21-51083

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

E.T., by and through her parents and next friends; J.R., by and through her parents and next friends; S.P., by and through her parents and next friends; M.P., by and through her parents and next friends; E.S., by and through her parents and next friends; H.M., by and through her parents and next friends; A.M., by and through her parents and next friends,

Plaintiffs-Appellees,

—v.—

KENNETH PAXTON, in his official capacity as Attorney General of Texas,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR *AMICUS CURIAE* COUNCIL OF PARENT ATTORNEYS AND ADVOCATES, INC. IN SUPPORT OF PLAINTIFFS-APPELLEES

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UNITED STATES COURT OF
APPEALS FIFTH CIRCUIT

E.T., et. al.
Plaintiffs-Appellants,
v.
KENNETH PAXTON,
In his official capacity as Attorney General of Texas
Defendant-Appellee.

Case No. 21-51083

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Amicus Curiae has no parent corporation, subsidiaries or affiliates that has issued shares to the public.

Amicus Curiae has no direct or indirect interest associated with the parties to this matter, or to their attorneys or counsel, though it and its members have a general interest in the issue and outcome of the case. Attorneys for Appellees and other putative *amicus* are independent members of COPAA, an organization which opens membership to attorneys who are interested in and/or represent parents and children with disabilities. COPAA has not contributed in any way to the Appellees or their pursuit of this matter.

Amicus Curiae adopts the statements of the Appellee and Appellant concerning the parties, trial judge(s), persons, firms, partnerships or corporations who have an interest in the outcome of the case.

Pursuant to 5th Cir. R. 26.1.1, as this brief is filed by *amicus* the following is list of all entities known to have an interest in the outcome of this appeal which has been "omitted from the certificate contained in the first brief filed and in any other brief that has been filed":

Amicus Curiae: Council of Parent Attorneys and Advocate, Inc., a non-profit organization.

Respectfully submitted, this the 14th day of January 2022.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The COUNCIL OF PARENT ATTORNEYS & ADVOCATES (COPAA) is a not-for-profit national organization for parents of children with disabilities, their attorneys and advocates. While COPAA does not represent children with disabilities directly, it does provide resources, training, and information for parents, advocates, and attorneys to assist in obtaining the free appropriate public education (FAPE) such children are entitled to under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq. COPAA's attorney members represent children in civil rights matters. COPAA also supports individuals with disabilities, their parents, and advocates in attempts to safeguard the civil rights guaranteed to those individuals under federal laws, including the Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (codified as amended at 42 U.S.C. §1983) (Section 1983), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Section 504) and the Americans with Disabilities Act, 42 U.S.C. § 12101, et seq. (ADA). [1]

[1] Pursuant to Rule 29(c)(5) of the Federal Rules of Appellate Procedure, *Amicus* states that: (A) there is no party, or counsel for a party in the pending appeal who authored the amicus brief in whole or in part; (B) there is no party or counsel for a party in the pending appeal who contributed money that was intended to fund preparing or submitting the brief; and (C) no person or entity contributed money that was intended to fund preparing or submitting the brief, other than *Amicus* and its members.

COPAA's interest in this case is its deep commitment to ensuring that all children with disabilities have equal access to attend their public schools and obtain an education alongside their non-disabled peers without being subjected to an increased threat of injury or illness from Covid-19 and its variants.

Because of COPAA's concern for the rights of students with disabilities and their parents and the experience of its members in advocating for their rights, COPAA offers a unique perspective. COPAA has extensive experience with the exhaustion requirement, including filing an *amicus curiae* brief in *Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). COPAA has also filed as *amicus curiae* in the United States Supreme Court in a number of matters related to IDEA, Section 504, and ADA and in numerous cases in the United States Courts of Appeal.

COPAA submits this *amicus curiae* brief to address two issues: whether administrative exhaustion under the IDEA is required for the gravamen of Plaintiffs' Complaint and whether the ADA and Section 504 require that school districts be permitted to mandate masking on a case-by-case basis as a reasonable accommodation for students with disabilities at serious risk of death or serious health consequences from Covid-19.

Both Appellants and Appellees have provided consent for the filing of this brief.

SUMMARY OF ARGUMENT

Plaintiffs are students who have disabling conditions that make them uniquely susceptible to the ravages of COVID. They seek redress for the Texas Governor's Executive Order GA-38 (GA-38) that prohibits schools from imposing any masking requirements on any school employee or student. This Order did not allow for any case-by-case exception being provided to enable students with disabilities who require mask-wearing mandates to safely attend school in-person. Because it exempted hospitals and jails from the bar on masking mandates, adults who receive similar services in hospitals or jails may be accommodated with masking mandates.

The district court (1) correctly held that exhaustion of administrative remedies was not required for Plaintiffs to be able to bring this suit regarding GA-38; and (2) correctly entered a permanent injunction barring enforcement of GA-38 insofar as that order categorically barred local school districts from requiring masking of any school employee or student as a reasonable accommodation for a student's disability.

In *Fry*, 137 S. Ct. at 754, the Supreme Court held that exhaustion of administrative remedies does not apply to claims for denial of an accommodation for a student that "might injure her in ways unrelated to a FAPE" and are therefore addressed by statutes other than the IDEA. More succinctly, exhaustion applies to claims that ultimately deal with a denial of a free appropriate public education or

"FAPE," and GA-38 has nothing to do with the appropriateness of educational programming.

Further, exhaustion of administrative remedies is not required where exhaustion is futile. This case involves a categorical determination by the Governor and enforcement by the Attorney General that public school districts must allow any school employee and any student to opt-out of masking in any class, school, or other setting, regardless of whether a masking requirement of any kind is a reasonable accommodation for students with disabilities under any circumstance. Moreover, whether enforcement of GA-38 permits case-by-case exceptions for any masking requirement that is required to protect students with disabilities and allow them to attend in-person schooling is a legal question for which exhaustion is unnecessary.

That mandatory masking for any or all school staff or students may be a necessary reasonable accommodation for students with disabilities during the Covid-19 pandemic is obvious. For Plaintiffs, masking mandates for all or some school students and staff are necessary reasonable accommodations for them to be able to access their public schools safely and prevent them from physical injury, hospitalization, and perhaps even death, conditions *obviously* unrelated to the IDEA. The Attorney General's enforcement of the complete bar on masking mandates in public schools, without any exception for reasonable accommodations for students with disabilities, was properly enjoined by the district court.

ARGUMENT

I. PLAINTIFFS' CLAIM THAT THE EXECUTIVE ORDER BARRING ANY MASKING MANDATES IN PUBLIC SCHOOLS VIOLATES ADA AND SECTION 504 IS AN EQUAL ACCESS CLAIM THAT DOES NOT REQUIRE EXHAUSTION OF ADMINISTRATIVE REMEDIES

Plaintiffs seek equal access to in-person education no different from their non-disabled peers. In their Complaint, they allege the Governor's Executive Order GA-38, which bars any "governmental agency," including school districts, from imposing any face mask requirement on any individual excludes them from participating in equal educational opportunities under Title II of the ADA and Section 504 by, *inter alia*, denying them reasonable modifications. 42 U.S.C. § 12132; 29 U.S.C. § 794; 28 C.F.R. § 35.130(b)(7). This case ***does not*** present a parental challenge to a particular Individualized Education Program (IEP) or even to a school policy. Rather, it is a parental challenge to a state-wide policy that applies generally to all governmental entities, with limited exceptions, and does not allow case-by-case exceptions so that an individual student's IEP or 504 plan may require mask wearing in classes, schools, or other settings or by specific school employees assigned to work with students with disabilities.

A. The Gravamen of Plaintiffs' Claim Is Unlawful Discrimination and Not FAPE

In *Fry,* the Supreme Court held that exhaustion of administrative remedies is not necessary "when the gravamen of the plaintiff's suit is something other than the

denial of the IDEA's core guarantee – what the Act calls a 'free appropriate public education.'" 137 S. Ct. at 748. The Court noted that ADA and 504 are "two antidiscrimination statutes," that require reasonable modifications for students with disabilities. *Id.* at 749. The Court observed that "[a] school's conduct toward such a child—say, some refusal to make an accommodation—might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA." *Id.* at 754. The Court emphasized that the plaintiff is the "master of the claim," identifying "its remedial basis," and "is subject to exhaustion based on that choice." *Id.* at 755.

The Court explained that "IDEA guarantees individually tailored educational services," while "Title II and § 504 promise non-discriminatory access to public institutions." *Id.* at 756. Plaintiffs' claims challenge GA-38's prohibition on masking mandates of any kind in public schools and other public entities with limited exceptions. This Order is not limited to public schools and has nothing to do with "individually tailored educational services." To the contrary, it allows no individual exceptions to its categorical bar on masking.

1. The Plaintiffs' Claims Make Clear They Are Seeking Access, not Educational Placement or Services

Plaintiffs' legal challenges regarding this order are for "access to public institutions": public schools. Their claim is that, without the ability of public schools to require masking of some or all staff or students, they are barred from attending public schools in-person or can only attend school with grave risk to their

health and lives. They claim that masking mandates are required to prevent some students with disabilities from physical injury, hospitalization, and perhaps even death, conditions *obviously* unrelated to the IDEA.

The Supreme Court was clear in *Fry* that exhaustion is required only for claims concerning the denial of a FAPE and not for disability-based discrimination. *Id.* The Court noted that, when determining the "gravamen" of the complaint, a plaintiff need *not* use the words "FAPE" or "IEP" on the face of the Complaint to allege a denial of FAPE. The Court emphasized that the *"substance,"* not "surface," of the Complaint matters, not labels:

> The use (or non-use) of particular labels and terms is not what matters. The inquiry, for example, does not ride on whether a complaint includes (or, alternatively, omits) the precise words(?) "FAPE" or "IEP." After all, §1415(*l*)'s premise is that the plaintiff is suing under a statute *other than* the IDEA, like the Rehabilitation Act; in such a suit, the plaintiff might see no need to use the IDEA's distinctive language—even if she is in essence contesting the adequacy of a special education program. And still more critically, a "magic words" approach would make §1415(*l*)'s exhaustion rule too easy to bypass.

Id. at 755.

The district court correctly held that Plaintiffs' claims do not involve special education services and instead involve access to schools under ADA and Section 504. *E.T. v. Morath*, 2021 U.S. Dist. LEXIS 220476 at 16-17 (W.D. Tex. Nov. 10, 2021). *Fry* explained that even where FAPE claims may "overlap" with non-FAPE

claims, the Court's task is to determine the *gravamen,* or "crux," of the case. *Fry*, 137 S. Ct. at 755.

Fry involved an individual request by parents of a student with a disability for permission for a service animal to join a student with a disability in the classroom. *Id.* at 746. The child's need for a service dog at a public school set forth an *access* case under Section 504 and the ADA. It was not dispositive that the district happened to propose a "human aide …as part of [the child's] individualized education program" to meet its obligations under IDEA. *Id.*

On remand from the Supreme Court, the District Court was tasked with determining the gravamen of Fry's complaint, and ultimately found that exhaustion was *not* required because the student was not seeking "an amendment to an IEP…, a declaration that the student was denied a FAPE under an existing IEP, [or] an award of additional educational services to be provided." *E.F. v. Napoleon Cmty. Sch.*, 371 F. Supp. 3d 387, 407 (E.D. Mich. 2019). Rather than being an element of her actual educational program, the service dog was a tool or accommodation that allowed the child *access to* her education, like a ramp allows access to a school.

Significantly, plaintiffs here challenge a rule imposed by the Governor and enforced by the Attorney General and not by any school official on public facilities in general. GA-38 deprives school districts of the ability to require masks for any or all students and staff, regardless of whether masks are needed as a reasonable

modification to provide access to the same programs and services that students without disabilities are able to access. The denial of access is because these Plaintiffs have disabilities that preclude their access to instruction based on a discriminatory policy.

The district court understood that school districts must have the flexibility to impose masking mandates to allow children like the Plaintiffs, who, due to their disabilities, cannot safely access their school settings without masking, to attend school with their non-disabled peers. It helps them avoid physical suffering or injury. It is akin to a request for a service dog, a ramp, or other modifications that allow children safe access to the school. In other words, at the core of Plaintiffs' Complaint, the students are not seeking FAPE, but access.

2. The *Fry* Questions Show The Plaintiffs' Complaint Was Not For Claims Requiring Exhaustion

The motions panel made the same error as the Sixth Circuit did in *Fry* when it asked whether the injuries were "educational" in nature. *Compare E.T. v. Paxton*, No. 21-51083, 2021 U.S. App. LEXIS 35508 at *9 (5th Cir. Dec. 1, 2021), *with Fry,* 137 S. Ct. at 758. Rather than considering Plaintiffs' claim as one requesting masking of staff or peers as a reasonable accommodation, the panel narrowly categorized Plaintiffs' claim, for the purpose of exhaustion, as "deprivation of an in-person state-sponsored education because of the risk of contracting Covid-19 without a mask mandate," *Id.* But the question under *Fry* is

whether the gravamen of the complaint was related to the provision of an appropriate education.

Although not dispositive, the two "clues" fashioned by Justice Kagan in *Fry* make clear that exhaustion does not apply to a challenge to GA-38, a general rule that applies to most public facilities. First, courts are advised to ask a location question: "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school?" Second, courts are advised to ask a question about the complainant: "could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" *Id*. at 756.

Because the bar on masking applies to other public facilities besides schools and also applies equally to adults as well as children, the answer to both questions is yes. A child could bring the same ADA or Section 504 claim regarding a different location, such as a government-operated after-school program. *See Sophie G. v. Wilson Cnty. Schs*, 742 F. App'x 73, 80 (6th Cir. 2018) (exhaustion did not apply to claim regarding access to subsidized childcare on equal terms, and not redress for the denial of a FAPE). And a schoolteacher, for example, could bring the same ADA or Section 504 access claim against the school if he requires masking at school to provide in-person teaching.

Fry's location inquiry about other public facilities is particularly relevant here because GA-38 exempted certain other public facilities from GA-38; these facilities

may require mask mandates *even though these other facilities* provide some of the same types of services to students that public schools do. Students with disabilities receive a wide array of related services that are similar to some services provided in hospital and jails. *See* 20 U.S.C. § 1401(26)(A) (related services are defined as including "physical and occupational therapy . . . , school nurse services . . . and medical services . . ."); *see also Cedar Rapids Cmty. Sch. Dist. v. Garret F. by Charlene F.*, 526 U.S. 66, 79 (1999) (school must provide one-on-one nursing services for a student who is ventilator-dependent); *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 895 (1984) (school district must provide clean intermittent catheterization for a student with spina bifida).

The question of whether a nurse providing ventilator care or a physical therapist providing physical therapy needs to be masked while providing services to an individual who is vulnerable to Covid-19 is the same whether the individual is in a hospital or school. However, GA-38's categorical bar on mask mandates of any kind in school-based settings prevents the same kind of service providers from taking the appropriate accommodation steps in schools that they would be permitted to take in hospital or jail settings.

The Supreme Court noted that the absence of a ramp, just like the absence of masking for some or all school staff and peers, "has educational consequences" because "if the child cannot get inside the school, he cannot receive instruction there;

and if he must be carried inside, he may not achieve the sense of independence conducive to academic (or later to real-world) success." 137 S. Ct. at 756. The same can be said of masking: if children cannot be educated in school like their peers, this exclusion "has educational consequences" but is not rooted in the appropriateness of the educational planning.

3. Challenges to Mask Mandates in Schools Are Not Subject to IDEA Exhaustion

Whether the ADA and Section 504 require giving a government agency the flexibility of being able to mandate masks as a reasonable accommodation for an individual with a disability is not an issue of FAPE. As discussed above, this is a case-by-case decision that schools and their IEP and 504 Plan teams should be able to evaluate and make reasonable determinations on when reasonable accommodations in the form of a mask mandate would be appropriate.[2] Most federal courts have acknowledged this, finding that exhaustion does not apply to claims that address restrictions on masking mandates.

[2] Significantly, the motions panel acknowledged that an injunction may have been appropriate if limited to allowing individualized accommodations by schools on a case-by-case basis. ROA.2457. This logic, however, does not address the fact that those determinations are not permitted by GA-38's blanket and exceptionless ban. Instead, "[p]laintiffs seek to allow their public-school districts the discretion to *impose* mask mandates and provide children with 'non-discriminatory access to public institutions' under the ADA and Section 504." *Id*., quoting *Fry*, 137 S. Ct. at 756.

The first federal district court to address the issue of whether claims regarding universal facial coverings in public schools requires exhaustion, the Southern District of Iowa, found that exhaustion was not required. *Arc of Iowa v. Reynolds*, No. 4:21-cv-00264, 2021 U.S. Dist. LEXIS 172685, at *27 (S.D. Iowa Sept. 13, 2021). That court found that the plaintiffs could bring their claims seeking to require a universal facial covering mandate at another public facility such as a library, and that an adult such as a teacher or other school staff member could bring the same claims. *Id.*

Since then, in addition to the instant case, all three federal district courts in Tennessee held that exhaustion was inapplicable to access cases regarding masking mandates. A district court in the Eastern District of Tennessee said, "The crux of Plaintiffs' allegations is safe access to public, brick-and-mortar government buildings, and not the denial of a FAPE." *Id.* at *18. *S.B. v. Lee*, No. 3:21-CV-00317-JRG-DCP, 2021 U.S. Dist. LEXIS 182674 (E.D. Tenn. Sept. 24, 2021). The court noted, "A medically compromised teacher, custodian, parent, grandparent, or visitor could bring an identical grievance in this case, whether based on safe and equal access to Knox County Schools or to another public, government building like a library or post office." *Id.* at *19. The court found that the plaintiffs' claim was a failure-to-accommodate claim under the ADA so that the students "can safely access their school buildings." *Id.* at *20.

Similarly, a federal district court in the Western District of Tennessee found that the gravamen of the Plaintiffs' claim was "not to seek a FAPE, but rather to seek 'non-discriminatory access to their public schools by way of a reasonable accommodation." *G.S. v. Lee*, No. 21-cv-2552-SHL-atc, 2021 U.S. Dist. LEXIS 182934, at *35 (W.D. Tenn. Sept. 17, 2021). More recently, a federal district court in the Middle District of Tennessee, held that exhaustion did not apply as the parents were "not suing for individualized, specific claims under IEPs." *R.K. v. Lee,* 1-cv-00853, 2021 U.S. Dist. LEXIS 236817, at *69 (M.D. Tenn. Dec. 10, 2021).[3]

Significantly, GA-38 makes no mention of the fact that there are a number of children who are at high risk of contracting a serious illness or even death due to Covid-19 and makes no allowance for a school district to have the flexibility to require masking in any classroom, school, or other setting or by any school employee, at any time, including requiring school nurses to wear masks when providing medical care to students at high risk of death from Covid-19 at times when there is high community transmission of Covid-19 if required as a reasonable accommodation for a student with a disability. GA-38 does not provide for the

[3] Only one court has reached a different conclusion, and the federal district court held that the plaintiffs had raised FAPE claims relating to their IEPs. *See Hayes v. Desantis*, No. 1:21-cv-22863-KMM, 2021 U.S. Dist. LEXIS 178707, at *26-27 (S.D. Fla. Sept. 15, 2021).

situation presented by this case, in which students whose disabilities require masking mandates for them to participate in in-person classes.

Courts have held that categorical rules that arise out of policymakers' decisions rather than decisions regarding individual cases raise legal issues that do not require exhaustion. *See Hernandez v. Graham*, No. 20-0942-JB-GBW, 2020 U.S. Dist. LEXIS 191301, at *209 (D. N.M. Oct. 14, 2020) (IEP misinterpreting state health regulations as barring in-person instruction); *L.L. v. Tenn. Dep't of Educ.*, No. 3:18-cv-00754, 2019 U.S. Dist. LEXIS 25194, at *20 (M.D. Tenn. Feb. 15, 2019) (holding a pre-school student's claim did not require exhaustion because allegations of "categorical refusal to offer mainstreaming to preschoolers target a broad policy with fundamentally structural roots, arising out of policymakers' decisions rather than mishandling of individual cases."); *K.S. v. R.I. Bd. of Educ.*, 44 F. Supp. 3d 193, 197 (D.R.I. 2014) (availability of public education for students age 21-22 is a legal question and exhaustion is not required).

Exhaustion is not required because the gravamen of Plaintiffs' claims is discrimination under ADA and Section 504, not individually tailored special education under IDEA. Further, this case involves a categorical rule without any exception provided for students with disabilities who require masking to permit them to attend in-person school, exhaustion is futile, and the district court's decision dismissing the case should be reversed.

B. Exhaustion Does Not Apply to Students Who Are Not Eligible Under IDEA Or to Claims that Cannot Be Remedied By IDEA

Another error in the panel's analysis is that it failed to account for the fact that many students are not even subject to IDEA exhaustion requirements by virtue of the fact that they are not eligible under that statute. The Supreme Court's most recent decisions have found that administrative exhaustion is a claims-processing issue[4] and not jurisdictional. *See Fort Bend Cnty. v. Davis*, 139 S. Ct. 1843, 1846 (2019) (holding that under Title VII, administrative exhaustion is merely a "claims processing rule"). As a result, exhaustion of administrative remedies is an affirmative defense, and the Defendants bear the burden of proof in establishing that exhaustion applies. *See Mosely v. Bd. of Educ. of City of Chi.,* 434 F.3d 527, 533 (7th Cir. 2006) ("A failure to exhaust is normally considered to be an affirmative defense . . . and we so see no reason to treat it differently here [under the IDEA]"). For the exhaustion requirement to apply, (1) the student must be eligible for IDEA relief and (2) the relief sought must be available under IDEA. Here, there are at least two plaintiffs who do not appear to be eligible under IDEA, and the relief sought – relief from the Governor's Executive Order – is not available under IDEA.

[4] The Supreme Court has explained that claims processing rules "seek to promote the orderly progress of litigation by requiring the parties take certain procedural steps at certain specified times." *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011).

1. Exhaustion Does Not Apply to Students who Do Not Meet IDEA's Definition of Child with a Disability

The exhaustion provision applies only if relief "is also available" under IDEA, but IDEA limits its relief to those students who meet the definition of a "Child With A Disability," under IDEA. 20 U.S.C. §§ 1401(3) and 1415(*l*). That definition requires not only that a student have one of the specifically enumerated disabilities under 20 U.S.C. § 1401(3)(A)(i), but also that student, "by reason thereof needs special education and related service." 20 U.S.C. §1401(3)(A)(ii). In contrast, ADA and Section 504 apply to a student who "has a physical or mental impairment that substantially limits one or more major life activities . . ." 42 U.S.C. § 12102(1)(A). *See Mann v. La. High Sch. Ath. Ass'n*, 535 F. App'x 405, 411 (5th Cir. 2013) ("the scope of the statutes [IDEA and 504/ADA] and their respective definitions of 'disability' are different"). While students who are eligible for IDEA services are usually protected by ADA and Section 504, there are many students with disabilities in Texas, who despite being immunocompromised, are "504-only," because they do not require special education, and, therefore, they are not eligible for IDEA services and instead are protected only by ADA and Section 504.[5]

[5] *See* Perry A. Zirkel & Gina L. Gullo, *State Rates of 504-Only in K-12 Public Schools: The Next Update,* 385 Educ. L. Rep. 14, 18 (2021) (finding that in 2017-18, 6% of Texas K-12 students were 504-only, giving Texas the second highest percentage of 504-only students in the nation).

The record reflects that one plaintiff, E.S., has one disability: moderate to severe asthma, and she does not have an IEP or require any special education. ROA. 2368.[6] Typically asthma is not a disabling condition that triggers the need for specialized academic instruction—a prerequisite for IDEA eligibility. 20 U.S.C. § 1401(3)(A)(i-ii). And students who are not eligible for special education services under IDEA can have no claim that their rights under IDEA – the right to a FAPE under IDEA – have been denied.

Instead, the Asthma and Allergy Foundation of America recommends 504 plans for students with asthma.[7] 504 plans for students with asthma typically include administering medication, space and time for use of inhalers and nebulizers, and providing emergency medical treatment when an asthma attack occurs at school.[8] None of those services are special education, which is defined as "specially designed instruction . . . to meet the unique needs of a child with a disability." 20 U.S.C. § 1401(29). The Centers for Disease Control and Prevention (CDC) states: "Similar to adults, children with obesity, diabetes, *asthma* or chronic lung disease,

[6] *Amicus* has observed that, for students with disabilities who only need health services, schools sometimes provide a health plan alone rather than a 504 plan.
[7] https://www.aafa.org/school-section-504-plan-for-asthma-allergies.aspx.
[8] *Id*.

sickle cell disease, or immunosuppression can also be at increased risk for severe illness from COVID-19."[9]

For example, in *McIntyre v. Eugene Sch. Dist. 4J*, 976 F.3d 902, 915-16 (9th Cir. 2020), the Ninth Circuit held that a student who had a 504 plan and not an IEP did not seek special education but sought instead specific accommodations, including compliance with emergency health protocols, and the claim therefore was not subject to IDEA's exhaustion requirement. The court said that because the plaintiff "seeks relief for specific accommodations that are neither 'special education' nor a 'related service' – the constituent parts of the IDEA's FAPE requirement—she does not seek relief for the denial of FAPE." *Id.* at 915 Clearly, because at least some plaintiffs do not appear to be eligible for special education under IDEA, IDEA exhaustion does not apply.[10] There is no requirement of exhaustion of administrative remedies for Section 504 claims.[11] *See* 29 U.S.C. § 794; 34 C.F.R. § 104.36.

2. Injunctive Relief against the Attorney General Is Not Relief Available Under IDEA And Therefore Exhaustion Does Not Apply

[9]Centers For Disease Control and Prevention, *People with Certain Medical Conditions* (Updated Dec. 14, 2021), https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html, (last visited January 10, 2022) (emphasis added).

[10] That IDEA exhaustion to resolve these 504 claims is not necessary for non-IDEA eligible students also suggests that the gravamen of the complaint *even for students eligible for IDEA* is **not** a FAPE claim requiring exhaustion.

[11] The regulations require school districts to provide an optional hearing process for those who elect to pursue administrative remedies. *See* 34 C.F.R. § 104.36.

The Plaintiffs sought an injunction enjoining the Attorney General from enforcing a Governor's Executive Order. This is relief outside the jurisdiction of a special education hearing officer. This is particularly true in Texas, where the state's due-process complaint form requires "a statement that a public education agency has violated Part B of the IDEA" or a "state special education statute or administrative rule." 19 Tex. Admin. Code § 89.1195(b)(3). Texas hearing officers routinely dismiss ADA and 504 claims (as well as other non-IDEA claims) for "lack of jurisdiction*." See, e.g.,* No. 017-SE-0920 at 2 n. 2 (June 23, 2021)[12]; No. 365-SE-0719 at 1-2 (Nov. 15, 2019)[13]; No. 144-SE-0119 at 3 (June 21, 2019)[14]; No. 228-SE-0518 at 36 (Feb. 8, 2019).[15] Under the plain language of the statute, IDEA's exhaustion provision only applies to claims seeking "relief that is also available" under IDEA. 20 U.S.C. § 1415(*l*), and the issues and relief sought in this case would not be appropriately before an IDEA Hearing Officer. As such, exhaustion requirements do not apply to Plaintiffs' claims.

II. THE CATEGORICAL ELIMINATION OF MASK MANDATES OF ANY KIND AS A REASONABLE ACCOMMODATION FOR STUDENTS WITH DISABILITIES IN THE PUBLIC SCHOOLS VIOLATES THE ADA AND SECTION 504

[12] https://tea.texas.gov/sites/default/files/017-SE-0920-childressisd.pdf.
[13] https://tea.texas.gov/sites/default/files/365-SE-0719_Katy%20ISD.pdf.
[14] https://tea.texas.gov/sites/default/files/144-SE-0119_Conroe%20ISD.pdf.
[15] https://tea.texas.gov/sites/default/files/228-SE-0518_Houston%20ISD.pdf.

It is undisputed both (1) that all the Plaintiffs, as students with either IEPs or Section 504 plans, are qualified individuals with disabilities protected from unlawful discrimination based on disability by the ADA and Section 504 and (2) that GA-38 categorically bars schools from requiring any masking mandate in their classrooms, schools, and other settings or by any school employee, including school nurses, even if it is determined that masking is a reasonable accommodation for a particular student with a disability. That categorical bar violates ADA and Section 504.

A. Categorically, Mask Mandates Can Be A Reasonable Accommodation Under ADA and Section 504 That Should Be Available for Consideration by 504 and IEP Teams

Unlawful discrimination includes the failure to make reasonable accommodations. *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 380 (5th Cir. 2016). That mask wearing during the Covid-19 pandemic may be a reasonable accommodation for students with disabilities who face serious illness or death if infected by Covid-19 is obvious. As of the November 5, 2021 update, the CDC advised that "[d]ue to the circulating and highly contagious Delta variant, CDC recommends universal indoor masking by all students (age 2 and older), staff, teachers, and visitors to K-12 schools, regardless of vaccination status."[16]

[16] Centers for Disease Control and Prevention, *Guidance for COVID-19 Prevention in K-12 Schools* (Updated Jan. 6, 2022), https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html (last visited Jan. 10, 2022).

The Supreme Court has held that determining the reasonableness of an accommodation request requires that "an individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). The Court therefore found that the PGA Tour's "refusal to consider Martin's personal circumstances in deciding whether to accommodate his disability runs counter to the clear language and purpose of the ADA." *Id.* While this Court has held that a school "is not duty bound to acquiesce in and implement every accommodation that a disabled study demands," this Court noted that the school in that case had seriously considered the accommodations requested by the student and provided reasonable accommodations, although not the ones preferred by the student. *See Campbell*, 842 F.3d at 381-82.

GA-38 removes an obvious critical tool in preventing the transmission of Covid-19 to highly vulnerable students with disabilities from a school district's toolkit for reasonable accommodations for Texan students with disabilities. Without providing for case-by-case determination of a particular student's need for masking of any school staff or student under any circumstances, the Governor's Order has barred public school campuses from even being able to consider for students with disabilities a whole class of reasonable accommodations under Section 504 and the ADA. Because GA-38 makes it impossible for a school district

to consider a student's "personal circumstances in deciding whether to accommodate his disability," it therefore "runs counter to the clear language and purpose of the ADA." *See PGA Tour, Inc.*, 532 U.S. at 688.

B. After a Full Bench Trial, the District Court Correctly Determined that Mask Mandates Must Be Available as Part of the Toolkit of Recommendations for Students with Disabilities.

The district court found, after a trial on the merits, "GA-38 forbids and Paxton's enforcement of GA-38 forcefully prohibits school districts from adopting a mask mandate of any kind, even if a school district determines after an individualized assessment that mask wearing is necessary to allow disabled students equal access to the benefits that in-person learning provides to other students." 2021 U.S. Dist. LEXIS 220476, at *34. The court specifically found that "GA-38 not only prohibits school districts from implementing universal masking in schools in accordance with CDC guidelines but also from imposing limited masking requirements, such as in one wing of a school building or in one classroom, or by requiring an individual aide to wear a mask while working one-on-one with a student who is at heightened risk of serious illness or death from COVID-19." *Id.* at 35.

At the trial, there was no finding of fact that any school official had determined that the accommodation sought – masking – was not reasonable or that any of the plaintiff students' needs could be met by an alternative accommodation.

Because there was no evidence in the record that alternative accommodations were reasonable for each of the individual plaintiffs and that any masking requirement was unnecessary, the motions panel erred in relying on "the availability of vaccines, voluntary masking, and other possible accommodations" for the proposition that the record "likely does not support a conclusion that a mask mandate would be both *necessary* and *obvious* under the ADA or the Rehabilitation Act." ROA 2454. There is ample evidence that the motion panel's suggestion would not eliminate the possibility that some students may require masking by one or more school staff or students as a reasonable accommodation for their disabilities.

First, the CDC has emphasized the importance of "layered prevention strategies," *i.e.*, "using multiple prevention strategies together."[17] Thus, any one strategy alone may be insufficient to protect vulnerable students.

Second, vaccinations do not eliminate the possibility of breakthrough infections, and breakthrough infections have been a serious concern with the Delta and Omicron variants.[18] And many individuals who are at great risk of Covid-19

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[17] *Id*.

[18] *See* Azizul Haque & Anudeep B. Pant, *Mitigating Covid-19 in the Face of Emerging Virus Variants, Breakthrough Infections and Vaccine Hesitancy*, Journal of Autoimmunity, 127 (2022), https://www.sciencedirect.com/science/article/pii/S0896841121002006 (last visited Jan. 10, 2022); *see also* Carlos del Rio et al., *Winter of Omicron—The Evolving COVID-19 Pandemic*, JAMA (Dec. 22, 2021),

do not get the same full protection from vaccinations that is provided to individuals without disabilities.[19]

Third, data also shows that in the past few weeks, children are at a higher risk of hospitalization due to Covid-19 infections than ever before during the pandemic. According to reports, "[m]ore than 4,000 children were hospitalized with covid-19 across the nation Wednesday [January 5, 2022], Washington Post figures show, marking a new high that towers above previous peaks set during the summer when the delta variant was driving up infections….Less than two weeks ago, on Christmas, fewer than 2,000 children were in hospitals with Covid."[20]

Fourth, voluntary masking obviously does not eliminate the risk of infection from individuals who refuse to mask. That so many health care workers who

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https://jamanetwork.com/journals/jama/fullarticle/2787609 (last visited Jan. 10, 2022).

[19] "We believe that immune dysregulation and increased cytokine production in DS [Down Syndrome] patients make them vulnerable to infections like RSV and COVID-19 as mortality is mainly related to cytokine release syndrome [3]. Moreover, we are concerned about insufficient immunity after disease recovery, and, thus, a higher risk of reinfection. As DS patients risk inadequate immunity after vaccination, they would still be in the high-risk category despite vaccination." Harald De Cauwer & Ann Spaepen, *Are Patients with Down Syndrome Vulnerable to Life-Threatening COVID-19?*, Acta Neurologica Belgica (2021), https://link.springer.com/content/pdf/10.1007/s13760-020-01373-8.pdf.

[20] Andrew Jeong, *Record 4,000 Children Hospitalized Amid Omicron Surge,* Wash. Post (Jan. 5, 2022), https://www.washingtonpost.com/nation/2022/01/06/covid-omicron-variant-live-updates/.

routinely wear masks and other PPE have been infected by Covid-19 demonstrates that masking by the vulnerable individual is not sufficient protection.

Fifth, there are many circumstances when social distancing is not possible, such as in schools that lack the classroom space to provide social distancing. Moreover, social distancing from school staff is often impossible when students receive medical and therapy services as well as individualized assistance from aides. It is obvious that social distancing is impossible for students who require clear intermittent catheterization, *Tatro*, 468 U.S. at 895, or ventilator care, *Garret*, 526 U.S. at 79, or the use of an epi-pen for an allergic reaction or emergency asthma medication that the Plaintiffs with asthma may require.

Sixth, the scientific evidence has not established that plexiglass shields by themselves provide adequate protection.[21]

[21] Research has largely focused on brief encounters and "infection risk from a single cough or sneeze from a single source," and those studies "are less applicable in settings where people share the space over a prolonged period (e.g., offices or classrooms), or when there is a greater likelihood of having more than one source in the room, as during periods of high community transmission." Further, "[o]nly one guidance document recommended the use of barriers in classrooms specifically, but offered few details. Other guidance documents mentioned the use of partitions in school environments, but not in classrooms." Angela Eykelbosh, National Collaborating Centre for Environmental Health, *A Rapid Review of the Use of Physical Barriers in Non-clinical Settings and Covid-19 Transmission* (Nov. 2021) at 7, 8, https://www.ccnse.ca/sites/default/files/FINAL%20Partitions%20doc%20-%20Nov%2017%202021%20v2.pdf.

GA-38's categorical bar on masking violates the ADA's requirement that an individualized assessment be made regarding reasonable accommodations for individuals with disabilities. The Supreme Court has recognized the importance of education and "the lasting impact of its deprivation on the life of the child." *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

Congress, in enacting ADA, specifically found that "society has tended to isolate and segregate individuals with disabilities," and that "such forms of discrimination continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). It found that discrimination in education persisted. 42 U.S.C. § 12101(a)(3). ADA's purpose is to eliminate discrimination against individuals with disabilities. 42 U.S.C. § 14101(b)(1). Shunting students with disabilities to virtual education and denying them in-person education with their peers and teachers is exactly the type of discrimination that ADA was designed to address. The district court correctly granted Plaintiffs a permanent injunction against GA-38, which denies school officials the flexibility to provide reasonable accommodations to students with disabilities who are vulnerable to serious health consequence and even death from COVID-19.

CONCLUSION

For all these reasons, IDEA exhaustion is not required, and GA-38's categorical elimination of any masking requirement from the toolkit of available

reasonable modifications to enable students with disabilities to access in-person education safely violates ADA and Section 504. This Court should affirm the decision of the district court.

Dated: January 14, 2022

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 32(a)(7)(C) AND CIRCUIT COURT RULE 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C), the attached amicus brief is proportionately spaced, has a typeface of 14 points and contains 6,493 words.

Dated: January 14, 2022

/s/Ellen Marjorie Saideman
Ellen Marjorie Saideman

CERTIFICATE OF CONFERENCE

In accordance with 5th Cir. R. 27.4, the undersigned certifies that on January 6, 2022, consent to file an amicus curiae brief was sought from parties' counsel. Both parties provided consent.

/s/Ellen Marjorie Saideman
Ellen Marjorie Saideman

CERTIFICATE OF SERVICE

I certify that on the foregoing document was served on January 14, 2022 on all parties or their counsel of record through the CM/ECF if they are registered users

/s/Ellen Marjorie Saideman
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