

**IN THE CIRCUIT COURT OF BOONE COUNTY  
THIRTEENTH JUDICIAL CIRCUIT OF MISSOURI**

The State of Missouri ex rel.,	)	
Eric S. Schmitt,	)	
	)	
Plaintiff,	)	
v.	)	No.: 21BA-CV02754
	)	
Columbia Public Schools, and all others similarly	)	
situated, et al.,	)	
	)	
Defendants.	)	

**SUGGESTIONS IN SUPPORT OF MOTION OF A.M., M.L, AND A.D. BY THEIR PARENTS AND NEXT FRIENDS ASHLEY IRWIN, CHRISTOPHER LACOUR, AND ALISON DURPHY TO INTERVENE AS PARTY-DEFENDANTS**

Unlike any of the existing parties to this case, A.M., M.L, and A.D. are children with disabilities who each attend a Missouri public school that has implemented a mask mandate<sup>1</sup> to prevent the spread of COVID-19. If the State’s requested relief is granted, the students’ likelihood of contracting COVID-19 at school will increase, thus heightening their risks of severe illness, long-term side effects, and death from COVID-19’s interaction with their diagnoses of cystic fibrosis, Langerhans Cell Histiocytosis (LCH), and microcephaly. If Missouri schools are prohibited from adopting mask mandates to protect students with disabilities from COVID-19, their parents will be forced to choose between their children’s education and health (both physical and mental) even though federal law prohibits the government from requiring them to make such a choice. The students have moved to intervene as Party-Defendants to protect their concrete interests as students with disabilities, which are interests that relate to the

---

<sup>1</sup> Intervenor-Defendants use the term “mask mandate” to refer to their respective school’s existing requirement that students and teachers wear masks or face coverings to prevent the spread of COVID-19, including to students with disabilities that put them at heightened risk from COVID-19.

subject of this action, would be impaired or impeded by the State’s requested relief, and are shared by no current party to the case.

**I. THE STUDENTS SHOULD BE PERMITTED TO INTERVENE AS A MATTER OF RIGHT.**

To ensure adequate representation of their protected interests, A.M, M.L., and A.D. should be permitted to intervene as a matter of right. A party has the right to intervene in an existing action under Mo. R. Civ. P. 52.12(a) if three elements are met: (1) the applicant has an interest relating to the property or transaction that is the subject of the action; (2) the applicant’s ability to protect the interest is impaired or impeded; and (3) the existing parties are inadequately representing the applicant’s interest. *Allred v. Carnahan*, 372 S.W.3d 477, 481 (Mo. App. W.D. 2012). “[T]he Rule should be liberally construed to permit broad intervention[.]” *Id.* at 482 (quotation and citation omitted). “When an applicant satisfies the elements, the right to intervene is absolute, and the motion to intervene may not be denied.” *McMahon v. Geldersma*, 317 S.W.3d 700, 705-06 (Mo. App. W.D. 2010).

**A. The students have an interest in the subject of this action as students with disabilities directly affected by mask mandates and the proposed prohibition of such mandates.**

If the State succeeds in prohibiting school district from requiring masks, A.M., M.L., and A.D. will be excluded from participation in or be denied the benefits of public education by reason of their disabilities; therefore, they have a legal interest in the subject of this action because they are entitled to an opportunity to receive an education in the least-restrictive and most integrated environment, without putting their lives at risk or being excluded or discriminated against because of their disabilities. Because the State’s requested relief would infringe upon their educational opportunity, they have viable claims under Title II of the Americans with Disabilities Act of 1990 (ADA), Section 504 of the Rehabilitation Act of 1973,

as amended, 29 U.S.C. 794, and the American Rescue Plan Act of 2021 (ARPA) that the requested relief is unavailable because prohibiting school districts from requiring masks would prevent the school districts from meeting their obligations to students with disabilities under federal law. To the extent Missouri laws would compel this Court to prohibit the use of universal masking requirements, as the State urges, those laws violate and are preempted by federal law. *See Bechtel ex rel. Bechtel v. State Dept. of Soc. Services, Family Support Div.*, 274 S.W.3d 464, 468 (Mo. banc 2009) (finding a statute invalid because it violated the ADA in that the statute at issue was the reason a person with disabilities was excluded from participation in program on the basis of that disability). To intervene as of right, an interest constitutes “a concern, more than mere curiosity, or academic or sentimental desire . . . in the outcome or result [of an action] because he has a legal right which will be directly affected thereby.” *Prentzler v. Carnahan*, 366 S.W.3d 557, 561–62 (Mo. App. W.D. 2012). This “‘interest’ must be such an immediate and direct claim upon the very subject matter of the action that intervener will either gain or lose by the direct operation of the judgment that may be rendered.” *State ex rel. Farmers Mutuals Auto. Ins. Co. v. Weber*, 273 S.W.2d 318, 321 (Mo. banc 1954).

Protecting vulnerable children from the ongoing spread of the COVID-19 virus has been a serious concern since the pandemic began, especially in the school setting, and is now of heightened concern due to the rising number of children contracting the Delta variant. *See, e.g.*, Melissa Jenco, *CDC: Delta variant causing increase in pediatric COVID-19 cases, not severity*, American Academy of Pediatrics News (Sep. 3, 2021), <https://www.aappublications.org/news/2021/09/03/covid-delta-variant-children-hospitalizations-090321>. The State itself concedes that COVID-19 and its variants pose a serious health risk. *Missouri ex rel. Eric Schmitt v. Page, et al.*, Case No. 21SL-CC03334, (21st Jud. Cir.), Court

Order dated September 20, 2021, at ¶ 5, *available at* [https://ago.mo.gov/docs/default-source/press-releases/2021-09-20-stl-county-order.pdf?sfvrsn=b23f6392\\_2](https://ago.mo.gov/docs/default-source/press-releases/2021-09-20-stl-county-order.pdf?sfvrsn=b23f6392_2) (also noting the recent death of a Missouri child from COVID-19, stating “the death of even one child is too many when it is possible to protect the people of the State of Missouri from such a pandemic”). The threat of COVID-19 is heightened for individuals, including children, with underlying medical conditions and disabilities. *See, e.g.*, Centers for Disease Control and Prevention, *COVID-19: Medical Conditions*, Aug. 20, 2021, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html>.

Prohibiting mask mandates in public schools would exclude students with disabilities from participation in and the benefits of a safe public education in violation of the ADA, the Rehabilitation Act, and ARPA. The ADA requires that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. In order to be protected under the ADA, an individual must meet the ADA definition of disability, which requires demonstrating that a diagnosis inhibits one or more “major life activities including, but not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A)(1). A major life activity “also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. § 12102(2)(B)(1). As discussed *infra*, A.M., M.L., and A.D. each satisfy the requirements of the ADA disability definition.

The Defendant School Districts are recipients of federal financial assistance and are obligated to provide a free appropriate public education to each qualified individual with a disability who is in the recipient's jurisdiction. 34 C.F.R. § 104.33. Prohibiting mask mandates would violate the rights of students with disabilities, including A.M., M.L. and A.D., under Section 504 of the Rehabilitation Act by discriminating on the basis of disability. *See* 29 U.S.C. § 794(a), 42 U.S.C. § 12132; and 34 C.F.R. § 104.4(a), (b)(1)(i), (b)(2), and (b)(4). The State's requested relief of a prohibition on mask mandates is unlawful because it is preempted by ARPA.<sup>2</sup> Federal law is the "supreme Law of the Land," and must prevail over any contrary provision of state law. U.S. Const. art. VI, cl. 2.; *Felder v. Casey*, 487 U.S. 131, 138 (1988) ("[A]ny state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."). Under the doctrine of preemption, a state law is preempted by federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Conserv. & Dev. Comm'n*, 461 U.S. 190, 204 (1983).

ARPA allocated large sums of money to state school districts. Missouri school districts were allocated over \$1.9 billion in Elementary and Secondary School Emergency Relief (ESSER) funds to prepare for a safe return to in-person schooling. Missouri Budget Project, *American Rescue Plan: State & Local Funding for Missouri*, March 11, 2021, <https://www.mobudget.org/arp-state-local-funds-mo/>. Section 2001(e)(2)(Q) of ARPA explicitly

---

<sup>2</sup> The United States Congress enacted ARPA as a comprehensive legislative response to the COVID-19 pandemic. According to House Budget Committee Chairman John Yarmuth, the Act was enacted to "provide economic relief to nearly every American family and hard-working individual, get vaccines into the arms of millions of Americans, and get our schools open safely." <https://budget.house.gov/news/press-releases/house-sends-yarmuth-led-american-rescue-plan-act-president-biden-s-desk> (last visited Sept. 20, 2021).

authorizes local school districts to use these ARPA ESSER funds for “developing strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the Centers for Disease Control and Prevention for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff.” ARPA § 2001(e)(2)(Q). The CDC’s guidance specifically recommends universal indoor masking in all K-12 schools. *See* <https://www.cdc.gov/coronavirus/2019-ncov/community/schools-childcare/k-12-guidance.html>. In directing school districts how their ARPA funds must be used, the U.S. Department of Education (USDOE) advised that each district must explain: “the extent to which it has adopted policies, and a description of any such policies, on each of the following safety recommendations established by the CDC...,” specifically including “universal and correct wearing of masks.” *See* Am. Rescue Plan Act Elementary and Secondary School Emergency Relief Fund, 86 Fed. Reg. 21195, 21200 (April 22, 2021). Of relevance here, the interim guidance further directed local school districts to pay special attention to “those students disproportionately impacted by the COVID-19 pandemic, including . . . children with disabilities.” *Id.*

A.M., a minor student with a disability, is five years old and attends kindergarten in the Blue Springs School District in Blue Springs, Missouri. A.M. has cystic fibrosis, a progressive, genetic disorder that causes chronic lung infections and severe lung damage as well as damage to other organs, limits the ability to breathe over time, and puts A.M. at a heightened risk of serious illness and long-term effects from COVID-19, and substantially limits one or more of her major life activities. Over time, cystic fibrosis limits one’s ability to care for oneself because so much effort and energy is exerted breathing that there is not sufficient energy to perform other tasks or activities. A.M. is on a high calorie and high fat diet so that her body can absorb sufficient

nutrients. A.M.'s sleep is impaired due to frequent and chronic coughing. A.M.'s learning has been impaired because she has had to miss school due to frequent hospitalizations. A.M.'s concentration is impacted when she suffers from an infection or illness.

M.L., a minor student with a disability, is eleven years old and attends sixth grade in the Park Hill School District in Kansas City, Missouri. In January 2021, he was diagnosed with Langerhans Cell Histiocytosis (LCH), a condition treatable by chemotherapy. M.L.'s diagnosis and treatment for LCH put him at heightened risk of serious illness and long-term effects from COVID-19, and substantially limits one or more of his major life activities. The chemotherapy depresses M.L.'s immuno-responses and any infection or fever can turn serious very quickly. Because of this, M.L. must be extra vigilant about his own hygiene in order to stay healthy. Chemotherapy and the accompanying steroid regimen prescribed to increase his appetite and prevent him from losing weight has caused him to gain weight over a short period of time and the result of this is that any kind of physical activity is painful and difficult. The treatment also negatively impacts M.L.'s sleep, causing him to have several nights a month where he gets very little or no sleep. M.L.'s walking is impaired, and he now attends physical therapy weekly in an attempt to keep his leg muscles and connective tissue in a condition that will allow him to walk without limping. M.L. is fatigued easily, which makes it difficult to stand for a long period of time and also affects his ability to concentrate. M.L.'s LCH is centered in his spine, limiting his ability to lift anything or bend over. Since his diagnosis, M.L. has had three episodes where breathing became so painful and difficult that he was taken to the emergency room.

A.D., a minor student with a disability, is ten years old and in the fifth grade in the St. Louis City School District in St. Louis, Missouri. She was born with missing brain matter, a condition known as microcephaly, and needs help with all life functions. Microcephaly is a life-

long condition for which there is no cure or standard treatment. A.D. has a seizure disorder, is grossly developmentally delayed, and has a history of aspiration pneumonia. A.D. cannot walk, talk, or care for herself. She requires fulltime assistance with all major life functions and is completely dependent on the care of others for survival and to complete daily tasks. A.D.'s condition puts her at heightened risk of serious illness and long-term effects from COVID-19, and substantially limits one or more of her major life activities.

Schools must make reasonable accommodations to ensure that students with disabilities are able to fully participate in public education. *See* 28 C.F.R. § 35.130(b)(7). Mask mandates are reasonable accommodations that allow students with disabilities to participate in public education. Prohibiting schools from requiring mask usage would have a disparate impact on disabled students, effectively discriminating on the basis of disability. *See* 42 U.S.C. § 12112(b)(3)(a); § 12112(b)(5)(a). Because of their ages, A.M., M.L., and A.D. are not yet eligible to receive the COVID-19 vaccine, making masks their primary safeguard against the virus. Their schools' mask mandates are a necessary accommodation to allow students with disabilities, full and safe participation in the educational environment. The loss of that necessary accommodation would exclude such students from the classroom and deny them the benefits of a public education. Each of the students has a legally protectable interest that would be directly and irreparably harmed by direct operation of a judgment in the State's favor in this case. *See Board of Education v. Rowley*, 458 U.S. 176, 203 (1982) (holding that states are required to provide every child with a disability a "free and appropriate education" at the public expense with sufficient services to guarantee the child educational benefits).

Moreover, a prohibition of universal masking requirements in Missouri public schools would have a disparate impact on students with disabilities, thereby systemically denying them



the same educational opportunities as their peers. The ADA requires reasonable modifications in policies, practices, or procedures “when modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7). The risks associated with COVID-19 are more severe for students with medical disabilities and removing the safeguard of masks will expose students to those heightened risks, forcing the families of disabled students to choose between their child’s education and health. Therefore, while facially neutral, a prohibition on school mask mandates would discriminate against students with disabilities because disabled students are more likely than nondisabled students to suffer from severe illness and death if they contract COVID-19. *See DeBord v. Board of Education*, 126 F.3d 1102, 1106 (8th Cir. 1997) (analyzing a disparate impact claim).

Because this case will decide whether students with disabilities will be able to equally and fairly participate in public education and whether school districts may accommodate students with disabilities by requiring other students to mask, the students have interests sufficient to support intervention.

**B. This litigation and the state’s requested relief impairs the students’ ability to protect their interests.**

Once it is established that the intervening defendants have an interest at stake in this action, they must prove that without intervention, their ability to protect that interest will be impaired. “The second element of intervention requires a showing that, absent intervention, the proposed intervenors’ ‘ability to protect his interest will be impaired or impeded as a practical matter’ by the disposition of the action.” *Allred*, 372 S.W.3d at 485 (internal citations omitted).

If the State’s request for Declaratory Judgment and Injunctive Relief is granted the students’ right to a free and appropriate public education will be impaired. *See Plyler v. Doe*, 457 U.S. 202, 230–31 (1982) (confirming constitutional right to a free public education). Moreover,

as discussed *supra.*, their rights under the ADA, Section 504 of the Rehabilitation Act, and ARPA likewise would be impaired. Because their legal rights will be impaired by the State's requested relief, the students' their ability to protect their legal interests will be impaired if they are not permitted to intervene.

**C. THE EXISTING PARTIES DO NOT ADEQUATELY REPRESENT THE UNIQUE INTERESTS OF THE STUDENTS.**

Unlike the other parties to this litigation, A.M., M.L., and A.D. will personally and immediately suffer should this Court grant the State's request. Because the first two elements comprising the right to intervention are met, the third element of inadequate representation requires only a "minimal showing" that the representation "may be" inadequate. *Allred*, 372 S.W.3d at 487.

Currently, the students attend public schools that require all persons within the school building to wear masks. If the State prevails, their respective school districts will not be permitted to protect them and other students with disabilities from exposure to COVID-19 by requiring all persons within the schools to wear masks. All students and employees of the school districts will be at heightened risk for contracting COVID-19 at school, but for these students' the danger from that risk is more severe. Because of their medical conditions, symptoms, and treatment, the students' exposure to COVID-19 in their classrooms will lead to heightened risk of severe illness and death, forcing their parents to choose between the students' health and education. No other existing party to this case will have a similar experience or similar stake in the outcome. *See Allred*, 372 S.W.3d at 486 ("[T]he fact that two parties are on the same side of the dispute is not enough, in and of itself, to preclude intervention."); *Alsbach v. Bader*, 616 S.W.2d 147, 151 (Mo. App. E.D. 1981) ("The determination of whether a proposed intervenor's

interest is adequately represented by an original party to an action usually turns on whether there is an identity or divergence of interest between the proposed intervenor and the party.”).

While the named defendants’ primary interest in defending public school districts’ right to implement mask mandates is to prevent the spread of COVID-19 in schools, the interest of students with disabilities is distinct. A public school district’s motivations for implementing a mask mandates are manifold and varied, including but not limited to concerns over employee health, classroom coverage for sick teachers, challenges if a class or group has to be quarantined after exposure, insufficient facility space for social distancing, the facilitation of remote learning options, and pressure from parents who do not have childcare or the ability to supervise remote learning if in-person school is not in session. While the school officials who have adopted masking requirements no doubt are concerned about protecting all students, including students with disabilities, their representation of student interests is more generic. Moreover, the relationship between the students and their school districts is somewhat adversarial in that it is the schools’ responsibility to comply with the federal laws that protect students with disabilities and, thus, it is the schools who will be subject to legal liability if they fail to do so.

As such, the existing parties do not adequately represent the students’ interests as students with disabilities.

## **II. IN THE ALTERNATIVE, THE STUDENTS SHOULD BE PERMITTED TO INTERVENE PERMISSIBLY.**

As an alternative to intervention as a matter of right, upon timely motion anyone may be permitted to intervene in an action when an intervenor’s defense and the main action have a question of law or fact in common. Permissive intervention statutes are to be “liberally construed to facilitate the determination of all related disputes in one proceeding, and thereby avoid a multiplicity of actions.” *State ex rel. Hughes v. Smith*, 485 S.W.2d 646, 651 (Mo. App. 1972).

Individuals upon whom the State seeks to impose a harm—here, students with disabilities—can present questions of law and fact that the named parties cannot. In addition, because A.M., M.L., and A.D. are in jeopardy of being excluded from participation in school because of their disabilities, or of risking their health and possibly lives, to attend school depending upon whether mask mandates are prohibited, they have a personal stake in the outcome of this litigation that shares questions of law and fact with this case. If the State is granted the requested relief, the students will be deprived of their legally protected right to a public education as well as to the protections afforded them by federal law. The ought to be heard.

### III. CONCLUSION

For the foregoing reasons, the Court should permit the applicants to intervene in this action as Party-Defendants.

Respectfully submitted,

/s/ Anthony E. Rothert  
 Anthony E. Rothert, #44827  
 Jessie Steffan, #64861  
 Molly E. Carney, #70570  
 Emily Lazaroff, #73811  
 ACLU of Missouri Foundation  
 906 Olive Street, Suite 1130  
 St. Louis, Missouri 63101  
 Phone: (314) 652-3114  
 Fax: (314) 652-3112  
 arothert@aclu-mo.org  
 jsteffan@aclu-mo.org  
 mcarney@aclu-mo.org  
 elazaroff@aclu-mo.org

Gillian R. Wilcox, #61278  
 ACLU of Missouri Foundation  
 406 W. 34th Street, Suite 420  
 Kansas City, Missouri 64111  
 Phone: (816) 470-9938  
 gwilcox@aclu-mo.org  
*Attorneys for Plaintiff*

**CERTIFICATE OF SERVICE**

I certify that, on September 22, 2021, a copy of the foregoing was filing electronically and delivered by operation of the Court's electronic filing system to all Counsel of record.

/s/ Anthony E. Rothert