IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 21-cv-02818

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,
C.B., by and through his parent and next friend, E.B.,
A.R., by and through his parent and next friend, L.R.,
J.G., by and through his parent and next friend, K.G.,
B.A., by and through her parent and next friend, J.A.,
M.M., by and through her parent and next friend, K.M.,
D.B., by and through his parent and next friend, J.B.,
R.P., by and through her parent and next friend, B.H.,
D.W., by and through his parent and next friend, G.W.,
A.L., by and through his guardian and next friend, C.L.

Plaintiffs;

v.

DOUGLAS COUNTY HEALTH DEPARTMENT,
DOUGLAS COUNTY BOARD OF HEALTH

Defendants.

DEFENDANTS' RESPONSE TO MOTION
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION
[DOC. 3]

Defendants, the Douglas County Health Department ("DCHD") and the Douglas County Board of Health ("DCBH") (collectively, "Douglas County"), submit the following Response to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction (Plaintiffs' "Motion"). Plaintiff Douglas County School District is referred to herein as the "School District;" the individual plaintiffs are referred to as "Individual Plaintiffs;" together, they are referred to as "Plaintiffs."

I. INTRODUCTION

Plaintiffs ask this Court to make unprecedented and sweeping new law under the ADA, which if adopted by this Court could require indefinite masking of 64,000 healthy children (and more than 500 staff) in the School District without exemptions, thereby harming many children's physical and mental health. While Plaintiffs try to invoke fear by citing COVID-19 data regarding adults and older adults, and by describing the vulnerability of the Individual Plaintiffs, the actual data regarding children in Douglas County and COVID-19 belies their argument: Douglas County, home to approximately 90,210 children,[1] has suffered only *one* pediatric death related to COVID-19 during the entire two-year period since the start of the pandemic,[2] and only 60 total pediatric hospitalizations during the entire two-year period since the start of the pandemic.[3]

It is an unfortunate reality that children with conditions like cystic fibrosis or severe asthma are at a greater risk for severe outcomes from every airborne pathogen that attacks the respiratory system, whether that pathogen is SARS-CoV-2, influenza, or Respiratory Syncytial virus ("RSV"). Plaintiffs do not assert that COVID-19 results in worse outcomes for children with disabilities than influenza, RSV or other viruses. As such, there is no limiting principle to Plaintiffs' argument. If the mere fact that some children with disabilities are at a greater "risk" of severe outcomes from COVID-19 makes this Court rule that Defendants have run afoul of the ADA by allowing children and adults physical and mental health exemptions from the School District's mask mandate, then the logical result is that all school children and staff will

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[1] https://www.census.gov/quickfacts/fact/table/douglascountycolorado/PST045219
[2] See attached **Exh. A**, pediatric deaths and hospitalization data from Tri-County Health Department website as of October 18, 2021.
[3] Id.

unnecessarily be in masks from this point forward, with no end. Plaintiff's requested remedy — that all students and adults in schools wear masks in schools indefinitely because some of their peers are at a greater risk for severe outcomes from an airborne pathogen — is not a reasonable accommodation under the ADA.

Plaintiffs cannot prevail on their requested injunctive relief because they have not alleged actual injury, rather they allege only fear of, or risk of, injury. As opposed to a case-by-case determination of reasonable accommodation under the ADA, here Plaintiffs ask the Court to lump together certain special needs students, based not on actual injury they have suffered because of discrimination with regard to their disabilities, but on a common fear among their parents that they are at *risk* of suffering an injury if physical and mental health mask exemptions for other special needs and general population students are permitted. This legal argument, if adopted by the Court, would be unprecedented.

Meanwhile, the arbitrariness of the rule Plaintiffs seek to create is also apparent as older adults, who are significantly more at risk with respect to COVID-19, are allowed to choose whether or not they will wear a mask in Douglas County, even in crowded indoor settings or settings with extended periods of contact with others similar to schools, and even in the presence of special needs children and adults. After school and on weekends, Douglas County students who are masked while at school freely attend spend time in myriad indoor settings without masks.

Universal masking in a school setting is not harmless. While stating there is no harm associated with mandating masks for all school children, Plaintiffs implicitly acknowledge at least some harm in their Complaint when they compare in person learning to virtual learning:

"Learning in-person is preferable to learning remotely for a variety of reasons, including the instructor's ability to read and interpret body language and other non-verbal cues associated with the learning process, fluid formative assessments related to progress monitoring, and critical interpersonal connections that facilitate learning."[4] That statement applies equally to children, speaking and interacting with their teachers and peers while wearing masks that shield those very same "non-verbal cues." It is not hard to admit that an elementary-aged child may have difficulty learning language/reading when her teachers and peers are masked, and then have added difficulty communicating with her teacher and peers when her voice is muffled behind her own mask. Indeed, during Defendants' public hearing on the Public Health Order, that very example was raised by a Douglas County speech pathologist in support of the PHO, as set forth below. Defendants will present evidence and testimony on serious physical and mental harms to children caused by mandated masks where exemptions were not available.

II. FACTUAL BACKGROUND

On July 16, 2020, Colorado Governor Jared Polis issued an executive order mandating mask-wearing for every Coloradan over the age of ten when out in public.[5] On May 14, 2021, the Governor ended the mask mandate in Colorado for adults and children. The Colorado Department of Public Health and Environment ("CDPHE") and the State of Colorado have not since mandated that adults or children wear masks in public places. Consistent with the State of Colorado's rules, and most school districts in Colorado, the School District announced before the start of the 2021-2022 school year that children and teachers would be allowed to return to

[4] Doc. 1, ¶ 38; *see also* Doc. 3, Exh. 16, ¶ 4.
[5] Exec. Order No. D 2020 138 (July 16, 2020).

school without a mask requirement. It was a welcome return to some normalcy for many Douglas County students and teachers, after all of the difficulties students and teachers had faced in education for the prior 18 months. The School District had acknowledged that schools were "safe" and not transmission points of COVID-19.[6]

The Tri-County Health Department ("TCHD"), however, which at that time served over Douglas County, Arapahoe County, and Adams County, Colorado, issued on August 18, 2021, effective August 23, 2021, its own Public Health Order requiring masks for school children 2-11 years of age, as well as teachers and staff in school. The order effected only schools and childcare settings; whereas, adults and children in Tri-County's jurisdiction, outside of school, were (and still are) not subjected to mask mandates in most situations, including for example crowded restaurants, movie theaters, gyms, parties and work places. The August 18 TCHD school mask order permitted counties to opt out. On August 19, 2021, Douglas County opted out of the Public Health Order. On August 24, 2021, Adams County opted out of the Public Health Order. On August 23, 2021, in response to Douglas County's opt out, the Douglas County School District issued its own school district-wide mask mandate for pre-school to sixth grade. On August 30, 2021, TCHD issued a second mask mandate for school children ages 2-18 and teachers and staff in school, which also applied to Douglas County School District. The TCHD mask mandates for schools were issued on questionable medical and public health grounds, as Dr. John Douglas, TCHD's Executive Director admitted the following, which all point to no significant change in the danger to children relative to prior to the issuance of the mandate, during TCHD's August 30, 2021 meeting:

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[6] See attached **Exh. B** and **Exh. C**, Letters from Corey Wise.

- "None of the studies have addressed Delta in kids."
- "These are cases, these are not severe illnesses…"
- "I think the major message here is that the biggest increases [in hospitalizations]…have been in the most vulnerable [ages 75+]"
- "Since the beginning of the pandemic, we've had 158 in the 0-11 group and 149 in the 12-17 group hospitalized…Over the entirety of the pandemic, there have been 6 pediatric deaths."

During the September 9, 2021 TCHD meeting, Dr. Douglas further admitted that:

- "We really don't yet see any evidence that the proportion of [pediatric] cases who are getting quite sick, hospitalized and even dying has gone up…"
- "Honestly, again, many of these kids aren't getting that sick…"
- "…let's be honest, those numbers [pediatric hospitalizations] are really tiny if you look at the larger spectrum…"
- "The board asked us last time to consider…you know…what's the end game here for mask mandates in particular…when might this end? The answer tonight is we don't have an answer."

Douglas County and Adams County began taking steps to withdraw from TCHD, which left TCHD winding up its existence, leaving Arapahoe County to begin to form its own health department as well. On September 7, 2021, Douglas County officially withdrew from TCHD and formed the Douglas County Health Department. On October 19, 2021, Adams County announced its intent to also withdraw from TCHD.

The Douglas County Health Department issued the Public Health Order in question on October 8, 2021 (the "PHO"), more consistent with the current state of public health orders for the State of Colorado (but differing from TCHD's August 2021 school mask mandates referenced above) allowing certain individuals in Douglas County to be exempt from

requirements to wear a face covering if impacting the individual's physical or mental health. Specifically, the PHO provides that school children in Douglas County under the age of 18 may be exempt from a face covering requirement "due to the negative impact on that individual's physical and/or mental health" with a "written declaration signed by the parent of guardian of the child."[7] As such, the PHO does not amount to an outright ban on the School District's ability to require masks; rather, it merely creates a health exemption to mask-wearing for children who experience negative mental and physical health impacts caused by masking at school, provided the child's parent or guardian signs a written declaration so stating. The DCHD's issuance of the PHO reflected the low health risks to school-age children of COVID, the increasing vaccination rates among children and teachers in Douglas County (per TCHD data, 67% of Douglas County kids ages 12-17 are vaccinated, similar to the rates for adults in Douglas County younger than age 60), and offered an exemption from mask wearing for those school children who may experience negative mental and physical health impacts.

Data from the Colorado Department of Public Health and Environment ("CDPHE") continues to indicate that school aged children are the least likely population to be harmed or hospitalized by COVID19. Children aged 0-19 cumulatively account for less than 20% of cases in Colorado, and roughly only 0.26% of deaths among COVID19 cases in the state.[8] Importantly, TCHD data showed no indication that schools were major transmission areas that lead to higher rates of hospitalizations in the community. TCHD's health data shows that hospitalization rates for children under age 18 have consistently remained around 0.5 incidences per 100,000

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[7] Douglas County Health Department Public Health Order (Oct. 8, 2021).
[8] *See* Tri-County Health Department COVID-19 Pediatric Case Reporting, https://data.tchd.org/covid19/PedsData/

(.0005%) even with the Delta variant.[9] The data reflects a very low-risk of serious illness for school aged children, particularly in Douglas County where test positivity rates for children ages 0-17 have been decreasing since mid-September 2021.[10] As stated above, there has been only one pediatric COVID-19 death in Douglas county during the entire pandemic, and only 60 pediatric hospitalizations, in a county with over 90,000 children.

Even the data cited by Plaintiffs estimates cases are around 300 per 100,000 people per week in school districts that do not require masks, and around 250 per 100,000 in districts that require masks. In a school with 1,000 students, that would mean the COVID-19 infection rate in a school with a mask mandate is 2.5 cases per week, and in a school without a mask mandate is 3.0 cases per week. In other words, Plaintiffs imply that a special needs student in a school district with 2.5 cases per 1,000 is safe whereas a special needs student in a school district with 3.0 cases (one-half of one student less) per 1,000 is not safe.[11]

III. LEGAL STANDARDS FOR TEMPORARY RESTRAINING ORDERS

In considering a motion for temporary restraining order, courts apply the same factors as when deciding a motion for preliminary injunction.[12] A party requesting a preliminary injunction must establish that:

(1) there is a substantial likelihood of success on the merits;

(2) he or she will suffer irreparable injury unless the injunction issues;

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[9] *See* Tri-County Health Department COVID-19 Case Reporting, https://data.tchd.org/covid19/.
[10] *See* Tri-County Health Department COVID-19 Pediatric Case Reporting, https://data.tchd.org/covid19/PedsData/.
[11] That is before accounting for the fact that, as Plaintiffs' acknowledge in their Complaint, mask wearing in the School District is still over 80%. Motion, p. 7.
[12] *Winnebago Tribe of Nebraska v. Stovall*, 205 F. Supp. 2d 1217, 1221 (D. Kan. 2002), *aff'd*, 341 F.3d 1202 (10th Cir. 2003).

(3) the threatened injury outweighs the damage the proposed injunction may cause the opposing party; and

(4) the injunction, if issued, would not be adverse to the public interest.[13]

A preliminary injunction should not be granted unless plaintiff has met her burden to establish each of these four factors. In considering whether to grant the injunctive relief requested, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief."[14] For the reasons outlined below, the Plaintiffs are not entitled to the injunctive relief sought in their Motion.

IV. ARGUMENT

The Plaintiff's motion for a temporary restraining order must be denied. First, the Individual Plaintiffs seek relief under Title II of the ADA and Section 504 of the Rehabilitation Act that is also available to them under the Individuals with Disabilities Education Act ("IDEA"),[15] without first exhausting the IDEA's administrative remedies as though their claims had been brought thereunder. Second, the School District lacks standing to raise claims under Title II of the ADA and Section 504 of the Rehabilitation Act. Finally, the Plaintiffs' claims under the ADA and Section 504 otherwise must fail, because they are unlikely to succeed on the merits of their claims, have not suffered irreparable harm, and their requested relief is not in the public interest.

A. The Plaintiffs have failed to exhaust their administrative remedies under IDEA.

[13] *See e.g.*, *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003).
[14] *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (quotation omitted).
[15] 20 U.S.C. §§ 1400, *et seq.*

Nowhere in their Complaint or Motion do the Plaintiffs mention the IDEA, or the fact that relief is available to them thereunder. The IDEA guarantees that children with disabilities receive a "free appropriate public education" or "FAPE" through the development, use, and implementation of "individualized education programs," or IEPs.[16] Before a disabled student may file a complaint under Title II of the ADA or Section 504 of the Rehabilitation Act, that student must first exhaust the administrative remedies that are available under the IDEA.[17] The IDEA establishes a "mandatory administrative framework for resolution of disputes over the education of children with disabilities."[18] Under the IDEA, if a complainant has concerns regarding "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child"[19] then the complainant is entitled to a hearing before the local or state educational agency, and may then appeal such findings to the state educational agency.[20] Plaintiffs who seek relief that is available under the IDEA, even if their claims are filed pursuant to other federal statutes, must first exhaust the administrative remedies that are available under the IDEA before filing a lawsuit in federal court.[21] In particular, "claims asserted under Section 504 and/or the ADA are subject to Section 1415(f)'s requirement that litigants exhaust the IDEA's administrative procedures to obtain relief that is available under the IDEA before bringing suit under Section 504 and/or the

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[16] *A.P., IV by Porco v. Lewis Palmer Sch. Dist. No. 38*, 728 F. App'x 835, 838 (10th Cir. 2018).
[17] *Id.*
[18] *Carroll v. Lawton Indep. Sch. Dist. No. 8*, 805 F.3d 1222, 1227 (10th Cir. 2015).
[19] 20 U.S.C. § 1415(b)(6)(A),
[20] *Id.* §§ 1415(f)(1)(A), 1415(g)(1).
[21] *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 753-55 (2017).

ADA."[22] If the complainant does not first exhaust these administrative remedies, then they are not entitled to seek relief under the ADA or the Rehabilitation Act.[23]

The relief that the Individual Plaintiffs seek is "available under" the IDEA, for the purposes of the exhaustion requirement. Their complaint alleges requirements of several of the Plaintiffs' IEPs,[24] and claims that the Defendants are denying the Individual Plaintiffs "the benefit of their public education" and "public school programs, services, and activities."[25] As such, the Plaintiffs' claims clearly fall within the IDEA's exhaustion requirement, irrespective of the fact that those claims were brought under the ADA and Section 504. In *Fry v. Napoleon Community Schools,* the Supreme Court stated:

> [The IDEA's] exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape §1415(l) merely by bringing her suit under a statute other than the IDEA—as when, for example, the plaintiffs … claimed that a school's failure to provide a FAPE also violated the Rehabilitation Act. Rather, that plaintiff must first submit her case to an IDEA hearing officer, experienced in addressing exactly the issues she raises.[26]

By claiming that the Defendants are excluding the Individual Plaintiffs from receiving a public education, and denying them the benefit of such an education, the Individual Plaintiffs are asserting relief that falls within the FAPE requirements of the IDEA.[27] Accordingly, because the Individual Plaintiffs do not allege in their Complaint or in their Motion that they have exhausted

[22] *M.T.V. v. DeKalb County Sch. Dist*., 446 F.3d 1153, 1158 (11th Cir. 2006).
[23] *Fry,* 137 S. Ct. at 754 ("[The] exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(l) merely by bringing her suit under a statute other than the IDEA.")
[24] Doc. 1 at ¶¶ 94, 132, 142, 149, 161.
[25] *Id*. at ¶ 171, 185.
[26] *Fry,* 137 S. Ct. at 754 (footnote omitted).
[27] *Durbrow v. Cobb Cty. Sch. Dist*., 887 F.3d 1182, 1190 (11th Cir. 2018) ("But if the complaint essentially alleges the denial of a FAPE, then the plaintiff must exhaust his administrative remedies" under IDEA.)

(or even sought) relief in accordance with the administrative remedies prescribed under the IDEA, then their claims under the ADA and Section 504 cannot support their request for injunctive relief and, moreover, must be dismissed.

B. The Douglas County School District lacks standing to bring discrimination claims under the ADA and Section 504.

A constitutional requirement under Article III, standing is "the threshold question in every federal case."[28] To attain standing in federal court, Plaintiffs have to show that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision."[29] Unlike the Individual Plaintiffs that have alleged discrimination under the ADA, the School District has not suffered an injury-in-fact under the ADA. As discussed in Section IV.A, above, to state a claim for relief under the ADA, a plaintiff must demonstrate they (1) are a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) that such exclusion, denial of benefits, or discrimination was because of a disability. The School District is not a "qualified individual with a disability," and cannot allege any specific facts that would support a valid claim that it has suffered discrimination under the ADA. The claims brought by the School District are under the ADA, and as such, must fail for lack of standing.

C. The Plaintiffs are not entitled to injunctive relief.

1. The Plaintiffs have not demonstrated that they are substantially likely to succeed on the merits.

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[28] *Warth v. Seldin*, 422 U.S. 490, 498 (1975).
[29] *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citation omitted).

The Plaintiffs' claims arise under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act. As the Plaintiffs have acknowledged, Section 504 and ADA claims are generally analyzed under the same standard.

Under Title II of Americans with Disabilities Act ("ADA"), "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."[30] Section 504 of the Rehabilitation Act simply extends the ADA's prohibition against discrimination on the basis of disability to recipients of federal funds.[31] To state a claim under the ADA, a plaintiff must demonstrate they (1) are a qualified individual with a disability, (2) who was excluded from participation in or denied the benefits of a public entity's services, programs, or activities, and (3) that such exclusion, denial of benefits, or discrimination was because of a disability.[32] Under the ADA, public entitles are required to make "reasonable accommodations" for those with qualified disabilities, to ensure their ability to meaningfully access the benefits of a public entities' services.[33]

Here, Plaintiffs' motion fails to demonstrate that (i) that they were excluded from participation or denied any benefits, (ii) that any such alleged discrimination was *because of* Plaintiffs' disability, or (iii) that the accommodation they seek, universal masking of all students, is reasonable to accommodate their disabilities. Accordingly, Plaintiffs are unlikely to succeed on the merits of their claim.

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[30] 42 U.S.C. § 12132.
[31] 29 U.S.C. § 794.
[32] *See id.*
[33] *St. Paul Sober Living, LLC v. Bd. of Cty. Comm'rs*, 896 F. Supp. 2d 982 (D. Colo. 2012) (citing *Thompson v. Colorado*, 278 F.3d 1020, 1029 (10th Cir. 2001).

i. The PHO does not discriminate against students with disabilities, nor does it deny the Individual Plaintiffs meaningful access to public education.

The PHO does not prevent or exclude the Individual Plaintiffs from attending public school, and does not deny them the benefits of an education. Rather, the PHO merely offers an exemption for other individuals where their physical and mental health is negatively affected by the mask, and which allows those individuals the opportunity to attend school without a mask. The Individual Plaintiffs are also free to continue attending classes in person while protecting themselves with masks if they choose. The PHO also does not restrict the Individual Plaintiffs from attending school. Even prior to COVID-19, Douglas County has had in place programs to accommodate special needs students who have too severe health risks to be among the general population of students, including the Homebound education program where they may engage in their education safely from their homes.

Any exclusion Plaintiffs in this case may experience is the result of Plaintiffs' choice and individual concerns rather than any actual injury caused by the PHO. Plaintiffs even acknowledge this choice, complaining that the PHO "forc[es] the parents of these students to choose between their child's education and their health and safety."[34] But that same choice existed before the pandemic and will continue to exist after the pandemic, and with the risk of other contagious diseases. The PHO allows Plaintiffs to make the choice to attend school, to wear a mask, or to exercise their own precautions without restricting their access to their education, while also acknowledging the fact that some students require an exemption from the

[34] Doc. 3, p. 4.

mask requirement in order to meaningfully access the same educational opportunities that the Individual Plaintiffs now demand.

As such, the PHO does not restrict Plaintiffs' "meaningful access" to school. Plaintiffs are not physically restricted from attending school, nor is their meaningful access to the educational opportunities presented by the Douglas County School District restricted on the basis of their disabilities. While Plaintiffs ask the Court to consider their fear of injury an actual injury, the PHO does nothing more than provide an option for certain students to attend school who experience physical or mental health harm by masks, including many other special needs children. As a result, the PHO cannot, *per se*, discriminate against Plaintiffs.

As such, the PHO does not exclude the Individual Plaintiffs from Douglas County schools or deprive them of education in any way; thus, the Defendants have not discriminated against the Plaintiffs because of their disabilities. The Plaintiffs have cited only their fears of injury, and not actual harm, and, as a result, have made the choice to exclude themselves.

ii. The PHO does not discriminate against the Individual Plaintiffs because of their disabilities.

Similarly, Plaintiffs' motion fails to allege that their alleged exclusion is *because of* their disabilities. (Plaintiffs have also failed to sufficiently define the disability which they claim requires the accommodation of universal masking with enough specificity such that a reasonable accommodation could be provided). Indeed, Plaintiffs concede that DCHD enacted the PHO in part to counter the mental health crisis among youth caused in part by masking.[35] Thus, because Plaintiff does not allege that DCHD was motivated by any animus towards Plaintiffs, and points

[35] Doc. 3, p. 16-17.

to no plausible evidence to support a finding otherwise, Plaintiffs have failed to satisfy the requisite causation to establish a *prima facie* case of discrimination based on their disabilities under the both the ADA and Section 504.

iii. The ADA requires that the Defendants make reasonable accommodations for the Individual Plaintiffs; however, universal masking is not a reasonable accommodation.

Under the ADA, if a qualified individual with a disability requests reasonable accommodations, the Defendants have an obligation to determine the best means of accommodating that disability. However, "[a]n institution is not duty bound to acquiesce in and implement every accommodation a disabled student demands."[36] In particular, a student "is not entitled to his preferred accommodation," so long as the offered accommodation is reasonable.[37]

The Plaintiffs contend that, by prohibiting the School District from requiring masks for all students, the Defendants are violating the Individual Plaintiffs' civil rights in denying them the reasonable accommodations to which they are entitled under the ADA. However, the PHO does not deny reasonable accommodations for students with disabilities; to the contrary, the PHO specifically states that "[t]he requirements of this Order shall be applied in a manner consistent with the Americans with Disabilities Act (42 U.S.C. 12101 et seq), Title VII of the Americans with Disabilities Act (42 U.S.C. 2000e et seq.), the Colorado Anti-Discrimination Act (C.R.S. 24-34-401 et seq.), and any other applicable federal or State law." As such, the Defendants are

[36] *Campbell v. Lamar Inst. Of Tech*., 842 F.3d 375, 381 (5th Cir. 2016).
[37] *Id.* at 382. *See also Bercovitch v. Baldwin School, Inc.*, 133 F.3d 141, 151-52 (1st Cir. 1998) ("[E]ven assuming that [the student] has a disability within the meaning of the ADA, the alterations in the school's normal requirements and standards that were sought by the plaintiffs and imposed by the district court went far beyond the 'reasonable accommodations' required by statute.").

committed to ensuring that all students with disabilities have access to reasonable accommodations.

Denying health-based exemptions to the School District's mandate, as urged by the Plaintiffs, is not reasonable to ensure that the Individual Plaintiffs remain uninfected by COVID-19, and is thus not a reasonable accommodation. To the contrary, Defendants will present evidence that the institution of universal masking for all students while on school property, regardless of their physical and mental health needs, is arbitrary. The Plaintiffs' proposal for universal masking, and their claim that such an accommodation is necessary to preserve their civil rights, ignores the possibility that certain special needs students (including, as an example, those with autism and other illnesses that render children less likely to understand social cues without seeing facial expressions) are seeking exemptions themselves. Many special needs students remain subject to mask mandates in other counties, and have been unable to obtain exemptions in order to attend class with no mask. Those students could also invoke their right to reasonable accommodations under the ADA, contending that a universal mask requirements with no or restrictive exemptions (as the Plaintiffs contend is *required* under the ADA) violates *their* civil rights by precluding their attendance at public school. By requiring masks for all students, and allowing students to claim an exemption to that requirement upon fulfilling certain requirements, the Douglas County PHO makes reasonable accommodations to protect the Plaintiffs as well as other students who may have valid concerns about the ramifications of wearing masks throughout the school day for an extended period of time.[38]

[38] Plaintiffs may also argue that the end point is vaccination, but the School District's own mask mandate belies that argument. The School District's mask mandate requires masks for everyone over two years old, despite (i) the Pfizer vaccine being fully FDA approved for people aged sixteen or older, (ii) the Moderna and Janssen vaccines being approved on an emergency basis for people aged eighteen or older,

Moreover, the ADA requires that the Defendants make a reasonable accommodation when necessary to avoid discrimination on the basis of a disability, *unless* that accommodation "fundamentally alters" the nature of the service, program, or activity offered by the public entity, *or* imposes an "undue burden."[39] Requiring all students to wear a mask when attending classes fundamentally alters the nature of certain educational offerings, and poses an undue burden on other healthy children who are harmed by masks. Defendants will present evidence that younger students, in particular, benefit from seeing their instructors' faces, particularly when learning to read by sounding out words. In instances such as these, students face hindered learning and social instruction with masks, thereby fundamentally altering the nature of that instruction. As set forth below and in the attached medical opinion, masks impose an undue burden on certain other students who suffer from anxiety and depression (here, the mask mandate was imposed just weeks after students started school with optional masks). Other students have suffered increased bacterial infections, rashes, and other physical harm caused by masks.

The requirements of the ADA do not require "reasonable accommodations" to make schools "safer" for students; rather, the ADA requires that public entities make reasonable accommodations to ensure that those with disabilities are not excluded from or denied access to the benefits that entity provides. The PHO requires masks for all individuals except those that have requested health-based exemptions, and thus ensures that all students, including the Individual Plaintiffs and other special needs students, are able to attend classes in a safe environment. If this Court were to grant the Plaintiffs' request for injunctive relief, the Court's

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and (iii) the Pfizer vaccine being approved on an emergency basis for children aged twelve to fifteen years. If the end point to mask wearing in schools is the availability of vaccination, there would be no reason to require masks with no exemptions for these age groups.

[39] *Hamer v. City of Trinidad*, 441 F. Supp. 3d 1155, 1172 (D. Colo. 2020).

ruling would confirm that a universal mask mandate in schools is necessary under ADA and Section 504 only because the mandate reduces the potential *risk* of contracting COVID-19 while on school grounds, without quantifying what level of risk is acceptable or even showing that the COVID-19 risk to children with disabilities is greater than that from other common viruses. To the extent that the Individual Plaintiffs' position is that universal mask requirements are the only reasonable accommodation that will keep them safe from illness, and knowing that COVID-19 will likely be present in our community as an endemic illness like seasonal flu, then their position leads to the conclusion that mask mandates must be in place, without end. By interpreting the ADA in this manner, this Court would, in essence, make any safety measure mandatory by the mere fact that it *may* have some marginal effect on safety.[40]

2. Neither the Individual Plaintiffs nor the School District have demonstrated that they will suffer irreparable harm if the Public Health Order is not enjoined.

[40] The Individual Plaintiffs allege, e.g., they are "more likely to develop serious health complications and be hospitalized if he contracts COVID-19." Plaintiffs do not define "greater," "more likely," or "increased" in terms of the degree of elevated risk that is present. Without supporting data, this unspecified level of increased risk allegedly transforms their school environment from a safe, acceptable environment under the ADA to one so dangerous that their rights under the ADA are violated. This lack of specificity in acceptable risk makes evaluating a reasonable accommodation to address the alleged increase in risk impossible. By way of another example, masks were mandated by the State of Colorado on September 10, 2020, when the 7-day average of new cases was 283.7, and they were also mandated on November 22, 2020, when the 7-day average was 5,402.4. See https://covid19.colorado.gov/data. Under Plaintiffs' argument, both rates were acceptable since both occurred while a mask mandate was in effect. By way of another example, Westminster 50 School District had a mask mandate in place since the beginning of the school year and had a COVID-19 incidence rate of 18.96 cases per 10,000 students for the week of August 22, 2021. During that same week, Cherry Creek 5 School District did not have a mask mandate in place since the beginning of the school year and had a COVID-19 incidence rate of 13.23 cases per 10,000 students the week of August 22, 2021. https://www.tchd.org/DocumentCenter/View/9438/Zoom-Recording-of-the-August-30-2021-Board-of-Health-Meeting Yet, under Plaintiffs' reasoning, Westminster 50 School District enabled students such as the Individual Plaintiffs to attend school safely under the ADA, whereas Cherry Creek 5 School District, with a lower incidence, did not.

Plaintiffs must demonstrate, clearly and unequivocally, that they will suffer irreparable harm if the Court does not grant the requested injunctive relief. The requirement of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction."[41] "[T]he moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered."[42]

In contrast to the cases cited by the Plaintiffs, the PHO is not an outright ban on the School District's ability to mandate masks for in-person attendance. In Tennessee, the defendant Boards of Education voted not to renew mask mandates, which prevented schools from requiring anyone to wear a mask.[43] That is not the case here, as the PHO does not ban masks; rather, it only allows a narrow exemption from mask wearing who those who provided a signed declaration. Because the PHO allows the School District to require masks for unexempted students, it does not present the same danger of irreparable harm that courts found in Tennessee.[44] Indeed, Plaintiffs acknowledge that mask wearing in the School District remains at a high percentage.[45]

As stated above, the Individual Plaintiffs do not allege that they have suffered actual and irreparable harm as a result of the Douglas County PHO. To the contrary, the Plaintiffs claim that

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[41] *Dominion Video Satellite, Inc. v. Echostar Satellite Corp*., 356 F.3d 1256, 1258 (10th Cir. 2004).
[42] *Id.*
[43] *S.B. by & through M.B. v. Lee*, Case No. 321CV00317JRGDCP, 2021 WL 4346232 (E.D. Tenn. Sept. 24, 2021).
[44] *See G.S. by & through Schwaigert v. Lee*, Case No. 21-CV-02552-SHL-ATC, 2021 WL 4268285 (W.D. Tenn. Sept. 17, 2021); *S.B. by & through M.B. v. Lee*, Case No. 321CV00317JRGDCP, 2021 WL 4346232 (E.D. Tenn. Sept. 24, 2021); *R.K. et al. v. Lee*, Case No. 3:21-CV-00725, 2021 WL 4391640 (M.D. Tenn. Sept. 24, 2021).
[45] Doc. 3, p. 2.

they are subject to increased risk of contracting COVID-19. Acknowledging that risk as actual harm in this case would result in an unprecedented extension of the ADA and Section 504.

Plaintiffs cite Dr. Rachel Herlihy, Colorado state epidemiologist, in support of their argument, noting that, at the time, "[t]he lower rates of COVID-19 are associated with school districts that are requiring masks in schools, again showing a clear impact that masks are having in decreasing transmission in our school settings." However, the Plaintiffs overlook the fact that Dr. Herlihy's data only point to a minimal difference in transmission rates. As stated above, Dr. Herlihy's data indicate that rates of COVID-19 among school-age children between ages 6 and 17 are approximately 300 cases per 100,000 per week in districts that have no mask requirement, whereas the data indicate that cases in that same age group are approximately 250 per 100,000 per week in districts that do require students to wear masks. This data, therefore, would indicate that in a school district with 1,000 students, the average infection rate for a district with a mask mandate is 2.5 cases per week, as opposed to 3.0 cases per week in a district that does require universal masking for all students. According to the Plaintiffs, therefore, a school district that records 2.5 cases per 1,000 students per week may be deemed safe, while a district with 0.5 additional cases per week must be considered unsafe. Moreover, the data does not address hospitalizations and deaths, and as such does not support Plaintiffs' claims of harm.[46] Defendants will also show that the data Plaintiffs cite is already outdated; whereas, the latest data

[46] In the Tri-County area, approximately 1% of COVID-19 cases under age 18 result in hospitalizations. https://data.tchd.org/covid19/pedsdata/. Accordingly, the estimated hospitalization risk difference using the above CDPHE data would be 0.025 hospitalizations per 1,000 students where there is no school mask mandate, as opposed to 0.030 hospitalizations per 1,000 students where there is a school mask mandate. Though Plaintiffs have not supplied any data regarding what they perceive as an acceptable level of risk of hospitalization, the difference of 0.005 hospitalizations per 1,000 students could not possible be a based to require universal masking under the ADA. The risk of pediatric death, at statistically zero difference, even less so.

from the CDPHE shows that Colorado school districts without mask mandates have lower incidence rates than schools with mask mandates. The Plaintiffs' logic on this point is unsound, and does not support a claim that they will be irreparably harmed if the Defendants' PHO is allowed to remain in place.

Moreover, data published by the CDC confirms that, as of October 20, 2021, 442 school-aged children in the United States have died after contracting COVID-19.[47] The CDC also estimates that, during the 2009-2010 flu pandemic, 358 children died after being diagnosed with the flu.[48] It is estimated RSV is responsible for the deaths of another 500 children per year.[49] In their Motion, Plaintiffs do not contend that they require an accommodation of universal masking when at risk of contracting seasonal flu, RSV, or other illnesses spread in a manner similar to SARS-CoV-2. At no time prior to the COVID-19 pandemic have the Individual Plaintiffs alleged that they have been denied reasonable accommodations because universal mask requirements were not imposed, despite the fact that data indicates that contracting seasonal flu or RSV may be more likely to result in serious illness for children than COVID-19. Plaintiffs have not offered any facts to suggest COVID-19 is more dangerous to the Individual Plaintiffs than the flu or RSV. Plaintiffs have also not alleged their children's risk from COVID-19 increased from when school started in the School District without a mask mandate in August 2021 (presumably the Individual Plaintiffs attended school without the request for accommodation during those first weeks of school prior to the mask mandate).

[47] U.S. Center for Disease Control and Prevention, Provisional COVID-19 Deaths: Focus on Ages 0-18, https://data.cdc.gov/NCHS/Provisional-COVID-19-Deaths-Focus-on-Ages-0-18-Yea/nr4s-juj3/data.
[48] U.S. Center for Disease Control and Prevention, Summary of 2017-2018 Influenza Season; https://www.cdc.gov/flu/about/season/flu-season-2017-2018.htm
[49] https://www.medscape.com/answers/300455-107817/what-is-the-mortality-and-morbidity-of-respiratory-syncytial-virus-rsv-pneumonia

3. The balance of the equities does not weigh in the Plaintiffs' favor, and the injunction does not serve the public interest.

When government entities are a party to a request for temporary restraining order or preliminary injunction, the balance of equities and public interest factors are properly considered together.[50] Plaintiffs urge the Court to find that the balance of equities is squarely in their favor, and that an injunction is clearly in the public's interest. Plaintiffs even state there is *no* harm at all by virtue of eliminating the mask exemption. Plaintiffs, however, fail to acknowledge the significant harm to other children and to the public if the Defendants' PHO is enjoined and universal masking is imposed. As discussed in the report attached hereto as Exhibit D, Dr. George R. Thompson, Ph.D., a toxicologist and psychopharmachologist, confirms that masks can pose significant physical and mental health effects for other children, as well as the fact that certain medical conditions may prevent students from wearing masks at all.[51] Indeed, Plaintiffs acknowledge that Individual Plaintiff C.B. "is unable to tolerate wearing a mask due to increased sensory sensitivity."[52] While Individual Plaintiffs demand reasonable accommodations in light of their own disabilities, and contend that such accommodations require the institution of universal masking of all students under the age of 18, they refuse to acknowledge any harm whatsoever to requiring every student to wear a mask regardless of her particular physical and mental health needs.

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[50] *Colo. v. DeJoy*, 487 F. Supp. 3d 1061, 1064 (D. Colo. 2020)
[51] **Exh. D**, George R. Thompson, Ph.D., "Dangerous Effects of Everyday COVID Mask Use" (2021) ("Thompson Report").
[52] Doc. 1, ¶ 123.

As stated in the Thompson Report, there are, in fact, a variety of negative health effects of mandatory masks for children under the age of 18, particularly when those masks are worn for an extended period (now two years from the start of the COVID19 pandemic), including:

- decreased oxygen and increased CO2 during prolonged periods of mask-wearing, contributing to perceived fatigue and exhaustion;[53]

- increased risk of infection and increased germ density beneath the mask in proportion to length of time the mask is worn;[54]

- negative mental health effects, including anxiety and depression, due to masking;[55]

- increased likelihood of skin rashes;[56] and

- reduced learning opportunities in younger students, in turn resulting in adverse academic outcomes (including younger students' learning and social difficulties without being able to see their teachers' faces and observe facial cues).[57]

Notably, in a study of 25,930 children, multiple negative impacts related to mask-wearing were reported, including headache (53% of respondents), difficulty concentrating (50% of respondents), joylessness (49% of respondents), learning difficulties (38% of respondents), fatigue (37% of respondents), new onset anxiety (25% of respondents), and nightmares (25% of respondents).[58]

Obtaining a medical mask exemption from a medical doctor's office has been nearly impossible for children who are truly negatively physically or mentally impacted by masks or have disabilities that prevent them from wearing masks, and as such would be an unreasonable requirement for a PHO. This is because many children's pediatricians and whole pediatric and

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[53] Exh. D, at 2-3.
[54] *Id.* at 1.
[55] *Id.* at 1, 4.
[56] *Id.* at 1.
[57] *Id.* at 4.
[58] *Id.*

other practices have issued blanket policies stating they will provide no medical mask exemptions whatsoever, regardless of the physical or mental health effect on the child of the mask, and regardless of the disability or special needs circumstance of the child, with certain narrow exceptions.[59]

Additionally, the materials used to make commonly available disposable and cloth masks include polypropylene and polyethylene (polymer) fibers, which have been demonstrated to contribute to adverse respiratory effects. Considering the recent onset of the COVID-19 pandemic within the last two years, no studies have been completed that specifically evaluate the adverse effects of children breathing through masks containing polypropylene and polyethylene fibers for long periods. However, related studies have indicated that workers in facilities that manufacture those polymer fibers have a significantly higher incidence of "pulmonary functional impairment of a restrictive type and with reduced diffusing capacity" and lung disease.[60]

Moreover, during DCBH's public hearing concerning the adoption of the PHO on October 8, 2021, Alicia Carroll, a speech pathologist, offered the following comments in support of the PHO:[61] "I have seen the clear impact on children's articulation, language, and social skills" because of mask wearing. Additionally, "I have seen first-hand the impact and the lack of progress on children's articulation skills because of masks." Ms. Carroll further states that children "have not been able to see the proper formation of sounds and words because of the

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[59] See e.g., https://www.greenwoodpediatrics.com/Covid19/Mask-Wearing, https://advancedpediatricassociates.com/, https://www.lonetreepediatrics.com/. Notably, the CDPHE and TCHD have been collecting the license numbers of doctors issuing medical mask exemptions. Medical license numbers had never before been required in TCHD's PHOs related to masks.

[60] S. Atis, B. Tutluoglu,*et al*., The respiratory effects of occupational polypropylene flock exposure, European Respiratory Journal, 25: 110-117 (2005), available at https://erj.ersjournals.com/content/25/1/110.

[61] Public Comments of Alicia Carroll, Douglas County Public Health Meeting (October 8, 2021), audio recording submitted herewith as **Exh. E**.

muffling from the masks. They struggle to hear the correct production of sounds and words," which impacts their ability to understand and to be understood by their peers and teachers. As a result of mask-wearing, children "cannot see how we form sounds . . . it's a struggle for them, and the lack of progress has been significant these last two years because of that." Moreover, "our young kids especially are at such a crucial time of learning letters, sounds, language, reading, social skills, and masks clearly have a negative impact on that development." Defendants will present evidence of parents whose children have suffered harms like those stated above when exemptions are not available to them.

These actual harms must be balanced against the Plaintiffs' fear of harm if the PHO is not enjoined and universal masking is not imposed for all students. Considering the physical and mental harm that universal masking poses for children under the age of 18, the Plaintiffs' call for universal masking cannot be justified as being in the public interest, and the balance of equities do not support the need for the Plaintiffs' requested injunction.

V. CONCLUSION

Wherefore, Defendants respectfully request that the Court deny Plaintiffs' Motion and enter such further relief as the Court deems just and proper.

Respectfully submitted this 24th day of October, 2021.

BURNS, FIGA & WILL, P.C.

/s/ Shelley Thompson
Shelley Thompson
April Hendricks
Burns, Figa & Will, P.C.
6400 S. Fiddler's Green Circle, Suite 1000
Greenwood Village, Colorado 80111
Tel.: (303) 796-2626

ATTORNEYS FOR DEFENDANTS

EXHIBIT LIST

EX NO.	DESCRIPTION
A	Pediatric deaths and hospitalization data from Tri-County Health Department
B	Letter from Corey Wise
C	Letter from Corey Wise
D	George R. Thompson, Ph.D., "Dangerous Effects of Everyday COVID Mask Use" (2021)
E	Public Comments of Alicia Carroll, Douglas County Public Health Meeting (October 8, 2021) (audio file)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION** was served on the following via electronic mail on the 24th day of October, 2021:

For Plaintiffs:
Elliott V. Hood, Esq.
John F. Peters, Esq.
CAPLAN AND EARNEST LLC
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Boulder, Colorado 80301
303-443-8010
ehood@celaw.com
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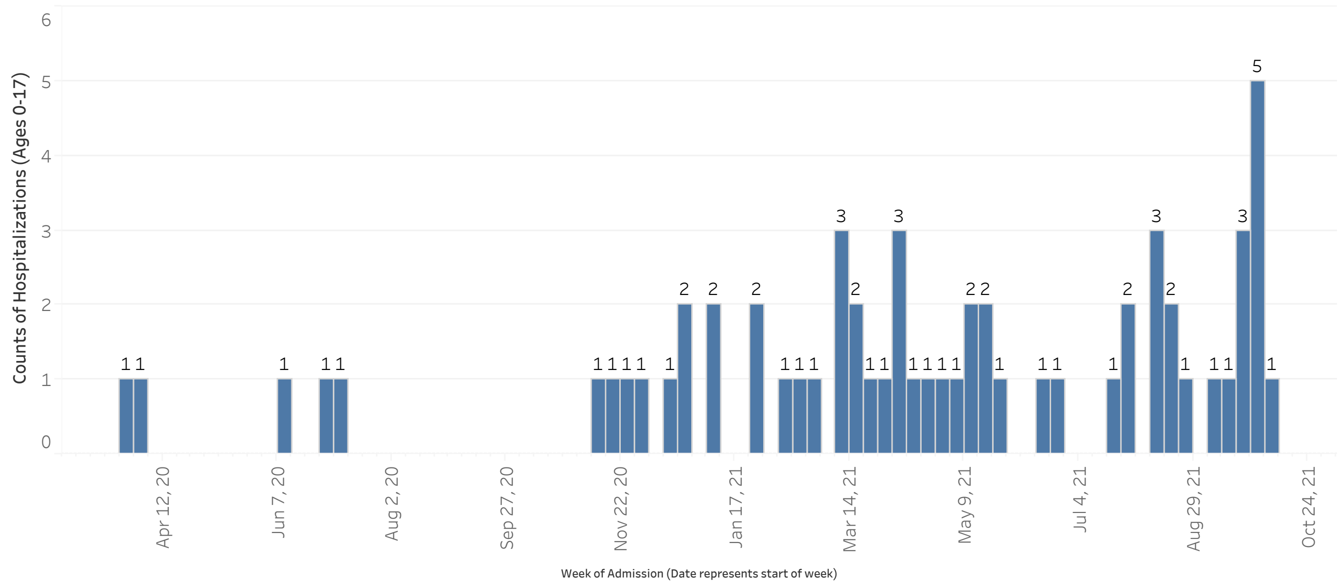
s/Shelley Thompson

EXHIBIT A

COVID-19 Hospitalizations of Youth Age 0-17

Douglas County, Colorado (Data as of 10/18/2021)



COVID-19 Hospitalizations of Youth Age 0-17

Douglas County, Colorado (Data as of 10/18/2021)

Year of Admit Date1	
2020	2021
12	48

Deaths Among COVID-19 Cases Youth Ages 0-17

Adams, Arapahoe, and Douglas Counties (Data as of October 18, 2021)

County	2020	2021
Adams	1	3
Arapahoe		1
Douglas		1
Grand Total	1	5

Year of Death Date

EXHIBIT B

Español | русский

December 11, 2020

Dear DCSD Families,

As you know, state and national health experts and elected officials have been stating that students should be in school even as positivity rates are at high levels in our communities. We agree that schools are safe and the COVID-19 transmission rates in schools are low, but health experts and elected officials fail to address the real reason why schools are not open: schools do not have enough staff members available (including substitutes, bus drivers, and nutrition services personnel) to support in-person learning at every level five days per week. This is mainly due to staff members being ill with COVID-19 or other seasonal illnesses, or being included in quarantines.

We hear our community members when they express sadness and frustration about students not being in school. We share your concerns about missed academic, social-emotional learning experiences, as well as other social experiences and milestones. We believe we must do all we can to get students back in school even as COVID-19 positivity rates are currently high in our community.

We also take seriously our role in protecting the health and safety of students, staff, and the community when schools are open. Per state public health orders, schools are required to follow quarantine and other Colorado Department of Public Health and Environment (CDPHE) and Tri-County Health Department procedures. These protocols are working and have kept COVID-19 transmission rates within our schools extremely low. However, the protocols have also resulted in the quarantining of staff members including teachers, bus drivers, kitchen workers, office staff, etc., resulting in not having enough staff at our schools to keep our students safe and engaged in learning.

Yesterday, we shared our initial return to school plans with our Board of Education and they provided their support of these plans. Today, we're pleased to share with you what we currently have in store for our students following Winter Break. Please keep in mind that the COVID-19 pandemic has proven to be unpredictable -- everything is subject to

change. We know that having an idea of when your child can return to school is critical for planning and preparing.

DCSD students will return to full, in-person learning or hybrid learning via the following phased approach.

Between each phase, DCSD will evaluate its organizational stability to ensure the school district can add another level of schools to in-person or hybrid learning and still remain fully able to operate. Our goal is to ensure that we do everything possible to keep students in their learning model so we can avoid transitioning back and forth from in-person or hybrid learning to remote learning.

Phase 1: Preschool, Elementary School, and Center-Based Students at the Middle and High School Levels.

January 4, 2021

- Previously scheduled non-student day for all DCSD students as the district calendar shows. Preschool and elementary staff prepare for the return to full in-person learning

January 5, 2021

- DCSD preschools and elementary schools return to full, **in-person** learning five days a week
- DCSD middle and high schools return to full **remote** learning five days a week
- DCSD's most impacted/at-risk students in center-based programs at the middle and high school levels return to in-person learning four days a week
- Plum Creek Academy starts in-person learning four days a week (Fridays remote)
- Bridge Program (18-21) starts in-person learning four days a week (Fridays remote)
- DC Oakes, Eagle Academy, and DC Support Center start remote learning
- eDCSD begins with all virtual learning

January 11, 2021

- eDCSD returns to blended schedule

January 18, 2021

- DC Oakes and Eagle Academy begin hybrid schedule
- DC Support Center begins in-person learning four days a week (Fridays remote)

If we are able to keep enough staff members in preschool and elementary schools and believe the school system can support bringing all staff and students back to

middle schools, we will move to Phase 2. If not, we will postpone Phase 2. We will keep our families and staff informed as we monitor the data.

TENTATIVE Phase 2: Middle Schools

January 19, 2021

- Board of Education Meeting - Prepare and Plan for Middle School Return

January 25-February 1, 2021

- Middle Schools return to hybrid learning between January 25 and February 1
- DCSD's most impacted/at-risk students in center-based programs at the middle and high school levels continue with in-person learning four days a week

If we are able to keep enough staff members in preschool, elementary, and middle schools and believe the school system can support bringing all staff and students back to high schools, we will move to Phase 3. If not, we will postpone Phase 3. We will keep our families and staff informed as we monitor the data.

TENTATIVE Phase 3: High Schools

February 16, 2021

- Board of Education Meeting - Prepare and Plan for High School Return

February 22 - March 1, 2021

- High Schools return to hybrid learning between February 22 and March 1
- DCSD's most impacted/at-risk students in center-based programs at the middle and high school levels continue with in-person learning four days a week

At any time, if too many staff members are infected and/or quarantined due to COVID-19 exposure and are therefore not available to come to work in schools every day, we may need to shift individual schools or entire groups of schools back to remote learning.

Phase 4: Return all students to full in-person learning
Timeframe to be determined.

Increased community spread and the resulting quarantines are the biggest obstacles to a return to full in-person learning.

You can help us get all students back to full in-person learning by:

1. **Contacting Governor Polis and encouraging him to provide schools with needed supports.**

   Governor Polis has publicly said that he believes schools are safe and should be open for in-person learning. We appreciate his support for our efforts, but we need his help to make that happen. DCSD and other metro area school districts are working with the Governor and his newly formed Back-To-School Task Force to address the obstacles to in-person learning. Email or call the Governor's Office and encourage him to:

   - Prioritize educators to receive a vaccine after healthcare workers, first responders, and those who are immunocompromised/high risk, which would greatly increase our ability to have enough staff members available to work in schools every day regardless of sustained COVID-19 spread in the community.
   - Provide free or low-cost test kits, personnel, and required training so that schools can offer free, ongoing saliva COVID-19 testing to students and staff.
   - Address the guidelines for quarantine protocols giving schools more flexibility and reducing the number of healthy staff and students placed in quarantine.

2. **Applying to be a substitute teacher, bus driver, or kitchen worker.**

   The Colorado Department of Education has temporarily created a one-year substitute teacher authorization that only requires applicants to have a high school diploma or equivalent (and a clean background check). To learn more and apply click here. Applicants need to apply for licensure and background checks with CDE and also complete a hiring process in DCSD (including fingerprinting processes). Note CDE's online application system will be down during Winter Break (December 23 - January 5).

   DCSD also has a variety of job openings for bus drivers and assistants, kitchen workers, maintenance staff, nursing staff, etc. Visit www.dcsdk12.org/careers to learn more and to apply.

3. **Continuing to follow health protocols and guidance, and keeping your children home when showing any symptoms of illness.**

Click here to view a helpful At-Home Symptom Screening Tool to use as a reference when determining whether your child should go to school.

Like you, we are feeling "COVID-19 fatigue". It's difficult to continue to explain to our children why they cannot be in school or participate in activities with friends. It's tiresome to continue to avoid gatherings with loved ones and to wear a face covering in public. But now is not the time to give up. With vaccines on the horizon, we are incredibly hopeful that the COVID-19 pandemic will be a thing of the past by the time we start the 2021-2022 school year. Together we can, and will get through this.

Sincerely,

Corey Wise
Interim Superintendent
Douglas County School District

Douglas County School District would like to continue connecting with you via email. If you prefer to be removed from our list, please contact Douglas County School District directly. To stop receiving all email messages distributed through our SchoolMessenger service, follow this link and confirm: Unsubscribe

SchoolMessenger is a notification service used by the nation's leading school systems to connect with parents, students and staff through voice, SMS text, email, and social media.

EXHIBIT C

April 26, 2021

Jill Hunsaker Ryan
Executive Director, CDPHE
Sent Via Email

Re: School Quarantine Requirements

It's time to eliminate mandatory COVID quarantines in Colorado's schools.

Messaging from Colorado's public health and elected officials has acknowledged, since before the new year, that rates of COVID transmission within our schools are low; that the mitigation measures we have in place are working; and that in-person schooling is critically important for many students in their social, emotional, and academic development. Similar findings have been made throughout the country, and at this juncture at least 11 states -- Ohio, Utah, Missouri, Texas, Nebraska, Oklahoma, Iowa, Wyoming, New Hampshire, North Dakota, and Indiana -- have eliminated prior quarantine rules that resulted in large numbers of students being removed from in-person schooling each time they have a school exposure to a COVID positive individual. Several of these states took these steps before the onset of the new year. In-school COVID transmission remains low in each of these jurisdictions, and none of them has needed to rescind their new response protocols because of a surge in COVID activity.

Many of us have been advocating for an end to school quarantine rules since before the spring break period and have heard that rescission of the quarantine rules was premature because of concerns about COVID variants and fears that school transmission would markedly increase as secondary school students moved from hybrid schooling models to more densely occupied classroom environments. More than a dozen Colorado school districts have been collecting data regarding in-school COVID transmission throughout the second semester, and the data show that in-school transmission remains extremely low notwithstanding the presence of COVID variants in our state and even after the transition from hybrid schooling models in mid-March to early April. Our most recent data compiled on April 23 shows that less than one half of one percent of students and staff placed into quarantine since January have subsequently tested positive for the virus -- and the rates are not increasing over the past month.

The frequent school quarantines have caused constant disruption to classroom environments, stress for students preparing for end of year exams, and a lack of predictability and consistency in almost every facet of a student's school experience. More than 3000 students per week have been completing quarantines over the past two weeks across the 13 districts currently participating in the COVID data reporting effort -- and their COVID infection rate has been less than two tenths of one percent.

If the existing quarantine rules remain in place as we head into the final month of the school year, we estimate that 10-20 percent of our students could find themselves sent home on quarantine at some time before summer break commences. Those quarantines would be on top of others that students and families have had to navigate throughout the school year. The most extreme case of which we're aware concerns a student sent home on quarantine six times throughout the year, but we have many students across our districts who have been out on quarantine two to three times this year and have had a choppy, inconsistent school experience. The protective health benefits for these students from quarantines have been small -- and the costs to their development and academic progress have been great. The stakes will

grow larger as participation in graduation ceremonies and planned in-person participation in advanced placement exams becomes at risk due to quarantine requirements.

We urge the Colorado Department of Public Health and Environment to take prompt action to rescind current school quarantine standards and replace them with protocols adopted in the states referenced above. The combination of continued indoor masking for students and staff members; home isolation of COVID positive staff and students; and directives that symptomatic individuals stay home has proven effective elsewhere in maintaining low rates of in-school COVID transmission. If similar standards are quickly adopted here, we can give tens of thousands of students the opportunity to finish the school year with consistency, predictability, and focus that they'll otherwise lose out on as they get on and off the quarantine carousel.

Your acknowledgement of this letter, and your anticipated timeline for providing a substantive response or change to existing school quarantine practice, would be appreciated by the close of business on April 27, 2021.

Sincerely,

Chris Gdowski, Superintendent, Adams 12 Five Star Schools
Douglas Bissonette, Superintendent, Elizabeth School District
Charlotte Ciancio, Superintendent, Mapleton School District
Tracy Dorland, Superintendent, Jeffco Public Schools
Brian Ewert, Superintendent, Littleton Public Schools
Chris Fiedler, Superintendent, 27J Schools
Rico Munn, Superintendent, Aurora Public Schools
Wendy Rubin, Superintendent, Englewood Schools
Mike Schmidt, Superintendent, Platte Canyon School District
Scott Siegfried, Superintendent, Cherry Creek School District
Pam Swanson, Superintendent, Westminster Public Schools
Corey Wise, Superintendent, Douglas County School District

Attachment: Semester Two Aggregate Data Regarding Student/Staff Quarantines from Colorado School Districts

Cc:
Dr. Eric France, Chief Medical Officer, CDPHE
Governor Jared Polis
Lisa Kaufmann, Chief of Staff to Governor Polis
Alana Plaus, Advisor to Governor Polis
Dr. John Douglas, Executive Director, Tri County Public Health and Co-Chair, Metro Denver Partnership for Health
Jason Vahling, Director, Broomfield Public Health and Co-Chair, Metro Denver Partnership for Health

EXHIBIT D

Draft - Dangerous Effects of Everyday COVID Mask Use

George R. Thompson, Ph.D.

(Toxicologist/Psychopharmacologist for > 50 years)

A comprehensive analysis of 109 scientific studies regarding the adverse health effects COVID masks can cause was published last spring (Kisielinski et al., 2021). From their compiled quantitative and scientific data, the authors concluded extended mask-wearing by the general population could lead to adverse effects and consequences in 8 primary medical fields and at least 27 different clinical conditions. Summarized conclusions derived from this study include:

1. **Indiscriminate mandatory use of masks for COVID protection are not based in science and are dangerous to millions of individuals in the public arena.**
2. **Ordinary fabric masks used by the general public have a 97% penetration of particles ≥ 0.3 um, in stark contrast to surgical masks with a 44% penetration, and N95 mask penetration rate of 0.01% for particles ≥ 3 um.**
3. **Masks have a serious disruptive effect on breathing.**
4. **Since masks trigger low blood oxygen and high carbon dioxide levels, masks should not be used during physical exercise or sports events, even for healthy athletes.**
5. **Use of masks in children must be weighed against the breadth of potential harm, including physical, psychological, social and communication concerns.**
6. **Wearing masks over long periods of time leads to physiological and psychological impairments, including reduced on-the-job work performance.**
7. **Incorrect use of community and surgical masks, and their frequent reuse, increased the risk of infection, allowed viruses to accumulate, and showed increased germ density beneath the mask in proportion to the length of time the mask was worn.**
8. **A major risk of mask use by the general public is the creation of a false sense of security with regard to protection against viral infection, and this leads to neglect of social distancing and hand hygiene that have a higher effectiveness than mask-wearing.**
9. **If decision makers are considering mandatory use of COVID masks, broad medical exemptions are warranted, preferably leaving the decision between the patient and their doctor.**
10. **Employers, including corporations, government agencies, and educational institutions, who chose to ignore this comprehensive and unequivocal scientific analysis of dangers created by mandated COVID mask-wearing can anticipate facing lawsuits from unions, individuals, and parents.**

Since 2019, many countries have required the public to wear masks to prevent the spread of SARS-CoV-2 (COVID-19), without consideration of adverse health effects from wearing the masks. In April 2021, a group of 8 German scientists published a compilation of 44 mostly experimental studies with significant negative mask effects for quantitative assessment and 65 publications on masks for substantive evaluation, including 178 references from around the world. Their review included data on fiber, surgical, and N95 masks. Across these 109 scientific studies, they found elevated adverse effects of masks in numerous medical disciplines (Table 1). Eight primary medical conditions were identified that had increased risk of exacerbation from wearing masks to prevent COVID exposure. Within these 8 disciplines, they identified 27 different clinical conditions that showed increased risk of adverse health risks from COVID mask wearing.

Table 1. Increased Risk of Adverse Health Effects from COVID Mask Wearing[1]

Pediatric Diseases (4)[2]	Psychiatric Illness (13)	Neurologic Diseases (7)
Asthma Respiratory Diseases Cardiopulmonary Diseases Neuromuscular Diseases Epilepsy	Claustrophobia Panic Disorder Personality Disorders Dementia Schizophrenia Helpless Patients Fixed & Sedated Patients	Migraine & Headache Suffers Patients with Intracranial Masses Epilepsy
Internal Diseases (11) COPD Sleep Apnea Syndrome Advanced Renal Failure Obesity Cardiopulmonary Dysfunction Asthma	**Ear/Nose/Throat Diseases (4)** Vocal Cord Disorders Rhinitis & Obstructive Diseases **Dermatologic Diseases (10)** Acne Atopy	**Occupational Health Restrictions (14)** Moderate/Heavy Work **Gynecological Restrictions (3)** Pregnant Women

[1] From: Kisielinski et al., 2021

[2] Numbers in parentheses indicate the number of publications reporting that undesired medical, organ, or organ-system effect.

This review classified the "consistent, recurrent and uniform presentation" of multiple physical and psychological symptoms from the different medical disciplines as **Mask-Induced Exhaustion Syndrome (MIES)** (Table 2). Both healthy and sick people in their analysis of the 109 studies can experienced MIES. They identified 19 components within MIES that were each documented in as many as 15 different scientific publications. The most frequently cited adverse medical effects were shortness of breath/difficulty breathing, increased blood carbon dioxide levels, and decreased blood oxygen saturation that frequently led to overall perceived fatigue and exhaustion.

Table 2. Symptoms of Mask-Induced Exhaustion Syndrome (MIES)[1]

Symptoms	# Reported Publications
1. Increase in breathing dead space volume	4
2. Increase in breathing resistance	4
3. Increase in blood carbon dioxide	15
4. Decrease in blood oxygen saturation	11
5. Increase in heart rate	4
6. Increase in blood pressure	2
7. Decrease in cardiopulmonary capacity	1
8. Increase in respiratory rate	5
9. Shortness of breath/difficulty breathing	15
10. Headache	9
11. Dizziness	2
12. Feeling hot and clammy	9
13. Decreased ability to concentrate	1
14. Decrease ability to think	2
15. Drowsiness	5
16. Decrease in empathy perception	1
17. Impaired skin barrier function with itching	11
18. Acne, skin lesions and irritation	3
19. Overall perceived fatigue and exhaustion	9

From: Kisielinski et al., 2021.

Masks expand the *natural dead space* well beyond the mouth and nose. As early as 2005, a study demonstrated that surgical masks in healthy medical personnel resulted in measurable physical effects, with increased levels of carbon dioxide within 30 minutes (Butz, 2005). The increased dead space under the mask causes an increased rebreathing of exhaled air and carbon dioxide. The dead space for an N95 mask is almost double that of an adult with no mask (i.e., 65-112%) (Xu et al., 2015). This increased mask dead space causes an impairment of respiratory physiology, including an increase in blood carbon dioxide, which reflexively increases respiratory muscle work and oxygen demand (Roberge et al., 2010; Matuschek et al., 2020; Pifarre et al., 2020; Roeckner, et al., 2020), and a mask-induced drop in blood oxygen (Kao et al., 2004; Beder, et al., 2008). In addition, the concentration of oxygen under the mask was significantly lower (18.3%) than the room air concentration (20.9%) (Pifarre et al., 2020). These documented changes in blood gases can result in confusion, decreased thinking ability, disorientation, and overall cognitive abilities (Johnson, 2016; Kyung et al., 2020; Rosner, 2020), and are known to trigger panic attacks (Kent et al., 2001; Morris et al., 2020). The mask-induced drop in blood oxygen results in an increase of the respiratory rate (Li et al., 2005; Roberge et al., 2012; Georgi et al., 2020), heart rate (Beder, et al., 2008; Kyung et al., 2020; Liu et al., 2020), and chest complaints (Kao et al., 2004; Mo et al., 2020). Obviously, changes in blood gases cause clinically relevant psychological and neurological effects.

It is known from pathology that not only exposure to conditions exceeding normal limits, but subthreshold or subliminal exposures, are also capable of causing pathological effects, if the exposure duration is sufficiently long. In the present analyses, duration of mask wearing is expected to be a significant factor in inducing long-term medical conditions (Kisielinski et al., 2021). For example, it is no surprise that the small, disease-promoting increase in carbon dioxide in inhaled air from the mask wearing created headaches, irritation of the respiratory tract (to include asthma), increase in blood pressure and heart rate with vascular damage, as well as neurological and cardiovascular impacts (including arteriosclerosis of the blood vessels (Azuma et al., 2018; Custodis et al. 2010). Chronic wearing of masks is responsible for these effects due to increases in inhaled carbon dioxide (Rebmann et al., 2013; Roberge et al., 2014; Mo et al., 2020; Bharatendu et al., 2020), small, sustained increases in heart rate (Kao et al., 2004; Beder, et al., 2008; Liu et al., 2020), and mild but sustained increases in respiratory rate (Roberge et al., 2012; Johnson et al., 2016; Kyung et al., 2020). The authors observed that:

> "The described mask-related changes in respiratory physiology can have an adverse effect on the wearer's blood gases subclinically, and in some cases also clinically manifest, and therefore, have a negative effect…on a wide variety of organ systems and metabolic processes with physical, psychological and social consequences for the individual."

Mask-related breathing resistance is also of special significance. An N95 mask can more than double airway resistance during inhalation and exhalation (by 126% and 122%, respectively), and reduce the air exchange volume of the lungs by minus 37% (Lee and Wang, 2012). Moisturization of the mask further increase the airway resistance by another 3% (Roberge et al., 2010). The body compensates by increasing the breathing frequency resulting in amplified work of breathing against the greater mask resistance, increased heart rate, and increased carbon dioxide production by the body. Such respiratory impairment produced a significant decrease in oxygen saturation in about 75% of their study results (Kisielinski et al., 2021). Individuals wearing the mask recognized these body compensatory responses as breathlessness and progressive exhaustion. The cardiac compensation for the pulmonary mask-reduced restrictions, still possible in healthy individuals, was probably no longer functional in patients with reduce cardiac output (Fikenzer et al., 2020). A study of fabric masks (community masks), surgical masks, and N95 masks reported these same respiratory impairment effects, but most of the complaints were with the N95 masks (Georgi et al., 2020). Studies with sick individuals indicated

mask intolerance associated with increased obesity, older age, Chronic Obstructive Pulmonary Disease (COPD, high blood pressure, patients with reduced cardiopulmonary function, pneumonia (Kao et al., 2004; Rebmann et al., 2013; Kyung et al., 2020; Matuscheck et al., 2020; Mo et al., 2020). Previously, Table 1 listed 27 different clinical conditions that showed increased risk of adverse health risks from COVID mask-wearing, within 8 primary medical disciplines. Clearly, as documented by these extensive and broad-based scientific studies, **mandatory use of masks for COVID protection are not based in science and are dangerous to millions of individuals in the public arena.**

Children are uniquely and particularly vulnerable to the wearing of COVID masks. Adverse COVID mask effects described for adults are all more valid for children (Kisielinski et al., 2021). One study reported that masks and face shields caused fear in 46% of 80 children (Forgie et al., 2009). A study in Germany with 25,930 children reported seven negative mask-wearing impacts on children (Table3). In addition, "masks block

Table 3. COVID Mask-Wearing Complaints of 25,980 Children[1]

Complaint	Incidence (%)
Headache	53
Difficulty Concentrating	50
Joylessness	49
Learning Difficulties	38
Fatigue	37
Onset Anxiety	25
Nightmares	25

[1]From Schwartz et al., 2021.

the "foundation of human communication and the exchange of emotions and, not only hinder learning, but deprive children of the positive effects of smiling, laughing, and emotional mimicry" (Spitizer, 2020; Kisielinski et al, 2021). Since the U.S. Center for Disease Control and Prevention (CDC) reported in October 2021 that only 587 children 18 years of age and younger died of COVID-19 (only 0.0008% of that population), the widespread use of masks in children, with their inherent negative effects, cannot be justified.

Scientists complain about the high permeability of fabric masks with particles, their potential risk of infection, and the lack of evidence for their use (MacIntyre et al., 2013; MacIntyre et al., 2015; MacIntyre and Chughtai, 2015; Matuschek et al., 2020). Ordinary fabric masks have a 97% penetration of particles $\geq$ 0.3 um in sharp contrast to surgical masks with a 44% penetration and N95 masks with a penetration rate of 0.01% for particles $\geq$ 0.3 um (MacIntyre et al., 2011; MacIntyre et al., 2015). In a laboratory experiment, both surgical and N95 masks had deficits against SARS-CoV-2 and influenza virus protection (Lee et al., 2008). The N95 mask was 8-12 times more effective than the surgical mask, but neither type mask showed reliable protection against corona and influenza viruses. Aerosol particles of 0.08 to 0.12 um penetrated both types of masks unhindered. Individuals wearing fabric, surgical, or N95 masks release significantly and proportionately smaller particles of 0.3 to 0.5 um into the air, than mask-less people when breathing, speaking and coughing – the masks act like nebulizers producing very fine particles (Asadi et al., 2020). In addition, 65% of health professionals and 78% of the general population use masks incorrectly (Gralton and McLaws, 2010). Masks currently used for children are exclusively adult masks with smaller geometric dimensions and have not been specifically tested, nor approved, for COVID use (Smart et al., 2020). Exclusion criteria for mask use include at least 18 different medical conditions (Table 4) (Goh et al., 2019).

Table 4. Exclusion Criteria for COVID Mask Use[1]

Cardiopulmonary Disease	Asthma	Bronchitis
Cystic Fibrosis	Congenital Heart Disease	Emphysema
Pneumonia	Anxiety Disorders	Diabetes
Hypertension	Epilepsy	Physical Disabilities
Upper Respiratory Disease	Rhinitis	Craniofacial Deformities
Neuromuscular Disease	Exertion Sensitive Conditions	Facial Hair

[1] From Goh et al., 2019.

The comprehensive scope of the negative effects of COVID mask-wearing clearly documents physical, psychological, and social adverse effects for mask wearers. This research group (Kisielinski et al., 2021) has demonstrated broad-based and significant negative health effects from "the drastic intervention of masks," especially when worn for long periods. Their highly detailed and in-depth analyses warrant careful consideration by policy makers in government and industry if lawsuits are to be avoided.

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