UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

L.E., by and through their parent and next friend, SARA CAVORLEY et al.,

Plaintiffs,

v.

CHRIS RAGSDALE, in his official capacity as Superintendent of Cobb County School District

Plaintiffs are children with disabilities and enrolled students in the Cobb County School District ("District"). Because of their disabilities, Plaintiffs are more susceptible to COVID-19 and its worst complications, including severe illness and death. The multilayered COVID-19 spread mitigation strategy the District has adopted for schools presents an immediate threat to Plaintiffs and prevents them from attending school in-person.

Federal law requires that Defendants adopt and modify policies and practices to allow Plaintiffs to safely access an equal in-person education alongside their peers. However, Defendants refuse to implement basic protections and

(McLaughlin Decl. ¶ 12; Dr. Crater Decl. ¶ 9). Georgia has reported over 104,486 cases among children between the ages of ten and fourteen, with 9,000 of those cases occurring between September 17 and September 27, 2021. (Crater Decl. ¶ 23). The case rate among K-12 aged children in Cobb County is more than twice as high as the U.S. Department of Health and Services' "dark red" zone classification, and 1050% higher than the fourteen-day case rate around the same time last year. (Schmidtke Decl. ¶ 10).

Pediatric hospitalizations have also recently risen significantly. (Crater Decl. ¶ 11). Of children who have been hospitalized with COVID-19 since March 2020, one in four has required intensive care. (Crater Decl. ¶ 13). Children with severe COVID-19 are at risk of developing respiratory failure, myocarditis, shock, acute renal failure co3.7(a)1 Tw 6.51 Tw3.7cm4.1(q)wn12.1(k, 0il)8.5(dr)3.7(e)12.1(n w)8(h)8

muscles. (Baird Decl. ¶¶ 1, 2). His condition causes impaired pulmonary function, which can result in acute respiratory failure, and its degenerative nature also weakens his respiratory system. (Baird Decl. ¶¶ 4, 5). His treatment consists of steroids, which suppress and weaken his immune system. (Baird Decl. ¶ 5).

Plaintiff A.Z. is a seven-year-old child with chronic bronchitis, persistent asthma, recurrent pneumonias, and airway clearance impairment. Recently, she was diagnosed with bronchiectasis of the right middle lobe. (Zeigler Decl. ¶¶ 2-3). A.Z. experiences recurrent episodes of respiratory illnesses that require additional

Georgia

schools and adopt a position statement endorsing CDC and AAP guidance, including universal masking.[3]

Public health experts recommend a multilayered approach to COVID-19 prevention, particularly in K-12 schools. (Schmidtke Decl. ¶ 7; Huffman Decl. ¶ 15). This approach includes vaccinations for eligible students, teachers, and staff, universal indoor mask use, some outdoor mask use, physical distancing, improved ventilation in school facilities, contact tracing procedures, symptom screening, surveillance testing, and quarantine for at least seven days for exposed students and staff. (Schmidtke Decl. ¶ 7; Huffman Decl. ¶ 15; McLaughlin Decl. ¶ 26). "There is overwhelming scientific evidence that masks work to decrease transmission of COVID-19." (Crater Decl. ¶ 51). Universal masking in schools is significantly more effective at reducing spread than partial masking. (Crater Decl. ¶¶ 54-55; Huffman Decl. ¶¶ 14-16).

The District's Willful and Deliberate Refusal to Act

The District knows the research-based, expert-endorsed guidance for mitigating COVID-19;

distancing, and mandatory, daily cleaning practices, without undue burden or interference with its day-to-day operations.[4]

2021, and several schools have had to quarantine entire grades. (Carter Decl. ¶ 20). There have been at least 136 COVID-19 outbreaks between Cobb and Douglas County Schools since the beginning of this school year. (Carter Decl. ¶ 23).

Still, the District refuses to act, despite receiving more than $160 million in federal funds under the American Rescue Plan for the purpose of protecting students and o(p)8.2(o)8.3(seg 026 -2[i478Cour)3.7 s Amades.

inadequate, unequal education or no education at all. (Cavorley Decl. ¶¶ 10-11, 13, 17; Baird Decl. ¶

for a preliminary injunction and a temporary restraining order ("TRO") is the same. Ingram v. Ault, 50 F.3d 898, 900 (11th Cir. 1995).

ARGUMENT

A. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THE M

participation in programs or activities provided by a public entity." 42 U.S.C. §12131(2).

All Plaintiffs have physical or mental impairments that substantially limit one or more major life activities and increase their risk of serious illness or death if they contract COVID-19. The District has independently found Plaintiffs to be qualified individuals with disabilities by finding each of them eligible for an IEP or Section 504 Plan in school. Additionally, all Plaintiffs are eligible and entitled to receive a free, public education as school-aged children living in Cobb County, Georgia. See Ga. Const. art. III, § I, para. I; see also Goss v. Lopez, 419 U.S. 565 (1975).

2. Plaintiffs have been excluded from participation in, denied the benefits of, or otherwise subjected to discrimination by a public entity

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enities to avoid; [illegible]

denying them the benefits of an in-person public education and other school activities, in violation of 42 U.S.C. § 12132; 28 C.F.R. § 35.130(a), (b)(1)(i), (a), (b)(1)(i), (b) failing to reasonably modify the District's programs to avoid discrimination on the basis of disability, in violation of 28 C.F.R. § 35.130(b)(7), (c) failing to educate Plaintiffs in the most integrated setting appropriate to their needs, in violation of 28 C.F.R. § 35.130(d) and 34 C.F.R. § 104.34(a), and (d) administering policies with the effect of subjecting Plaintiffs to discrimination on the basis of disability, in violation of 28 C.F.R. § 35.130(b)(3) and 34 C.F.R. § 104.4(b)(4).

First, Defendants exclude Plaintiffs from participation in and deny them the benefits of the District's education in-person – conduct which is plainly prohibited. See 42 U.S.C. §12132. Exclusion or denial of benefits to an otherwise qualified person with a disability need not be deliberate, direct, or express to constitute prohibited discrimination under the ADA and Section 504. Belton v. Georgia, No. 1:10-CV-0583-RWS, 2012 WL 1080304, at *9 (N.D. Ga., Mar. 30, 2012) ("the Act's implementing regulations make clear that [ ] exclusion or denial of benefits need not be express or direct to run afoul of the ADA"); Concerned Parents to Save Dreher Park Center v. City of West Palm Beach, 954 F. Supp. 986 (S.D. Fla. 1995) (finding that plaintiffs who could not participate in city recreational programs due to

their disabilities and the nature of the offered activities were "excluded" in violation of the ADA, even without evidence of deliberate exclusion). And a qualified individual need not be entirely excluded or denied of a benefit to establish discrimination under the ADA. Shotz v. Cates, 256 F.3d 1077, 1081 (11th Cir. 2001) ("[A] violation of Title II . . . does not occur only when a disabled person is completely prevented from enjoying a service.607 -M670.92 0 Td (nm -0 0 1Bt[9F0 11

where the state offered mental health counseling but failed to offer equal benefit to deaf and hard of hearing plaintiffs for American Sign Language proficient counselors); Concerned Parents, 954 F. Supp. at 991 (holding that one size fits all recreational programs denied the benefits of recreation to individuals with disabilities who could not access the programs due to their limitations).

Plaintiffs have medical conditions due to their disabilities and are at increased risk of severe illness or death from COVID-19. Because Defendants have created an unreasonably dangerous learning environment, Plaintiffs must stay home and Defendants deny them an equal opportunity to participate in an in-person education and its benefits.

Second, Defendants discriminate against Plaintiffs by failing to reasonably modify the District's policies and practices to ensure Plaintiffs can access an in-person education. The ADA requires public entities to make "reasonable modifications in policies, practices, or procedures when modification is necessary to avoid discrimination on the basis of disability[.]" 34 C.F.R. § 35.130(b)(7). And the District's failure to comply with this obligation is a form of discrimination under both the ADA and Section 504. See Alboniga v. Sch. Bd. of Broward Cnty. Fla., 87 F. Supp. 3d 1319, 1337 (S.D. Fla. 2015) (citing Wisconsin Cmty. Servs. Inc. V. City of Milwaukee, 465 F.3d 737, 751 (7th Cir. 2006) (citations omitted)); Nadler v.

Harvey, No. 06-12692, 2007 WL 2404705, at *5 (11th Cir. Aug. 24, 2007); McGary v. City of Portland, 386 F.3d 1259, 1266 (9th Cir. 2004) (holding that failure to make reasonable accommodations is sufficient to state an ADA claim).

A modification, or accommodation, is necessary if a qualified individual with a disability is, because of their disability, unable to meaningfully access a benefit to which they are entitled, and the proposed modification will allow such meaningful access. Alexander v. Choate, 469 U.S. 287 (1985). It is reasonable if it seems reasonable "in the run of cases" and would not fundamentally alter the nature of the service or activity. Shaw v. Habitat for Humanity of Citrus Cnty., Inc., 938 F.3d 1259, 1265 (11th Cir. 2019); Bircoll, 480 F.3d at 1082; see also Nat'l Fed'n of the Blind v. Lamone, 813 F.3d 494, 507 (4th Cir. 2016)

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cv-01560-TWT (ECF No. 5), 2021 WL 2024687 (N.D. Ga. May 12, 2021). The District's refusal to reasonably accommodate Plaintiffs is actionable discrimination.

Third, Defendants discriminate against Plaintiffs by failing to educate them in the most integrated environment appropriate to their needs in violation of 28 C.F.R. § 35.130(d). The unnecessary segregation of persons with disabilities constitutes *per se* discrimination on the basis of disability and gives rise to liability under the ADA and Section 504. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597-98 (1999); *Georgia Advocacy Office v. Georgia*, 447 F. Supp. 3d 1311, 1321-22 (N.D. Ga. 2020) (upholding *Olmstead* as applied to the unnecessary segregation of students with disabilities in public schools). Segregation is "unnecessary" where persons are eligible to receive services in a more integrated setting. *Olmstead*, 527 U.S. at 600. Defendants' refusal to implement effective COVID-19-safety protocols has barred Plaintiffs from in-person school and forced them into an isolated,

utilizing “methods of administration” with the same effect 28 C.F.R. § 35.130(b)(3); 34 C.F.R. § 104.4 (b)(4)(i) (emphasis added). Courts have found this provision to apply “to both written policies as well as actual practices, and [that it] is intended to prohibit both ‘blatantly exclusionary policies or practices’ as well as ‘policies and practices that are neutral on their face but deny individuals with disabilities an

discrimination to give rise to a violation. McNely v. Ocala Star-Banner Corp., 99 F.3d 1068, 1077 (11th Cir. 1996). The ADA imposes a "but for" liability standard, requiring only that Plaintiffs show a causal connection between their disability and the challenged conduct. Id. at 1076-77; see also Bircoll, 480 F.3d at 1081 n.11; Schwarz, 544 F.3d at 1212 n.6; People First, 491 F.Supp.3d at 1179 (holding that

injury in civil rights cases is to afford plaintiffs relief in areas where injury is difficult to establish.").

Plaintiffs also suffer continuing irreparable harm because they are being denied educational opportunities and the social, emotional, and academic benefits that neither damages nor success on the merits can compensate. Hispanic Interest Coalition v. Governor of Ala., 691 F.3d 1236, 1249 (11th Cir. 2012) (holding that interference with educational rights is not harm that can be compensated by money damages "given the important role of education in our society and the injuries that would arise from deterring [ ] children from seeking the benefit of education"); see also Alejandro v. Palm Beach State Coll., 843 F. Supp. 2d 1264, 1270-71 (S.D. Fla. 2011) (holding that missing classes constitutes irreparable harm and granting injunctive relief); Ray v. Sch. Dist., 666 F. Supp. 1524, 1535 (M.D. Fla. 1987) (finding irreparable injury where HIV-positive students were unnecessarily excluded from a "normal, integrated classroom setting"); Borough of Palmyra, Bd. of Educ. v. F.C. ex rel. R.C., 2 F. Supp. 2d 637, 645 (D.N.J. 1998) (finding loss of an appropriate education to be an irreparable harm under preliminary injunction analysis). And students with disabilities experience exacerbated harm when they miss educational opportunities. L.R. v. Steelton-Highspire Sch. Dist., No. 1:10CV00468, 2010 U.S. Dist. LEXIS 84254, at *11 (M.D. Pa. Aug. 7, 2010)

("Although this would trouble the court under ordinary circumstances, it is even more troubling because [the child] is a student with a disability whose needs were met in [the school district] over a period of years.")

C. THE THREATENED HARM TO PLAINTIFFS OUTWEIGHS ANY POTENTIAL DAMAGE TO DEFENDANTS, AND AN INJUNCTION WOULD NOT HARM THE PUBLIC INTEREST

The equities weigh heavily in favor of granting Plaintiffs' TRO and preliminary injunction. "Education is perhaps the most important function of state and local governments," because "it is doubtful that any child may be reasonably expected to succeed in life if he is denied the opportunity of an education." Brown v. Board of Educ., 347 U.S. 483, 493 (1954). Education is of such critical importance that when a policy deters children from attending school, the equities favor enjoining the policy. Hispanic Interest Coal. v. Governor of Ala., 691 F.3d 1236, 1249 (11th Cir. 2012). Protecting children against disability discrimination is a matter of equal importance. The Congressional intent for enacting the ADA was to "provide a clear and comprehensive national mandate for the elimination of discriminating against individuals with disabilities", recognizing disability discrimination as a "serious and pervasive social problem." 42 U.S.C. § 12101.

Granting a TRO and preliminary injunction is necessary to protect Plaintiffs' interests in avoiding discrimination and participation in their education. Conversely,