

ERIE COUNTY SUPREME COURT

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IN THE MATTER OF MARINA WILLIAMS,  
ON BEHALF OF CARLEY WHITNEY AND MACKENZIE  
WHITNEY FROM ACTION OF THE BOARD OF EDUCATION  
OF THE ORCHARD PARK SCHOOL DISTRICT  
REGARDING THE DENIAL OF RELIGIOUS  
EXEMPTION TO IMMUNIZATION

AFFIRMATION IN SUPPORT  
OF ORDER TO SHOW CAUSE  
SEEKING DECLARATORY  
AND INJUNCTIVE RELIEF

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Frank Housh, Esq., an attorney admitted to practice in the State of New York, who is the attorney of record for MARINA WILLIAMS, ON BEHALF OF CARLEY WHITNEY AND MACKENZIE WHITNEY, hereby affirms under penalties of perjury, pursuant to CPLR 2106, that the facts set forth herein are true:

1. I am a member of the law firm the Housh Law Offices, PLLC attorneys for the Petitioners herein. I make this affirmation in support of the within motion.

2. The sources of my information and belief are conversations with the accused, a review of the Court file, and my own investigation.

**RELEVANT FACTS**

3. CARLEY WHITNEY was born October 17, 2003 and, until November 30, 2018, was a sophomore student in the Orchard Park School District. She had an exceptional academic record and no health problems.

4. MACKENZIE WHITNEY was born June 9, 2005, and, until November 30, 2018, was an eighth-grade student in the Orchard Park School District. Like her sister CARLEY, she had an exceptional academic record and no health problems.

5. On October 4, 2018, OF MARINA WILLIAMS, ON BEHALF OF CARLEY WHITNEY AND MACKENZIE WHITNEY, their mother MARINA WILLIAMS applied for a Religious Exemption from Vaccinations, Education Law §914(1), Public Health Law §2164.

6. On October 1, 2018, OF MARINA WILLIAMS, ON BEHALF OF CARLEY WHITNEY AND MACKENZIE WHITNEY filed a Request for Religious Immunization Exception, New York Public Health Law §2164(9), **Exhibit A**.

7. The Request was identical to the Request which had been previously filed and accepted by the students' previous district, the West Seneca School District.

8. No information had changed since the West Seneca application was originally filed and granted by the West Seneca School District without hearing or investigation.

9. On October 4, 2018, the ORCHARD PARK SCHOOL DISTRICT summarily denied the Request for Religious Exemption for Carley and Mackenzie Whitney, **EXHIBIT B**.

10. It should be noted that rather than request more information about the Request or proceed with an investigation, the DISTRICT immediately denied the request, citing procedural flaws in the language and date of the request.

11. On November 2, 2018, Petitioners served a Notice of Petition and Petition for a Stay from enforcing exclusion from school.

12. On November 9, 2018 the Commissioner of Education denied the Stay. The Appeal is proceeding. As below, paragraph 26, there will be no decision for at least six (6) to eight (8) months. In the hiatus, the WHITNEY children are receiving no education and no alternative, pedagogical services.

13. On November 30, 2018, the ORCHARD PARK SCHOOL DISTRICT excluded CARLEY and MACKENZIE WHITNEY from all educational services.

14. The DISTRICT made no alternative, educational arrangements, and made no allowance for receipt of homework, tutoring, distance learning, or any alternative accommodation.

15. Rather, the DISTRICT harassed MARINA WILLIAMS by phone, threatening to call Erie County Child Protection Services and have the children removed from her custody.

16. On December 5, 2018 CARLEY WHITNEY had blood work done in contemplation of complying with the DISTRICT's demands, **Exhibit C**.

17. On December 5, 2018 MACKENZIE WHITNEY had blood work done in contemplation of complying with the DISTRICT's demands, **Exhibit D**.

**THE DISTRICT WAS REQUIRED – BUT FAILED – TO EDUCATE THE WHITNEY CHILDREN WHILE THEIR IMMUNIZATIONS WERE IN PROCESS**

18. Thus, CARLEY and MACKENZIE WHITNEY fully complied with New York State Education Department Regulations implementing vaccination requirements, *see* 10 NYCRR 66-13(b) which reads:

66-1.3 Requirements for school admission.

**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 one of the following:**

(a) A certificate of immunization, as described in section 66-1.6 of this Subpart, from a health care practitioner or from NYSIIS or the CIR, documenting that the child has been fully immunized according to the requirements of section 66-1.1(f) of this Subpart.

**(b) Documentation that the child is in process of receiving immunizations as defined in section 66-1.1(j) of this Subpart. A principal or person in charge of a school shall not refuse to admit a child to school, based on immunization requirements, if that child is *in process*.**

(emphasis added)

19. 10 NYCRR 66.1.1(j)(ii) defines “in process” as:

(j) *In process* means that:

(2) a child is obtaining serologic tests within 30 days of notification of the parent/guardian that such testing is requested;

20. Thus, the WHITNEY children have fully complied with New York regulations requiring serological testing in contemplation of vaccinations.

21. The DISTRICT gave no explanation for refusing to follow the Commissioner's Regulations requiring that they "not refuse admission" to CARLEY AND MACKENZIE WHITNEY in this matter.

22. On January 16, 2019, counsel for the ORCHARD PARK SCHOOL DISTRICT – after an extension of its filing deadline – filed its Memorandum of Law in Support of excluding Carley and Mackenzie Whitney from school with the Commissioner of Education.

23. Carley and Mackenzie Whitney have been excluded from their rightful education in the ORCHARD PARK SCHOOL DISTRICT since November 30, 2018, and have been receiving no educational services.

24. This has caused and continues to cause tremendous hardship and permanent harm to their educational development.

25. During the pendency of the Appeal to the Commissioner, the ORCHARD PARK SCHOOL DISTRICT has effectively expelled Carley and Mackenzie, and refused any educational services to them.

26. The Appeal to the Commissioner will take approximately six (6) to eight (8) months, during which time the WHITNEY children will receive no education, despite New York's clear mandatory education requirements.

27. While the merit of the denial for a Religious Exemption to the Vaccination Requirement is an issue for the Commissioner, the ORCHARD PARK SCHOOL DISTRICT has

failed to adhere to its legal responsibilities and thus must allow the children back into the DISTRICT to continue their education.

### CONCLUSION

28. Although Petitioners argue that the ORCHARD PARK SCHOOL DISTRICT acted arbitrarily and capriciously in denying the Religious Exemption to vaccination in this case, they understand that determination is an administrative one for the Commissioner.

29. The urgent issue before this Court is whether the WHITNEY children will be educated in the minimum six (6) to eight (8) month hiatus.

30. This pendency issue is clearly within the Court's jurisdiction, as the DISTRICT has clearly violated the law by refusing admission while the serological tests are in process.

*WHEREFORE, your deponent respectfully requests this Court, Pursuant to CPLR Article 30, DECLARE that the ORCHARD PARK SCHOOL DISTRICT ACTED OUTSIDE OF THE NEW YORK STATE COMMISSIONER OF EDUCATION's REGULATIONS and ORDER that CARLY AND MACKENZIE WHITNEY BE READMITTED TO THE ORCHARD PARK SCHOOL SYSTEM, OR, IN THE ALTERNATIVE, BE GIVEN ALTERNATIVE BUT EQUAL ACCESS TO THEIR EDUCATION.*

Dated: Buffalo, New York  
February 6, 2018

Respectfully Submitted,

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