

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

IN THE MATTER OF S.B., A MINOR)
STUDENT, BY AND THROUGH HIS)
PARENTS, M.B. AND L.H.;)

M.S., A MINOR STUDENT, BY AND)
THROUGH HER PARENT, K.P.)

T.W., A MINOR STUDENT, BY AND)
THROUGH HIS PARENTS, M.W. AND J.W.)

And)

M.K., A MINOR STUDENT, BY AND)
THROUGH HER PARENT, S.K)

Plaintiffs,)

) No. 3:21-cv-00317-JRG-DCP

v.)

GOVERNOR BILL LEE, in his official)
Capacity as GOVERNOR OF TENNESSEE)
And KNOX COUNTY BOARD OF)
EDUCATION)

Defendants,)

And)

M.M, A STUDENT WHO HAS REACHED THE)
AGE OF MAJORITY, and E.M. and D.M., MINOR)
STUDENTS, BY AND THROUGH THEIR)
PARENT, P.M.)

Intervenors-Defendants.)

PROPOSED INTERVENOR-DEFENDANTS' MOTION TO INTERVENE

Proposed Intervenor-Defendants, MM, EM, and DM (collectively, Intervenors), move for intervention of right in this case as Defendants pursuant to Federal Rule Civ. Proc. 24 (a). The

reasons for granting this motion are set forth in Proposed Intervenor-Defendants' accompanying memorandum of law, which is incorporated by reference, along with attached exhibits.

Based upon this Honorable Court's Standing Order 21-19, proposed Intervenor-Defendants' Counsel requests this court would allow this Motion to Intervene to be heard via video conferencing or otherwise grant counsel an exception to wearing a mask, as counsel has a medical exemption to wearing a mask. Counsel can provide this exemption to the court before any motion hearing.

Respectfully submitted this 4th day of March, 2022.

s/ W. Andrew Fox

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Certificate of Service

I hereby certify that on the 4th day of March, 2022, I electronically filed the foregoing document with the Clerk of Court and that the foregoing document will be served via the CM/ECF system on all counsel of record.

s/ W. Andrew Fox

W. Andrew Fox
Attorney for Intervenor-Defendants

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INTERVENOR-DEFENDANTS' ANSWER TO PLAINTIFFS'
FIRST AMENDED VERIFIED COMPLAINT

Intervenor-Defendants, hereby respond to Plaintiffs' First Amended Verified Complaint (ECF 7) ("Complaint") and assert their defenses as follows:

GENERAL DEFENSES

1. Plaintiffs' First Amended Verified Complaint for Declaratory and Injunctive Relief should be dismissed for failure to state a claim upon which relief can be granted.
2. Intervenor-Defendants adopt the defenses raised by Gov. Lee that Plaintiffs' claims necessarily arise under the Individuals with Disabilities Education Act ("IDEA"), and because Plaintiffs have not pursued administrative remedies, their claims are not ripe and not justiciable.
3. Intervenor-Defendants adopt the defenses raised by the KCBOE regarding Plaintiff's' lack of standing.
4. Plaintiffs are not entitled to recover any damages against Intervenor-Defendants', nor are they entitled to any attorney's fees, expert fees, or other costs in this action pursuant to the Innocent Intervenor doctrine.
5. Plaintiffs repeatedly cite to various CDC pronouncements, media webpages, and other third party assertions, to which Intervenor-Defendants' object as hearsay. These citations should be stricken from the pleading to the extent that the Court would consider them for any purpose other a representation pursuant to Rule 11 that Plaintiffs' counsel has a basis for making an allegation.

In answer to the numbered allegations of the Complaint, Intervenor-Defendants' respond as follows:

I. PARTIES, JURISDICTION, AND VENUE

1. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 1 of the complaint.

2. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 2 of the complaint.

3. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 3 of the complaint.

4. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 4 of the complaint.

5. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 5 of the complaint.

6. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 6 of the complaint.

7. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 7 of the complaint.

8. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 8 of the complaint.

9. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 9 of the complaint.

10. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 10 of the complaint.

11. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 11 of the complaint.

12. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 12 of the complaint.

13. Upon information and belief, Intervenor-Defendants admit the allegations of Paragraph 13 of the complaint.

14. Intervenor-Defendants admit the allegations of Paragraph 14 of the complaint.

15. Intervenor-Defendants' admit the allegation in Paragraph 15 of the Complaint regarding public entities, but have insufficient information to either admit or deny the State of Tennessee's or Office of Governor's status as recipients of federal financial assistance as defined by the Rehabilitation Act.

16. Intervenor-Defendants admit the allegations of Paragraph 16 of the complaint regarding public entity, but have insufficient information to either admit or deny the KCBOE receiving Federal financial assistance as defined by the Rehabilitation Act.

17. Intervenor-Defendants admit the allegations of Paragraph 17 of the complaint regarding jurisdiction pursuant to 28 U.S.C. §1331 and 28 U.S.C. §§2201-2202, but deny jurisdiction pursuant to 28 U.S.C. §1343 (a)(3).

18. Intervenor-Defendants admit the allegations of Paragraph 18 of Plaintiffs' complaint.

II. Facts

19. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 19 of Plaintiffs' complaint.

20. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 20 of Plaintiffs' complaint.

21. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 21 of Plaintiffs' complaint.

22. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 22 of Plaintiffs' complaint.

23. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 23 of Plaintiffs' complaint.

24. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 24 of Plaintiffs' complaint.

25. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 25 of Plaintiffs' complaint.

26. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 26 of Plaintiffs' complaint.

27. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 27 of Plaintiffs' complaint.

28. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 28 of Plaintiffs' complaint.

29. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 26 of Plaintiffs' complaint, and in any event aver that the CDC's pronouncement does not substitute as expert opinion for the issue of Covid-19 or any disease, nor is a CDC pronouncement considered a public record, and therefore is irrelevant.

30. Intervenor-Defendants deny the allegations of paragraph 30 of the complaint.

31. Intervenor-Defendants deny the allegations of paragraph 31 of the complaint as stated.¹

¹ The document cited by Plaintiffs is now located at <https://stacks.cdc.gov/view/cdc/105949>. Plaintiffs misstate

32. Intervenor-Defendants deny the allegations of paragraph 32 of the complaint as stated.

33. Intervenor-Defendants deny the allegations of paragraph 32 of the complaint regarding the claim of transmission by asymptomatic or pre-symptomatic persons infected with Covid-19, but have insufficient information to either admit or deny the allegations regarding how these persons may feel.

34. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 34 of Plaintiffs' complaint.

35. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 35 of Plaintiffs' complaint.

36. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 36 of Plaintiffs' complaint.

37. Intervenor-Defendants deny the allegations of paragraph 37 of the complaint regarding the claims that community masking and social distancing can "seriously mitigate" any level of risk for Covid-19, but have insufficient information to either admit or deny the remaining allegations of this paragraph.

38. Intervenor-Defendants deny the allegations of paragraph 38 of the complaint.

39. Intervenor-Defendants deny the allegations of paragraph 39 of the complaint regarding the claim that community masking protects others, but have insufficient information to either admit or deny the allegations regarding medically fragile or compromised children. Intervenor-Defendants' aver that allegations regarding the anecdotal experience of a nonparty residing in another county is irrelevant to this case and should be stricken from these pleadings.

40. Intervenor-Defendants deny the allegations of paragraph 40 regarding community masking being a reasonable modification and protective of selves and others. Intervenor-Defendants' have insufficient information to either admit or deny whether Gov. Lee made said as the cited page is no longer available, but in any event aver that if he made the statement, it is not dispositive, it is not the statement of an expert for consideration by the court, it is not a legislative finding, and the statement has no evidentiary value other than to serve as an admission he made personally, which could impeach any statements made by Gov. Lee to the contrary if he were an expert.

41. Intervenor-Defendants deny the allegations of paragraph 41 of the complaint.

42. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 42 of Plaintiffs' complaint, but in any event the recommendations, actions, or pronouncements of third parties do not make an unsupported hypothesis more or less likely to be true.

43. Intervenor-Defendants admit the allegations of paragraph 43 regarding the issuance of Opinion No. 20-14 by the Tennessee Attorney General, and upon information and belief admit that the paragraph accurately reflects language from the opinion, but in any event aver that Gov. Lee's executive orders are not dispositive, are not the statement of an expert for consideration by the court, are not legislative findings, and have no evidentiary value except to be used against the State of Tennessee as an admission if it makes claims to the contrary.

44. Intervenor-Defendants deny the substantive allegations made about Covid-19 in paragraph 44 of the complaint, purportedly emanating from the Tennessee Attorney General, but in any event aver that the Tennessee Attorney General's statements in Opinion No. 20-14 are not

dispositive, are not the statement of an expert for consideration by the court, are not legislative findings, and have no evidentiary value.

45. Intervenor-Defendants' deny the substantive allegations made about Covid-19 in paragraph 45 of the complaint, purportedly emanating from the Tennessee Attorney General. Furthermore, Intervenor-Defendants' deny the legal reasoning of the Tennessee Attorney General and the comparison to seat belts and motorcycle helmets. In Opinion No. 20-14, the Tennessee Attorney General relied heavily upon Jacobson v. Massachusetts as reasoning to defend emergency Executive Orders. 197 U.S. 11 (1905). Jacobson has been implicitly overruled by the many cases dealing with bodily integrity under the 14th amendment. Additionally, Jacobson only spoke to the extent to which the United States Constitution and its Bill of Rights, as understood in 1905, placed limitations on the state and local governments' power to engage in state disease control efforts. State and local governments, such as Tennessee, erred by construing Jacobson as authority to overlook their own state's constitutional limitations on the police power to engage in disease prevention and mitigation measures.

46. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 46 of the complaint.

47. Intervenor-Defendants admit the allegations of paragraph 47 regarding Governor Lee's issuance of Executive Order No. 84, but have insufficient information to either admit or deny the remaining allegations of paragraph No. 47 of the complaint.

48. Intervenor-Defendants' admit that the allegations of paragraph 48 regarding Governor Lee's declaration of a state of emergency, issuance of Executive Order 38, and issuance of Executive Order 84, but have insufficient information to either admit or deny the remaining allegations of this paragraph.

49. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 49 of the complaint.

50. Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 50 of the complaint.

51. Intervenor-Defendants deny the allegations of paragraph No. 51 of the complaint.

52. Intervenor-Defendants admit the allegation of paragraph No. 52, masks would be and are harmful physically, socially, and emotionally, but have insufficient information to either admit or deny the remaining allegations of paragraph No. 52 of the complaint.

53. Intervenor-Defendants have insufficient information to either admit or deny the allegations of paragraph No. 53 of the complaint.

54. Intervenor-Defendants deny the allegations of paragraph 54 of the complaint.

55. Intervenor-Defendants deny the allegations of paragraph 55 of the complaint.

56. Intervenor-Defendants deny the allegations of paragraph 56 of the complaint.

57. Intervenor-Defendants deny the allegations of paragraph 57 of the complaint that they are entitled to establish a class for certification pursuant to Fed. R. Civ. P. 23.

58. Intervenor-Defendants deny the allegations of paragraph 58 of the complaint that they are entitled to establish a class for certification pursuant to Fed. R. Civ. P. 23.

59. Intervenor-Defendants deny the allegations of paragraph 59 of the complaint.

60. Intervenor-Defendants deny the allegations of paragraph 60 of the complaint.

61. Intervenor-Defendants deny the allegations of paragraph 61 of the complaint.

62. Intervenor-Defendants have insufficient information to either admit or deny the allegations of paragraph No. 62 of the complaint.

63. Intervenor-Defendants admit that Plaintiffs seek declaratory and injunctive relief as alleged in paragraph No. 63 of the complaint. Intervenor-Defendants have insufficient information to either admit or deny the remaining allegations of paragraph No. 63 of the complaint.

64. Regarding paragraph 64 of the complaint, Intervenor-Defendants' adopt herein by reference all of their previous responses to the previous allegations.

65. Intervenor-Defendants admit the allegations of paragraph No. 65 of the complaint, but deny that the KCBOE has violated any provision of 29 U.S.C. §794 (a) by forbearing from mandating the wearing of a mask while attending or working in a public school.

66. Intervenor-Defendants admit that paragraph No. 66 accurately quotes the law, but deny that the KCBOE has violated any provision of 42 U.S.C. §12132 by forbearing from mandating the wearing of a mask while attending or working in a public school.

67. Intervenor-Defendants admit that paragraph No. 67 accurately quotes the law, but deny that the KCBOE has violated any regulations or judicial interpretations of the ADA or section 504 of the Rehabilitation Act by forbearing from mandating the wearing of a mask while attending or working in a public school.

68. Intervenor-Defendants deny the allegations of paragraph No. 68 of the complaint to the extent that Plaintiffs claim that the forbearance by the State of Tennessee and/or the KCBOE from mandating the wearing of a mask while attending or working in public school creates a violation of the statutes or regulations of the ADA. Intervenor-Defendants have insufficient information to either admit or deny any remaining allegations of paragraph No. 68 of the complaint.

69. Intervenor-Defendants' admit that paragraph No. 69 accurately states federal law.

70. (Misabeled as paragraph 42). Regarding paragraph 70 of the complaint, Intervenor-Defendants' adopt herein by reference all of their previous responses to the previous allegations.

71. (Misabeled as paragraph 43). Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 71 of the complaint.

72. (Misabeled as paragraph 44). Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 72 of the complaint.

73. (Misabeled as paragraph 45). Intervenor-Defendants have insufficient information to either admit or deny the allegations of Paragraph No. 73 of the complaint, except to the extent that Plaintiffs claim that community masking is needed to attend school safely, which Intervenor-Defendants' deny.

74. (Misabeled as paragraph 46). Intervenor-Defendants deny the allegations of paragraph No. 74 of the complaint to the extent that Plaintiffs claim that the forbearance by the State of Tennessee and/or the KCBOE from mandating the wearing of a mask while attending or working in public school creates a violation of the statutes or regulations of Section 504 of the Rehabilitation Act. Intervenor-Defendants have insufficient information to either admit or deny any remaining allegations of paragraph No. 74 of the complaint.

75. (Misabeled as paragraph 47). Intervenor-Defendants deny that Plaintiffs are entitled to the relief requested in paragraph No. 75 of the complaint.

76. (Misabeled as paragraph 48). Intervenor-Defendants deny that Plaintiffs are entitled to the relief requested in paragraph No. 76 of the complaint.

77. (Misabeled as paragraph 49). Intervenor-Defendants deny that Plaintiffs are entitled to the relief requested in paragraph No. 77 of the complaint.

78. (Misabeled as paragraph 50). Intervenor-Defendants deny that Plaintiffs are entitled to the relief requested in paragraph No. 78 of the complaint.

79. (Misabeled as paragraph 51). Intervenor-Defendants deny that Plaintiffs are entitled to the relief requested in paragraph No. 79 of the complaint.

80. Any allegations not heretofore admitted, denied, or otherwise addressed are hereby generally denied.

WHEREFORE, having fully answered Plaintiff's' complaint, Intervenor-Defendants' prays court would dismiss this Case with prejudice, grant attorney's fees to Intervenor-Defendants, and tax costs to Plaintiffs. A jury trial has already been demanded.

Respectfully submitted this 4th day of March, 2022.

s/ W. Andrew Fox
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