TEMPLATE MEMORANDUM OF LAW

Weighing Public Health Equities

PREFACE

Case law in support of this brief are too numerous to cite. The reader is invited to review abstracts of Section 310 Appeals from the Commissioner's NYS website. In each case, the Commissioner affirms the appeal based on the law and on the fact that the Commissioner cannot consider facts that are outside of the record.

Note also that decisions of the Commissioner under EDU Section 310 are equivalent to law. The most recent case in support of this brief is the Appeal of D.W. and N.W. v. Yeshiva of Spring Valley [Decision No. 16,144. August 30, 2010],

MEMO OF LAW

This brief alleges that by considering public health issues as either a primary basis, or as a component rationale, in denying petitioner's exemption application, respondent had thus acted arbitrarily and capriciously.

School administrators have ministerial and judicial functions. Their role in the enforcement of NY Pub. Health Law §2164(9) is clearly the latter: They are required to act as adjudicators in determining whether or not to grant a religious waiver, based upon information applicants are instructed to furnish administrators—which is entirely and exclusively related to religion, and not medical or public health. Consequently, an administrator's decision must weigh the merits of the religious information that is supplied, and not public health information that is neither supplied, nor required.

Put simply, the law provides a legal waiver based upon religion. Applicants are required to submit religious-based explanations. Schools are required to assess those beliefs on their religious merits, and no other merits.

This interpretation is based on statutory language (in §2164), and 10 NYCRR Section 66-1.3(d), and its descendants in local jurisdictions, such as NYC Chancellor's Regulation A-701(111)(A)(4)(b).

THE STATUTE

In 1989, the NYS legislature amended the wording in NY Pub. Health Law §2164(9) to read:

> This section shall not apply to children whose parent, parents, or guardian hold genuine and sincere religious beliefs which are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.

State regulators (including the Commissioner of Education in countless precedential decisions) interpreted subsection 9 to mean that school administrators must determine that applicants base their beliefs upon the teachings of genuine religions, as opposed to philosophies, and that said beliefs are sincerely held, before a religious waiver can be granted. That is the sole "test."

The reason this is the sole test is not just because of the absence of considerations other than "genuine and sincere", listed in §2164(9) The other reason is a plain language interpretation: §2164(9) begins with the words, "This section ..." In other words, the entire section of §2164, which obviously includes §2164(7) and other subsections that refer to the actual vaccine mandates and public health issues, "shall not apply to children...".

Thus, exemption status derived from §2164(9) supersedes the requirements written in the other subsections cohabiting §2164. If §2164(9) supersedes the cohabiting subsections attending to public health concerns, then how could public health concerns determine whether or not a religious exemption is granted?

Had the legislature wanted public health equities—or any other considerations—to be balanced against the merits of an applicant's religious beliefs, then it would have specified them in §2164(9), alongside the "genuine and sincere" threshold requirement for the waiver.

Therefore, a school administrator who determines on his own which public health issues to consider, and then weighs those considerations against the merits of an applicant's expressed religious beliefs, is—prima facia—ultra vires (in excess)of statutory authority.

THE REGULATIONS

The above-cited regulations do not offer justification for schools to adjust the screening process of the religious waiver with the intention of maintaining or otherwise accommodating public health concerns. There's no language to that effect in said regulations. The religious exemption was not intended to regulate vaccination compliance rates one way or the other. The very act of doing so would belie the stated reasons the religious waiver was included in the law in the first place.

Indeed, the state Legislature intended the religious waiver in section §2164(9) and §2165(9) to be a First Amendment right, based upon text contained in the subsection, "Constitutionality—Generally", under the section Notes of Decisions on page B-4:

> The Legislature had approved of, and considers religious freedom a legitimate waiver from the immunization requirements—based upon the Constitution.

The Constitution. Nothing about public health, or preventing outbreaks, or protecting unvaccinated teachers.

Similarly, there is no language contained in the "written statement" clause, or the "supporting documents" clause of 10 NYCRR, §66-1.3(d), to construe that a public health calculation is required, or that such a calculation is necessary to restrict or otherwise regulate the numbers who qualify for the waiver, as a means to maintain public health.

Granted, there are regimes which govern school and campus exclusions based on vaccination status—i.e. NY Pub. Health Law §2164(7), Education Law §906 ("Existence of communicable diseases; return after illness"), 10 NYCRR 66-1.10 ("Exclusion of susceptibles"), and NYC Chancellor's Regulation A-701(111)(A)(4)(c)(i-ii) ("Exclusion During Outbreaks of Diseases Preventable by Vaccination"). But these are separate regulations that are not related to religious exemptions, because a religiously exempt student, for example, who nonetheless is antibody positive to the outbreak disease, would be allowed to remain in school.

Furthermore, they apply to conditions and criteria that are unlike those which govern exclusion based on religion. For example, the conditions under which exclusion of susceptibles would apply is under atypical circumstances (i.e. a disease outbreak); confined to limited duration (typically up to 3 weeks); and are unrelated to the assessed efficacy of parent's or student's religious beliefs. Whereas the exclusion from school based on the denial of a religious waiver is of longer and indefinite duration, and is restricted solely to the consideration of religious beliefs, independent of public health conditions.

CONCLUSION

Therefore, the equities relating to public health are not relevant to an application for the religious waiver. The waiver is granted, or not, on the basis of religious beliefs, not public health concerns. Half of the students in a classroom may conceivably have religious exemptions, despite the purported public health risk that may spell. Yet there's no statutory or regulatory authority for school administrators to deny religious waivers in order to prevent that occurrence.

Petitioner respectfully submits that respondent's proper function in this proceeding is solely to fairly consider petitioner's theological beliefs, and to leave the administration of public health matters to public health officers employed by the Departments of Education and Health. To do otherwise should respectfully be deemed arbitrary and capricious actions.