IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT SOUTH CAROLINA
Columbia Division

DISABILITY RIGHTS SOUTH CAROLINA, ABLE SOUTH CAROLINA, AMANDA McDOUGALD SCOTT, individually and on behalf of P.S., a minor; MICHELLE FINNEY, individually and on behalf of M.F., a minor; LYUDMYLA TSYKALOVA, individually and on behalf of M.A., a minor; EMILY POETZ, individually and on behalf of L.P., a minor; SAMANTHA BOEVERS, individually and behalf of P.B., a minor; TAMICA GRANT, individually and on behalf of E.G. a minor; CHRISTINE COPELAND individually and on behalf of L.C. a minor; HEATHER PRICE individually and on behalf of H.P. a minor; and CATHY LITTLETON individually and on behalf of Q.L. a minor,

Plaintiffs,

v.

HENRY McMASTER, in his official capacity as Governor of South Carolina; ALAN WILSON, in his official capacity as Attorney General of South Carolina; MOLLY SPEARMAN, in her official capacity as State Superintendent of Education; GREENVILLE COUNTY SCHOOL BOARD; HORRY COUNTY SCHOOL BOARD; LEXINGTON COUNTY SCHOOL BOARD ONE; OCONEE COUNTY SCHOOL BOARD; DORCHESTER COUNTY SCHOOL BOARD TWO; CHARLESON COUNTY SCHOOL BOARD; and PICKENS COUNTY SCHOOL BOARD,

Defendants.

Case No. 3:21-cv-02728-MGL

MEMORANDUM IN SUPPORT OF MOTIONS FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

TABLE OF CONTENTS

PRELIMINARY STATEMENT

As the school year begins and COVID-19 cases soar, local school districts face a dilemma: whether to comply with the state's Budget Proviso 1.108, which precludes them from imposing mask mandates, or whether to meet their obligations under federal disability rights laws, to integrate, not exclude, children with disabilities from public education. Parents too face a dilemma: whether to risk their children's health by sending them to school or to keep them home and safe but without the education to which they are entitled. The Hobson's choice is particularly acute for parents whose children have disabilities, leaving them to decide whether to expose their medically vulnerable children to an unsafe educational environment or to remove them from in-person schooling and thereby deprive them of a safe and integrated public school education.

The U.S. Centers for Disease Control ("CDC") recommends universal masking. So does the South Carolina Department of Health and Environmental Control ("DHEC"). And so does the American Association of Pediatrics, the American Medical Association, and hundreds of physicians and educators across the state. Yet under the challenged law—Budget Proviso 1.108—all masking requirements are illegal.[1] The Proviso, which went into effect on June 25, 2021, provides that "[n]o school district, or any of its schools, may use any funds appropriated or authorized pursuant to under this act to require that its students and/or employees wear a facemask at any of its education facilities." Defendant Spearman has advised districts that, under Proviso 1.108, "districts may not create or enforce *any* policy, which would require the wearing of face coverings." (emphasis added).

[1] While the Proviso speaks to the use of state dollars, the State has made clear, in its lawsuit filed in the South Carolina Supreme Court challenging a City of Columbia ordinance requiring masks in schools, its view that any mask mandate adopted by a locality in the state violates the Proviso. Attorney Decl. ¶ 2 & Ex. A.

By prohibiting that basic public health measure, Defendant State Officials are preventing public entities statewide from complying with the Americans with Disabilities Act ("ADA") and the Rehabilitation Act. Defendant State Officials are illegally forcing South Carolina families who have children with disabilities to choose between their child's education and their child's health and safety, in violation of the ADA and Section 504 of the Rehabilitation Act. Further, the enforcement of Proviso 1.108 needlessly and unconscionably exposes South Carolina school children and their families to a heightened risk of infection, hospitalization, and death. It is against the calamitous consequences of Proviso 1.108's enforcement that Plaintiffs seek emergency injunctive relief.

FACTS

1. The Risk Posed by COVID-19 to Students with Disabilities

For many students with disabilities across the State of South Carolina, it is too risky to return to brick-and-mortar schools if schools do not follow recommended health guidelines to protect them from COVID-19. These students have underlying health conditions—all of which are disabilities—that would make COVID-19 infections much more likely and/or more likely to lead to severe illnesses. According to the American Academy of Pediatrics, "the Delta variant has created a new and pressing risk to children and adolescents across this country" and pediatric cases of COVID-19 have been "skyrocketing." Compl. ¶ 36; *see generally* Saul Decl. ¶¶ 10, 12 & 13.

All children and staff in schools are at risk but school-aged children with certain disabilities, including a range of underlying medical conditions, can face a higher rate of severe illness from COVID-19 as compared to other children without those underlying medical conditions. Saul Decl. ¶ 17; Compl. ¶ 38. According to the CDC, "current evidence suggests children with medical complexity, with genetic, neurologic, metabolic conditions, or with congenital heart disease" can be at increased risk for severe illness from COVID-19. Saul Decl.

¶ 17; Compl. ¶ 38. And "children with obesity, diabetes, asthma or chronic lung disease, sickle cell disease, or immunosuppression can also be at increased risk for severe illness from COVID-19-19." Saul Decl. ¶ 17; Compl. ¶ 38. Many of these conditions are common in the state: For example, more than twelve percent of non-Hispanic Black children, and more than eight percent of all children, in the state have asthma. Attorney Decl. ¶ 3 & Ex. B.

Individuals with intellectual disabilities are also at increased risk of contracting COVID-19. Saul Decl. ¶ 19; Compl. ¶ 39. A recent study published in the New England Journal of Medicine found that individuals with intellectual disabilities were more likely to contract COVID-19; if diagnosed with COVID-19, more likely to be admitted to the hospital; and more likely to die following admission. Saul Decl. ¶ 19; Compl. ¶ 39.

The beginning of the school year coincides with a dramatic increase in COVID-19 transmission in recent weeks in South Carolina. Saul Decl. ¶¶ 10, 13; Compl. ¶ 35. Based on data from 48 states, South Carolina has the fourth highest cumulative case rate per 100,000 children in the United States, with over 9,500 recorded pediatric cases per 100,000 children. Saul Decl. ¶ 13. Based on data from 49 states, South Carolina also has the third highest proportion of pediatric COVID-19 cases in the United States with children accounting for over 19% of all South Carolina COVID-19 cases. Saul Decl. ¶ 13; Compl. ¶ 37.

The risk to school children and staff is already apparent. Nine days after it opened for the 2021-22 school year without any requirement that staff and students wear masks, the Pickens County School District announced that it was reverting to all-virtual classes after 142 students and 26 staff tested positive for COVID-19. Attorney Decl. ¶ 4 & Ex. C. After one week of school (August 16-20), Dorchester County School District 2 is reporting 324 infected students

and 42 infected staff. Three Dorchester County School District 2 staff members have already died from the virus this month. Finney Decl. ¶ 8.

For the 2020-2021 school year, South Carolina had 761,290 students enrolled in public schools. Attorney Decl. ¶ 5 & Ex. D; Compl. ¶ 41. Of these students, 101,365 were identified as "special education" students, of whom 99,301 were placed inside regular classes for at least part of the day. Attorney Decl. ¶ 6 & Ex. E; Compl. ¶ 41. As of the 2020-2021 survey, 5,858 students were identified as having an intellectual disability, 9,859 students were identified as having an autism spectrum disorder, 40,962 have a specific learning disability, and 16,087 are identified as "other health impaired." Attorney Decl. ¶ 6 & Ex. E; Compl. ¶ 41. Many of these students, as well as thousands more with asthma, diabetes, and other conditions are at risk if they go to schools where students and staff are unmasked.

2. COVID-19 Prevention in Schools

The CDC unambiguously recommends "universal indoor masking for all students, staff, teachers, and visitors to K-12 schools, regardless of vaccination status." Saul Decl. ¶ 23; Compl. ¶ 47. Leading medical organizations, including the American Academy of Pediatrics and the American Medical Association, similarly recommend universal masking as part of school openings. Saul Decl. ¶ 24; Compl. ¶ 47. And DHEC also "strongly recommends mask use for all people when indoors in school settings." Saul Decl. ¶ 25; Compl. ¶ 49.

Recent studies have confirmed that wearing masks is one of the most powerful tools to thwart the transmission of COVID-19 in indoor settings, such as schools. Saul Decl. ¶ 26; Compl. ¶ 50. Researchers at Duke University conducted a study on COVID-19 transmission considering over 1 million students in North Carolina K-12 schools and concluded that "wearing masks is an effective strategy to prevent in-school COVID-19 transmission." Saul Decl. ¶ 26; Compl. ¶ 50.

In the opinion of Dr. Robert Saul, the President of the South Carolina Chapter of the American Academy of Pediatrics and a pediatrician with over 45 years of experience, "the only safe course at this time is universal masking at school and school-related functions. . . ." Saul Decl. ¶ 29.

3. Proviso 1.108 and Actions of the Defendant State Officials

On June 21, 2021, in passing its general budget, the South Carolina legislature enacted Budget Proviso 1.108 entitled "SDE: Mask Mandate Prohibition." Attorney Decl. ¶ 7 & Ex. F; Compl. ¶ 2. The Proviso, which went into effect on June 25, 2021, provides that "[n]o school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities." Attorney Decl. ¶ 7 & Ex. F; Compl. ¶ 2.

On July 6, Defendant Spearman directed each school board that, pursuant to Proviso 1.108, "school districts are *prohibited* from requiring students and employees to wear a facemask while in any of its educational facilities for the 2021-22 school year." This directive reversed the Department of Education's prior policy. Attorney Decl. ¶ 8 & Ex. G; Compl. ¶ 3.

In the months since Proviso 1.108 was passed, COVID-19 infection rates, daily cases, and COVID-19-related hospitalizations have ballooned in South Carolina. Attorney Decl. ¶ 16 & Ex. O; Compl. ¶ 53. With the emergence of the Delta variant, the number of reported new cases has grown to over 20 times higher than when Proviso 1.108 was enacted and COVID-19-related deaths have again begun to climb. Attorney Decl. ¶ 16 & Ex. O; Compl. ¶ 53. Specifically, in recent days, South Carolina has reported between 2,000 and 4,000 new cases per day. Attorney Decl. ¶ 9 & Ex. H; Compl. ¶ 53. In the last two weeks, South Carolina has reported over 10,000 new COVID-19 cases among South Carolina children. Attorney Decl. ¶ 16 & Ex. O; Compl. ¶ 53. Notwithstanding the reemergence of COVID-19, Governor McMaster has doubled down on

the prohibition on mask mandate, recently tweeting "mandating masks is not the answer. Personal responsibility is." Attorney Decl. ¶ 13 & Ex. L; Compl. ¶ 54. On August 9, Governor McMaster reiterated "for the government to mask children who have no choice . . . is the wrong thing to do. And we're not going to do it." Attorney Decl. ¶ 14 & Ex. M; Compl. ¶ 54. On August 10, Attorney General Wilson wrote to the City of Columbia that a City Ordinance requiring all faculty, staff, visitors, and students in school buildings wear facemasks conflicted with Proviso 1.108 and should be rescinded or amended; Defendant Wilson has since filed suit in the South Carolina Supreme Court seeking to enjoin Columbia's City Ordinance. Attorney Decl. ¶ 15 & Ex. N; Compl. ¶ 55.

The enforcement of Proviso 1.108 by State officials places all children at risk. Saul Decl. ¶ 30-32; Compl. ¶ 58.

4. Harm to Named Plaintiffs

Dr. Saul, head of the South Carolina AAP and a physician with over 45 years of practice succinctly describes the dilemma families face as result of Provision 1.108:

> In communities where COVID-19 is prevalent, parents with children with conditions that can make them vulnerable to severe illness in particular will face a terrible dilemma of whether to risk their children's health and even life, or to keep the children out of school. That is not a decision they should be forced to make, when we have the option of masks to protect the safety of those in the school. . . . No child should risk serious illness if we can prevent it.

Saul Decl. ¶¶ 30-31.

That is the dilemma faced by families across the state, including our named Plaintiffs and those represented by Disability Rights South Carolina and ABLE South Carolina, who have disabilities that make them susceptible to contracting COVID-19 or to severe illness if they contract COVID-19. Compl. ¶¶ 8-9. Whether these children live with Down Syndrome, kidney disease, asthma, diabetes, Autism Spectrum Disorder, autoimmune diseases, or other conditions

that make them more vulnerable to contracting COVID-19, they face losing equal access to their education.

Each Individual Plaintiff risks their health if they choose to go to school, which they all want to do and have a right to do.

L.P., a six-year-old kindergarten student at Clemson Elementary School, has congenital myopathy; his chest muscles are weaker than those of others his age, leaving him vulnerable to upper respiratory illnesses including pneumonia and COVID-19. Poetz Decl. ¶¶ 5-6. His parents, both nurses who have seen the devastating impact of COVID-19-19, are "scared to send L.P. to school where mask mandates are illegal" given the risk to his health. Poetz Decl. ¶¶ 9-10. And they are not satisfied to keep him home, having seen the negative consequences of isolation for L.P. last year. Poetz Decl. ¶ 12. Considering the prospects for her son, Emily Poetz, L.P.'s mother, maintains, "I do not believe my son should be isolated from in-person schooling because of his disability." Poetz Decl. ¶ 12.

M.A., who is five-years-old, is also a kindergartner at Clemson Elementary school. Tsykalova Decl. ¶ 2. She has asthma, a condition the CDC identifies as one that can put a child at risk of severe illness should she contract COVID-19. Tsykalova Decl. ¶ 4. Her school has offered M.A. the option of virtual learning. Tsykalova Decl. ¶ 10. It is not an acceptable choice for Lyudmyla Tsykalova, M.A.'s mother: "I do not believe that it is possible for my daughter to learn or develop through virtual learning . . . and I believe that if everyone was wearing a mask. . . . my daughter would be safe in school." Tsykalova Decl. ¶¶ 11-12.

P.S., the five-year-old son of Amanda McDougald Scott, also has asthma. McDougald Scott Decl. ¶ 3. In addition, P.S. has also been previously hospitalized for Henoch-Schönlein purpura (HSP), a condition that involves inflammation of small blood vessels. McDougald Scott

Decl. ¶ 4. COVID-19 puts him at risk of recurrence of the HSP. McDougald Scott Decl. ¶ 5. Because P.S. is not safe at school absent masking, his parents have placed him at Furman Child Development Center, a private school that costs $7,000 per year. Because of Proviso 1.108, he has been deprived of a free public education. McDougald Scott Decl. ¶¶ 8-9.

M.F., a sixteen-year-old in school in Dorchester County, has Renpenning Syndrome, an exceedingly rare condition that causes multiple health conditions. Finney Decl. ¶ 3. While there are no known published studies relating it to COVID-19. M.F.'s condition puts him at high risk of swelling around his heart and lungs. Finney Decl. ¶ 6. M.F.'s body is generally immunocompromised and lacks the ability to fight off infection and disease, putting him in danger of severe illness should he contract COVID-19. Finney Decl. ¶ 6. M.F.'s mother, Michelle Finney, has pulled M.F. out of school given the risks to him in a school that does not comply with the CDC guidelines. Finney Decl. ¶¶ 9-11. As a result, M.F. will "miss out on many necessary services and invaluable learning opportunities." Finney Decl. ¶ 10.

Q.L, H.P., P.B., L.C., and E.G. all have Autism Spectrum Disorder. Littleton Decl. ¶ 4; Price Decl. ¶ 4; Boevers Decl. ¶ 3; Copeland Decl. ¶ 4; Grant Decl. ¶ 3. They attend schools in Oconee, Lexington, Charleston, and Greenville County schools, respectively. Littleton Decl. ¶ 2; Price Decl. ¶ 2; Boevers Decl. ¶ 2; Copeland Decl. ¶ 2; Grant Decl. ¶ 2. Q.L., who is five, also has a history of respiratory syncytial virus, and he is nonverbal, leaving him unable to communicate when he is not well. Littleton Decl. ¶ 5. His condition makes it more likely he will be severely impacted should he get COVID-19. Littleton Decl. ¶ 5. P.B. has communication and developmental delays and has been hospitalized for basic illnesses like the flu because of his inability to communicate his symptoms in a timely manner so that he could get care before the symptoms worsened. Boevers Decl. ¶¶ 4-5. Should he get COVID-19, his symptoms will likely

be exacerbated because of his difficulty communicating. Boevers Decl. ¶ 6. His doctor has advised that P.B. should return to school only if he would be in a fully masked environment. Boevers Decl. ¶ 7. H.P. is vaccinated; he needs to be reminded about social distancing and washing his hands. Price Decl. ¶ 5. His father has Charcot-Marie-Tooth disease, which puts him at high risk for COVID-19. Price Decl. ¶ 3. L.C.'s mother has asked her school for an accommodation for her daughter; as of August 20, she had had no response. Copeland Decl. ¶ 9. E.G., who is nine, also has Attention Deficit/Hyperactivity Disorder and struggles with social distancing, leaving him more vulnerable to infection in an environment where everyone is not masked. Grant Decl. ¶ 4.

The parents of Q.L, H.P, L.P., L.C., and E.G. all attest that virtual learning disadvantages their children and that they believe their children would be safe if everyone were wearing a mask in their school. Littleton Decl. ¶ 6; Price Decl. ¶ 6; Poetz Decl. ¶¶ 12-13; Copeland Decl. ¶ 6; Grant Decl. ¶ 5. *See also* Starkey Decl. ¶ 8.

The story of A.S., the twelve-year-old daughter of Nicole Starkey, makes clear the risk of returning to school. A.S. has Down Syndrome, a blood clotting disorder, and a history of hospitalizations for respiratory ailments. Starkey Decl. ¶ 3. She attended school in Pickens County for nine days; although she was vaccinated and masked, the majority of those in her school were not masked. Starkey Decl. ¶ 5-7. A.S. contracted COVID-19, became very ill, and because of the severity of her infection, had to receive a monoclonal antibody infusion. Starkey Decl. ¶¶ 11, 13. Her mother also tested positive for COVID-19 two days after A.S. Starkey Decl. ¶ 12.

Because of Proviso 1.108, these children are all being denied equal access to their education. They each must choose between going to school and risking their own health and that of their family. That is an unconscionable and illegal choice.

LEGAL STANDARD

To obtain a temporary restraining order or a preliminary injunction, the plaintiffs "must establish '[1] that [they are] likely to succeed on the merits, [2] that [they are] likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in [their] favor, and [4] that an injunction is in the public interest.'" *Real Truth About Obama, Inc. v. Fed. Election Comm'n*, 575 F.3d 342, 346 (4th Cir. 2009) (citation omitted).

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

A. Defendants are Discriminating Against Students with Disabilities in Violation of Federal Law.

Title II of the ADA provides 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. Likewise, Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance … ." 29 U.S.C. § 794(a). Because the language of Title II of the ADA and Section 504 of the Rehabilitation Act are "substantially the same," courts "apply the same analysis to both." *Doe v. Univ. of Maryland Med. Sys.*, 50 F.3d 1261, 1265 n.9 (4th Cir. 1995); *Taliaferro v. N. Carolina State Bd. of Elections*, 489 F. Supp. 3d 433, 437 (E.D.N.C. 2020) ("Claims under the ADA's

Title II and the Rehabilitation Act can be combined for analytical purposes because the analysis is substantially the same.") (citations and internal quotation marks omitted).

The ADA and the Rehabilitation Act prohibit discrimination against a disabled person by reason of the person's disability. *See* 42 U.S.C. § 12132. Together, the ADA and the Rehabilitation Act require public entities, including public school districts and state school systems, to afford students with disabilities, an equal opportunity to participate in or benefit from any aid, benefit, or service provided to others. 28 C.F.R §§ 35.130(b)(1), 34 C.F.R. §104.4 (b)(ii). As the Fourth Circuit explained in *Pashby*:

> Title II of the ADA provides 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. . . . [A] state that decides to provide . . . services must do so "in the most integrated setting appropriate to the needs of qualified individuals with disabilities," 28 C.F.R. § 35.130(d). Pursuant to federal regulations, the "most integrated settings" are those that "enable[] individuals with disabilities to interact with nondisabled persons to the fullest extent possible." 28 C.F.R. pt. 35, app. B.

Pashby v. Delia, 709 F.3d 307, 321 (4th Cir. 2013).

In other words, a public school system cannot provide different or separate aids, benefits, or services to individuals with disabilities than are provided to others unless such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others. 28 C.F.R. § 35.130(b)(1)(iv). Nor can a public entity otherwise limit a qualified individual with a disability in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service. 28 C.F.R. § 35.130(b)(1)(vii).

By their enforcement of Proviso 1.108, Defendants have violated the ADA and Section 504 of the Rehabilitation Act. They have done so by effectively excluding disabled students from public school in the state; discriminating against students with disabilities; and failing to take steps to ensure students with disabilities can be safely integrated in the public schools. As set forth below, Plaintiffs readily show a likelihood of success on the merits of these claims.

To demonstrate a violation of the Rehabilitation Act or Title II, "plaintiffs must show: (1) they have a disability; (2) they are otherwise qualified to receive the benefits of a public service, program, or activity; and (3) they were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016).

Here, Plaintiffs have demonstrated likelihood of success on the merits of each of these elements.

1. Plaintiffs have disabilities, are otherwise qualified to receive a public education, and have standing to bring this action.

"Disability" is defined by the ADA as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1)(A). Through the ADA Amendments Act, Congress clarified that "[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability." 29 C.F.R. § 1630.1(c)(4).

Here, each Individual Plaintiffs has a disability that places them at high risk of contracting COVID-19 and/or heightened risk of complications if they contract COVID-19. *See* McDougald Scott Decl. ¶¶ 3-4 (asthma, Henoch-Schonlein purpura); Finney Decl. ¶ 3 (Renpenning Syndrome); Tsykalova Decl. ¶ 4 (asthma); Poetz Decl. ¶ 5 (congenital myopathy);

Boevers Decl. ¶ 3 (Autism Spectrum Disorder); Price Decl. ¶ 4 (Autism Spectrum Disorder and ADHD); Littleton Decl. ¶ 4 (Autism Spectrum Disorder, Global Developmental Delays), Copeland Decl. ¶ 4 (Autism Spectrum Disorder & anxiety); Grant Decl. ¶ 3 (Autism Spectrum Disorder & ADHD); *see also* Saul Decl. ¶ 18. The Organizational Plaintiffs represent their constituents who are individuals with disabilities that place them at high risk of experiencing severe health complications from COVID-19. Compl. ¶¶ 8-9. *See generally* 42 U.S.C. § 12102(1)(A) ("Under the ADA, an individual has a disability if he has a "physical or mental impairment that substantially limits one or more major life activities of such individual.").

Additionally, each Individual Plaintiff, as well as the many students represented by the organizational Plaintiffs, is enrolled or planned to enroll in a public school and is qualified to receive the guarantee of a free public education. McDougald Scott Decl. ¶¶ 6, 8; Finney Decl. ¶ 4; Tsykalova Decl. ¶ 2; Poetz Decl. ¶ 3; Boevers Decl. ¶ 2; Price Decl. ¶ 2; Littleton Decl. ¶ 2; Copeland Decl. ¶ 2; Grant Decl. ¶ 2. The Organizational Plaintiffs each have associational standing where their primary functions are to protect the rights of individuals with disabilities, their constituents. *Wilson v. Thomas*, 43 F. Supp. 3d 628, 632 (E.D.N.C. 2014) (finding associational standing for protection and advocacy organization); *Bone v. Univ. of N. Carolina Health Care Sys.*, No. 1:18-cv-994, 2019 WL 4393531, at *11 (M.D.N.C. Sept. 13, 2019) (finding Disability Rights of North Carolina had associational standing pursuant to its mandate to ensure equal access to persons with disabilities).

Accordingly, the Individual Plaintiffs and the students represented by the Organizational Plaintiffs are all qualified individuals with disabilities who meet the essential eligibility requirements for the services in question. 28 C.F.R. § 35.104.

2. Plaintiffs have been excluded from participation in or been denied the benefits of the services, programs, or activities of a public entity or

otherwise discriminated against by such entity by reason of such disability

Plaintiffs are likely to succeed on the merits of their discrimination claims because Defendants' conduct in enforcing Proviso 1.108 violates the ADA and/or the Rehabilitation Act. Defendants' conduct violates these civil rights laws in at least five ways, any one of which suffices as grounds for injunctive relief.

First, Defendants are excluding Plaintiffs from participation in public education in violation of 42 U.S.C. § 12132, 28 C.F.R. § 35.130, 29 U.S.C. § 794 (a), and 34 C.F.R. 104.4 (a) & b(1), by creating an unreasonably dangerous environment for children with disabilities who are at high risk of contracting, or are susceptible to severe illness from, COVID-19, effectively excluding them from classrooms with other children and from participating in school activities with their classmates. As the Fourth Circuit has written, under the 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." *Pashby*, 709 F.3d at 321.

Second, Defendants are administering a policy that has the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability, because the direct and necessary result of Defendants' enforcement of Proviso 1.108 is to exclude children with disabilities who are at high risk of contracting, or are susceptible to heightened risk of contracting severe illness, from COVID-19 from classrooms with other children, and from participating in school activities with their classmates in violation of 28 C.F.R. § 35.130(b)(3) and 34 C.F.R. § 104.4 (b)(4). Defendants' conduct further has the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities in violation of 28 C.F.R. §

35.130(b)(3) and 34 C.F.R. § 104.4 (b)(4), because the objectives of public school programs are to provide safe, healthy environments for students to participate in class and school activities with other children.

Third, Defendants are failing to permit public entities to administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities in violation of 28 C.F.R. § 35.130(d) and 34 C.F.R. § 104.34(a) by refusing to allow school districts to provide a safe environment for their students by requiring masks and other common-sense precautions to halt the spread of COVID-19. *See generally Lamone*, 813 F.3d at 505-066 (noting that one objective of the ADA is to "integrate disabled individuals into the social mainstream of American life.") (citing *PGA Tour Inc. v. Martin*, 532 U.S. 661, 675 (2001)).

Fourth, Defendants are failing to make services, programs, and activities "readily accessible" to disabled individuals in violation of 28 C.F.R. § 35.150 by making school programs and activities available exclusively under conditions that are demonstrably dangerous to children with disabilities. *See generally Lamone*, 813 F.3d at 505-06 (noting that discrimination can be found in "the failure to make modifications to existing facilities and practices.") (internal quotations marks omitted).

Fifth, Defendants are failing to make reasonable modifications in violation of 28 C.F.R. § 35.130(b)(7) because they are prohibiting schools from requiring all students to wear masks at school so that students with disabilities can participate in in-person learning with their peers. As the Fourth Circuit has held: a "`public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability.'" *Lamone*, 813 F.3d at 507 (quoting 28 C.F.R. § 35.130(b)(7)).

Defendants are "public entities" as defined under federal law, 42 U.S.C. §12131(1)(B), and they receive federal financial assistance. Defendants are therefore subject to the requirements of the ADA and Rehabilitation Act. *See* 29 U.S.C. § 794(b)(2)(B) (any "local educational agency" eligible to receive federal grants under the Elementary and Secondary Education Act ("ESEA") (20 U.S.C. § 7801) is a covered entity under the Rehabilitation Act). Governor McMaster, Attorney General Wilson, and Superintendent Spearman, acting in their official capacities, are subject to suit under the Rehabilitation Act and the ADA where they have taken affirmative steps to implement and enforce Proviso 1.108: Defendant Spearman has issued directives instructing school districts to enforce Proviso 1.108, Defendant Wilson has sued the City of Columbia for purported violations of Proviso 1.108 by requiring masks in schools, and Defendant McMaster encouraged the Legislature to enact Proviso 1.108, and has repeatedly advocated for Proviso 1.108 to remain in effect and to be vigorously enforced. *See generally Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 484, 496-97 (4th Cir. 2005) (confirming abrogation of sovereign immunity under the ADA and susceptibility of state officials to suits for injunctive and declaratory relief for violations of the Rehabilitation Act under *Ex parte Young*, 209 U.S. 123, 161 (1908)).

Without Proviso 1.108, the Individual Plaintiffs and individuals represented by the Organizational Plaintiffs would have the option of attending public schools that follow public health guidelines, or have the option of requesting the reasonable modification of universal masking, in order to attend their schools in person. *See* McDougald Scott Decl. ¶¶ 10-11;

Finney Decl. ¶¶ 9-11; Tsykalova Decl. ¶¶ 9, 12; Poetz Decl. ¶¶ 10, 13; Boevers Decl. ¶ 8; Price Decl. ¶¶ 8-11; Littleton Decl. ¶¶ 9-11, Copeland Decl. ¶¶ 7-8; Grant Decl. ¶¶ 7-8.[2]

B. Proviso 1.108 is Preempted by Federal Law

The Supremacy Clause of the United States Constitution renders federal law the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. Under the doctrine of federal preemption, "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Felder v. Casey*, 487 U.S. 131, 138 (1988) (citing *Free v. Bland*, 369 U.S. 663, 666 (1962)). State law is preempted when, among other things, it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n*, 461 U.S. 190, 204 (1983).

Proviso 1.108 conflicts with federal law because it frustrates Congress' purpose to ensure that local school districts have the authority to adopt public health policies, including mask requirements, to protect students and educators as they develop plans for safe return to in-person instruction. Under Section 2001(i) of the American Rescue Plan Act of 2021 (ARPA), local school districts in South Carolina have been allocated over $1.9 billion dollars in Elementary and Secondary School Emergency Relief (ESSER) funding so that they can

[2] Defendants cannot avoid their obligations under the ADA even if compliance may violate state law. Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the laws of the United States "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." State law must give way to the extent it "conflicts with federal law." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 378 (2000). Such conflicts exist not only where "it is impossible . . . to comply with both state and federal law," but also "where under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. at 372-73 (citation and internal quotation marks omitted). Simply put, a defendant "is duty bound not to enforce a [state] statutory provision if doing so would either cause or perpetrate unlawful discrimination" under federal law. *Astralis Condo. Ass'n v. HUD*, 620 F.3d 62, 69-70 (1st Cir. 2010) To the extent Proviso 1.108 or any other South Carolina law, regulation, or directive impedes any School Board's ability to comply with its ADA obligations, state law must "give way." *N. Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971).

adopt plans for a safe return to in-person instruction. Pub. L. No. 117-2, § 2001(i), 135 Stat. 4, 23 (2021). Section 2001(e)(2)(Q) of the ARP Act expressly gives local school districts the authority to use these ARPA ESSER funds for "[d]eveloping strategies and implementing public health protocols including, to the greatest extent practicable, policies in line with guidance from the Centers for Disease Control and Prevention for the reopening and operation of school facilities to effectively maintain the health and safety of students, educators, and other staff." *Id.* § 2001(e)(2)(Q), 135 Stat. 21 (emphasis added). As discussed above, the CDC's guidance specifically recommends universal indoor masking in all K-12 schools.

Furthermore, interim final requirements adopted by the U.S. Department of Education specifically require each local school district to adopt a plan for safe return to in-person instruction that describes "the extent to which it has adopted policies, and a description of any such policies, on each of the following safety recommendations established by the CDC …", including specifically "[u]niversal and correct wearing of masks." *See* Am. Rescue Plan Act Elementary and Secondary School Emergency Relief Fund, 86 Fed. Reg. 21,195, 21,200-01 (April 22, 2021). While the requirement "does not mandate that [a local educational agency] adopt the CDC guidance" it does "requires that [each district] describe in its plan the extent to which it has adopted the key prevention and mitigation strategies identified in the guidance," which include both "[u]niversal and correct wearing of masks," and notably "appropriate accommodations for children with disabilities with respect to health and safety policies," among others. *Id*. at 21,200. The interim requirements further provide that a local educational agency must ensure the interventions it implements will respond to the needs of all students, "and particularly those students disproportionately impacted by the COVID-19 pandemic,

including . . . children with disabilities." *Id.* at 21,201. The school districts of South Carolina cannot satisfy this requirement given Proviso 1.1.08.

On August 18, the Department of Education sent Defendants McMaster and Spearman a letter warning that Proviso 1.108 is squarely at odds with the purpose of ARPA and stands as an obstacle to the accomplishment and execution of ARPA's full purposes and objectives. Rather than affording discretion to local school boards to develop and implement safety protocols as envisioned by ARPA, Budget Proviso 1.108 *prohibits* local school districts, including Defendant School Boards, from implementing precisely the type of safe return-to-school policies encouraged by ARPA. As explained by U.S. Education Secretary Cardona, Proviso 1.108 "restrict[s] the development of local health and safety policies and is at odds with the school district planning process embodied in the U.S. Department of Education's (Department's) interim final requirements." Attorney Decl. ¶ 17 & Ex. P.

Proviso 1.108 impermissibly conflicts with and is preempted by the American Rescue Plan Act and the implementing final requirements of the U.S. Department of Education. In particular, it bars school districts from complying with the American Rescue Plan Act requirement as implemented by the Department of Education that school districts adopt plans for a safe return to in-person instruction consistent with CDC guidance, including mask requirements. Accordingly, Proviso 1.108 should be declared null and void.

II. PLAINTIFFS WILL SUFFER IRREPARABLE INJURY UNLESS AN INJUNCTION ISSUES.

Plaintiffs need only demonstrate that irreparable harm "is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008) (emphasis added). Here, Plaintiffs can show three types of irreparable harm that flow directly from Defendants' enforcement of Proviso 1.108.

Proviso 1.108 causes irreparable harm because it violates federal disability laws. *See* Part I (above). Where a "defendant has violated a civil rights statute," courts "presume that the plaintiff has suffered irreparable injury from the fact of the defendant's violation." *Silver Sage Partners, Ltd. v. City of Desert Hot Springs,* 251 F.3d 814, 827 (9th Cir. 2001) (citing cases); *see also Gresham v. Windrush Partners, Ltd.,* 730 F.2d 1417, 1423 (11th Cir. 1984) ("[I]rreparable injury may be presumed from the fact of discrimination and violations of fair housing statutes"); *Duke v. Uniroyal, Inc.,* 777 F. Supp. 428, 433 (E.D.N.C. 1991) (noting that "[t]he purpose of the presumption of irreparable injury in civil rights cases is to afford plaintiffs relief in areas where injury is difficult to establish."). Thus, Defendants' violation of the ADA and the Rehabilitation Act alone give rise to a presumption of irreparable injury.

But beyond that, Plaintiffs are experiencing, and will continue to experience, two additional irreparable injuries because of Proviso 1.108. The first is heightened exposure to a deadly viral contagion—COVID-19. Courts throughout the country have repeatedly found that exposure to a life-threatening virus, or one that can cause life-long complications such as COVID-19, is an irreparable harm that cannot be remedied at law. *See, e.g., Coreas v. Bounds*, 451 F. Supp. 3d 407, 428-29 (D. Md. 2020) (finding COVID-19 exposure risks irreparable harm); *Banks v. Booth*, 459 F.Supp.3d 143, 159 (D.D.C. 2020) (same); *Peregrino Guevara v. Witte*, No. 6:20-CV-01200, 2020 WL 6940814, at *8 (W.D. La. Nov. 17, 2020) (noting that "[i]t is difficult to dispute that an elevated risk of contracting COVID-19 poses a threat of irreparable harm"). Furthermore, when the risk of contraction or serious infection is augmented due to a person's disability, including an underlying health condition, emergency injunctive relief is necessary. *Thakker v. Doll*, 451 F. Supp. 3d 358, 362, 365 (M.D. Pa. 2020) (in granting an injunction to release petitioners in civil detention who suffered from "chronic medical conditions

and face[d] an imminent risk of death or serious injury if exposed to COVID-19," court determined that "[t]here [could] be no injury more irreparable" than the "very real risk of serious, lasting illness or death"); *Basank v. Decker*, No. 20 Civ. 2518 (AT), 2020 WL 1953847, at *7 (S.D.N.Y. Apr. 23, 2020) (in granting an injunction to prevent placing petitioners in immigration detention, court noted that "[p]etitioners [were] at particular risk for serious illness or death, because their preexisting medical conditions either [made] them more vulnerable to contracting COVID-19, or more likely to develop serious complications due to COVID-19, or both" and the possibility of a severe, and "quite possibly fatal" infection constituted irreparable harm that warranted a preliminary injunction).

Given the heightened risks posed by COVID-19 to Individual Plaintiffs, several parents have opted to temporarily remove their child from public school. *See* McDougald Scott Decl. ¶¶ 8-9; Finny Decl. ¶ 9. But that merely substitutes one irreparable harm for another. The loss of educational opportunities is a paradigmatic example of irreparable harm, as it is both intangible and deeply damaging. *See, e.g., Issa v. School Dist. of Lancaster*, 847 F.3d 121, 142 (3d Cir. 2017) ("[E]ven a few months in an unsound program can make a world of difference in harm to a child's educational development") (citing *Nieves-Marquez v. Puerto Rico*, 53 F.3d 108, 121-22 (1st Cir. 2003)) (internal quotation marks omitted); *see generally Faulkner v. Jones*, 10 F.3d 226, 233 (4th Cir. 1993) (affirming preliminary injunction against Citadel's policy of excluding women students). "[T]he gravity of the harm is vast and far reaching" when a child is deprived of his or her education. *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 958 (11th Cir. 2005) (citing *Brown v. Board of Educ*., 347 U.S. 483, 493 (1954) ("[E]ducation is perhaps the most important function of state and local governments" because "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.")).

On those grounds, numerous courts have issued preliminary injunctions in order to immediately stop the irreparable harm deriving from a child's absence in school. *See, e.g., Alejandro v. Palm Beach State Coll.*, 843 F. Supp. 2d 1263, 1270-71 (S.D. Fla. 2011) (concluding that missing school classes constitutes irreparable harm, and granting temporary injunctive relief); *Borough of Palmyra, Bd. of Educ. v. F.C. ex rel. R.C.*, 2 F. Supp. 2d 637, 645 (D.N.J. 1998) (holding that the loss of an appropriate education is an irreparable harm under preliminary injunction analysis).

Without emergency relief from this Court, Individual Plaintiffs—and many others like them—will be forced to decide *which* irreparable injury they would rather endure: an imminent risk of infection for their child with disability, or the exclusion, alienation, and deprivation of services that would result from being removed from school. Saul Decl. ¶¶ 30-31; McDougald Scott Decl. ¶¶ 6-9; Finney Decl. ¶¶ 9-11; Tsykalova Decl. ¶¶11-14; Poetz Decl. ¶¶ 10, 12; Boevers Decl. ¶ 8; Price Decl. ¶¶ 6, 8-11; Littleton Decl. ¶¶ 6, 9-11; Grant Decl. ¶¶ 6-8; Copeland Decl. ¶¶ 6-11. The Court has authority to spare Plaintiffs from this cruel choice, and the law weighs heavily in favor of it doing so.

III. THE BALANCE OF EQUITIES WEIGHTS HEAVILY IN PLAINTIFFS' FAVOR AND THE INJUNCTION SERVES THE PUBLIC INTEREST.

The balance of equities tips decisively in favor of the Plaintiffs and an injunction is undoubtedly in the public interest. When the Defendants are governmental actors, these two factors merge and are properly considered together. *Roe v. Dep't of Defense*, 947 F.3d 207, 230 (4th Cir. 2020) (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)); *Taliaferro*, 489 F. Supp. 3d at 438 ("The Court considers the public interest and the balance of the equities together.").

Congress has mandated that the public interest requires equal treatment for persons with disabilities, thereby maximizing their integration and independence. An injunction here supports

that public interest, toward the ends which the federal law requires. *Taliaferro*, 489 F. Supp. 3d at 439 ("[T]he public interest does not lie with enforcement of those state procedures which violate the laws which Congress has passed to prevent discrimination based upon disability."). It is against the public interest to allow a state to continue to violate federal law, because the Supremacy Clause requires that federal law be paramount.

With little administrative burden and no discernible costs associated with the requested modification, the balance of the hardships is greatly in favor of the Plaintiffs and the Motion for Preliminary Injunction should be granted.

CONCLUSION

Plaintiffs, on behalf of their children with disabilities, respectfully request that this Court immediately enjoin enforcement of Proviso 1.108 and allow the school districts to ensure that each child receives a free and appropriate education in the least restrictive and the most integrated environment—without jeopardizing their lives or safety.

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AMERICAN CIVIL LIBERTIES UNION OF SOUTH CAROLINA

D. Allen Chaney Jr.
Allen Chaney
Federal Bar No. 13181
P.O. Box 20998
Charleston, SC 29413
T: (843) 282-7953
E: achaney@aclusc.org

SOUTH CAROLINA APPLESEED LEGAL JUSTICE CENTER

Adam Protheroe
Federal Bar No. 11033
P.O. Box 7187
Columbia, SC 29202
T: (803) 816-0607 | Fax: (803) 779-5951
adam@scjustice.org

DISABILITY RIGHTS SOUTH CAROLINA

B. Randall Dong (Fed. Ct. ID 5989)
Anna Maria Conner (Fed. Ct. ID 5532)
Amanda C. Hess (Fed. Ct. ID 10303)
3710 Landmark Dr., Suite 208
Columbia, SC 29204
T: (803) 782-0639
dong@disabilityrightssc.org
conner@disabilityrightssc.org
hess@disabilityrightssc.org

WYCHE, P.A.

Rita Bolt Barker
Federal Bar No. 10566
200 East Camperdown Way
Greenville, SC 29601
T: (864) 242-8235 | Fax: (864) 235-8900
E: rbarker@wyche.com

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

Louise Melling*
125 Broad St.
New York, NY 10004
T: (212) 549-2637
E: lmelling@aclu.org

Susan Mizner*
39 Drumm Street
San Francisco, CA 94111
T: (415) 343-0781
E: smizner@aclu.org

ARNOLD & PORTER KAYE SCHOLER LLP

John A. Freedman*
Tara L. Williamson*
601 Massachusetts Ave, NW
Washington, DC 20001
T: 202.942.5316
E: john.freedman@arnoldporter.com

*Motion to proceed *pro hac vice* forthcoming

Attorneys for the Plaintiffs