IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

G.S. by and through his parents and next friends, BRITTANY and RYAN SCHWAIGERT, S.T. by and through her mother and next friend, EMILY TREMEL; J.M., by and through her mother and next friend, KIMBERLY MORRISE; and on behalf of those similarly situated,	)	
Plaintiffs,	)	
v.	)	**Case 2:21-cv-02552-SHL-atc**
GOVERNOR BILL LEE, in his official capacity as GOVERNOR OF TENNESSEE, and SHELBY COUNTY, TENNESSEE,	)	
Defendants.	)	

RESPONSE OF DEFENDANT GOVERNOR BILL LEE
IN OPPOSITION TO PLAINTIFFS' MOTION
FOR CLASS CERTIFICATION

Defendant Bill Lee, Governor of the State of Tennessee (the "State Defendant"), in his official capacity, by and through the Office of the Tennessee Attorney General, files this response in opposition to Plaintiffs' Motion for Class Certification. As grounds, Plaintiffs' class definition is too broad and ill-defined; their claims regarding numerosity are too speculative; and they fail to demonstrate that questions of law or fact are common to the members of their proposed class. Accordingly, the Court should deny Plaintiff's motion for class certification.

PROCEDURAL SETTING

Plaintiffs' Claims

Plaintiffs G.S. and S.T., by and through their parents, filed a complaint for declaratory and injunctive relief "on behalf of themselves and a class of similarly situated disabled children who [are] at severe risk of illness and injury due to their disabilities" against the State Defendant and Defendant Shelby County, Tennessee (the "County"), on August 27, 2021. (ECF 1, PageID 1.) G.S. attends West Middle School in the "Collierville Municipal School District," and S.T. attends Houston Middle School in the "Germantown Municipal School District." Both schools are in Shelby County. (*Id.*, at 7-8.) Plaintiffs claim that State Defendant's Executive Order No. 84 (the "EO"), which authorizes parents and guardians to opt their children out of mask mandates imposed upon public schools, violates their rights under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("Section 504"). (*Id.*, at 5.) According to Plaintiffs, the EO "has placed the parents of those with disabilities, which make them more susceptible to severe reaction to COVID-19 infection, in the impossible situation of having to choose between the health and life of their children and the basic fundamental right of an education for their children." (*Id.*, at 12.)

On September 9, 2021, with leave of the Court, Plaintiffs filed an amended complaint to add J.M., by and through her mother, as a plaintiff. (ECF 54, PageID 1170.) J.M. attends school in the Collierville Municipal School District. (*Id.*, at 1177.)

Plaintiffs' Request for Temporary and Preliminary Injunctive Relief

Together with the filing of their original complaint, Plaintiffs moved, pursuant to Fed. R. Civ. P. 65, for a temporary restraining order and preliminary injunction to enjoin the State Defendant "from allowing parents to op-out of the Shelby County mask mandate and ordering

Shelby County . . . to enforce its county-wide mask mandate . . . without . . . exception." (ECF 2, PageID 30.) The State Defendant opposed the motion for a temporary restraining order, arguing that Plaintiffs were unlikely to succeed on their claims because they sought relief also available under the Individuals with Disabilities Education Act ("IDEA") without exhausting the IDEA's required administrative procedures. (ECF 24, PageID 115.)[1]

The Court heard Plaintiffs' motion for a temporary restraining order on August 30, 2021. (ECF 28, PageID 998-99.) During the hearing, his mother testified that S.T. has an individualized education program or IEP, and that she was concerned that the EO subjected S.T. to "the denial of a free appropriate public education," that is, a FAPE. (*Id.*, at 1057-59.) G.S.'s mother testified that, after State Defendant issued the EO, she asked for "an emergency IEP [meeting] to call for some modifications in his learning;" the modifications included the "mask[ing of] everyone that was in his sphere," "additional enhanced cleaning in his room," a request to install "a HEPA filter," prohibitions on G.S. attending PE class and the lunchroom to avoid unmasked peers, and to allow G.S. to arrive at the school 15 minutes after classes began. (*Id.*, at 1066-68, 1073.) Both parents testified that, after the EO was issued, the schools granted some of their requested accommodations. (*Id.*, at 1058, 1073.) The Court entered an order granting Plaintiffs' request for a temporary restraining order on September 3, 2021. (ECF 34, PageID 273.)

The Court heard Plaintiffs' application for a preliminary injunction on September 9. (ECF 55, PageID 1089.) The State Defendant presented the testimony of Theresa Nicholls, Assistant Commissioner for Special Populations with the Tennessee Department of Education

[1] The State Defendant also argued that Plaintiffs lacked standing and that their ADA and Section 504 claims otherwise fail. (ECF 24, PageID 115-16.)

("TDOE"). (*Id.*, at 1102.) Ms. Nicholls oversees TDOE's Division of Special Populations. That Division supports the implementation of special education to ensure the protection of "the rights of students with disabilities" within the State's Local Education Agencies ("LEAs") in compliance with federal and state laws. (*Id.*, at 1102-03.)

Ms. Nicholls stated in her declaration and testified at the hearing that students with disabilities have protections under the ADA and Section 504 while attending school within an LEA. (*Id.*, at 1110-11.) A subset of those students that qualify as needing additional special educational accommodations, services, and supports to receive a FAPE also receive protections pursuant to the IDEA. (*Id.*, at 1106-07, 1109.) In Tennessee, LEAs have the duty to "ensur[e] that children with disabilities receive" a FAPE under the ADA, Section 504, and IDEA. (*Id.*, at 1111-12.) To determine the appropriate accommodations, supports, or services needed to provide a student with a FAPE, the LEA must undertake an individualized process to ensure that the affected students have access to the educational environment. (*Id.*, at 1109-10, 1121-22.)

For those students who fall within the IDEA's bounds, an LEA is tasked with developing an IEP for the student. (*Id.*, at 1104.) The IEP serves as a "contract between the family that represents the student and the . . . the LEA." (*Id.*) The IEP outlines a student's performance, areas of strengths and weaknesses, goals, and the "services, supports, accommodations and the setting in which those services will be provided" to allow the student to "gain access to the general education environment." (*Id.*) Through the IEP, an LEA provides qualifying students protections "across the school day," including "transportation to and from school," "extracurriculars such as field trips, clubs, sports," and any other benefits "that a nondisabled peer[] would have access to." (*Id.*, at 1108.)

Parents of students with an IEP may pursue multiple avenues of relief to resolve any of their disagreements with the LEA. (*Id.*, at 1112-13.) Parents may file an administrative complaint with TDOE, request mediation with an impartial mediator, or file a due process complaint seeking compliance by their LEA with the student's IEP. (*Id.*, at 1113-16.) Additionally, if TDOE determines that the LEA does not comply with the protections provided by federal law, TDOE may withhold the LEA's federal funds. (*Id.*, at 1124.)

Since the start of the COVID-19 pandemic, TDOE has encouraged LEAs to utilize "creative, outside of the box" solutions to ensure the provision of FAPE to students with disabilities under the ADA, Section 504, and IDEA. (*Id.*, at 1125-26.) For example, to meet their obligations under federal law, LEAs have implemented scheduling changes and provided remote or virtual instruction and teleservices to students. (*Id.*, at 1123-25, 1129-30, 1135-37.) TDOE also anticipates working with LEAs to properly "implement and comply with the [EO] while also protecting the rights of students with disabilities." (*Id.*, at 1135-37.) Due to the individualized nature of the required accommodations, supports, and services, an LEA is unlikely to implement a "one-size-fits-all approach" to comply with federal law. (*Id.*, at 1145-46.) For a given school, an LEA might need to weigh the number of children who opted out of a mask mandate, the demographics of the school's students with disabilities, and whether those students with disabilities can interact with other students in the "general education setting" or are already within a "self-contained part of the school." (*Id.*, at 1145-46.)[2] In short, the LEA is tasked with finding creative solutions to "ensur[e] that the children stay safe and that their rights are protected." (*Id.*, at 1146.)

[2] The State Defendant acknowledges that due to the filing deadline for this submission, he does not presently have the benefit of the Court's ruling on the pending preliminary injunction motion.

Plaintiffs' Motion for Class Certification

Plaintiffs' motion for class certification seeks an order "certifying this matter as a class action under Rule 23(b)(2)." (ECF 16, PageID 83.) Plaintiffs propose to certify a class defined as:

> All current and future K-12 students attending public school in Shelby County, Tennessee during the coronavirus pandemic who are unable to obtain a vaccine either because of their age or for whom the vaccine is of limited efficacy due to their compromised or suppressed immune system, as well as all current and future children who attend school in Shelby County who have: (a) lung disease, including asthma chronic obstructive pulmonary disease (*e.g.* bronchitis or emphysema), or other chronic conditions associated with impaired lung function; (b) heart disease, such as congenital heart disease, congestive heart failure and coronary artery disease; (c) chronic liver or kidney disease (including hepatitis and dialysis patients); (d) diabetes or other endocrine disorders; (3) hypertension; (f) compromised immune systems (such as from cancer, HIV, receipt of an organ or bone marrow transplant, as a side effect of medication, or other autoimmune disease); (g) blood disorders (including sickle cell disease); (h) inherited metabolic disorders; (i) history of stroke; (j) neurological or developmental disability; (k) cancer or cancer treatments; and/or (l) muscular dystrophy or spinal cord injury.

(*Id.*, at 86.) Plaintiffs also seek to certify a subclass defined as:

> [A]ll individuals who are members of the Class who are also under the age of twelve years and therefore ineligible to receive any vaccine for COVID-19 as currently approved by the FDA.

(*Id.*) Plaintiffs contend that their proposed class and subclass are appropriately defined and comply with Fed. R. Civ. P. 23(a)'s prerequisites of numerosity and commonality. (*Id.*, at PageID 87, 96.)

ARGUMENT

Plaintiffs Are Not Entitled to Class Certification.

The Court should deny the proposed class certification. First, Plaintiffs' proposed class definitions are too broad. They encompass students who have no qualifying disability under the ADA, Section 504, or IDEA, as well as students who are not arguably harmed by the EO. And since Plaintiffs' definitions are too broad, the Court should deny certification.

Second, Plaintiffs cannot meet the numerosity and commonality prerequisites for class certification under Fed. R. Civ. P. 23(a). For numerosity, Plaintiffs rely only on their own speculation that all students with disabilities across Shelby County's schools have suffered discrimination. Plaintiffs also lack commonality with their proposed class that would allow the Court to generate a common outcome for the putative members of the proposed class. Plaintiffs' proposed class contains members who are entitled to various forms of relief under the ADA, Section 504, and IDEA, and Ms. Nicholls's testimony demonstrates that the accommodations, supports, and services available to such students require an individualized approach—regardless of the statutory protections that they are entitled to receive. Because Plaintiffs fail to meet their burden to demonstrate that class certification is appropriate, the Court should deny their motion.

I. Standard of Review

In general, civil litigation "is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). The Federal Rules of Civil Procedure provide an exception to this general rule in the form of a class action. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). But to justify departing from the general rule, the party seeking class certification must satisfy the criteria under Fed. R. Civ. P. 23. *Id.* at 348-49. In short, the party must demonstrate "all four of the Rule 23(a) prerequisites—numerosity,

commonality, typicality, and adequate representation—and fall within one of the three types of class action listed in Rule 23(b)."[3] *Young v. Nationwide Mut. Ins. Co.*, 693 F.3d 532, 537 (6th Cir. 2012). The moving party bears "the burden [of] prov[ing] the Rule 23 certification requirements." *Id.*

A district court must conduct a "rigorous analysis" to determine if the prerequisites of Rule 23(a) have been met. *Dukes*, 564 U.S. at 350-51 (internal quotation marks omitted). This analysis may require a district court to "probe behind the pleadings before coming to rest on the certification question." *Gen. Tele. Co. of Southwest v. Falcon*, 457 U.S. 147, 160 (1982). A plaintiff's mere reliance on his complaint's allegations and repetition of the language of Rule 23(a) "'is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled.'" *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996) (quoting *Weathers v. Peters Realty Corp.*, 499 F.2d 1197, 1200 (6th Cir. 1974)).

A district court abuses its discretion in granting class certification if it applies the wrong legal standard, misapplies the correct legal standard, or relies on a clearly erroneous finding of fact. *Schachner v. Blue Cross & Blue Shield of Ohio*, 77 F.3d 889, 895 (6th Cir. 1996). And "[g]iven the huge amount of judicial resources expended by class actions," a district court must take "particular care" in determining whether it should grant class certification. *Pipefitters Local 636 Ins. Fund v. Blue Cross BlueShield of Mich.*, 654 F.3d 618, 630 (6th Cir. 2011).

[3] Courts have concluded that commonality, typicality, and adequacy elements "tend to merge" and are "intertwined." *Dukes*, 564 U.S. at 349 n.5; *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 853 (6th Cir. 2013).

II. Plaintiffs Fail to Satisfy the Prerequisites for Class Certification.

A. Plaintiffs' proposed class is overly broad.

As an initial matter, the district court "must first consider whether a precisely defined class exists and whether the named plaintiffs are members of the proposed class." *Edwards v. McCormick*, 196 F.R.D. 487, 490-91 (S.D. Ohio 2000) (citing *East Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977)). If the party seeking class certification fails to adequately define the proposed class, "the court need not proceed to a full Rule 23 analysis." *Id.* at 493. And Plaintiffs have inadequately defined their proposed class.

The class definition proposed by Plaintiffs implicates two separate groups: (1) "current and future K-12 students attending public school in Shelby County, Tennessee during the coronavirus pandemic who are unable to obtain a vaccine either because of their age or for whom the vaccine is of limited efficacy due to their compromised or suppressed immune system," and (2) "current and future children who attend school in Shelby County who have [enumerated conditions that make them medically vulnerable to COVID-19]." (*See* ECF 16, PageID 86.) In addition, Plaintiffs seek to certify a subclass of class members "who are also under the age of twelve years and therefore ineligible to receive any vaccine for COVID-19 as currently approved by the FDA." (*Id.*)

Plaintiffs' proposed class definitions are overly broad. Rule 23(b)(2) permits maintenance of a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Although the Sixth Circuit does not require that a class proceeding under Rule 23(b)(2) be precisely ascertainable, *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016), the party

seeking certification still must show that the action "is based on grounds which have general application to the class." Fed. R. Civ. P. 23(b)(2), Advisory Committee Note, 1966 Amendment. In other words, the challenged conduct must be "such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (internal quotation marks omitted).

Plaintiffs' proposed class and subclass exceeds those bounds. First, the basis of Plaintiffs' challenge to the EO is not generally applicable to all members of their proposed classes. Plaintiffs contend that the EO discriminates against members in violation of the ADA and Section 504. (*See* ECF 54, PageID 1187, 1189.) Both the ADA and Section 504 prohibit discrimination against an individual with a disability, defined as "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1); *see also* 28 U.S.C. § 705(20)(b) (adopting the ADA definition of "disability" for Section 504). Age and vaccine ineligibility, however, do not fall within that definition of a disability. *See Sandison v. Mich. High School Athletic Ass'n, Inc.*, 64 F.3d 1026, 1033, 1035-36 (6th Cir. 1995); *see also Adams v. Rice*, 531 F.3d 936, 943-44 (D.C. Cir. 2008) (stating that a person's mere impairment does not qualify as a disability under the ADA or Section 504). In addition, persons in whom the vaccine is of limited efficacy are not disabled within that definition absent some other physical or mental impairment. *See Adams*, 531 F.3d at 943-44. The grounds on which Plaintiffs challenge the EO thus are not applicable to individuals who are ineligible to receive the vaccine due to their age or in whom the vaccine is of limited efficacy. The Court should reject Plaintiffs' proposed classes as inadequately defined. *See Edwards*, 196 F.R.D. at 493.

As to the remaining members of the proposed class—current and future children who attend school in Shelby County who have enumerated conditions associated with medical vulnerability to COVID-19—the class definition is overly broad in two respects. Class definitions generally must identify a particular group, harmed during a particular time frame, in a particular location, in a particular way. *See* 1 McLaughlin on Class Actions § 4:2 (17th ed.). Here, the proposed class is not properly limited to the particular time frame. Plaintiffs contend that the EO is discriminatory because it permits students to opt out of Shelby County Health Department's Amended Health Order No. 24, which requires universal masking in schools within Shelby County. That alleged discrimination can only persist so long as a universal masking requirement remains in place for schools within Shelby County. Such requirements are not permanent; even in the context of the present COVID-19 pandemic, universal masking has not been required in schools during periods of decreased virus transmission.[4] A class that includes all current and future students with enumerated conditions, even if temporally limited to the COVID-19 pandemic, is thus overbroad.

In addition, Plaintiffs' proposed class includes members who could not have been harmed by the EO. As part of their response to the COVID-19 pandemic, LEAs have offered virtual or remote instruction to students. (*See* ECF 55, PageID 1123, 1129.) Those students would not be physically present within a school to receive instruction. And since those students would not be physically present, the EO would not affect them. *See Edwards*, 196 F.R.D. at 491-92 (citing *Pagan v. Dubois*, 884 F. Supp. 25, 28 (D. Mass. 1995)). Since Plaintiffs' class definitions are too broad, the Court should find that they are not entitled to class certification.

[4] Laura Testino, *Masks optional for Germantown, Collierville, Arlington students, staff beginning next week*, Memphis Commercial Appeal, May 12, 2021. https://www.commercialappeal.com/story/news/education/2021/05/12/masks-optional-collierville-schools-students-staff-may-17/5063174001/

B. Plaintiffs' numerosity claim is too speculative to satisfy Fed. R. Civ. P. 23(a)(1).

Should the Court reach the issue, Plaintiffs also fail to satisfy Fed. R. Civ. P. 23(a)'s prerequisites. To meet the first class-certification requirement—numerosity—Plaintiffs must establish that "the class is so numerous that joinder of all members is impractical[.]" Fed. Rule Civ. Proc. 23(a)(1). "The numerosity requirement requires examination of the specific facts of each case and imposes no absolute limitations." *Gen. Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 330 (1980). There is "no strict numerical test for determining impracticability of joinder." *In re Am. Med. Sys.*, 75 F.3d at 1079. But while the exact number of class members need not be proved, the party seeking class certification must affirmatively show impracticability, and speculation as to the number of parties involved is insufficient. *Golden v. City of Columbus*, 404 F.3d 950, 965-66 (6th Cir. 2005) (citing 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1762 (3d ed. 2001)).

In this case, the proof Plaintiffs rely on to show impracticality of joinder is purely speculative. Plaintiffs' proposed class definitions purport to include students with a myriad of conditions, and they rely on a 2016 Commercial Appeal article that states that 12,000 students in Shelby County Schools suffer from asthma. (ECF 16, PageID 88.) But the relevant inquiry is not whether a large number of students with asthma—or any other disability—exists within Shelby County's public schools. The relevant inquiry is whether a number of students with disabilities suffer discrimination because of the EO. And allegations regarding Plaintiffs' experiences at two to three schools within two LEAs, without more, is insufficient to demonstrate that Plaintiffs' experiences are spread throughout other schools in Shelby County. *See Golden*, 404 F.3d at 966 (holding that the total number of renters in Columbus is not sufficient proof of numerosity where the putative class consisted of renters whose water service

was terminated due to the landlord's or prior tenant's indebtedness); *Gevedon v. Purdue Pharma*, 212 F.R.D. 333, 337-38 (E.D. Ky. 2002) (holding that the total sales volume of a product is not itself sufficient proof of numerosity in a products liability case). In sum, Plaintiffs' proof is too speculative to demonstrate numerosity.

C. Plaintiffs' proposed class and subclass lack commonality under Fed. R. Civ. P. 23(a)(2).

Plaintiffs also fail to demonstrate that their interests are common to their proposed class and subclass. They claim that the Court may determine "in one stroke" questions of law and fact common to their proposed members, namely, whether State Defendant's "policies and practices discriminate against the members . . . in violation of the ADA and [Section 504]." (ECF 16, PageID 89-91.) Plaintiffs' claim lacks merit. First, Plaintiffs' proposed class includes putative students with a disability who are not harmed by the EO and others who do not fall within the protections of the ADA, Section 504, or IDEA. Second, the remaining putative class members would be entitled to individualized relief through the ADA, Section 504, and IDEA, inhibiting the Court's ability to generate a common answer for the putative class members. Since the proposed class (and subclass) lacks commonality, the Court should find that Plaintiffs are not entitled to class certification.

A party may proceed with a class action "only if . . . there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). A party does not satisfy this prerequisite by merely asserting that all class members "suffered a violation of the same provision of law." *Dukes*, 564 U.S. at 350. Rather, the party must demonstrate that the proposed class "suffered the same injury" and that the "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* (internal quotation marks omitted). In other words, commonality requires the class action to generate common answers, and

dissimilarities within the putative class have the potential to defeat certification. *Id.* Put simply, a class lacks commonality if the "issues actually certified would require" a court to provide the members "individualized attention." *Pipefitters Local 636 Ins. Fund*, 654 F.3d at 629-30; *see also Jamie S. v. Milwaukee Pub. Sch.*, 668 F.3d 481, 498 (7th Cir. 2012) (reversing a district court's grant of class certification where resolving "any individual class member's claim" would "require[] an inherently particularized inquiry into the circumstances of the child's case").

Here, the Court cannot grant Plaintiffs' proposed class relief "in one stroke." *See Dukes*, 564 U.S. at 350. The proposed class would include "[a]ll current and future K-12 students attending public school in Shelby County . . . who are unable to obtain a vaccine . . . because of their age." (ECF 16, PageID 86.) This definition, however, encompasses members who "have [not] suffered the same injury." *See Dukes*, 564 U.S. at 350. Plaintiffs seek to represent putative class members who cannot obtain a vaccination due solely to their age or which the vaccine is of limited efficacy. Yet age and vaccine efficacy, standing alone, are not recognized disabilities under the ADA or Section 504. *See Adams*, 531 F.3d at 943-44; *Sandison*, 64 F.3d at 1033, 1035-36; *see also Zatarain v. WDSU-Television, Inc.*, 243 n.1 (E.D. La. 1995) (stating that "advanced age" standing alone is not an impairment under the ADA). Further, some of Plaintiffs' proposed class members are attending public school in Shelby County remotely or virtually and, due to their physical absence in a public school, are not affected by the EO. (*See* ECF 55, PageID 1123, 1129.) Unlike these proposed class members, the "representative" Plaintiffs allege that they attend school in person. (ECF 54, 1176-77, 1181-82, 1189.)[5] In other

[5]Although Plaintiffs, in relying on *Wilson v. Williams*, 455 F. Supp. 3d 467 (N.D. Ohio 2020), argue that "[f]actual discrepancies among members" of their proposed class "do not defeat a showing of commonality," (ECF 16, PageID 91), their argument misses the point. As an initial matter, the Sixth Circuit reversed the district court's grant of a preliminary injunction to a subclass of inmates at a single correctional institution, finding that they were unlikely to succeed

words, the named Plaintiffs do not have common questions of fact or law with these proposed class members.

Nor do Plaintiffs have commonality with those proposed class members who do have qualifying disabilities and attend school in person. Proposed class members who fall within the IDEA's protections have different avenues of relief available to them than those who are entitled to relief only under the ADA and Section 504. (ECF 55, PageID 1112-16.) And as Ms. Nicholls testified, schools and LEAs are required under the ADA, Section 504, and IDEA to provide such students accommodations, services, and supports that are individualized to their needs. (ECF 55, PageID 1109-12, 1135-37.) Because schools contain various demographics of students who have a disability, different percentages of students who sought relief pursuant to the EO, and other students with disabilities who may already be within a least restrictive environment that limits interactions with other students, LEAs within Shelby County cannot implement a "one-size-fits-all-approach" to ensure protections and inclusivity to students with disabilities. (*Id.*, at 1145-46.)

Throughout the COVID-19 pandemic, LEAs have implemented "creative, outside of the box" solutions to the meet the specific needs of students with disabilities. (*Id.*, at 1125-26, 1135-36.) Such solutions include scheduling changes, remote or virtual instruction, and teleservices to comply with their obligations under federal law. (*Id.*, at 1123-25, 1129-30, 1135-37.) And more creative adaptations may also be available to mitigate potential harm to students. These

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on the merits of their claim. *Wilson v. Williams*, 961 F.3d 829, 832-33 (6th Cir. 2020). And unlike the class in *Wilson*, Plaintiffs are attempting to certify a class that encompasses *all* of Shelby County public schools, not a class as to only one school. *See Wilson*, 455 F. Supp. 3d at 470. Even if *Wilson* could extend as far as Plaintiffs claim, Ms. Nicholls' testimony demonstrates that students subject to the protections of the ADA, Section 504, and IDEA are entitled to *individualized* relief that would prevent the Court from generating a common answer "with one stroke." *See Dukes*, 564 U.S. at 350.

individualized considerations for students within Shelby County schools counsel against a finding that "questions of law or fact" are common to class members. *See* Fed. R. Civ. P. 23(a)(2); *Dukes*, 564 U.S. at 350.

The following hypothetical also highlights the lack of commonality among Plaintiffs' proposed class members: Student A, a Shelby County K-12 student with a compromised immune system, is an in-person attendee at one school with a classmate who opted out of the masking mandate under the EO; Student B, also a Shelby County K-12 student with a compromised immune system, attends school in person at a different LEA where no classmates opted out. Under Plaintiffs' theory, the question in both scenarios is whether the EO violates both Students A and B's rights under the ADA and Section 504. (ECF 16, PageID 90.) "But while that generic question" may be part of Student A's and B's claims, the Court must separately answer any violations to their rights "based on individualized questions of fact and law." *See Jamie S.*, 668 F.3d at 497-98. The Court would be required to determine whether allowing the classmate to attend the same school in person as Student A violates the ADA and Section 504 while separately deciding whether the mere issuance of the EO violates Student B's rights. This type of individualized inquiry demonstrates a lack of commonality among Plaintiffs' proposed class members. *See Jamie S.*, 668 F.3d at 498; *Pipefitters Local 636 Ins. Fund*, 654 F.3d at 629-30.

Based on the proposed class definition and the evidence in the record, Plaintiffs cannot meet their burden to demonstrate that "questions of law or fact [are] common to the[ir proposed] class." *See* Fed. R. Civ. P. 23(a)(2); *Young*, 693 F.3d 532, 537.

CONCLUSION

Because Plaintiffs proposed class definition is too broad, and they otherwise fail to meet the prerequisites under Fed. R. Civ. P. 23(a), the Court should deny their motion for class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 13th day of September, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing report. Parties may access this filing through the Court's electronic filing system.

s/Robert W. Wilson
Assistant Attorney General