UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T., by and through her parents and next friends; D.D., by and through her parents and next friends; E.R., by and through her parents and next friends; J.R., by and through her parents and next friends; H.M., by and through her parents and next friends; N.C., by and through her parents and next friends; J.G., by and through her parents and next friends; E.S., by and through her parents and next friends; M.P., by and through her parents and next friends; S.P., by and through her parents and next friends; R.S., by and through her parents and next friends; J.V., by and through her parents and next friends; H.P., by and through her parents and next friends; and A.M., by and through her parents and next friends, Plaintiffs, v. GOVERNOR GREG ABBOTT, in his official capacity as GOVERNOR OF TEXAS; MIKE MORATH, in his official capacity as the COMMISSIONER of the TEXAS EDUCATION AGENCY; and the TEXAS EDUCATION AGENCY, Defendants.	)	Civil Action No. 1:21-cv-00717-LY

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

Plaintiffs have shown they are entitled to a temporary restraining order ("TRO") to prevent the enforcement and effect of the unlawful mask provisions of GA-38 for the 21 days until this case is tried. Plaintiffs have shown a substantial likelihood of success on the merits of their Americans with Disabilities Act ("ADA"), Rehabilitation Act, and preemption claims. There is a substantial threat of irreparable harm to Plaintiffs given that they are "high risk" for COVID-19 complications and given the existing conditions in Texas schools. Finally, the balancing of the equities and public interest factor weigh heavily in favor the issuance of the requested TRO.

To date, the only federal district courts to address this issue (in Tennessee and Iowa) have entered TROs in favor of plaintiffs challenging governors' orders restricting schools' ability to implement mask requirements.[1] Defendants' Response (D32) ignores these two cases, fails to negate the facts weighing in favor of the issuance of a TRO, and instead misstates the record and relief sought by Plaintiffs.

For the reasons set forth in the original Motion (D7), Supplemental Brief (D27), this Reply and the various exhibits to those filings, this Court should enter the requested TRO in the form of the revised proposed order filed together with this brief, and enjoin the Defendants from enforcing the mask provisions in GA-38 until the October 6, 2021 trial.

I. Plaintiffs Have Demonstrated a Substantial Likelihood of Success on the Merits

A. Plaintiffs Are Likely to Succeed on the ADA and Rehabilitation Act Claims.

The evaluation of a claim of disability discrimination under the ADA and Section 504 is substantially the same.[2] Plaintiffs will likely prevail on the merits because they are qualified

[1] *G.S. by and through Schwaigert v. Lee*, No. 21-cv-2552, 2021 WL 4057812 (W.D. TN. Sept. 3, 2021) (governor's order allowed parental opt-outs from mask requirements); *The Arc of Iowa v. Reynolds*, No. 21-cv-264, 2021 U.S. Dist. LEXIS 172685 (S.D. Iowa Sept. 13, 2021) (governor's order prohibited mask requirements).

[2] *See Wilson v. City of Southlake,* 936 F. 3d 326, 330 (5th Cir. 2019) ("To establish a prima facie case of discrimination under the ADA, a plaintiff must demonstrate: (1) that he is a qualified individual within the meaning of the ADA; (2) that he is being excluded from participation in, or being denied benefits of, services, programs, or

individuals with disabilities under the ADA and Section 504, and are being denied meaningful access to their public education: the ban on mask requirements is forcing the plaintiffs to choose between staying at home to protect their health and safety, and thus forgoing the benefits of in-person education, or exposing themselves to serious risk of illness or death by appearing for in-person classes in the absence of the most important and effective COVID-19 prevention strategy.

Both federal courts to have addressed similar ADA/Rehabilitation Act claims have granted TROs. As here, those plaintiffs are students with disabilities who have medical conditions that place them at higher risk of severe illness or death if they contract COVID-19, and they have been unsuccessful with virtual school.[3] The Tennessee court concluded they were likely to succeed on the merits of their ADA/Section 504 claims because "[t]hey have established that their exclusion is due to the threat Plaintiffs face from COVID-19 exposure because of their extreme medical vulnerabilities—in other words, due to their disabilities."[4] The Iowa court similarly found that the plaintiffs were likely to succeed on the ADA/Section 504 claims.[5] Plaintiffs here are also likely to succeed on the merits of these discrimination claims.

1. Plaintiffs are qualified individuals with disabilities.

A disability under the ADA and Section 504 is defined as a physical or mental impairment that substantially limits one or more major life activity, and this definition "shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the [ADA's] terms."[6] As detailed in Plaintiffs' Motion and attached declarations, each plaintiff is under age 12, eligible to attend public school, and has an impairment that substantially limits a major life activity,

activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination is by reason of his disability.").
[3] *G.S.*, 2021 WL 4057812 at *3; *Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *12–*16.
[4] *G.S.* at *8.
[5] *Arc of Iowa* at *39–*40.
[6] 42 U.S.C. §§ 12102(1), (2), (4)(A).

e.g., Down syndrome, moderate to severe asthma, chronic lung and heart conditions, cerebral palsy, epilepsy, autism, neurological conditions, spina bifida, and weakened immune systems. Defendants do not dispute that Plaintiffs are qualified individuals with disabilities.

2. G.A. 38 and TEA's Health Guidance discriminate against Plaintiffs.

The focus of both the ADA and Section 504 is prohibiting discrimination for those with disabilities.[7] Both statutes prohibit exclusion from participation, denial of benefits, or other kinds of discrimination.[8] Unlawful discrimination includes (1) denying the opportunity to participate in or benefit from educational services, (2) affording an unequal opportunity to participate or benefit, or (3) limiting a person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others.[9] It also includes failure to make reasonable modifications in policies, practices, or procedures when such are necessary to avoid discrimination.[10] Thus, unlawful discrimination occurs both when there are barriers to access, and when there is a failure to provide reasonable modifications needed for meaningful access.[11] Defendants' actions here result in the denial of benefits and unequal benefits, and deny the provision of reasonable modifications.

a) Exclusion/Unequal Treatment

Defendants' actions deny educational access to Plaintiffs, three of whom have missed in-person school because their schools are not requiring masks as a result of GA-38 and TEA's health guidance. For example, M.P. began the school year attending class in-person in Fort Bend ISD; the district adopted a mask requirement after local spread of COVID-19 forced several schools to

[7] 29 U.S.C. § 701(a)(3)(F) (Rehabilitation Act) (Congress found that individuals with disabilities should "enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American Society."); 42 U.S.C. § 12101 (ADA) (Congress found that individuals with disabilities should be assured "equality of opportunity, full participation, independent living, and economic self-sufficiency.").
[8] 42 U.S.C. § 12132; *Wilson,* 936 F. 3d at 330.
[9] 28 C.F.R. § 35.130(b)(1)(i)-(ii), (vii).
[10] 28 C.F.R. § 35.130(b)(7)(i); *Cadena v. El Paso Cty*., 946 F.3d 717, 723–24 (5th Cir. 2020).
[11] *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (6th Cir. 2013) (§ 504 and ADA Title III).

halt in-person learning. But the district then reversed course when the state-court injunctions were stayed.[12] M.P.'s parents had no choice but to pull M.P. from in-person school given the rising number of cases and Fort Bend's adherence to GA-38.[13] For M.P. and others removed from in-person classes, the ban on mask requirements has created an absolute barrier. For other Plaintiffs, who are attending classes in person despite the risk of severe illness or worse, the ban on mask policies has denied them meaningful access to their education, *i.e.*, an "equal opportunity to … gain the same benefit."[14] As found by the court in *Arc of Iowa*, "Plaintiffs have demonstrated that school programs, services, and activities are not 'readily accessible' to the disabled minor children involved here because these children cannot attend in-person learning at their schools without the very real threat to their lives because of their medical vulnerabilities."[15]

Additionally, five Plaintiffs are attending school in person in districts that are currently requiring masks but facing the threat of enforcement from Defendants: two of those districts have been sued by the Attorney General, and the remaining districts have received letters from the Attorney General stating that litigation will follow. The parents of two plaintiffs, J.R. and A.T., believe that they will have no choice but to pull their children from in-person classes if masks are no longer required on their campuses.[16] These plaintiffs will also be denied meaningful access.

b) Failure to Provide Reasonable Modification

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[12] "[R]ight now the provisions of Executive Order GA-38 that bar mask mandates are effective. In light of this legal development, at this time, the District is not requiring the wearing of masks." https://www.fortbendisd.com/site/default.aspx?PageType=3&DomainID=4&ModuleInstanceID=12&ViewID=6446EE88-D30C-497E-9316-3F8874B3E108&RenderLoc=0&FlexDataID=175699&PageID=1.

[13] Decl. of K.P. at ¶ 7-13 (attached hereto as Ex. 1)

[14] *Argenyi*, 703 F.3d at 449.

[15] *Arc of Iowa* at *37. Courts have also recognized that accommodations in the employment context can be required to address a risk of injury or health consequence under Title I of the ADA. *See Burnett v. Ocean Properties, Ltd.*, 987 F.3d 57, 68–69 (1st Cir. 2021) (finding plaintiff needed an accommodation because although he was able to physically perform his job, he did so at risk of injury); *Kleyman v. SUNY Downstate Med. Ctr.*, No. 18CV3137PKCST, 2020 WL 5645218, at *10 (E.D.N.Y. Sept. 21, 2020) (finding there was dispute whether plaintiff could perform her job without accommodation only by "seriously endangering her health").

[16] Decl. J.L. ¶ 12 (attached as Ex. 2), Decl. of A.T. ¶ 12 (attached as Ex. 3).

Both the ADA and Section 504 require covered entities to provide reasonable accommodations or modifications to individuals with disabilities.[17] Under Section 504, a reasonable accommodation may be required to ensure meaningful access to a benefit.[18] Under the ADA, reasonable modifications are required when necessary to avoid discrimination on the basis of a disability.[19] This determination is a fact-specific inquiry requiring individualized consideration of both the need for the accommodation as well as the impact of granting it on the program or service being offered.[20]

As the experts' declarations demonstrate, for children under the age of 12, the best accommodation to protect those who are at risk of significant illness from COVID-19 is the universal use of masks. The need for masking has been recognized by national health authorities, including the CDC, as well as by local health authorities and school officials weighing the specific needs of their local communities. Local school districts, who have implemented mask policies since the start of the pandemic, are the proper decision-makers as to what accommodations are needed to address Plaintiffs' individual needs as well as the impact on the educational program. Yet Defendants have thwarted the ability of school districts to adopt this effective and simple accommodation, preventing school districts from meeting their obligations under federal law.

3. The discrimination is by reason of the Plaintiffs' disability.

Plaintiffs have disabilities and medical conditions that qualify each of them as "high risk" for COVID-19 complications such as severe illness, death, or Long Covid.[21] Defendants'

[17] Courts often use "accommodation" and "modification" interchangeably in non-employment cases.
[18] *Alexander v. Choate*, 469 U.S. 287, 301 (1985).
[19] 28 C.F.R. § 35.130(b)(7).
[20] *Staron v. McDonald's Corp*., 51 F.3d 353, 356 (2nd Cir. 1995) ("[T]he determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.").
[21] D7 at 5, Ex. D. at ¶¶ 7, 13-18.

Response ignores the above cited evidence and the Plaintiffs' conditions, and tries to frame the issue as only concerns about "COVID-19 generally" and the "threat that we all face from COVID-19."[22] Here, the threat to Plaintiffs is greater than to the general public because of their condition(s) and because of GA-38's preclusive effect on school districts' ability to implement recommended prevention strategies to address the heightened risk the Plaintiffs' disabilities create. The District of Tennessee held that a similar barrier created by the ban on mask mandates is tied directly to the students' disabilities.[23]

B. Plaintiffs are Likely to Succeed on their Preemption Claim.

Plaintiffs' claims are likely to succeed on the merits because GA-38 and the TEA Guidance are preempted by federal law insofar as they "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[24] Defendants' prohibition on school mask requirements creates such a conflict with the ADA and Section 504 of the Rehabilitation Act because it excludes disabled children from participating in and denies them the benefits of the public schools' programs, services, and activities to which they are entitled.[25] GA-38 and the TEA Guidance are also preempted by the American Rescue Plan Act and the Department of Education's implementing requirement, because the prohibition on school mask requirements "stands as an obstacle" to Congress' purpose and objective that local school districts—not the state—have discretion to decide whether and to what extent they will adopt public health policies, including mask requirements, consistent with CDC guidance.[26]

II. The Remaining Factors Weigh in Favor of the Issuance of a TRO Until Trial.

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[22] D35 at 25, 10.
[23] *G.S.,* 2021 WL 4057812, at *8.
[24] *Pac. Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 204 (1983).
[25] *Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *39–*40 (Iowa's prohibition on mask requirements is preempted).
[26] D7 at 13–15; *see* American Rescue Plan Act of 2021, Pub. L. No. 117-2, §§ 2001(i), 2001(e)(2)(Q); 86 Fed. Reg. 21195, 21200 (April 22, 2021); *cf. Lawrence County v. Lead-Deadwood School Dist.*, 469 U.S. 256, 260–61 (1984) (state law restricting how local governments could use federal funding was preempted where federal statute and implementing regulation expressly provided for local discretion).

As shown in the Motion and Supplemental Brief, Plaintiffs face a substantial threat of irreparable harm, and both the balance of the equities and public interest weigh heavily in favor of the issuance of a TRO for the no-more-than three weeks until trial. Defendants do not dispute the exponentially increasing COVID-19 case count and resulting impact on the schools and children. Instead, their lone argument on irreparable harm and balance of equities is that a TRO will prevent "Defendants, and most notably Attorney General Paxton, [from] trying to stop the widespread defiance of GA-38 by local officials."[27] This argument is curious (at best) given Defendants' position that none of them, including the Attorney General, can enforce or are enforcing GA-38.[28]

Defendants blatantly misstate the requested relief in this case. Plaintiffs do not, as Defendants argue, want to "force everyone to wear masks."[29] Rather, the requested relief seeks to remove an unlawful barrier to each school district or campus deciding whether to follow CDC and other guidance on masks based on the current situation in that district.[30] The Defendants and GA-38, not the Plaintiffs or this lawsuit, are the only barriers to localized decision-making.

Finally, Defendants misstate the status quo that a TRO would restore. This case pertains to whether school districts can decide whether to mandate masks on their campuses. As of the end of the prior school year, school districts could choose to implement mask mandates.[31] This suit and request for a TRO were filed at the start of this school year, when GA-38 prevented school districts from making that choice in the face of a devastating spike in the number of pediatric COVID-19 cases. A TRO would return the parties to the last peaceable time, when school districts could make that choice based on the pandemic's impact in that district. The Texas Supreme

[27] D35 at 29.
[28] *E.g.*, *id.* at 14-23.
[29] *Id.* at 29.
[30] *E.g.,* Complaint (D1) at 7, 8; Motion (D7) at 8.
[31] D27 at 4–5.

Court's recent order did not address this more narrow issue, and is not binding on this Court.

III. Defendants Jurisdictional Arguments are Flawed and, in Any Event, Need Not Be Addressed Before a TRO is Issued.

Although Defendants raised a number of jurisdictional arguments in their Response, they also agreed that the Court would address these issues at a later date, *i.e.*, the October 6, 2021 trial.[32] Of course, it is well settled that a district court may issue a TRO pending determination of its jurisdiction over the underlying dispute.[33] Here, the issuance of a TRO will not harm Defendants as these issues are set to be heard in just three weeks. Even though the Court need not address them, Plaintiffs will respond briefly to the arguments first made yesterday but reserve the right to provide a more fulsome response pursuant to the local rules or the time prescribed by the Court.

A. Plaintiffs Have Standing to Bring their Claims.

Plaintiffs have suffered a concrete injury by being forced to choose between exposure to a deadly virus and foregoing their right to in-person public education.[34] Plaintiffs whose school districts have not implemented mask requirements because of Defendants' enforcement are currently being injured. Plaintiffs whose districts are requiring masks face imminent injury if Defendants' enforcement efforts succeed in forcing those districts to drop their mask requirements.

Plaintiffs' injury is fairly traceable to and likely to be redressed by an injunction against Defendants' enforcement of GA-38's mask provisions against school districts. Defendants have threatened numerous school districts (including districts in which Plaintiffs attend school) with civil lawsuits and have sued several such districts.[35] Many districts have foregone mask

[32] D32 at 2.
[33] *E.g.*, *Stewart v. Dunn*, 363 F.2d 591, 598 (5th Cir. 1966) (citing *United States v. United States Mine Workers of America*, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947)).
[34] D7 at 1, 4–5; *see Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *1; *G.S.* at 8–10 (finding standing based on similar alleged injury).
[35] *See, e.g.*, *State of Texas v. Galveston ISD*, No. 21-cv-1513 (Galveston County District Court); *State of Texas v. Round Rock ISD*, No. 21-1471-C368 (Williamson County District Court); *State of Texas v. Board of Trustees of Sherman Independent District*, No. CV-21-1149 (Grayson County District Court). Furthermore, the Attorney

requirements because of Defendants' enforcement, and would require masks but for that enforcement.[36] Thus, the requested injunction would likely redress Plaintiffs' injury.[37] Furthermore, the possibility that a local official might enforce GA-38 does not defeat standing. The ability '"to effectuate a partial remedy' satisfies the redressability requirement."[38] The requested injunction does not have to enjoin every possible enforcer.

Plaintiffs likewise have standing to assert their claim for preemption under the ARP Act because it is based not on any private right of action under that statute, but rather on the well-established and longstanding equitable power of the Court to enjoin unlawful actions by state officials pursuant to the *Ex parte Young* doctrine.[39]

B. Defendants lack sovereign immunity because they are enforcing GA-38.

Plaintiffs have already explained why Defendants—and particularly the Attorney General—fall within the *Ex parte Young* exception to sovereign immunity because they are actively enforcing GA-38's prohibition on school mask requirements.[40] In the week since that filing, the Attorney General has escalated from his previous threats by filing at least six lawsuits against school districts that have implemented mask requirements in violation of GA-38.[41] Yet

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General's website indicates that many other school districts have abandoned mask requirements without being sued. https://www.texasattorneygeneral.gov/covid-governmental-entity-compliance (last updated Sept. 14, 2021 at 10:01 A.M.) (listing school districts OAG has sued or threatened with litigation).

[36] D26 at 6–7.

[37] *See Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *24; *G.S.* at 8–10.

[38] *Uzuegbunam v. Preczewski*, 141 S. Ct. 792, 794 (2021).

[39] *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law."); *Ex parte Young*, 209 U.S. 123, 150–51 (1908).

[40] *See* D26 *passim*.

[41] According to its website, as of September 10 the Office of the Attorney General has filed lawsuits against Elgin ISD, Galveston ISD, Richardson ISD, Round Rock ISD, Sherman ISD, and Spring ISD. *See* https://www.texasattorneygeneral.gov/covid-governmental-entity-compliance (last updated: Sept. 10, 2021 at 4:44 p.m.). Two of those districts (Richardson and Round Rock) are among the districts in which Plaintiffs attend school. Furthermore, according to news reports, the Attorney General has filed four additional lawsuits against Waco, Midway, McGregor and La Veqa school districts. *See* State sues Waco, Midway, La Vega, McGregor school districts over mask mandates, Waco Tribune-Herald (Sept. 13, 2021), https://wacotrib.com/news/local/education/state-sues-waco-midway-la-vega-mcgregor-school-districts-over-mask-mandates/article_0849ce82-14e2-11ec-95a1-0304f6a335e7.html.

Defendants inexplicably continue to assert that the Attorney General "does not enforce" and has "no power to enforce" GA-38 (D35 at 17, 19), despite the Attorney General filing multiple civil lawsuits seeking injunctive and declaratory relief against disobedient school districts. Defendants cannot on the one hand disclaim any connection to enforcement while at the same time arguing that the Court must deny Plaintiffs' requested relief because "Defendants… are trying to stop the widespread defiance of GA-38 by local officials"[42]

Defendants' attempt to distinguish *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389 (5th Cir. 2015) is unavailing. Defendants acknowledge the Fifth Circuit's holding in that case that the Attorney General had sufficient "connection" to enforcement because his letters threatening specific legal action effectively acted as a "preliminary injunction."[43] But the same is true here, where by the Attorney General's own reckoning at least 19 school districts have backed down from implementing mask requirements as a result of his office's enforcement threats.[44] Furthermore, the additional cases cited by Defendants are far off point because, unlike GA-38, the statutes at issue in those cases expressly precluded any enforcement by state officials.[45]

CONCLUSION

For the reasons set forth above, the Court should grant the requested TRO in the form of the revised proposed order filed together with this brief.

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[42] D35 at 29; *compare id*. at 17 (asserting that GA-38 is enforced by local district attorneys).
[43] D35 at 18–19; *see NiGen*, 804 F.3d at 397.
[44] *See* https://www.texasattorneygeneral.gov/covid-governmental-entity-compliance (last updated: Sept. 10, 2021 at 4:44 p.m.) (listing 19 school districts as "Now in Compliance (previously not in compliance)").
[45] *See* D35 at 14–15. Defendants point to the U.S. Supreme Court's recent refusal to enjoin a Texas abortion statute, *see Whole Woman's Health v. Jackson*, 21A24, 2021 WL 3910722 (U.S. Sept. 1, 2021), but neglect to mention that statute provides for enforcement "exclusively through . . . private civil actions." *See* Tex. Health & Safety Code § 171.207. Likewise, in *California v. Texas*, 141 S. Ct. 2104 (2021), the Supreme Court rejected plaintiffs' constitutional challenges to the Affordable Care Act because the 2017 amendments to that statute had zeroed out its penalty provision, with the result that *no one* had any power to enforce it. *Id*. at 2114.

Dated: September 14, 2021

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system on September 14, 2021.

/s/Thomas M. Melsheimer
Thomas M. Melsheimer

Exhibit 1

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T., by and through her parents and next friends; D.D., by and through her parents and next friends; E.R., by and through her parents and next friends; J.R., by and through her parents and next friends; H.M., by and through her parents and next friends; N.C., by and through her parents and next friends; J.G., by and through her parents and next friends; E.S., by and through her parents and next friends; M.P., by and through her parents and next friends; S.P., by and through her parents and next friends; R.S., by and through her parents and next friends; J.V., by and through her parents and next friends; H.P., by and through her parents and next friends; and A.M., by and through her parents and next friends. Plaintiffs, v. GOVERNOR GREG ABBOTT, in his official capacity as GOVERNOR OF TEXAS; MIKE MORATH, in his official capacity as the COMMISSIONER of the TEXAS EDUCATION AGENCY; and the TEXAS EDUCATION AGENCY, Defendants.	§	Civil Action No. 1:21-cv-00717-LY

DECLARATION OF K.P. REGARDING STUDENT M.P.

COMES NOW, K.P. and, declares under penalty of perjury that the foregoing is true and correct:

1. My name is K.P., and I am over 18 years old and have personal knowledge of the facts as stated herein.

2. I am the mother of M.P., my eleven-year-old daughter who was born with Down syndrome.
3. Because my daughter is under age 12, she is not eligible to receive any of the currently authorized COVID-19 vaccines.
4. M.P. attends Fort Bend Independent School District (FBISD), where she receives supports, services and accommodations. We live in Fort Bend County.
5. Her treating doctors and specialists have informed me that my child is at high risk for severe complications due to COVID-19 infection. They highly recommend wearing masks in public indoor spaces. In order to decrease her risk, she and everyone around her should observe strict COVID-19 safety protocols and wear a mask indoors. No one can guarantee her safety.
6. The Texas Virtual School Network or other online programs do not provide the necessary supports, services and accommodations, including direct instruction and socialization with peers.
7. In the current 2021-2022 school year, M.P. attended school in-person starting August 11, 2021 at which time FBISD was not yet offering virtual instruction. After receiving near-daily updates from Fort Bend ISD about the rising number of cases of COVID-19 in the schools, and learning FBISD was having to close some campuses because of COVID-19 outbreaks, we made the decision for M.P. to stop attending school in-person until there was a masking requirement in place.
8. When they made it available, M.P. switched to a limited virtual learning option.
9. The virtual learning option only offers a portion of her classes.
10. This decision, while the right choice for M.P.'s safety and health, has had a detrimental effect on her emotional wellbeing, mental health, and education.

11. M.P. is no longer receiving the social interaction with her peers that in-person instruction offers or learning nearly as much as she would in person.
12. We were pleased the FBISD school board voted to implement a masking requirement starting August 26th which we thought would allow M.P. to begin her much needed in person instruction. Unfortunately, that only lasted two days before FBISD decided they were unable to implement their policy because the state's efforts to enforce the mask ban and Texas Supreme Court's decision to allow ban to be enforced.
13. Because FBISD isn't allowed to implement mask requirements, our daughter continues to be denied access to in person instruction she needs.

I swear under the penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated this 12th day of September 2021, at Sugar Land, Texas.

DocuSigned by:
Karina Pichardo
E06C95B367514DA...

Karina Pichardo

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T., by and through her parents and next friends; D.D., by and through her parents and next friends; E.R., by and through her parents and next friends; J.R., by and through her parents and next friends; H.M., by and through her parents and next friends; N.C., by and through her parents and next friends; J.G., by and through her parents and next friends; E.S., by and through her parents and next friends; M.P., by and through her parents and next friends; S.P., by and through her parents and next friends; R.S., by and through her parents and next friends; J.V., by and through her parents and next friends; H.P., by and through her parents and next friends; and A.M., by and through her parents and next friends. Plaintiffs, v. GOVERNOR GREG ABBOTT, in his official capacity as GOVERNOR OF TEXAS; MIKE MORATH, in his official capacity as the COMMISSIONER of the TEXAS EDUCATION AGENCY; and the TEXAS EDUCATION AGENCY, Defendants.	§	Civil Action No. 1:21-cv-00717-LY

DECLARATION OF J.L. RE STUDENT J.R.

COMES NOW, J.L. and, declares under penalty of perjury that the foregoing is true and correct:

1. My name is J.L., and I am over 18 years old and have personal knowledge of the facts as stated herein.

2. I am the mother of J.R., my eight-year-old daughter who has attention deficit hyperactivity disorder, a growth hormone deficiency, and moderate to severe asthma.
3. Because my daughter is under age 12, she is not eligible to receive any of the currently authorized COVID-19 vaccines.
4. J.R. attends San Antonio Independent School District, where she receives supports, services and accommodations. We live in Bexar County.
5. Her treating doctors and specialists have informed me that my child is at high risk for serious and severe complications if she contracts COVID-19. In order to decrease her risk, she and everyone around her should observe strict COVID-19 safety protocols and wear a mask indoors.
6. Due to COVID-19 and our family members' multiple asthma and autoimmune disorder diagnoses, we rarely leave the home, and we avoid all indoor public places as well as any crowded outdoor places. Because of Governor Abbott's wanton disregard for my child's safety, he is also endangering the health of my entire family.
7. As I included in my August 17, 2021 declaration, I did not see a way for J.R. to stay home this school year. During remote learning, her generalized anxiety disorder had been exacerbated by having to remain homebound and isolated from her same-aged peers at school. Virtual instruction was also not an option at the time I signed that declaration.
8. Since that time, San Antonio ISD has provided for some limited virtual options that I still do not believe would meet my daughter's needs.
9. Fortunately, I have been able to safely send J.R. to school because San Antonio ISD has implemented a mask mandate.

10. J.R. is doing very well in school this school year and it would be devastating to have to remove her from in person schooling.
11. Sadly, I have followed the news of rapid COVID-19 spread and campus closures in many school districts that are following the Governor's orders and know that the Attorney General's office and other state officials may force San Antonio ISD to relent on its mask policy.
12. At this time, I have decided that if San Antonio ISD were not allowed to continue implementing a mask requirement, I would have to keep J.R. home, even knowing she would lose out on the in person educational services she needs.

FURTHER DECLARANT SAYETH NAUGHT.

Dated this 12th day of September 2021, at San Antonio, Texas.

DocuSigned by:
0CD364AC25334FB...
Julia Longoria

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T., by and through her parents and next friends; D.D., by and through her parents and next friends; E.R., by and through her parents and next friends; J.R., by and through her parents and next friends; H.M., by and through her parents and next friends; N.C., by and through her parents and next friends; J.G., by and through her parents and next friends; E.S., by and through her parents and next friends; M.P., by and through her parents and next friends; S.P., by and through her parents and next friends; R.S., by and through her parents and next friends; J.V., by and through her parents and next friends; H.P., by and through her parents and next friends; and A.M., by and through her parents and next friends. Plaintiffs, v. GOVERNOR GREG ABBOTT, in his official capacity as GOVERNOR OF TEXAS; MIKE MORATH, in his official capacity as the COMMISSIONER of the TEXAS EDUCATION AGENCY; and the TEXAS EDUCATION AGENCY, Defendants.	§	Civil Action No. 1:21-cv-00717-LY

DECLARATION OF A.T. REGARDING STUDENT E.T.

COMES NOW, A.T. and pursuant to 28 U.S.C. § 1748, declares under penalty of perjury that the foregoing is true and correct:

1. My name is A.T., and I am over 18 years old and have personal knowledge of the facts as stated herein.

2. I am the mother of E.T., my eleven-year-old daughter. She has been diagnosed with Down syndrome, asthma, hypogammaglobulinemia, and a severe B-cell lymphocyte deficiency, which has resulted in a weakened immune system.
3. Because my daughter is under age 12, she is not eligible to receive any of the currently authorized COVID-19 vaccines.
4. E.T. attends Round Rock Independent School District, where she receives supports, services and accommodations. We live in Williamson County.
5. Her treating doctors and specialists have informed me that it is dangerous for her to return to brick-and-mortar school without such precautions as requiring everyone to follow the recommended CDC guidelines. They highly recommend that all COVID-19 mitigation measures are followed, including but not limited to masking of all persons in crowded public places such as schools.
6. We attempted virtual instruction last year but it was largely unsuccessful and resulted in a significant loss of education for E.T. It also resulted in a substantial increase of self-harm behaviors given that virtual instruction is an inappropriate platform for a student with E.T.'s type of disability needs.
7. The Texas Virtual School Network or other online programs do not provide the necessary supports, services and accommodations, including direct instruction and socialization with peers.
8. At the time I signed the declaration on August 17, 2021, I do not know what to do with respect to E.T.'s education this school year. E.T. will wear a mask without difficulty, but I was concerned that may not be enough to protect her from COVID-19 if others around her do not mask. Her treating psychiatrist has recommended that she attend in-person classes

provided it is safe as virtual learning was detrimental to her psychological, social, and developmental health and has resulted in significant regression, agitation, and the aforementioned self-harm. Governor Abbott's order has placed my family in an impossible situation.

9. On August 25, 2021 the Round Rock ISD school board adopted a mask requirement, which has allowed me to send E.T. to school safely.
10. I have seen the news of other Central Texas districts with mask optional policies having to close schools, like Lago Vista or Marble Falls, or the entire district, like Burnet ISD, because of so many COVID-19 cases.
11. I also noticed that Attorney General sued Round Rock ISD for requiring masks and the mask requirement is set for discussion at another upcoming board meeting.
12. I am very concerned that if the mandate is rolled back and our campus staff and students do not choose to use masks, I will have no choice but to keep E.T. home even though she needs in person instruction.
13. My "choice" is also complicated by the fact that the district does not allow families who select in person instruction to move to virtual instruction.
14. For my daughter's sake, I hope that this court stops enforcement of the executive order so Round Rock ISD at least has the option to continue a mask requirement that allows my daughter to safely attend school.

I swear under the penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Dated this 12th day of September 2021, at Austin, Texas.

DocuSigned by:
Anna Theurer
B4DD98513E5A406...

Anna Theurer

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

E.T., by and through her parents and next friends; D.D., by and through her parents and next friends; E.R., by and through her parents and next friends; J.R., by and through her parents and next friends; H.M., by and through her parents and next friends; N.C., by and through her parents and next friends; J.G., by and through her parents and next friends; E.S., by and through her parents and next friends; M.P., by and through her parents and next friends; S.P., by and through her parents and next friends; R.S., by and through her parents and next friends; J.V., by and through her parents and next friends; H.P., by and through her parents and next friends; and A.M., by and through her parents and next friends, Plaintiffs, v. GOVERNOR GREG ABBOTT, in his official capacity as GOVERNOR OF TEXAS; MIKE MORATH, in his official capacity as the COMMISSIONER of the TEXAS EDUCATION AGENCY; the TEXAS EDUCATION AGENCY; and ATTORNEY GENERAL KENNETH PAXTON, in his official capacity as ATTORNEY GENERAL OF TEXAS, Defendants.	)	Civil Action No. 1:21-CV-00717-LY

ORDER GRANTING PLAINTIFFS' EMERGENCY MOTION FOR A TEMPORARY RESTRAINING ORDER

Pending before the Court is Plaintiffs' Emergency Motion for Temporary Restraining Order and Preliminary Injunction ("TRO") filed on August 18, 2021. ECF No. 7. Plaintiffs filed a Supplemental Brief in Support of their Motion for a TRO on September 8, 2021 (ECF No. 25), Defendants filed a Response to Plaintiffs' Motion for TRO on September 13, 2021 (ECF No. 35),

and Plaintiffs filed a Reply in Support of their Motion for a TRO on September 14, 2021 (ECF No. ___). On September 15, the Court held a hearing on the TRO. *See* ECF No. ___.

Having considered the briefing and argument, the applicable law, and all matters properly before the Court, the Court finds that Plaintiffs, who are students with disabilities enrolled in Texas public schools, have clearly shown that immediate and irreparable injury, loss, or damage will result to Plaintiffs if Defendants Governor Greg Abbott's, Attorney General Kenneth Paxton's, Texas Education Agency Commissioner Mike Morath's, and the Texas Education Agency's acts are not immediately restrained. Further, the Court finds that Plaintiffs have made a proper showing of (1) a substantial likelihood of success on the merits; (2) a substantial threat that failure to grant the TRO will result in irreparable injury to the moving party; (3) the threatened injury outweighs any damages the injunction may cause Defendants; and (4) the injunction is in the public interest. *See Jackson Women's Health Org. v. Currier*, 760 F.3d 448, 452 (5th Cir. 2014); *Whole Woman's Health v. Paxton*, 264 F. Supp. 3d 813, 818 (W.D. Tex. 2017).

Background

Plaintiffs seek to enjoin Defendants from enforcing Executive Order GA-38 ("GA-38"), which provides: "No governmental entity, including a . . . school district . . . may require any person to wear a face covering or to mandate that another person wear a face covering[.]" Plaintiffs allege GA-38 violates the civil rights of Plaintiff under Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973 ("Section 504"), 29 U.S.C. § 794(a). Plaintiffs also assert GA-38 is preempted by the American Rescue Plan Act of 2021 ("ARPA"), Pub. L. No. 117-2, 135 Stat. 4 (2021), as well as by the ADA and Section 504. Plaintiffs want Texas public schools to have the opportunity to comply with these federal laws and to be able to provide an integrated and accessible environment for their most

medically vulnerable students, including Plaintiffs. Plaintiffs assert GA-38 and Defendants' recent actions to enforce its provisions against Texas public schools have prevented or will prevent Plaintiffs and other students with disabilities from safely returning to school for in-person instruction without serious risk to their health and safety.

Analysis

A. Likelihood of Success on the Merits

a. Violation of the ADA and Rehabilitation Act

Section 504 and the ADA are antidiscrimination statutes that prohibit discrimination against individuals with disabilities. *D.A. ex rel. Latasha A. v. Hous. Indep. Sch. Dist.,* 629 F.3d 450, 453 (5th Cir. 2010). Section 504 provides: "No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[.]" 29 U.S.C. § 794(a). The ADA similarly provides: "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. "Together, these laws require public schools to afford disabled students an equal opportunity to participate in and benefit from the aids, benefits, or services that are provided to others." *Arc of Iowa v. Reynolds*, No. 4:21-cv-00264, 2021 U.S. Dist. LEXIS 172685, at *42 (S.D. Iowa Sep. 13, 2021).

Regulations implementing these provisions include "the integration mandate" requiring public entities, including public schools, "shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d); *see also McCarthy v. Gilbert*, No. A-03-CA-231-SS, 2003 U.S. Dist. LEXIS

29318, at *38-39 (W.D. Tex. May 23, 2003) (noting that the "most integrated setting" is defined as "a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible") (quoting 28 C.F.R. Pt. 35 App. A). Unlawful discrimination also includes denying the opportunity to participate in or benefit from educational services, 28 C.F.R. § 35.130(b)(1)(i); affording an unequal opportunity to participate or benefit, 28 C.F.R. § 35.130(b)(1)(ii); or limiting a person in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others. 28 C.F.R. § 35.130(b)(1)(vii). In addition, "[a] public entity shall operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and usable by individuals with disabilities." 28 C.F.R. § 35.150. And a public entity discriminates when it fails to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability." 28 C.F.R. § 35.130(b)(7)(i); *see Cadena v. El Paso Cty*., 946 F.3d 717, 723–24 (5th Cir. 2020) ("[B]oth the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals").

Claims for disability discrimination or a failure to accommodate under Section 504 and the ADA are substantially the same. *Wilson v. City of Southlake,* 936 F.3d 326, 330 (5th Cir. 2019). To establish a violation, a plaintiff must demonstrate (1) that he or she "is a qualified individual" with disability; (2) that he or she "is being excluded from participation in, or being denied benefits of, services, programs, or activities for which the public entity is responsible, or is otherwise being discriminated against by the public entity;" and (3) "that such exclusion, denial of benefits, or discrimination is by reason of his [or her] disability." *Id.*

Plaintiffs are children who each have a qualifying disability that substantially limits a major life activity, including Down syndrome, moderate to severe asthma, chronic lung and heart

conditions, cerebral palsy, epilepsy, autism, neurological conditions, spina bifida, and weakened immune systems. 42 U.S.C. §§ 12102(1)(A) (defining "disability" as "a physical or mental impairment that substantially limits one or more major life activities").

Plaintiffs are also students at public schools entitled to participate in the programs, services, and activities of their schools. Plaintiffs have identified at least three ways they have been excluded from participating in or been denied the benefits of their school's programs, services, and activities in violation of Section 504 and the ADA.

First, GA-38's ban on mask requirements prevents school districts from administering their programs, services, and activities in the "most integrated setting" appropriate to the needs of qualified students with disabilities, in violation of 28 C.F.R. § 35.130(d). Plaintiffs include three students who are missing in-person schooling because their districts have not required indoor masking in response to GA-38. For example, Plaintiff M.P. began the school year attending class in-person in Fort Bend ISD after the district adopted a mask requirement in response to the community spread of COVID-19 forcing several elementary schools to halt in-person learning. But after several injunctions involving GA-38 were lifted or stayed, the district changed course and withdrew its mask requirement to comply with GA-38. Because of her increased risk for severe illness from COVID-19, the student's parents removed her from in-person school given the rising number of cases of COVID-19 in the community and the school district's withdrawal of its masking requirement to comply with GA-38. K.P. Decl. at ¶¶ 7–8. Plaintiff, R.G. cannot return to in person school until masking requirements are allowed or COVID-19 spread decreases. R.G. Decl. at ¶ 13. Even those plaintiffs who have attended have endured different experiences. For example, E.R. has had to be physically moved away from the majority of his classmates who do not voluntarily wear masks to try to protect himself and his other vulnerable family members. The

stress has worsened anxiety and has caused him to sleep on this mother's floor because his nightmares are so bad. A.R. Decl. at ¶¶ 7–11.

Defendants suggest that GA-38 "contain[s] no restrictions on Plaintiffs' ability to attend school virtually or on local schools' ability to offer this service." ECF No. 35 at 25. But this would provide these students with disabilities an "inferior service" that is "unnecessarily segregated from their peers." *Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *39. In-person learning is important for "the mental, emotional, and physical health of children" and students with disabilities "have a particular need for in-person instruction." ECF No. 7-4, ¶ 20. To provide the "most integrated setting," schools are required to enable students with disabilities to interact with other students "to the fullest extent possible." 28 C.F.R. Pt. 35 App. A. Because GA-38 prevents school districts from providing the "most integrated setting" possible, it violates Plaintiffs' rights under Section 504 and the ADA. *See Olmstead v. L. C. by Zimring*, 527 U.S. 581, 592, 600 (1999) (noting that "Congress explicitly identified unjustified 'segregation' of persons with disabilities as a 'form of discrimination'").

Second, GA-38's ban on mask requirements prevents school districts from making their programs and services "readily accessible," in violation of 28 C.F.R. § 35.150, by making in-person learning at school available only under conditions that are dangerous to children with disabilities. In addition to the Plaintiffs who have been excluded from in-person learning, those students who are attending classes in person are doing so because they have no other option and, as a result, have been forced to risk significant illness, or even worse, to attend school. Attending school with the threat of significant injury, which is not present for other students, is not meaningful access. Section 504 and the ADA require schools to "start by considering how their educational programs are used by non-disabled students and then take reasonable steps to provide

disabled students with a like experience." *Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *37 (quoting *Argenyi v. Creighton Univ.*, 703 F.3d 441, 451 (8th Cir. 2013)) (cleaned up). A school district's programs, services, and activities are not "readily accessible" to Plaintiffs "because these children cannot attend in-person learning at their schools without the very real threat to their lives because of their medical vulnerabilities." *Id.*; *see also G.S. by & through Schwaigert v. Lee*, No. 21-CV-02552-SHL-ATC, 2021 WL 4057812, at *8 (W.D. Tenn. Sept. 3, 2021) (finding that a state's policy of allowing students to opt-out of mask requirements "makes Plaintiffs' schools not 'readily accessible' to Plaintiffs"); *Smith v. City of Oakland*, No. 19-CV-05398-JST, 2020 WL 2517857, at *9–10 (N.D. Cal. Apr. 2, 2020) (finding that a housing program that offered almost exclusively inaccessible housing was discriminatory in part because inaccessible units subjected people with disabilities to potential dangers). Defendants correctly note that COVID-19 poses risks to everyone. However, that risk is not the same as the risk posed to Plaintiffs due to their disabilities. Thus, attending school with these risks is not a "like experience" to children without these disabilities. *See G.S.*, 2021 WL 4057812, at *8. Removing GA-38's prohibition on mask requirements would allow school districts to adopt mask requirements where appropriate and "allow disabled children who are at an increased risk of severe illness or death from COVID-19 to participate in their school's programs, services, and activities 'with a like experience' to their nondisabled peers." *Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *37–38 (quoting *Argenyi*, 703 F.3d at 451).

Third, GA-38's ban on masks requirements prevents school districts from adopting "reasonable modifications" to disabled students to provide them with equal access to school programs, services, and activities, in violation of 28 C.F.R. § 35.130(b)(7). "A universal masking requirement instituted by a school is a reasonable modification that would enable disabled students

to have equal access to the necessary in-person school programs, services, and activities." *Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *38. Several Texas school districts have expressed a desire to adopt mask requirements to protect their students and are well of aware of the limitations Plaintiffs face without mask requirements. In addition, the need on a local level for the use of masks has been recognized by local health authorities and school officials who are weighing the specific needs of their local communities. Defendants suggest that allowing districts to adopt mask requirements would not be a reasonable modification because it would "'fundamentally' alter the policy choice set forth in GA-38," ECF No. 35 at 27, but the relevant inquiry as to reasonableness is whether the modification "would fundamentally alter the nature of the service, program, or activity" provided by the school districts. 28 C.F.R. § 35.130(b)(7). And "[a]llowing schools to make the reasonable modification of universal masking to protect disabled children also would not fundamentally alter the nature of the services that public schools provide." *Arc of Iowa*, 2021 U.S. Dist. LEXIS 172685, at *38.

Each of these exclusions or denials of benefits from GA-38's ban on mask requirements is tied directly to the threat Plaintiffs face from COVID-19 because of their greater risk of severe illness, long-lasting disability, and death from COVID-19—"in other words, due to their disabilities." *G.S.*, 2021 WL 4057812, at *8.

Accordingly, Plaintiffs have demonstrated that they have are substantially likely to succeed on the merits of their claims under Section 504 and the ADA.

b. Preemption

The Supremacy Clause of the U.S. Constitution renders federal law "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Supremacy Clause "invalidates state laws that 'interfere with, or are contrary to,' federal law." *Hillsborough Cnty. v. Automated Med. Laboratories, Inc.*,

471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 211 (1824)); *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."). State law is preempted when, among other things, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hillsborough Cnty.*, 471 U.S. at 713; *Pac. Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 204 (1983). The Court has well-established and longstanding equitable power to enjoin unlawful actions by state officials. *See Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378, 1384 (2015) ("[W]e have long held that federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law.").

For the reasons set forth above, Plaintiffs have shown a substantial likelihood that they will succeed in showing that GA-38 is preempted by Section 504 and the ADA. GA-38 conflicts with Section 504 and the ADA because it excludes students with disabilities from full participation in and denies the benefits of public-school district's programs, services, and activities. As a result, GA-38 "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" Section 504 and the ADA. *Hillsborough Cnty.*, 471 U.S. at 713.

In addition, Section 2001(i) of the ARPA provides local school districts in Texas—including Plaintiffs' school districts—over $11 billion dollars in Elementary and Secondary School Emergency Relief ("ESSER") funding so that those districts can adopt plans for a safe return to in-person instruction. *See* 39 Pub. L. No. 117-2, § 2001(i). Section 2001(e)(2)(Q) of the ARPA expressly gives local school districts the authority to use ESSER funds for "developing strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the Centers for Disease Control and Prevention for the

reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff." *Id.* § 2001(e)(2)(Q). The Centers for Disease Control's "Guidance for COVID-19 Prevention in K-12 Schools" currently recommends "universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status," noting that "protection against exposure remains essential in school settings."

The U.S. Department of Education has also adopted interim final requirements pursuant to the ARPA for each local school district to adopt a plan for safe return to in-person instruction that describes "the extent to which it has adopted policies, and a description of any such policies, on each of the following safety recommendations established by the CDC[,]" specifically including "universal and correct wearing of masks." Am. Rescue Plan Act Elementary and Secondary School Emergency Relief Fund, 86 Fed. Reg. 21195, 21200 (April 22, 2021). The interim final requirements make clear that districts are not required to adopt the CDC guidance, but the local agency must ensure that the interventions it implements will respond to the needs of all students "and particularly those students disproportionately impacted by the COVID-19 pandemic, including . . . children with disabilities." *Id*. Thus, the legislative purpose and intention of Congress under the ARPA is that local school districts—and not the State of Texas—have the authority to decide whether and to what extent they will use ESSER funding to adopt public health policies, including mask requirements. As a result, GA-38 also conflicts with and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" the ARPA. *Hillsborough Cnty.*, 471 U.S. at 713. Plaintiffs have therefore shown a substantial likelihood that they will succeed on the merits in showing that GA-38 is preempted by the ARPA.

c. Sovereign Immunity

A state waives its Eleventh Amendment immunity as to claims under Section 504 by accepting federal funds conditioned on such waiver. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 274 (5th Cir. 2005) (en banc). Defendants do not dispute that sovereign immunity has been waived as to Plaintiffs' Section 504 claim. ECF No. 35 at 23.

As for the ADA and ARPA claims, Plaintiffs rely on *Ex Parte Young*, 209 U.S. 123 (1908) to bypass Eleventh Amendment immunity by suing state officials in their official capacities to enjoin ongoing violations of federal law. *Air Evac EMS, Inc. v. Texas, Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 518 (5th Cir. 2017). The Ex Parte Young Doctrine can be invoked to enjoin state officials who are sufficiently connected to the enforcement of the challenged state law. *Id.* ("*Ex Parte Young* requires defendants have 'some connection' to the state law's enforcement and threaten to exercise that authority."). The analysis is fact-specific and can turn on "subtle distinctions" between different cases. *Id.* To satisfy the "some connection" requirement, a plaintiff must typically show that actions by a state official have resulted in "compulsion or constraint." *K.P. v. LeBlanc*, 627 F.3d 115, 124 (5th Cir. 2010). Courts require only a "scintilla" of enforcement to establish such a connection. *City of Austin v. Paxton*, 943 F.3d 993, 996, 1000–02 (5th Cir. 2019).

Defendants fall within the *Ex Parte Young* exception to sovereign immunity because they are actively enforcing GA-38's prohibition on school mask requirements. As of September 10, 2021, Attorney General Paxton's office has filed lawsuits against at least six school districts that have implemented mask requirements in violation of GA-38, and has sent letters specifically threatening similar legal action against at least ninety other school districts (at least nineteen of

which have subsequently abandoned their mask requirements).[1] More have been filed since. Here, the "connection" to enforcement is considerably stronger than in *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389 (5th Cir. 2015), in which the Fifth Circuit held that letters from the Attorney General threatening to bring enforcement actions under the Deceptive Trade Practices Act were sufficient evidence of enforcement to satisfy *Young*. *See id*. at 392–94. Governor Abbott's public statements show that he is collaborating with and supporting the Attorney General's enforcement campaign.[2] *Cf. Fagin v. Hughs*, 473 F. Supp. 3d 711, 717 (W.D. Tex. 2020) (finding that Governor Abbott was a proper defendant in suit challenging another COVID-related executive order). The Texas Education Agency and its Commissioner Mike Morath are also connected to the enforcement of GA-38 because TEA issued mandatory "Public Health Guidance" stating that "[p]er GA-38, school systems cannot require students or staff to wear a mask,"[3] and because the Commissioner has sweeping and expansive discretionary powers under the Texas Education Code to investigate and sanction noncompliant school districts.[4]

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[1] *See* Office of the Attorney General, COVID-19: List of Government Entities Unlawfully Imposing Mask Mandates, https://www.texasattorneygeneral.gov/covid-governmental-entity-compliance (last updated Sept. 10, 2021, 4:44 p.m.).

[2] *E.g.*, "***Governor Greg Abbott*** and Attorney General Ken Paxton announced the filing of a mandamus petition in the 5th Court of Appeals to strike down the actions by Dallas County Judge Clay Jenkins"; "Any school district, public university, or local government official that decides to defy the order ***will be taken to court***." Office of the Texas Governor – Greg Abbott, "Governor Abbott, Attorney General Paxton Aligned in Defense of Executive Order Prohibiting Mask Mandates" (Aug. 11, 2021), https://gov.texas.gov/news/post/governor-abbott-attorney-general-paxton-aligned-in-defense-of-executive-order-prohibiting-mask-mandates (emphasis added).

[3] *See* D21-2, Ex. 2 to Amended Complaint (Aug. 5, 2021). TEA's subsequent statement that it will not enforce GA-38 while legal challenges are pending (*see* https://tea.texas.gov/sites/default/files/covid/SY-20-21-Public-Health-Guidance.pdf) does not remove the threat of future enforcement if GA-38 survives those legal challenges.

[4] *See, e.g.*, Tex. Educ. Code Tex. Educ. Code §§ 39.003(a)(16),(d)(2) (providing that, *inter alia*, the Commissioner may initiate a special investigation and lower a district's accreditation status for any reason); *id*. §§ 39.057, 39.102, and 39A.001 *et seq*. (various provisions for investigations, interventions, and sanctions).

Plaintiffs have thus shown that they have a substantial likelihood of success on the merits in establishing the *Ex Parte Young* exception to sovereign immunity.

d. Standing

Plaintiffs must have standing for the Court to exercise its jurisdiction.[5] *Friends of the Earth, Inc. v. Laidlaw Entl. Servs.*, 528 U.S. 167, 185 (2000). To have standing, "a plaintiff must demonstrate injury in fact that is fairly traceable to the defendant's conduct and that would be redressed by a favorable judicial decision." *NiGen Biotech, L.L.C. v. Paxton*, 804 F.3d 389, 396 (5th Cir. 2015) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). But at the pleading stage, a "complaint need only allege facts from which it reasonably could be inferred that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* (cleaned up).

Plaintiffs have standing to challenge GA-38 because they allege an actual, concrete and particularized injury. As detailed above, several Plaintiffs have been or will be forced to choose between exposing themselves to a virus that poses serious risk to their health and safety and withdrawing from in-person learning, given the increased cases of COVID-19 in their communities and school districts' inability to adopt and/or abandonment of mask requirements due to the enforcement of GA-38. Plaintiffs' inability to attend school to attend school and receive in-person

[5] Defendants have raised several jurisdictional arguments, including additional arguments as to standing in their Motion to Dismiss, which the Court will address in due course. However, it is well settled that a district court may issue injunctive relief pending determination of its jurisdiction over the underlying dispute. See *Stewart v. Dunn*, 363 F.2d 591, 598 (5th Cir. 1966) (citing United States v. United States Mine Workers of America, 330 U.S. 258, 67 S. Ct. 677, 91 L. Ed. 884 (1947)).

instruction without serious risk to their health and safety is an actual injury sufficient to confer standing.

Moreover, Plaintiffs' injuries are directly traceable to Defendants' enforcement of GA-38, and enjoining Defendants' enforcement of GA-38 will redress Plaintiffs' alleged injuries. Prior to GA-38, school districts in Texas, including those attended by Plaintiffs, required masks on their campuses. In addition, many school districts which planned to—and still wish to—implement mask mandates have refrained from doing so as a result of GA-38 and Defendants' enforcement. For example, the Texas Attorney General's website currently identifies at least sixteen school districts that were "previously not in compliance" with GA-38's prohibition on mask requirements but are "[n]ow in compliance," after several of these districts received letters from the Attorney General's office threatening enforcement actions. Moreover, school officials have expressly stated they would impose mask requirements if GA-38 did not prohibit them from doing so. Thus, if GA-38 is not enforced, then those public school districts and others in Texas will have discretion to implement a mandatory mask policy on school grounds without violating the order, which Defendants assert is binding Texas law. Therefore, it is not "merely speculative" that enjoining enforcement will redress Plaintiffs' alleged injuries.

B. Irreparable Injury

The Court finds that Plaintiffs have made a clear showing of irreparable injury in two ways. *First*, Plaintiffs are likely to suffer irreparable injury if Governor Abbott's Executive Order GA-38 ("Executive Order GA-38") is enforced because school has already begun, cases of COVID-19 are increasing in Texas, including thousands of positive cases among Texas students and a record high number of pediatric COVID-19 hospitalizations, dozens of Texas school districts have closed due to COVID-19 outbreaks, and under Executive Order GA-38 schools are prohibited from

requiring face coverings and Defendants' actions to enforce Executive Order GA-38 have prevented school districts from adopting mask requirements despite a desire to do so. Without the ability for these school districts to implement a mask policy, Plaintiffs will be exposed to an increased risk of infection, hospitalization, or death because of COVID-19 or otherwise be forced to stay home and be denied the benefits of an in-person education. *See G.S. v. Lee*, No. 21-CV-02552-SHL-ATC, 2021 WL 4057812, at *8 (W.D. Tenn. Sept. 3, 2021). Second, Plaintiffs are particularly vulnerable to COVID-19 due to their medical conditions and because they remain ineligible to receive the vaccine due to being under the age of 12 years old. Plaintiffs' exposure to a life-threatening virus that may cause lifelong complications is an irreparable harm incapable of being adequately remedied at law with money damages. *See Parks v. Dunlop*, 517 F.2d 785, 787 (5th Cir. 1975); *Peregrino Guevara v. Witte*, Case No. 6:20-CV-01200, 2020 WL 6940814, at *8 (W.D. La. Nov. 17, 2020) (noting that "[i]t is difficult to dispute that an elevated risk of contracting COVID-19 poses a threat of irreparable harm"). Moreover, a temporary restraining order is necessary to prevent Plaintiffs from suffering the irreparable injuries described in this paragraph during the period between the entry of this order and the injunction trial set below.

In addition, courts presume that a violation of a civil rights statute is an irreparable harm. *See Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 827 (9th Cir. 2001) ("[W]here a defendant has violated a civil rights statute, we will presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation."); Gresham v. Windrush Partners, Ltd., 730 F.2d 1417, 1423 (11th Cir. 1984) ("[I]rreparable injury may be presumed from the fact of discrimination and violations of fair housing statutes."). As discussed above, enforcement of GA-38 is likely to violate the ADA and Section 504 of the Rehabilitation Act.

Thus, Plaintiffs have also shown an irreparable harm caused by Defendants' violation of federal civil rights laws.

C. Balancing the Weight of the Injuries and Public Interest

The Court finds that Plaintiffs have met their burden that there will be no substantial harm to Defendants and that a TRO is in the public interest. The TRO will not cause any harm to Defendants because complying with federal law is "no hardship" and is in the public interest. *Mitchell v. Pidcock*, 299 F.2d 281, 287 (5th Cir. 1962). It is also in the public's interest to inhibit the spread of COVID-19 and the devastation it is wreaking in Texas, both among school-aged children and their families, particularly for the safety of disabled children. It is in the public's best interest for its local government and school boards to have full authority to respond to the needs of its citizenry by considering county-wide infection and hospitalization rates, available resources, vaccination rates, public opinion, and the number of other factors that guide public policy during a pandemic.

Accordingly, in balancing the weight of the equities in this case and considering the public interest, the Court concludes these combined factors weigh in favor of granting a TRO "to preserve the status quo until the merits are determined."

IT IS THEREFORE ORDERED, to avoid irreparable harm, maintain the status quo, and precent further injury, damages, and loss to Plaintiffs, Plaintiffs' Emergency Motion for TRO is **GRANTED**, and Defendants, Defendants' officers, agents, servants, employees, and attorneys, and other persons who are in active concert or participation with Defendants are hereby temporarily restrained and enjoined from implementing, giving any effect to, issuing any guidance adopting, imposing any fines or withholding any funding in connection with, or bringing any legal

actions to enforce Paragraphs 3(b), 3(e), 3(g), and 4 of Executive Order GA-38 as to public schools or school districts, which provide in relevant part:

- that "no person may be required by any jurisdiction to wear or to mandate the wearing of a face covering," (ECF No. 21, Ex. A at ¶ 3(b)),
- that "[p]ublic schools may operate as provided by, and under the minimum standard health protocols found in, guidance issued by the Texas Education Agency," to the extent that it requires public schools to follow any TEA Guidance providing that school systems cannot require students or staff to wear a mask, (ECF No. 21, Ex. A at 3(e)),
- that Paragraph 3 of Executive Order GA-38 "supersedes any conflicting local order in response to the COVID-19 disaster, and all relevant laws are suspended to the extent necessary to preclude any such inconsistent local orders," (ECF No. 21, Ex. A at 3(g)),
- that "no governmental entity can mandate masks," (ECF No. 21, Ex. A at ¶ 4),
- that "[n]o governmental entity, including a county, city, school district, and public health authority, and no governmental official may require any person to wear a face covering or to mandate that another person wear a face covering," (ECF No. 21, Ex. A at ¶ 4(a)),
- that Paragraph 4 of Executive Order GA-38 "shall supersede any face-covering requirement imposed by any local governmental entity or official," (ECF No. 21, Ex. A at ¶ 4(b)),
- that "[t]o the extent necessary to ensure that local governmental entities or officials do not impose any such face-covering requirements," Governor "suspend[s]"

certain sections of the Texas Government Code, the Texas Health and Safety Code, the Texas Local Government Code, and "[a]ny other statute invoked by any local governmental entity or official in support of a face-covering requirement," (ECF No. 21, Ex. A at ¶ 4(b)), and

- that "face coverings cannot be mandated by any governmental entity," (ECF No. 21, Ex. A at ¶ 4(b)).

IT IS FURTHER ORDERED that the required bond or security to be posted by Plaintiffs under Rule 65(c) of the Federal Rules of Civil Procedure is waived.

IT IS FURTHER ORDERED that a trial is set in this case, including on Plaintiffs' request for a permanent injunction, on October 6, 2021 at 9:00 a.m.

IT IS FINALLY ORDERED that this Temporary Restraining Order will expire in 28 days after its entry. Good cause exists to extend the duration of this Temporary Restraining Order from 14 days to 28 days because of the expedited schedule and trial setting and the potential for further irreparable harm to Plaintiffs if this Temporary Restraining Order expired in 14 days.

SIGNED this September 15, 2021 at ___:___ __.m.

THE HONORABLE LEE YEAKEL
UNITED STATES DISTRICT JUDGE