of the chickenpox more than normally expected? Some would posit no, at least not in an elementary school setting. People might, however, be willing to opine that one case of poliomyelitis (polio) would be more than expected in today's society. Thus, one's expectation of the occurrence of a disease may very well depend on the disease's classification. Additionally, what constitutes "a given period of time?"⁹³ If a vaccine-preventable disease infects one or more children for one week, is one week an adequate amount of time to allow the school to exclude unvaccinated children from attendance? Must the disease infect one or more children for two weeks? Three weeks? One month?

When a homeschooled, unvaccinated child living in New York contracted the measles in 2014, city health officials barred that child's sibling, who was not homeschooled, from attending school.⁹⁴ In that instance it appears that one child's contraction of the measles was sufficient to constitute an outbreak.⁹⁵ Because the child was homeschooled, however, the only unvaccinated child prohibited from attending school was the homeschooled child's sibling, yet the statute does not explicitly address treatment of a sick child's sibling. Must every unvaccinated child with a brother or sister infected with a vaccine-preventable disease be excluded from school? The statute fails to answer this question.

[*197] Furthermore, although the statute implies that only unvaccinated children attending the school in which the outbreak occurs may be excluded from attendance,⁹⁶ should unvaccinated children at schools in close proximity to the school in which the outbreak occurs also be banned from attendance? If one New York school is battling an outbreak should neighboring schools within the vicinity take precautionary measures and ban their unvaccinated students from attending?

Additionally, to further protect public health, the statute's scope should be expanded to reach colleges and universities. Implementing a social distancing policy in schools such as daycares, elementary schools, and high schools is controllable because a manageable number of students attend such schools. Implementing a social distancing policy across college and university campuses, however, may be more problematic. Many colleges and universities attract thousands of students to their campuses each year. The more students in attendance, the more tedious it becomes to keep track of every non-vaccinated student, and dormitory housing on college campuses poses an additional problem. During the outbreak of a vaccine-preventable disease, unvaccinated students would need to be banned not only from attending class, but also from being on campus or in dorms. If unvaccinated college students were merely banned from attending class, disease would still spread amongst the students living in close proximity within the dorms. Nevertheless, a modified version of New York's social distancing policy may be advantageous to

⁹¹ Ingrid Koo, Epidemiology 101: Outbreak Investigation?, About.com (Aug. 14, 2014), <http://infectiousdiseases.about.com/od/basics/a/outbreaks.htm>.

⁹² Id.

⁹³ Id.

⁹⁴ Mueller, *supra* note 31.

⁹⁵ Id.

⁹⁶ N.Y. Comp. Codes, R., & Regs. tit. 10, § 66-1.10 (2014).

college campuses such as Ohio State University, where twenty-three cases of the mumps were reported in March of 2014.⁹⁷ Extending the statute's reach to unvaccinated teachers and professors, principals and deans, and faculty and staff would also be beneficial to public health.

Expanding New York's social distancing policy even further, to reach non-school settings such as the workplace would also be advantageous to public health. Like schools, businesses and corporations can foster the spread of infectious disease because they are group settings in which people work in close proximity to one another and share materials and equipment. The Center for Disease Control and Prevention recommends that employers structure their time and attendance policies to [*198] encourage sick employees to stay home, limiting the sick employees' exposure to the workplace to ensure less staff members become sick.⁹⁸ Executing a social distancing policy similar to that imposed in New York schools would be more beneficial than the CDC's recommendations. If unvaccinated employees were banned from attending work when vaccine-preventable disease outbreaks occurred, unvaccinated employees susceptible to illness would not be exposed to disease. If fewer employees were exposed to disease, disease would be less likely to spread throughout the workplace and the health of the public would be less endangered.

Currently, New York is the only state that implements a social distancing policy within its school system. It may be favorable for other states to follow suit. In 2013, research confirmed that a 2010 whooping cough outbreak in California was the nation's worst in over fifty years.⁹⁹ Nine thousand one hundred and twenty children contracted whooping cough, resulting in ten deaths.¹⁰⁰ The study showed more cases of whooping cough in clusters of unvaccinated children than in clusters of vaccinated children.¹⁰¹ Additionally, researchers concluded the disease was spread by children whose parents applied for non-medical exemptions to school vaccination requirements, many for religious reasons.¹⁰² In San Diego alone, 5,100 vaccination exemptions were granted and 980 cases of whooping cough occurred.¹⁰³ Had a social distancing policy such as that in New York been employed within the state of California, unvaccinated children would have been barred from attending school during the disease outbreak, and fewer children would have been exposed to whooping cough.

V. Conclusion

Although New York's social distancing policy appears problematic for students with sincere religious beliefs advising them against mandatory vaccination, the policy is extremely [*199] beneficial to public health and should be upheld, despite parents' complaints that their unvaccinated children are improperly and unfairly banned from school. Families applying for a religious exemption to New York's mandatory vaccination requirement should be informed and advised that refusing to vaccinate their children can

⁹⁷ Alexandra Sifferlin, 4 Diseases Making a Comeback Thanks to Anti-Vaxxers, *Time* (Mar. 17, 2014), <http://time.com/27308/4-diseases-making-a-comeback-thanks-to-anti-vaxxers/>.

⁹⁸ Adult Immunization, CDC (Oct. 23, 2013), <http://www.cdc.gov/workplacehealthpromotion/implementation/topics/immunization.html>.

⁹⁹ Brian Krans, Anti-Vaccination Movement Causes a Deadly Year in the U.S., *Healthline News* (Dec. 3, 2013), <http://www.healthline.com/health-news/children-anti-vaccination-movement-leads-to-disease-outbreaks-120312#1>.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

result in their children being barred from attending school in the instance of a vaccine-preventable disease outbreak. Thus, parents will be able to make fully informed decisions regarding the vaccination of their children. The social distancing policy may even encourage parents who normally would not vaccinate their children due to religious beliefs to vaccinate their children, in fear of hindering their child's education if a vaccine-preventable disease outbreak renders their child banned from school. A higher student vaccination rate will result in heightened public health protection. To further protect the health of the public, a social distancing policy should also be integrated into college universities and the workplace, as minimizing the spread of infectious disease and shielding the public from harm is essential.

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