

NYC's Teacher COVID Vax Mandate Cleared By Federal Judge

By **Kevin Stawicki**

Law360 (September 24, 2021, 4:22 PM EDT) -- A federal judge shut down New York City public school teachers' attempt to block the city's COVID-19 vaccine mandate that requires them to get at least one jab within the next few days, saying their claims that the policy is unconstitutional fall flat.

In an order denying a request for a preliminary injunction, U.S. District Judge Brian M. Cogan said Thursday that the group of teachers suing the city failed to make the case that the mandate violated their due process rights by restricting their freedom to pursue employment. The teachers risk termination if they don't comply with the mandate.

The city mandate passes muster because the U.S. Supreme Court has said the 14th Amendment's due process clause is "subject to reasonable government regulation," according to the judge. Other courts have held that the Constitution only protects individuals from government policies that entirely block an individual's attempt to secure employment, Judge Cogan said.

"Although defendants may render it more difficult for them to pursue their calling, plaintiffs are not absolutely being barred from doing so," Judge Cogan wrote, adding that the teachers can pursue employment at private schools if they lose their jobs as a result of the mandate. "Therefore, plaintiffs are not being denied their fundamental right to pursue their profession."

Furthermore, the teachers came up short in their argument that the regulation was so beyond the pale that the Constitution doesn't protect it, the judge said. He explained that while they may disagree with the mandate, it "represents a rational policy decision surrounding how best to protect children during a global pandemic."

Public school teacher Rachel Maniscalco sued the city Department of Education and New York City on Sept. 10 challenging the city's Aug. 23 executive order that required all city teachers to be vaccinated by Sept. 27 and didn't leave any opportunity for teachers to opt-out of getting the jab by getting a weekly COVID-19 test instead.

The suit claims, among other things, that the city's mandate violates the free exercise and equal protection clauses of the Constitution because it puts at risk their liberty to pursue the teaching profession, in addition to Article 78 of the New York Civil Practice Law and Rules.

Although the vaccine mandate as announced by New York City Mayor Bill de Blasio, a named defendant in the suit, didn't include exemptions for teachers with medical concerns or religious objections, the mayor **changed his mind** soon thereafter, saying teachers would have the opportunity to claim those exemptions.

"Such an ongoing, draconian punishment shocks the conscience, violates constitutional rights and not only should not be permitted, but must be restrained immediately to prevent irreparable harm," the teachers said in the suit.

But the city said in response Sept. 16 that the vaccine mandate was issued solely to save lives and that the teachers can't make the case that they are harmed by the policy's implementation.

"They cannot establish that any alleged harm they may suffer, absent the requested relief, is irreparable," the city said. "Nor can plaintiffs demonstrate any likelihood of success on the merits of

their claims or that the balance of equities tips in their favor."

Thursday's decision is the latest to back the city's vaccine mandate. A New York state court judge Sept. 22 **lifted a temporary restraining order** that barred the implementation of NYC's policy, finding that the municipal unions attempting to stop the mandate are unlikely to prevail and that the public's health interests outweigh the interests of the petitioners.

A spokesperson for the city said in a statement that Thursday's decision was yet another indication that the mandate is on solid legal footing.

"Yet again, another court has cleared the way for a vaccine mandate at the DOE which is in the best interest of children and department employees," the spokesperson for the NYC Law Department said. "The court has again recognized the authority of the Health Department to implement a mandate that is firmly grounded in science and the expertise of public health officials from across the nation."

The city is facing other lawsuits challenging the mandate. A group of 10 teachers and administrators asked a judge in the Southern District of New York on Sept. 21 to **strike down the mandate** for educators, saying the requirement tramples their constitutional right to religious expression.

Counsel for the teachers did not immediately respond to requests for comment on Friday.

The teachers are represented by Mark J. Fonte and Louis M. Gelormino of F&G Legal Group.

The city is represented by Georgia M. Pestana of Corporation Counsel of the City of New York.

The case is Maniscalco et al. v. NYC Department of Education et al., case number 21-cv-5055, in the U.S. District Court for the Eastern District of New York.

--Additional reporting by Vin Gurrieri, Melissa Angell and Tim Ryan. Editing by Neil Cohen.