

2017 NY Slip Op 50744(U)

**In the Matter of a Proceeding Under
Article 10 of
the Family Court Act, Bashiri C.,
Khalfani C.,
Baby Girl A.K.A. Mensa Musa C.
Children Under
Eighteen Years of Age Alleged to be
Neglected by Tiffany R. and Bashiri C.,
Respondents.**

NXXXX/15

Family Court, Kings County

Decided on June 7, 2017

Julie Robinson, Esq., attorney for the
Administration for Children's Services

Brian Zimmerman, Esq., attorney for the
respondent mother

Francine Silverstein, Esq., legal advisor for
the respondent father

Bashiri C., pro se

Lena McMahon, Esq., the Legal Aid Society,
attorney for the child

Lillian Wan, J.

The following decision memorializes the oral decision the Court issued on the record on May 8, 2017, following a consolidated hearing on the disposition for the three subject children, the mother's Family Court Act (hereinafter FCA) §1028 application for the newborn child, Canaan C., and the Administration for Children's Services' (hereinafter ACS) motion for an order to have the children immunized over the respondents' objection.¹ The mother's FCA §1028 application was denied for the reasons set forth in a separate decision and order and will not be

addressed in the body of this decision. *See* Decision and Order Denying the Respondent Mother's FCA §1028 Application for Canaan dated May 8, 2017. For the reasons described below, the Court finds that the children's best interests will be served with an order of placement with ACS until the completion of the next permanency hearing. Furthermore, the Court grants the application for an order granting ACS and/or its designated foster care agency leave to consent to all medically recommended immunizations for the subject children, Bashiri C., Khalfani C., and Mensa Musa C.

At the dispositional phase of an Article 10 proceeding, the paramount concern is the best interests of the child. *See Matter of Dazahnae S.*, 2 N.Y.S.3d 903 (2nd Dep't 2015). The parent's capacity to properly supervise the child based on current information is a factor for the Court to consider in making the determination. *Id.* The Court chose to consolidate these hearings, in part, because of the overlapping issues related to what is in the children's best interests.

ACS's application seeking to compel immunizations must be viewed in the context of the procedural history of this case. Findings of neglect have already been entered with regards to both parents, and the subject children have resided continuously in foster care since they were originally remanded to ACS on August 27, 2015. On June 30, 2016, the respondent mother submitted to the jurisdiction of the Court pursuant to FCA §1051(a) and consented to a finding of neglect based on the allegations in the petition. The petition alleged that the respondent mother and respondent father failed to supply the children with adequate food and medical care in that the respondents fed Mensa Musa (who was approximately 6 weeks old at the time) only pureed fruits and vegetables. The petition further alleged that according to Brookdale Hospital records, Mensa Musa was diagnosed with failure to thrive, severe

malnutrition and vitamin D deficiency. The child weighed 6 pounds, 5.4 ounces at birth, but on August 27, 2015, weighed only 5 pounds. The petition further alleged that the child's failure to thrive was secondary to the parents providing inappropriate nutrition. The petition further alleged that Khalfani was diagnosed with failure to thrive, anemia, and iron deficiency. Khalfani's weight dropped from being in the 75th percentile when he was 4 months old to being in the first percentile at age 1 ½. Bashiri's weight dropped from the 90th percentile to the 63rd percentile in the course of seven months. The petition further alleged that the respondents failed to take Mensa Musa to four appointments for medical care.

On December 7, 2016, the respondent father failed to appear, the case proceeded to inquest, and a finding of neglect was entered on the father's default. The Court drew the strongest negative inference against the respondent father for his failure to testify at the fact finding. ACS presented the testimony of both Dr. Monica Mirchandani and Dr. Juliane Garan, who were both qualified as experts in pediatrics. Based on the credible testimony of ACS's witnesses and twelve documentary exhibits, the Court found that the respondent father failed to provide adequate medical care to the child Mensa Musa and that he failed to supply all the children with adequate food. The Court specifically found that the record established that all the subject children were diagnosed with failure to thrive, Khalfani was diagnosed with anemia and Mensa Musa was diagnosed with a vitamin D deficiency. Expert testimony and medical records established that the children did not suffer from any underlying medical condition and that inadequate caloric intake was the cause of their failure to thrive. Mensa Musa's diet as a newborn child consisted of pureed fruits and vegetables which led to inadequate weight gain. Notably, Dr. Mirchandani testified that the consequences of failure to thrive include not growing properly in the short term, effects on

cognition, poor school functioning, and developmental

Page 3

delays in the long term. The Court further found that ACS failed to establish that the respondent father perpetrated acts of domestic violence against the mother in the presence of the children which subjected the children to emotional and physical harm or risk thereof.²

It is long established that a parent's fundamental right to rear his or her child is not beyond regulation, and that "neither rights of religion nor rights of parenthood are beyond limitation." *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The United States Supreme Court has further noted that "[t]he right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Id.* at 166-67. The state as *parens patriae* may intervene to ensure that a child's health or welfare is not being seriously jeopardized by a parent's fault or omission. *Id.*; *See also Matter of Hofbauer*, 47 NY2d 648 (1979). In *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), the earliest case to deal with compulsory vaccination, the United States Supreme Court upheld a Massachusetts law requiring all residents to be vaccinated for smallpox. The *Jacobson* Court noted that the state's authority to enact such legislation derives from the state's police power in order to protect public health and public safety. *Id.* State intervention into an individual's right to practice their religious beliefs is not only permitted where the life of the child is in danger. In *Matter of Sampson*, 37 AD2d 668 (3rd Dep't 1971), *affd.* 29 NY2d 900 (1972), the Appellate Division, Third Department, affirmed the Family Court's decision ordering that the subject child undergo recommended surgery, including the administration of blood transfusions as necessary. *Matter of Sampson* involved a teen who suffered from extensive

neurofibromatosis of the face and neck which manifested as significant facial disfigurement causing the right eyelid, cheek, corner of the mouth and ear to droop. The respondent mother was a Jehovah's Witness who refused to permit blood transfusions, and contended that it was a violation of her First Amendment rights to mandate a blood transfusion. The child was virtually illiterate and had been excused from school because of this facial disfigurement since he was 9 years old. The parties conceded that the child's disease proposed no immediate threat to his life and that it had not seriously affected the child's general health. However, the record established that surgery was necessary for the child to have a "normal life" and that the operation would improve the child's appearance. The Court of Appeals, in affirming the Appellate Division, Third Department, further emphasized that the Court has the power to direct surgery even in the absence of risk to the physical health or life of the child or to the public. *Matter of Sampson*, 29 NY2d at 901.

New York State has enacted a number of statutes allowing the state as *parens patriae* to intervene in order to provide medical care to children. 18 New York Code Rules and Regulations (hereinafter NYCRR) §441.22(a) requires each authorized agency to provide comprehensive medical and health services for every foster child in its care. This includes a comprehensive medical examination within 30 days upon admission to foster care. 18 NYCRR §441.22(c)(1). The medical examination must be comprehensive in accordance with current recommended medical practice, taking into account the age, environmental background and development of the child, and it must include "an assessment of the child's immunization status

Page 4

and the provision of immunizations as necessary." 18 NYCRR §441.22(c)(2)(iii). The regulations further mandate the agency to

obtain written authorization from the child's parent or guardian for routine medical and/or psychological assessments, immunizations, and medical treatment, and for emergency medical care in the event that the parent or guardian cannot be located at the time such care becomes necessary. 18 NYCRR §441.22(d). The regulation further provides that if written authorization cannot be obtained from the parent or guardian in cases of involuntary placements, the Commissioner may provide written authorization in accordance with Social Services Law (hereinafter SSL) §383-b. *Id.* SSL §383-b, in turn, provides that the local commissioner of social services may give effective consent for medical, dental, health and hospital services for any child who has been found by the Family Court to be an abused or neglected child, or who has been placed in the protective custody of the Commissioner.

Furthermore, SSL §398(6)(c), which enumerates the powers and duties of Commissioner of public welfare and city public welfare officers in relation to children in foster care, provides that the Commissioner must provide "necessary medical or surgical care" and pay for such care from public funds if necessary. Finally, under FCA §233, "whenever a child within the jurisdiction of the court appears to the court to be in need of medical, surgical, therapeutic, or hospital care or treatment, a suitable order may be made therefor."

In furtherance of protecting public health and safety, the New York State Legislature has enacted §2164(2) of the Public Health Law, which requires vaccinations against communicable childhood diseases. The statute requires that a parent immunizes his or her child against polio, mumps, measles, diphtheria, rubella, varicella, haemophilus influenza type b (Hib), pertussis, tetanus, pneumococcal disease, and hepatitis B. Proof of immunizations is required before a child is allowed to enroll in school. However, the Legislature has also set out a religious

exception to the vaccination requirement. A parent can claim a religious exemption under Public Health Law §2164(9) if the parent can establish that their opposition to immunizations is based on "genuine and sincere religious beliefs."

New York State case law addressing a parent's refusal to immunize his or her child is generally analyzed in the framework of the Public Health Law religious exemption. In *Matter of Christine M.*, 157 Misc 2d 4 (Kings County Family Court 1992), a case also cited to by the respondent mother, the Court entered a finding of neglect based on the respondent's failure to immunize a 3-year-old against measles in the wake of a measles outbreak in New York City. The Court found that the respondent failed to demonstrate that his opposition to inoculation stems from a sincerely held religious belief. In that case, the Court found it significant that the respondent's three oldest children were vaccinated, and the thrust of the respondent's testimony was related to his belief that vaccinations were both medically and scientifically unnecessary and unsafe. The Court emphasized that in enacting Public Health Law §2164(2), the Legislature has already made a determination that the inoculation of school aged children against certain diseases constitutes necessary medical care. *Id.* at 14. The Court in *Christine M.* ultimately declined to utilize its discretionary power to order the inoculation since New York City was no longer experiencing the outbreak at the time the decision was issued, and there was no other evidence of medical neglect. The facts of *Christine M.* are distinguishable from the instant facts in that here, there has been a finding of medical neglect as to all three children unrelated to immunizations. The subject children were definitively diagnosed as Failure to Thrive. Mensa Musa was hospitalized after she dropped one pound below her birth weight at six weeks old because she was not being adequately fed. The children have already been in foster care for

Page 5

approximately twenty months based on the respondents' failure to provide adequate food and medical care to the children.

In *Matter of Isaac J.*, 75 AD3d 506 (2nd Dep't 2010), the Family Court found that the mother neglected the child, based, in part, on failure to provide the child with adequate medical care, and granted ACS's motion directing the child to be immunized. The Appellate Division, Second Department, affirmed noting that the mother failed to prove by a preponderance of the evidence that her opposition to immunization stems from genuinely held religious beliefs. *See also Matter of Freedom R.*, 142 AD3d 922 (1st Dep't 2016) (dismissing petitioner's appeal as moot since children were already vaccinated pursuant to Court order, but noting that if they were to reach the merits of the appeal, they would find the petitioner failed to demonstrate that the opposition to immunization stems from beliefs that are religious in nature, and are genuinely and sincerely held); *see also Matter of Kenneth Binns*, 63 AD3d 1058 (2nd Dep't 2009) (affirming Family Court order giving father decision making authority with respect to all medical matters after mother failed to demonstrate that her opposition to immunizing the child was based on genuinely and sincerely held religious beliefs).

In assessing whether a parent has a genuine and sincere religious belief the federal courts have been instructive on this issue. In *International Soc. for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430 (2d Cir. 1981), the United States Court of Appeals for the Second Circuit stated that an adherent's belief would not be sincere if he or she acts in a manner inconsistent with that belief. An individual's sincerity is also evaluated in light of the religion's size and history, but this is not dispositive. *Id.* at 441. The Second Circuit has further stated that one touchstone of a religion is present where a

believer will categorically disregard elementary self-interest rather than transgressing religious tenets. *Id.* at 440. In *Watkins-El v. Dept. of Educ.*, 2016 WL 5867048 (E.D.NY 2016), a case with similar facts to the instant case, the United States District Court for the Eastern District of New York noted that the plaintiff claiming religious exemption opposed vaccines on the assertion that vaccines contain monkey cells, pork derivatives, and aborted human fetuses. The Court further noted that while the plaintiff's opposition may be genuine and sincere, he had not demonstrated that it stems from a religious, rather than simply moral, belief. *Id.*

In *Matter of Sherr v. Northport-East Northport Union Free School District, et al.*, 672 F.Supp. 81 (E.D.NY 1987), the Court determined that for one family, the Sherrs, although they were clearly genuinely opposed to immunization, the heart of their opposition did not lie in theological considerations. Although the father, who the Court noted to be a chiropractor, testified that he opposed intrusion into the body on religious grounds, he had the child x-rayed when he believed the child broke his leg, allowed dentists to remove decay from cavities, and had his children circumcised. The record also established that the parents sought a religious exemption through a written affidavit when they registered their older son for kindergarten, but they made no mention of a religious foundation for their beliefs in this document. The school district rejected the parents' claim, and the child entered school after receiving the requisite vaccinations. Two years later they registered their younger son for kindergarten and submitted a document signed by a minister of a religious group in Florida, which indicated that members of the group and temple believe in spiritual healing and opposed compulsory immunization. The Court noted that investigation by the school district uncovered that the temple was nothing more than a "mail order church," and further emphasized that the father admitted

on the stand that he joined the group solely for the purpose of attempting to gain an exemption from immunization

Page 6

for his son and was not even clear as to the temple's name. *Id.* at 95-96. It also became clear to the Court during the father's testimony that his opposition to vaccinations and attitudes towards sickness and health derived from his medical and philosophical perspective as a chiropractor. The Court ultimately concluded that the parents' claims of a sincerely religious basis for their objections to inoculations were not credible. *Id.*

Similarly, in *Mason v. General Brown Cent. School Dist.*, 851 F.2d 47 (2d Cir. 1988), the United States Court of Appeals for the Second Circuit affirmed the judgment of the trial court in holding that the plaintiffs were not entitled to a religious exemption under the Public Health Law because their beliefs were based on chiropractic and scientific principles, not genuine religious beliefs. *Mason* involved parents who were members of the Davenport Universal Life Church. They advocated a "natural existence" and believed that the human body possesses the means of healing itself without medical intervention. At trial, the father testified about the possible side effects from immunizations in medical terms based on scientific evidence and personal theory. The father testified that substances contained in vaccines have been shown to cause harm to children, and that children have actually contracted polio because of the vaccine. He further testified that the measles and mumps vaccines are both a live virus vaccine directly injected into the bloodstream, and that a live virus vaccine violates the natural defense mechanisms that a human body already has to prevent a person from getting the disease in the first place. *Id.* at 51. In *Mason*, the Court did not question that the parents had strong convictions, and those convictions were evidenced by the fact

that the parents chose to live in the country and eat naturally. However, the Court further noted the parents' choice of lifestyle did not rise to the level of religion. The Court went on to state that "[m]erely because these decisions are important, and may be supported by strong conviction, does not render them religious." *Id.* at 52. The Court further noted that the legislature established a strict religious exemption to the Public Health Law to "prevent individuals from avoiding this health requirement merely because they oppose such medical procedures on the basis of personal moral scruples or by reasons of unsupported personal fears." *Id.*, citing to *Maier v. Besser*, 73 Misc 2d 241, 243 (Supreme Court Onondaga County 1972).

In *Shmuel v. Rivka F.*, 6 Misc 3d 1018(A) (Family Court Kings County 2005), a case where ACS sought a court order to immunize the foster children over the mother's objection, the Family Court found that the respondent mother's opposition to immunization was rooted in her religious beliefs and denied ACS's application to immunize the foster children. In reaching this conclusion, the Family Court placed great weight on the mother's testimony. The Court found that during the last fifteen years of the mother's life, her practices had been fairly consistent with her espoused beliefs. The Court found it significant that the mother was Jewish and accepted the written and oral Torah as a binding and religious practice, that her children always attended religious school, that she maintained a kosher home, and that she never immunized the subject children, who were 14 and 10. The Court also emphasized that religious text was entered into evidence at the hearing to support her conviction, and this text demonstrated that her religion required her to be skeptical of medical treatment and physicians.

In *Matter of Nassau County Dept. of Social Servs. v. R.B.*, 23 Misc 3d 270 (Nassau County Family Court 2008), the Department of Social Services filed an order to show cause

seeking a hearing for the Court to determine whether the respondent qualified for a religious exemption to mandatory immunization under Public Health Law §2164, and an order permitting the Department to immunize the children if it was determined that the respondent was found not

Page 7

to qualify. The Court noted that in assessing the sincerity of a religious belief, a trial court must rely upon its ability to assess the demeanor of the witness in order to weigh the credibility of the claim. In determining that the respondent met her burden, the Court noted that the evidence established that the three children (ages 9, 10 and 14) had never been immunized, that the respondent had espoused her beliefs continuously since the age of 13, and that the respondent testified credibly that she was willing to place the health of her children at risk by refusing to have them immunized rather than transgress the tenets of her belief. *Id.* at 276. The Court also noted that the specific tenets of the respondent's religion, including the proscription against shots, were reflected in documentary evidence, showing further evidence of the respondent's religious belief. *Id.*

In the instant matter, the respondent mother's argument that the Public Health Law requirement should not apply to these children because the mother has expressed an interest in home schooling is unavailing, and in this Court's view, an attempt to circumvent the compulsory statute. Significantly, the Court notes that the respondent father did not present any evidence during this hearing with regards to immunizations. This Court notes that the father has sporadically attended court proceedings throughout this hearing. Although he was warned multiple times that his failure to appear in Court could lead to the Court finding him in intentional default and precluding him from presenting

any evidence, he failed to come to Court. Although the Court did eventually preclude the respondent father from testifying or presenting any documentary evidence, the Court did allow the respondent father to make oral closing arguments. The Court also afforded the respondent father the opportunity to cross examine witnesses whenever he was present in Court. On several occasions, the respondent father called the Court, well after the proceeding for the day had started, and the Court allowed belated telephonic appearances, despite the respondent father's failure to have an adequate excuse for not appearing in Court in person. The Court is drawing the strongest negative inference against the respondent father for his failure to testify in these proceedings. *See Matter of Amanda Ann B.*, 38 AD3d 537 (2nd Dep't 2007).

The children here are 1, 3 and 5 years old. The eldest child, Bashiri, entered Kindergarten in the fall, but because he was not fully immunized, and the school did not receive sufficient paperwork to justify a religious exemption, he was not allowed to continue in school. The Court finds that while the mother may have sincerely held beliefs against immunizations, these beliefs do not stem from religion. The mother testified that she is Moorish American, which is both a nationality and a religion. She indicated that she has always been Moorish American but has let it be known publicly for the last seven to eight years. She informed the Court that she believes in the teachings of the prophet Noble Drew Ali. According to the mother, Noble Drew Ali established the Moorish Science Temple in 1923. The mother testified that immunizations are specifically prohibited by "the divine teachings" of Noble Drew Ali and the "Seven Circle Koran," however she never submitted any documentation related to the prohibition on immunizations. The mother testified that there is a "moral code" and there are many actions prohibited by the Seven Circle Koran but was not able to provide any specifics or details. The mother

described her relationship with the creator as very personal, and stated that she stopped eating meat prior to the birth of her first son. When asked about the practices and obligations of her religion she responded: "I can't sit here and break down my faith for anyone so I don't know how to answer that question." The mother further testified that she is against immunizations because the children are born perfect and free from disease, and immunizing the

Page 8

children gives them a version of the disease. The mother believes that immunizations are a form of experiment. She expressed concern that vaccines have side effects such as low birth weight, fever, sore arm, and even death. She indicated that there are still a lot of concerns with immunizations and she believes that immunizations contain plastic, mercury, cattle blood, fetuses, feces and "aborted children." She testified that she has to keep her children safe and that "pumping them with plastic animal byproducts, monkey brains, is not helpful to anyone."

The mother further stated there is a Moorish American diet that is adhered to by all Moorish Americans. The mother submitted an internet printout from the Moorish American Science Temple of America website, entitled "Moorish American Diet & Food List" as Respondent Mother's Exhibit E. This document lists the types of foods that are permissible as part of this diet and includes a series of recipes towards the end of the document. It is essentially a vegan diet. The mother testified that the diet does not permit the consumption of meat or any animal protein, dairy, or bread. It also does not permit anything man made, such as tofu. Notably, this food list is the only documentary evidence that was submitted to this Court addressing the teachings of the religion. It does not address immunizations.

In the instant matter, the Court finds that the mother's own affirmative actions belie her position that her opposition to immunizations is grounded in a sincere and religious belief. The argument is severely undercut by uncontroverted evidence that the oldest child, Bashiri, was immunized on three separate occasions, years before this case was brought to Court and before any ACS involvement. Petitioner's Exhibit 14, the Citywide Immunizations Registry, establishes that Bashiri received immunizations on three separate dates: August 1, 2011, October 4, 2011, and December 12, 2012. In fact, a letter dated October 7, 2016 from the NYC Department of Education (Petitioner's Exhibit 6) specifically states that Bashiri had all of his required vaccines *except* for a 4th dose of DTAP, a 4th dose of polio, a 2nd dose of MMR, a 3rd dose of hepatitis B, and a 2nd dose of varicella. The mother's explanation for the August 1st immunizations was not credible. She claimed that on that date, she took Bashiri to the doctor for his 2 month old visit. According to the mother, she was in the examination room with Bashiri during the doctor's checkup, but she was sitting alone on a chair and the doctor blocked her view of Bashiri. She claimed that the doctor took Bashiri's diaper off and then administered vaccinations without her knowledge. The mother's claim that the doctor did not inform her that she was vaccinating the child and that there was no discussion of vaccinations until after it already happened is not believable. The mother had no explanation for the October 4, 2011 and December 12, 2012 immunizations, yet she acknowledged that Bashiri was in her sole care and that she was the one who took Bashiri to all of his medical appointments. Petitioner's Exhibit 14 specifically delineates all the vaccinations that Bashiri has received over the years.

Furthermore, the mother claims that her religion requires her to follow a strict vegan diet. However, she regularly brings pizza, an item that contains both dairy and bread, to visits, and eats it with the children. She also

makes an exception for fish, which she has also brought to visits. The mother also testified that she eats fish herself. This is yet another inconsistency that the Court must consider in assessing whether or not the mother holds a sincere and genuine religious belief against immunizations.

Most significantly, the respondent mother's own expert witness, Dr. Katherine Teets Grimm, testified unequivocally that she is a proponent of immunizations and described herself as a "very strong advocate" of vaccinations. Dr. Grimm has been a practicing pediatrician for over forty years and is currently an associate clinical professor of pediatrics at Mount Sinai School of

Page 9

Medicine in Manhattan. Dr. Grimm is also the medical director of both the Mount Sinai Child Abuse Program and the New York Center for Children, formerly known as the Children's Advocacy Center of Manhattan. She is board certified in pediatrics and child abuse and has been a member of the American Academy of Pediatrics since 1980. Dr. Grimm testified how easily measles, mumps, and pertussis or whooping cough is spread. She indicated that diseases like pertussis or measles are spread by droplets, so if a person with the disease coughs on another person who is inadequately immunized or not immunized at all, it could be spread this way. Dr. Grimm noted that a child who is unimmunized could catch the disease on the subway or in the playground. Petitioner's Exhibits 15 and 16 establish that outbreaks of these illnesses do still occur. In October 2015, the NYC Department of Health and Mental Hygiene issued a pertussis alert in New York City when 109 cases of pertussis were reported in Crown Heights, Williamsburg, and Borough Park, Brooklyn. Ninety percent of the cases involved children. Furthermore, in September 2013, the Centers for Disease Control and Prevention (hereinafter CDC) reported that on March 13,

2013, an unintentionally unvaccinated 17-year-old returned to New York City from London, England, while infectious with measles. This led to the largest outbreak of measles in the United States since 1996. A total of 58 cases were identified in Brooklyn, specifically Williamsburg and Borough Park. Again, children were disproportionately targeted.

Dr. Grimm emphasized that an individual never knows when they are going to come in contact with a disease and these are diseases that can make people deathly ill. Dr. Grimm further indicated that she has treated patients with these diseases, including pneumococcal pneumonia, pneumococcal meningitis and haemophilus or Hflu meningitis, measles, mumps, and pertussis. She is aware of reports that unimmunized people have died of tetanus. She further stated that vaccinations and antibiotics are the two things that have contributed to the longevity of children's lives. According to Dr. Grimm, the American Academy of Pediatrics and the CDC have nationally accepted guidelines for immunizations and timelines for when immunizations should be given to children. She specified that an infant usually gets their first Hepatitis B vaccine as a newborn, but definitely before 2 months of age. Doses of polio, haemophilus influenza (Hib), and pneumococcal vaccines are given at 2 months, 4 months, and 6 months. At 1 year, it is recommended that each child gets measles, mumps and rubella (MMR), and varicella. Between 15-18 months, the children are usually given booster shots for DTaP or polio. Booster shots are again given at ages 4 and 5, and then again at ages 10 or 11. Dr. Grimm noted that according to the Citywide Immunization Registry, Bashiri is missing his last Hepatitis B, DTaP, polio, MMR booster, and varicella vaccines. Dr. Grimm further noted that all these diseases carry a risk of death, and that measles, mumps and rubella are by far the most virulent. Pertussis in an infant can also be life threatening. Tetanus and polio are life threatening and can cause

paralysis and inability to breathe. Children who had haemophilus influenza became deaf or had brain abscesses. Children with measles can develop a very high fever, brain inflammation and encephalitis. In Dr. Grimm's expert opinion, a malnourished child would be more susceptible to contracting one of these diseases. She further opined that Mensa Musa was at a higher risk at the time she came into foster care because she was malnourished. Dr. Grimm also testified that there are minimal risks associated with vaccines, and she has never had a serious reaction in her many decades of experience as a pediatrician. Dr. Grimm was unequivocal about the risks associated with vaccines being outweighed by the benefits of vaccination.

Finally, Dr. Grimm testified that there are no alternatives to immunizations. When Dr.

Page 10

Grimm was asked about "benzonite," an alternative that the respondent mother testified about, Dr. Grimm indicated that she was not familiar with such a substance. While the mother is entitled to stray from her own beliefs, and pick and choose which beliefs she wishes to follow in leading her own life, she cannot at the same time validly claim religious exemption from the state's vaccination laws for her children citing religious practices that she herself has chosen not to follow. Furthermore, based on the testimony of the respondent mother's own expert witness, the Court finds that there was overwhelming medical evidence to support the subject children being immunized in accordance with CDC and American Academy of Pediatrics standards.

With regards to the disposition of the three children, it is clear based on the record before the Court that it is in the best interests of the children to be placed with ACS. It is not in the best interests of the children to be

released to the care of either the respondent father or respondent mother at this time. With regards to the respondent father, initially, the Court must note that the father's visitation with the subject children was suspended on an interim basis by the Hon. Margaret Morgan on September 26, 2016 after the respondent father behaved aggressively at an agency supervised visit, threatened to punch the case planner in the face, and then spit on the case planner's leg. The Court also entered a full stay away temporary order of protection against the respondent father reflecting that all visitation was suspended. The order suspending visitation was continued until this jurist modified the order on January 6, 2017, to allow for the father to resume agency supervised visitation once the agency was able to confirm the respondent father's participation in services. On January 18, 2017, the Court specifically ordered the agency to facilitate a strictly supervised visit for the respondent father requiring a caseworker to be in the room for the duration of the visit, and allowing the agency to retain discretion to end the visit if the respondent behaved inappropriately or if safety concerns arose during the visit.

Children's Aid Services supervisor, Jill Glenney, testified that the respondent father's service plan includes a mental health evaluation and following recommendations, completing parenting, anger management, CPR training, medical training, attending medical and educational appointments, and maintaining stable housing and income. While the agency has finally been able to confirm the respondent father's participation in parenting class and anger management, his engagement in services is recent and it is premature to discharge the children to his care. According to Petitioner's Exhibit 17, the respondent father's therapist at Union Settlement indicated that the respondent has poor insight and boundaries and has anger issues. In terms of the father's visitation, although the evidence establishes that he has

been visiting the children more regularly in recent months since the Court reinstated his visitation, the Court must also note that prior to his visits being suspended in September 2016, he was not visiting regularly and the last time he visited before September 2016 was in April 2016, months prior.

Another safety concern regarding the respondent father is his alcohol usage. According to the respondent father's Expedited Imminent Risk Evaluation (Court's Exhibit 2), dated February 9, 2017, he reported to Dr. Sascha Griffing that he has some concerns about his own alcohol use. The father indicated that he has a family history of alcohol abuse, and that he stopped drinking about four years ago; however he has begun to drink alcohol again due to the stress of the court proceedings. Although he denied drinking to the point of intoxication, he acknowledged that he drinks a few times per week in order to cope with stress. The Court further notes that at the court appearance on February 21, 2017, the respondent father failed to appear for the entire length of the proceeding. ACS reported to the Court that the respondent had arrived at a supervised visit with the children smelling of alcohol, and he admitted to Children's

Page 11

Aid Society staff that he drank alcohol prior to the visit. The agency still facilitated this visit. Upon learning this, the Court issued an order that the respondent father's supervised visits at the agency are to be terminated if he arrives at the agency under the influence of alcohol or smelling of alcohol. It also concerns the Court that the respondent father arrived at the intake appointments at Union Settlement smelling of alcohol. See Petitioner's Exhibit 8. Furthermore, the record has established that the respondent father has failed to attend medical and educational appointments for the children.

With regards to the respondent mother, release or immediate trial discharge of Bashiri, Khalfani and Mensa Musa is not in their best interests at this time. The neglect finding is based on the children suffering from failure to thrive which is not a condition that occurs overnight. Ms. Glenney testified that the service plan for the mother is parenting skills training, CPR training, medical training for the children, regular visitation, obtain stable income and housing, drug testing, and attend medical and educational appointments for the children. The children's medical care is a central issue in this case. Petitioner's Exhibit 2 establishes that the foster care agency has invited the mother to attend the children's medical training and appointments but she has gone to appointments sporadically. From July 2016 to December 2016, the mother attended eight appointments but missed ten appointments. The mother attended the August 5, 2016 appointment for Mensa Musa to see a gastroenterologist however when at the appointment, the mother refused to allow the subject child to be seen by the doctor. She also cancelled a nutritionist appointment for Bashiri and Khalfani on August 8, 2016. The mother missed endocrinology appointments for both Mensa Musa and Khalfani in December and also missed a cardiology appointment for Bashiri.

The pediatrician has recommended that Khalfani have a speech evaluation because of language delays, and an evaluation was scheduled on several occasions but the mother did not cooperate with this process. Although Khalfani was eligible to receive early intervention services prior to turning 3 years old, he could not receive the benefits of such services because the parents would not consent. The parents have also refused iron supplements for Khalfani although this was recommended by the agency pediatrician, Dr. Juliane Garan, who has diagnosed Khalfani with iron deficiency anemia. Petitioner's Exhibit 11 details the numerous efforts that the pediatrician has made to discuss the

importance of immunizations and her recommendations for iron supplements to increase the iron in Khalfani's diet. Dr. Garan also reported that she referred the mother to nutritionists at Downstate Hospital and Maimonides Medical Center, but the mother failed to attend appointments at those hospitals a total of four times. With regards to Mensa Musa, Ms. Glenney testified that the pediatrician recommended Early Intervention services because of the failure to thrive diagnosis. The mother did not believe that these services were necessary so the agency had surrogacy assigned to the foster parent in order for Mensa Musa to receive those services.

The respondent mother has continued to miss critical appointments for the children over the last few months as well. On February 16, 2017, the mother missed an endocrinology appointment for Mensa Musa after being given notice of the appointment days before and after she confirmed that she would be there. The foster care agency linked the mother with a nutritionist, Kathleen Delgado, back on August 29, 2016, and the nutritionist made several attempts to reach the mother to no avail. According to Petitioner's Exhibit 18, a meeting was finally scheduled for October 11, 2016, and the mother arrived two hours late. During the visit, the mother discussed her disapproval of vaccinations, her dissatisfaction with the agency, and the

Page 12

special diets of the children. She further discussed purchasing pizza for one of the children. The nutritionist asked the mother to detail her meals in a 3-day food diary, and a follow up visit was scheduled for October 17, 2016; however the mother failed to attend this appointment. The next visit did not occur until January 12, 2017, after the birth of Canaan, where the nutritionist asked the mother to make a 7-day food diary in order for the nutritionist to better understand the mother's diet. Ms. Delgado called the mother

a few days after the visit, and the mother indicated that she did not do the diary. Their next visit was scheduled for January 26, 2017, but the mother failed to attend the appointment and had not reached back out to the nutritionist as of February 27, 2017. Ms. Delgado expressed that the mother showed little interest in following up with nutrition counseling, that she has failed to follow up with a food diary, has not been able to set nutrition goals related to herself or the children, and has demonstrated a lack of readiness to receive nutrition counseling. According to Petitioner's Exhibit 17, a Children's Aid Society report dated March 15, 2017, the mother expressed to agency staff that she no longer wishes to continue working with Ms. Delgado and will instead find her own nutritionist at Harlem Hospital.

The mother testified that she continues to follow the Moorish American vegan diet and wants her children to follow it. Given that the subject children came into foster care because of failure to thrive and inadequate nutrition, the mother's ability to meet the nutritional needs of these three children on a full time basis remains a serious concern for the Court. Notably, Dr. Grimm testified that she discourages a vegan diet for young children, and indicated that if a parent does undertake such a diet for children, it takes much skill and knowledge, and that the parent would "definitely" need to meet with a nutritionist regularly. The Court agrees with the attorney for the children that this is extremely crucial for Mensa Musa who, as Dr. Grimm noted, is still severely underweight and below the growth curve. Dr. Grimm indicated that the children can develop vitamin B12 deficiencies from the lack of animal protein as well as calcium and magnesium deficiencies. In addition to failing to follow up with nutrition counseling, the Court notes that the respondent mother is not engaged in any individual counseling at this time, and this remains a critical component of her service plan.

The Court has further concerns that the respondent mother does not appreciate the risk that the father poses to the children, and the Court is not persuaded that she will enforce an order keeping the respondent father away from the children except for agency supervised visitation if the children were released to the care of the mother on a full time basis. In her testimony, the respondent mother minimized the father's anger management issues when she was asked about the incident that led to his visits being suspended. She also expressed no concern over the father's alcohol usage, even though it became an ongoing issue during this hearing, and was reported by the foster care agency, the father's service provider, Union Settlement, and the Kings County Family Court Mental Health Services Clinic. Towards the end of her testimony, the respondent mother stated the following in response to her attorney's question about whether she has been able to gather any more information that she would like to present regarding the religious basis for her opposition to immunizations:

I will pick Mr. [Bashiri C.] as my husband before we came into court and I will pick him after. I am not afraid of him. I do not see him or see a reason for him not to be around his children. I do not see him as a threat to me or my children.

After careful consideration of the mother's entire testimony, it has become clear to the Court that the mother has prioritized her relationship with the father over the children. Notably, when the

Page 13

matter was initially set down for the Court's decision, the mother failed to appear due to the father's alleged dental emergency. The Court adjourned the case to provide the respondent parents with another opportunity

to appear. On the adjourn date, both respondents appeared. Prior to the Court rendering its decision, the mother indicated that she does not "feel safe" without the respondent father present in Court with her. The Court further notes that the respondent mother left the courtroom while the Court was stating the basis for its decision on the record during the morning court session on May 8, 2017. The matter was recalled in the afternoon for the Court to finish rendering its decision, and the mother failed to return.

³ The specific terms of the dispositional order, including the obligations of both the respondents and the agency, are enumerated in a separate order of disposition dated May 8, 2017.

Accordingly, the Court finds that the best interests of the children will be served with an order of placement with ACS.³ Furthermore, the application for an order granting the agency leave to consent to all medically recommended immunizations for the subject children is granted.

This constitutes the decision of the Court.

DATED: June 7, 2017

Hon. Lillian Wan

Footnotes:

¹ Counsel for the respondent mother filed an Affirmation in Opposition to ACS's motion and simultaneously cross-moved for an order permitting the respondent mother to home school the children, and for an order permitting the children to attend religious services at the Moorish Science Temple of America. In a separate order dated May 8, 2017, the Court denied the home schooling application, and permitted additional visitation with the children for the purposes of religious worship under certain conditions.

² The Court found that Department of Homeless Services records did not sufficiently establish this cause of action. Accordingly, the third count of the petition was dismissed and a finding of neglect was entered as to counts one and two only.