

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION NO. _____

TAMAR MASSOYAN-ARTINIAN, on behalf of
her children, and MADISON SCHILTZ,

Plaintiffs,

v.

MONICA BHAREL, in her official capacity as
Commissioner of the Massachusetts
Department of Public Health and the
MASSACHUSETTS DEPARTMENT OF
PUBLIC HEALTH,

Defendants.

JURY TRIAL DEMANDED

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action challenging the enforceability of a press release issued by the defendant Department of Public Health (“DPH”) purporting to require all students, including post-secondary school students under the age of thirty, to submit to an influenza vaccination as a pre-condition to attending school in the Commonwealth of Massachusetts. The “order” goes into effect on December 31, 2020 and unlawfully would ban any student from attending school beginning in January 2021 if the student does not comply.

2. The Massachusetts Legislature has carefully considered which vaccinations should be mandatory for students attending both K-12 schools in the Commonwealth, and the world-renowned colleges and universities for which it is known. For K-12 schools, the Legislature created a list of required vaccinations but then granted the DPH authority to add additional

vaccinations to that list through the usual process of adopting regulations. On the other hand, the Legislature required a different set of vaccinations for post-secondary students and did not give the DPH any authority to alter or enlarge that list.

3. The Legislature pointedly did not include the influenza vaccine in any of its lists. Nevertheless, on August 19, 2020, the DPH took it upon itself to issue a “press release” announcing it now required all children in K-12 schools, and all students attending colleges and universities, to receive the influenza vaccine before December 31, 2020 (the “**Flu Shot Mandate**” or the “**Mandate**”). The problem is that the DPH has no authority to create a new vaccination mandate for students attending colleges and universities – only the Legislature could do that. Furthermore, all the DPH did was issue a press release. It never took the steps needed to adopt a new regulation, such as providing prior notice or a public comment period. Thus, the Flu Shot Mandate is not a formal “regulation” and as such is unenforceable.

4. In addition to its other deficiencies, the DPH enacted the Flu Shot Mandate as a measure to prevent transmission of the flu and thereby decrease the burdens on the Commonwealth’s healthcare system. However, over the past decade, multiple published surveys of all available medical studies have “found no evidence that vaccines prevent viral transmission” of influenza. This means that mandating the influenza vaccine cannot prevent its transmission. Further, independent reviews have repeatedly concluded that there is no reliable evidence that the influenza vaccine reduces the burden on healthcare resources. And since the DPH cannot support that the Flu Shot Mandate will prevent the spread of influenza or reduce the burden on the healthcare system, it has no rational basis or other grounds to vitiate the fundamental constitutional rights to bodily integrity, informed consent, parental choice, and substantive due process by forcing unwilling individuals to receive the influenza vaccine.

5. Plaintiffs are an adult graduate student at Springfield College and the parent of two elementary school students in Waltham Public Schools. Each of these three students has received all the required vaccines to attend school but has not received the influenza vaccine. Nothing in the Commonwealth's laws requires them to receive the influenza vaccine in order to attend school. Nevertheless, the Flu Shot Mandate wrongfully threatens to prevent Plaintiffs from attending school on January 1, 2021, because they made the informed choice to not receive the influenza vaccine. Plaintiffs now bring this action seeking a declaration that the Flu Shot Mandate is invalid and an injunction preventing its enforcement.

6. Plaintiffs do not question the need for robust public health tools to cope with the COVID-19 pandemic. However, the Flu Shot Mandate is neither legally adopted nor scientifically supported. If instead proper legislative and regulatory process had been followed, there would have been an opportunity to present to legislators and regulators powerful evidence that the Flu Shot Mandate infringes on protected constitutional rights for no demonstrable public health benefit.

7. By granting the instant relief and enjoining the DPH from enforcing the Flu Shot Mandate, this Court will merely be maintaining the status quo. Plaintiffs do not oppose any individual choosing to receive the influenza vaccine. In fact, currently by employing non-coercive means the DPH has achieved one of the highest levels of child influenza vaccination in the nation. Even with an injunction, the DPH will be free to continue to non-coercively encourage parents and students to receive the influenza vaccine just as it does now. Plaintiffs merely ask that they, and other students like them, be allowed to continue to attend their same schools without having to sacrifice their constitutionally protected rights in the process.

JURISDICTION AND VENUE

8. The plaintiffs bring this action to redress a deprivation of their rights secured under the Constitution and laws of the United States and the Declaration of the Rights of the Massachusetts Constitution and the laws of the Commonwealth.

9. This Court has jurisdiction pursuant to G.L. c. 231A, § 1 and G.L. c. 212, §§ 3 and 4 because this is a civil action for declaratory and injunctive relief against the Massachusetts Department of Health. This Court has concurrent jurisdiction to adjudicate Federal Constitutional, statutory and common law claims against each of the defendants under Article VI, Clause 2 (the Supremacy Clause) of the United States Constitution.

10. This Court is authorized to issue the declaratory and injunctive relief sought herein by 28 U.S.C. §§ 2201, 2202, 42 U.S.C. § 1983, and G.L. c. 231A.

11. Venue is proper in this Court pursuant to G.L. c. 231A, § 1 and G.L. c. 223, § 1, because Monica Bharel, in her official capacity as Commissioner of the Massachusetts Department of Public Health and the Department itself, are situated in Boston, Suffolk County.

PARTIES

The Plaintiffs

12. Plaintiff Tamar Massoyan-Artinian is the mother of two children, R.A., age 7 and H.A., age 11. Her children currently attend elementary school in Waltham Public Schools but will be excluded after December 31, 2020 if they do not receive an influenza vaccine against Mrs. Massoyan-Artinian's wishes.

13. Plaintiff Madison Schiltz is a 27-year-old student, teacher, and coach. She attends Springfield College and will be excluded after December 31, 2020 if she does not receive an influenza vaccine.

The Defendants

14. Defendant Monica Bharel is the Commissioner of the Massachusetts Department of Public Health. She is sued in her official capacity.

15. Defendant the Massachusetts Department of Public Health the (“DPH”) is a public agency of the Commonwealth of Massachusetts. On August 19, 2020, the DPH announced by press release an influenza vaccination mandate for all Massachusetts students through the age of 30 years old.

ALLEGATIONS

I. Statutory Framework for Requiring Influenza Vaccine for School

16. The Legislature determined that in order to attend a K-12 school, absent an exemption, a child shall have been “immunized against diphtheria, pertussis, tetanus, measles, and poliomyelitis and *such other communicable diseases as may be specified from time to time by the department of public health.*” G.L. c. 76, § 15 (emphasis added). As for students attending colleges and universities in the Commonwealth, the Legislature provided that all college students under thirty years of age, and all students in undergraduate or graduate health science programs need to have “been immunized against measles, mumps, rubella, tetanus and diphtheria,” and all college or university students who live in a dormitory must also be immunized against “meningococcal disease.” G.L. c. 76, §§ 15C, 15D. Thus, the Legislature chose a different set of vaccinations to apply to students in higher education settings as opposed to children in lower schools, and it did not grant the DPH authority to require additional immunizations for higher education students. *Compare* G.L. c. 76, § 15 *with* G.L. c. 76, § 15C.

17. The Massachusetts Administrative Procedures Act (“MAPA”), G.L. c. 30A, § 1 *et seq.*, provides the statutory scheme for an administrative agency to adopt regulations. Among other requirements, prior to adopting any regulation, MAPA requires an administrative agency,

like the DPH, to provide notice to the public and a period of time during which the public has an opportunity to comment on the proposed regulations. G.L. c. 30A, § 3.

II. The Flu Shot Mandate

18. On August 19, 2020, without adopting a regulation, the DPH issued a press release entitled “Flu Vaccine Now Required for all Massachusetts School Students Enrolled in Child Care, Pre-School, K-12, and Post-Secondary Institutions.” The press release declared that:

State public health officials today announced that influenza immunization will be required for all children 6 months of age or older who are attending Massachusetts child care, pre-school, kindergarten, K-12, and colleges and universities. ...

All students in K-12 must receive the seasonal influenza vaccine annually by December 31. ...

For older students, the flu vaccine requirement applies to all full-time undergraduate and graduate students under 30 years of age and all full- and part-time health science students. ... The only exception is for college and university students who exclusively attend classes online and never visit campus in person. College students who attend any classes or activities on campus, even once, must be vaccinated by December 31.

The DPH also issued an FAQ which made clear that this requirement will apply perpetually henceforth.

19. At no point did the DPH adopt any regulation to codify this new purported requirement in this press release, nor were any of the MAPA requirements for adopting a regulation followed, including no prior notice to the public, no public comment period, no business impact statement published, nor anything filed with the secretary of state regarding any proposed regulation.

III. Plaintiffs Will Be Excluded from School or College on January 1, 2021

20. Plaintiffs and their affected children have received all immunizations required to attend college or school pursuant to G.L. c. 76 § 15 and § 15 C. None of them, however, have

received an influenza vaccine. It is on that basis alone that Plaintiffs or their children will be excluded from their public K-12 schools or from their graduate program on January 1, 2021.

21. Plaintiff Massoyan-Artinian's two school-age children, R.A., age 7 and H.A., age 11 each have received all of the vaccinations required to attend their public schools in Massachusetts as of December 11, 2020. Both children have a history of allergies and adverse reactions to medications including amoxicillin and influenza vaccines.

22. Plaintiff Massoyan-Artinian's older child previously experienced intense adverse reactions to the influenza vaccine. This child developed asthma at a young age and the condition worsened over time. Each year, after receiving the influenza vaccine, the child suffered complications including bronchitis, bacterial pneumonia, respiratory infections, and asthma attacks. Most of these reactions led to emergency room visits, and one led to hospitalization at Boston Children's Hospital. Her younger child had adverse reactions to the influenza vaccine as well, including high fevers, rashes, and asthmatic tendencies such as requiring a nebulizer and steroids to stabilize breathing.

23. After the last adverse response to the influenza vaccine, Plaintiff Massoyan-Artinian stopped having it administered to both of her children. She inquired about a medical exemption to the influenza vaccine from her pediatrician based on her children's prior experiences but was told that the medical practitioner "decided that it will not provide exemptions for the flu vaccine."

24. If the DPH mandate is enforced, it will make Plaintiff Massoyan-Artinian face the Hobson's Choice to either (i) comply against her judgment as their parent and risking her children's' health, or (ii) continue to refuse and have her children excluded from school.

25. If the children are excluded from school, it will have devastating real-world effects on the family whether they leave or stay in Massachusetts. They have many strong ties to their

local cultural and religious communities. Plaintiff Massoyan-Artinian's in-laws live close to them, and they are the reason the family is living where they are. Leaving their family and community would be devastating.

26. On the other hand, if they stay in the Commonwealth and are excluded from school, other irreparable harm will result. Both Plaintiff Massoyan-Artinian and her husband work. If their children are excluded from school, they will be forced to homeschool the children. This will come at great expense as one of them would likely have to give up his or her salary to stay home and educate the children. Neither of the parents is trained as an educator and homeschooling is outside their life plans and abilities.

27. Furthermore, if the children are excluded from their school in January, they will be devastated. Like other students, they have already experienced upheaval due to the COVID-19 restrictions, but now as there is light at the end of the tunnel on COVID, they will be told they can never go back with their friends, or their teachers. The children will suffer emotionally and will experience anxiety if this new dramatic change is foisted upon them, especially after the very challenging and trying year they have already experienced.

28. Plaintiff Madison Schiltz is a 27-year-old student, teacher, and coach. She is fully vaccinated and has received every vaccine recommended to her by her doctors except for the influenza vaccine. She is a master's graduate student at Springfield College, pursuing a masters in strength and conditioning. She is completing her third semester, has a 3.78 g.p.a. which she has worked hard for, and currently expects to graduate with her master's degree in May 2021.

29. Plaintiff Schiltz grew up getting vaccinated "on schedule." She understands the risks and benefits involved with her medical choices, including vaccines, and typically feels the benefit outweighs the risks. She has not reached that same conclusion with regard to the influenza vaccine. She has worked very hard to get where she is, and to know she may be unable to complete

her education due to something she does not consent to is troubling. Thus, the fact that her education is being threatened by an unlawful mandate has caused her mental and emotional distress.

30. When Plaintiff Schiltz first heard about the DPH mandate, she took action. She contacted her student body government, other students, and eventually the President of Springfield College to discuss her concerns and her objection to this mandate. Plaintiff Schiltz was told that this was a mandate from the DPH and so the school's hands were tied.

31. When Plaintiff Schiltz was accepted at Springfield College, an influenza vaccine was not required. She cannot comply with this mandate and will continue to stand up for what she believes in: informed consent, bodily autonomy, and her constitutional rights to liberty. If she is merely excluded from campus, and forced to complete her degree remotely, that too will cause her numerous harms. Specifically, as she is currently a Graduate Assistant, she will lose that position and the thousands of dollars in free tuition and the monthly stipend that comes with the position. Without these, she likely would be unable to afford to complete her degree. Therefore, if the mandate is enforced, Plaintiff Schiltz will be forced out of her school and will be unable to complete the degree that she has already expended significant time and resources to obtain.

IV. The "Flu" and Influenza Vaccines

32. The DPH repeatedly refers to influenza vaccines as an approach for dealing with the "flu." However, most cases of the "flu," respiratory infections and illnesses, are not caused by influenza virus but rather by other viruses. Every year, hundreds of thousands of respiratory specimens are tested across the United States and, on average, only 16% are found to be influenza positive. Hence, the influenza vaccine, even if it were an effective product, could only address a small fraction of the "flu" cases in Massachusetts.

33. The influenza vaccine also changes each year to target the new strains of influenza virus. One implication of this variation is that influenza vaccines are manufactured each year without knowing their efficacy or safety profile. This can only be discovered after the fact. Moreover, as discussed in the accompanying expert affidavits by world-renown scientists, there is no credible evidence these products reduce the incidence of hospitalization or mortality. However, influenza vaccines can cause serious injury and death, including various autoimmune and neurological disorders and can have serious unintended consequences including increased susceptibility to other infections.

COUNT 1
(Invalid and Unenforceable Mandate For Post-Secondary Students)

34. Plaintiffs hereby incorporate by this reference each and every one of the previous allegations of this Complaint as though fully set forth here.

35. With regard to requiring immunizations for attending K-12 school, the Legislature provided a list of required vaccinations, but then also permitted “such other communicable diseases as may be specified from time to time by the” DPH. G.L. c. 76, § 15. However, it made a different choice for immunizations required to attend colleges and universities. *Compare* G.L. c. 76, § 15 *with* § 15C. There, the Legislature did not grant the DPH any role in selecting the required vaccinations. Instead, it identified a finite list of required vaccinations. Specifically, the Legislature mandated that post-secondary students need to have “been immunized against measles, mumps, rubella, tetanus and diphtheria,” and “meningococcal disease” if they live in a dormitory. G.L. c. 76, §§ 15C, 15D.

36. Clearly the Legislature knew full well how to grant the DPH authority in Chapter 76 to expand the list of required vaccinations through duly promulgated regulations and did so for K-12 students in Section 15. The fact that Section 15C is silent as to the DPH’s involvement,

necessarily means that the Legislature intended to not empower the DPH to require additional immunizations to attend colleges and universities.

37. Without such authorization to act, the DPH lacked authority to enact the Flu Shot Mandate for post-secondary students and the Mandate cannot be enforced against such students.

38. Given the Legislature's unambiguous choice to withhold authority from the DPH regarding vaccinations for college students, the DPH exceeded its statutory authority, and Plaintiff Schiltz has been harmed thereby.

COUNT 2

(G.L. c. 30A, § 1 *et seq.*: Violation of the Massachusetts Administrative Procedures Act)

39. Plaintiffs hereby incorporate by this reference each and every one of the previous allegations of this Complaint as though fully set forth here.

40. In order for the Flu Shot Mandate to apply to K-12 students, DPH should have enacted a "regulation" promulgated pursuant to the procedure required by the MAPA. G.L. c. 30A, § 1 *et seq.* However, DPH chose to not enact the Flu Shot Mandate as a regulation. It failed to provide prior notice to the public, an opportunity for the public to comment, and it never entered the Flu Shot Mandate into the Code of Massachusetts Regulations ("**CMR**"), all steps required by the MAPA. The DPH's failure to follow such procedures means that the Flu Shot Mandate is nothing more than an *ultra vires* fiat with no legal force.

41. G.L. c. 76, § 15 is the enabling legislation by which the DPH is authorized to regulate which additional immunizations -- beyond those already required by that section -- shall be required to attend K-12 school in Massachusetts. Because this enabling legislation itself does not specify the "mode and method" for adopting a regulation to require an additional immunization for school attendance, the DPH was bound to abide by the procedures contained in the MAPA before adopting the Flu Shot Mandate.

42. The DPH failed to adhere to those procedures in announcing the Flu Shot Mandate. Its adoption of the Flu Shot Mandate, through a press release, violates chapter 30A of the General Laws.

43. The MAPA requires that “[p]rior to the adoption, amendment, or repeal of any regulation ... the agency shall ... afford interested persons an opportunity to present data, views or arguments in regard to the proposed action orally or in writing” and “[i]f the agency finds that oral presentation is unnecessary or impracticable, it may require that presentation be made in writing.” G.L. c. 30A, § 3. These notice and comment procedures are not mere formalities. Indeed, failure to abide by these requirements results in the invalidation of the regulation.

44. Here, the DPH never provided notice that it intended to adopt the Flu Shot Mandate, nor did it provide an opportunity for public comment on the Mandate prior to its adoption. These procedural lapses, among others, are fatal to the Flu Shot Mandate because, by failing to abide by the MAPA procedures, the Flu Shot Mandate was *never* properly adopted and so it is invalid.

45. Consequently, the Flu Shot Mandate does not carry the force of law as a “regulation.”

46. Furthermore, the lack of public comment had substantive consequences here because it allowed the DPH to act based on faulty assumptions about the effects of the influenza vaccine, including that it would reduce hospitalization and the transmission of the flu. However, these assumptions are not supported by scientific studies, a fact that could have been brought to the DPH’s attention if it allowed the public to comment.

47. The DPH’s press release announcing the Flu Shot Mandate stated that “[t]he new vaccine requirement is an important step to reduce flu-related illness and the overall impact of respiratory illness during the COVID-19 pandemic.” However, even assuming *arguendo* the DPH was entitled to a waiver from the formal deliberative processes of notice, hearing, and public

comment required by MAPA, due to the ongoing COVID-19 public health emergency, the DPH failed even to comply with requirements of the MAPA applicable to issuing emergency regulations.

48. The DPH failed to adopt the Flu Shot Mandate in a manner conforming to the requirements of the MAPA, and Plaintiffs have been harmed thereby.

COUNT 3

(42 U.S.C. § 1983: Violation of the Fourteenth Amendment to the U.S. Constitution)

49. Plaintiffs hereby incorporate by this reference each and every one of the previous allegations of this Complaint as though fully set forth here.

50. Each Defendant is a government actor for purposes of 42 U.S.C. § 1983, who took the actions described herein under color of state law.

51. The Fourteenth Amendment to the United States Constitution guarantees that states cannot “deprive any person of life, liberty, or property, without due process of law[.]” U.S. Const. Amendment XIV.

52. Defendants’ Flu Shot Mandate violates the Fourteenth Amendment to the U.S. Constitution as applied to, or as threatened to be applied to, Plaintiffs.

53. Defendants’ Flu Shot Mandate, as applied to, or as threatened to be applied to, Plaintiffs is an unconstitutionally overbroad restriction on their right to informed consent guaranteed under the Fourteenth Amendment to the U.S. Constitution.

54. Defendants’ Flu Shot Mandate, as applied to, or as threatened to be applied to, Plaintiffs is an unconstitutionally overbroad restriction on their right to bodily integrity guaranteed under the Fourteenth Amendment to the U.S. Constitution.

55. Defendants' Flu Shot Mandate, as applied to, or as threatened to be applied to, Plaintiffs is an unconstitutionally overbroad restriction on their right to parental choice guaranteed under the Fourteenth Amendment to the U.S. Constitution.

56. Defendants' Flu Shot Mandate does not serve a significant governmental interest as applied to, or as threatened to be applied to, Plaintiffs.

57. Defendants' Flu Shot Mandate is not narrowly tailored, nor is it the least restrictive means, to accomplish any permissible governmental purpose sought to be served by Defendants as applied to, or as threatened to be applied to, Plaintiffs.

58. Defendants' Flu Shot Mandate is irrational and unreasonable with regard to Plaintiffs, imposing unjustifiable restrictions on the exercise of their protected constitutional rights. Because Defendants' Flu Shot Mandate is irrational and unreasonable, its application violates the due process guarantee of the Fourteenth Amendment to the U.S. Constitution

59. Defendants' actions in depriving Plaintiffs of their constitutionally protected rights, especially as it concerns a forced injection of foreign materials into their body or the body of their children, shocks the conscience.

60. Plaintiffs have no adequate remedy at law and, unless enjoined, Defendants will continue to act under color of law to deprive Plaintiffs of their constitutionally protected rights, thereby irreparably harming Plaintiffs.

61. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiffs are entitled to declaratory relief and temporary, preliminary, and permanent injunctive relief invalidating and restraining enforcement of the Defendants' Flu Shot Mandate.

62. Plaintiffs found it necessary to engage the services of private counsel to vindicate their rights under the law. Plaintiffs, therefore, are entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

COUNT 4
(Violation of the Constitution of the Commonwealth of Massachusetts, Declaration of Rights)

63. Plaintiffs hereby incorporate by this reference each and every one of the previous allegations of this Complaint as though fully set forth here.

64. Pt. 1, Art. I, of the Massachusetts Constitution, as amended by Art. 106, states in pertinent part: “All people are born free and equal and have certain natural, essential and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties ... in fine, that of seeking and obtaining their safety and happiness.”

65. Article I and other provisions in the Declaration are interpreted to encompass due process and equal protection provisions analogous to and more sweeping than those found in the federal Constitution.

66. The Flu Shot Mandate deprives Plaintiffs of the right to informed consent, bodily autonomy, and the right of parents to make healthcare decisions for their children, all protected by the Massachusetts Constitution.

67. These constitutional violations have resulted, and will result, in significant and irreparable harm to Plaintiffs.

68. Plaintiffs are entitled to injunctive and declaratory relief enjoining and invalidating the Flu Shot Mandate.

PRAYER FOR RELIEF

69. WHEREFORE, the Plaintiffs respectfully request that this Honorable Court grant the following relief:

- A. Declare that the Defendants are in violation of law as aforesaid.
- B. Enter a judgment granting equitable injunctive relief ordering:
 - i. That the Flu Shot Mandate is *ultra vires* and void;

- ii. That the Flu Shot Mandate cannot be enforced against Plaintiffs.
- C. Award the Plaintiffs reasonable attorneys' fees and costs, as authorized pursuant to 42 U.S.C. § 1988; and
- D. Award the Plaintiffs such further and additional relief that this Court deems just and proper.

JURY TRIAL DEMAND

The Plaintiffs respectfully demand a trial by jury on all issues so triable.

Respectfully submitted,

TAMAR MASSOYAN-ARTINIAN and
MADISON SCHILTZ

By their attorneys,

SIRI & GLIMSTAD LLP

/s/ Aaron Siri

Aaron Siri (*pro hac vice* motion filed herewith)
Elizabeth Brehm (*pro hac vice* motion filed
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Date: December 18, 2020