

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

**G.S. by and through his parents and next
friends, BRITTANY and RYAN
SCHWAIGERT, S.T. by and through
her mother and next friend, EMILY
TREMEL; J.M., by and through
her mother and next friend,
KIMBERLY MORRISE; and on
behalf of those similarly situated,**

Plaintiffs,

v.

**GOVERNOR BILL LEE, in his official
capacity as GOVERNOR OF TENNESSEE,
and SHELBY COUNTY, TENNESSEE,**

Defendants.

Case 2:21-cv-02552-SHL-atc

**ANSWER OF GOVERNOR BILL LEE TO
PLAINTIFFS' FIRST AMENDED COMPLAINT**

Defendant Bill Lee, Governor of the State of Tennessee (“Defendant”), in his official capacity, by and through the Office of the Tennessee Attorney General, responds to the numbered allegations of Plaintiffs’ First Amended Complaint (ECF 54) and asserts his defenses as follows:

I.

1. Defendant recognizes the necessity of educating children and protecting the health and lives of children. Defendant issued Executive Order 84 to recognize the right of parents and guardians to opt their child out of any order or requirement for a student in kindergarten through twelfth grade to wear a face covering at school, on a school bus, or at school functions. Defendant denies the remaining allegations.

2. Defendant admits that the State of Tennessee has experienced the spread of COVID-19, including the spread of the Delta variant. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' remaining allegations, and therefore denies same and demands strict proof.

3. Defendant admits that Shelby County, Tennessee, has experienced the spread of COVID-19, including the spread of the Delta variant. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' remaining allegations, and therefore denies same and demands strict proof.

4. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

5. Defendant recognizes the importance of in-person learning for school-aged children. Defendant admits that students in Tennessee experienced a decline in Spring 2021 Tennessee Comprehensive Assessment Program (TCAP) results. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' remaining allegations, and therefore denies same and demands strict proof.

6. Defendant recognizes the importance of in-person learning for school-aged children. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' remaining allegations, and therefore denies same and demands strict proof.

7. Defendant admits that Tenn. Code Ann. § 68-2-609 provides that a county health officer is authorized to order "[r]ules and regulations as are necessary or appropriate to protect the general health and safety of the county." Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' remaining allegations, and therefore denies same and demands strict proof.

8. Defendant denies that Shelby County had authority to override executive orders issued by him pursuant to his emergency authority. As to any remaining allegations, denied.

9. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

10. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

11. Defendant issued Executive Order 83 on August 6, 2021, to declare a continuing state of emergency due to increasing hospitalizations, increasing COVID-19 positive case rates, and the burden placed on health care systems. Executive Order 83 authorized the limited use of personnel in the National Guard and State Guard to serve in certain health care and emergency roles. Executive Order 83 permits out-of-state health care providers to practice in Tennessee. Executive Order 83 was issued pursuant to Tenn. Code Ann. § 58-2-107. As to any remaining allegations, denied.

12. Defendant issued Executive Order 84 on August 16, 2021. The Order states that "a student's parent or guardian shall have the right to opt out of any order or requirement for a student in kindergarten through twelfth-grade to wear a face covering at school, on a school bus, or at school functions, by affirmatively notifying in writing the local education agency or personnel at the student's school." Defendant issued Executive Order 84 after declaring a continuing state of emergency in Executive Order 83. As to any remaining allegations, denied.

13. Defendant issued Executive Order 84 pursuant to the Tennessee Constitution and other applicable law, including Tenn. Code Ann. § 58-2-107. As to the remaining allegations, denied.

14. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

15. Plaintiffs' allegations contain legal conclusions to which no response is required. To the extent a response is required, Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' factual and legal allegations contained in this paragraph, and therefore denies same and demands strict proof.

16. Denied.

17. Plaintiffs' allegations contain legal conclusions to which no response is required. To the extent a response is required, denied.

JURISDICTION AND VENUE

18. Defendant asserts that Plaintiffs lack standing and that sovereign immunity applies. Defendant denies that the Court has jurisdiction over Plaintiffs' suit.

19. Defendant asserts that Plaintiffs lack standing and that sovereign immunity applies. Defendant denies that the Court has jurisdiction over Plaintiffs' suit.

PARTIES

20. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

21. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

22. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

23. Defendant admits the first sentence. Defendant admits the second sentence with the qualification that he issued, rather than enacted, the executive order challenged in this action. Defendant admits the remaining allegations.

24. Defendant denies that Shelby County, Tennessee, is a municipality within the State of Tennessee. As to the remaining allegations, upon information and belief, admitted.

PLAINTIFFS' FACTS

25. Upon information and belief, the virus that causes COVID-19, SARS-CoV-2 is infectious, can be deadly, and can be transmitted from person to person. With this qualification, admitted.

26. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

27. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

28. To the extent Plaintiffs' reference to "the vaccine" means a COVID-19 vaccine therapy, Defendant admits that such vaccines are currently approved through emergency use authorization issued by the FDA for individuals aged 12 years and older. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' remaining allegations, and therefore denies same and demands strict proof.

29. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

30. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

31. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

32. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

33. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

34. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

35. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

36. Defendant admits that students in Tennessee experienced a decline in Spring 2021 TCAP results. With this qualification, the first sentence is admitted. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' remaining allegations, and therefore denies same and demands strict proof.

37. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

38. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

39. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

40. Denied.

41. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

42. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

43. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

44. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

45. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

PLAINTIFFS' CLASS ALLEGATIONS

46. Defendant admits that Plaintiffs purport to bring suit pursuant to Fed. R. Civ. P. 23(b)(2) on behalf of themselves and putative class members. To the extent Plaintiffs claim that they should be allowed to proceed in this suit as a class action, denied. As to any remaining allegations, denied.

47. Defendant admits that Plaintiffs are seeking to represent both a Class and Subclass. To the extent Plaintiffs claim that they should be allowed to proceed in this suit as a class action, denied. As to any remaining allegations, denied.

48. Defendant admits that Plaintiffs purport to bring suit pursuant to Fed. R. Civ. P. 23(b)(2) on behalf of themselves and putative class members. Plaintiffs' remaining allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is required, denied.

49. Plaintiffs' allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is required, denied.

50. Plaintiffs' allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is required, denied.

51. Plaintiffs' allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is required, denied.

52. Plaintiffs' allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is required, denied.

53. Plaintiffs' allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is required, denied.

a. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

b. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

c. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

d. Defendant lacks sufficient knowledge or information to admit or deny the truth of Plaintiffs' allegations, and therefore denies same and demands strict proof.

54. Plaintiffs' allegations in this paragraph contain legal conclusions to which no response is required. To the extent a response is required, Defendant admits that Plaintiffs seek declaratory and injunctive relief and to certify their proposed class. Defendant denies that Plaintiffs are entitled to relief. As to any remaining allegations, denied.

55. Denied.

PLAINTIFFS' CAUSES OF ACTION

**First Cause of Action: Discrimination on the Basis of Disability
in Violation of the ADA**

56. Defendant relies on its answers in Paragraphs 1-55 to respond to Plaintiffs' allegations in this paragraph. To the extent an additional response is required, Defendant denies that Plaintiffs are entitled to relief.

57. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

58. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

59. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

60. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

61. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

a. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

b. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

c. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are

entitled to relief.

d. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

62. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

63. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

64. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

**Second Cause of Action: Violation of Section 504 of the
Rehabilitation Act of 1973 Against All Defendants**

65. Defendant relies on its answers in Paragraphs 1-64 to respond to Plaintiffs' allegations in this paragraph. To the extent an additional response is required, Defendant denies that Plaintiffs are entitled to relief.

66. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

67. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

68. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant admits that the State of Tennessee receives federal financial assistance. As to the remaining allegations, Defendant denies that Plaintiffs are entitled to relief.

69. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

a. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

b. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

c. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

70. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

71. Plaintiffs' allegations are legal conclusions to which no response is required. To the extent a response is required, Defendant denies that Plaintiffs are entitled to relief.

**PLAINTIFFS' REQUEST FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION**

72. Defendant relies on its answers in Paragraphs 1-71 in response to Plaintiffs' allegations in this paragraph. To the extent an additional response is required, Defendant denies that Plaintiffs are entitled to relief.

73. Defendant admits that Plaintiffs previously sought, and were later granted, a temporary restraining order. Defendant denies that Plaintiffs were, or are, entitled to such relief.

74. Defendant admits that Plaintiffs previously sought, and were later granted, a preliminary injunction. Defendant denies that Plaintiffs were, or are, entitled to such relief.

75. Any allegation not specifically admitted, qualified, or denied herein is hereby denied by Defendant.

PLAINTIFFS' PRAYER FOR RELIEF

76. Defendant denies that Plaintiffs are entitled to any of the relief requested in their First Amended Complaint.

DEFENDANT'S AFFIRMATIVE DEFENSES

Having fully answered Plaintiffs' First Amended Complaint, Defendant raises the following affirmative defenses:

1. Plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted.
2. Plaintiffs lack standing to bring suit on behalf of themselves or the putative class members.
3. Defendant retains sovereign immunity from Plaintiffs' claims brought pursuant to Title II of the Americans with Disabilities Act ("ADA").¹
4. Plaintiffs G.S. and S.T. failed to exhaust their administrative remedies as required by the Individuals with Disabilities Education Act, 84 Stat. 175, as amended, 20 U.S.C. §§ 1400, *et seq.*
5. Plaintiffs' disparate-impact claims under the ADA and Section 504 of the Rehabilitation Act ("Section 504") are not cognizable.

¹ To the extent Plaintiffs separately bring their ADA claims against the State of Tennessee, the State also retains sovereign immunity.

6. Pursuant to 28 C.F.R. 35.130, and while Executive Order 84 remains in effect, Local Education Agencies (“LEAs”) are able to provide Plaintiffs with reasonable modifications to avoid discrimination within its programs, services, and activities.

7. Pursuant to 28 C.F.R. § 35.150(a)-(b), and while Executive Order 84 remains in effect, LEAs can operate their services, programs, or activities by using methods that, when viewed in their entirety, make their services, programs, and activities readily accessible to and usable by Plaintiffs.

8. Pursuant to the ADA and Section 504, and while Executive Order 84 remains in effect, LEAs are able to consider the needs of other students before determining appropriate and reasonable modifications available to Plaintiffs

9. Pursuant to 28 C.F.R. § 35.150(a), and while Executive Order 84 remains in effect, LEAs are not required to make all existing facilities accessible to and usable by Plaintiffs.

10. Executive Order 84 is facially valid under the ADA and Section 504, and its issuance does not cause Plaintiffs to be excluded from participating in, be denied the benefits of, or otherwise be subjected to discrimination in, a LEA’s offered services, programs or activities.

11. Plaintiffs cannot demonstrate that Defendant issued Executive Order 84 because of their disabilities under the ADA or its implementing regulations.

12. Plaintiffs cannot demonstrate that Defendant issued Executive Order 84 solely because of their disabilities under Section 504 or its implementing regulations.

13. Plaintiffs cannot demonstrate that Defendant issued Executive Order 84 in bad faith or gross misjudgment.

14. Plaintiffs cannot demonstrate that Defendant's Executive Order 84 had a demonstrable impact on their education constituting an exclusion from, or the denial of, an educational benefit under the ADA or Section 504.

15. Plaintiffs cannot demonstrate that they are being treated differently than similarly situated, non-disabled students under the ADA or Section 504.

16. Plaintiffs cannot demonstrate that Defendant issued Executive Order 84 with discriminatory intent or animus against them under the ADA or Section 504.

17. Pursuant to Fed. R. Civ. P. 23, Plaintiffs cannot demonstrate the prerequisites for proceeding as a class action against Defendant.

18. Defendant reserves the right to amend its Answer to the First Amended Complaint pursuant to the Federal Rules of Civil Procedure and this Court's orders.

WHEREFORE, having fully answered Plaintiffs' Amended Complaint, Defendant respectfully requests that (1) the First Amended Complaint be dismissed with prejudice; (2) that all costs be assessed against Plaintiffs; and (3) that Defendant be awarded any further relief to which he may be entitled.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter

s/James R. Newsom III
James R. Newsom (TN BPR No. 6683)
Special Counsel
Matthew R. Dowty (TN BPR No. 32078)
Assistant Attorney General
Robert W. Wilson (TN BPR No. 34492)
Assistant Attorney General
Office of the Tennessee Attorney General
40 South Main Street, Suite 1014
Memphis, TN 38103
(901) 543-2473
Jim.Newsom@ag.tn.gov
Matthew.Dowty@ag.tn.gov
Robert.Wilson@ag.tn.gov

CERTIFICATE OF SERVICE

I hereby certify that on this the 23rd day of September, 2021, a copy of the foregoing was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing report. Parties may access this filing through the Court's electronic filing system.

s/James R. Newsom III
James R. Newsom III
Special Counsel
Office of the Tennessee Attorney General
40 South Main Street, Suite 1014
Memphis, TN 38103
(901) 543-2473
Jim.Newsom@ag.tn.gov