

**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 friends, EMILY TREMEL; 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,

No. 21-cv-02552-SHL-atc

MOTION OF JORDAN CARPENTER FOR LEAVE TO FILE AS *AMICUS CURIAE* ON THE SUBJECT OF APPLICABILITY OF ADA AND SECTION 504 TO RELIGIOUS ORGANIZATIONS THAT DO NOT RECEIVE FEDERAL FINANCIAL ASSISTANCE

Proposed *Amicus* moves for leave to file the attached amicus brief for this Court to consider before ruling on Plaintiffs’ motion for preliminary injunction.

1. Proposed *Amicus* Jordan Carpenter is the father of two children enrolled in a private, Christian school in Memphis, Tennessee, and has monitored the progress in this matter since its inception.
2. After reading the Court’s Order (ECF No. 34) on Plaintiffs’ motion for temporary restraining order that enjoined Defendant Lee from enforcing his Executive Order No. 84 and ordered Defendant Shelby County to enforce its Amended Health Order No. 24 and Health Order No. 25 (*id.* at PageID 290), Mr. Carpenter became concerned about the standard for applicability of the Parties’ claims and the Court’s orders to parents

who have chosen to enroll their children in schools not subject to Title III of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.

3. Mr. Carpenter attended the Court's hearing on Plaintiffs' motion for preliminary injunction on September 9, 2021.
4. Mr. Carpenter is not opposing the relief sought by Plaintiffs as it applies to Plaintiffs or the prospective class (*i.e.*, "[a]ll current and future K-12 students attending public school in Shelby County, Tennessee" (ECF No. 16 at PageID 86)).
5. However, the effect of a direct reading of the relief granted so far extends beyond Plaintiffs and the prospective class to children enrolled in schools not subject to Title III of the Americans with Disabilities Act or Section 504 of the Rehabilitation Act.
6. Based upon his knowledge of the issues and relationships with persons affected, Mr. Carpenter is well-positioned to offer information that is "timely, useful, or otherwise necessary to the administration of justice." *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1990).

Dated: September 13, 2021

Respectfully submitted,

s/ Jordan K. Carpenter
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CERTIFICATE OF CONSULTATION

I certify that I attempted to consult with counsel for all parties concerning this motion via email on September 10, 2021. I sent this email to Jim Newsom, Matthew Dowty, and Robert Wilson as counsel for Defendant Lee; Marlinee Iverson, Lee Whitwell, Nathan Bicks, Tannera Gibson, and Sarah Stuart as counsel for Defendant Shelby County; and Bryce Ashby, Robert Donati, Brice Timmons, and Craig Edgington as counsel for Plaintiffs.

Counsel for Defendant Lee consented to its filing. Counsel for Plaintiffs neither consented to nor opposed this motion. Counsel for Shelby County did not respond.

Dated: September 13, 2021

Respectfully submitted,

s/ Jordan K. Carpenter

Jordan K. Carpenter (TN BPR #035074)

CERTIFICATE OF SERVICE

I certify that on September 13, 2021, the above memorandum was filed using the Court's CM/ECF system, which will notify all registered counsel.

Dated: September 13, 2021

Respectfully submitted,

s/ Jordan K. Carpenter

Jordan K. Carpenter (TN BPR #035074)

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

Defendants,

No. 21-cv-02552-SHL-atc

**BRIEF OF JORDAN CARPENTER IN SUPPORT OF MOTION AS *AMICUS CURIAE*
ON THE SUBJECT OF APPLICABILITY OF ADA AND SECTION 504 TO RELIGIOUS
ORGANIZATIONS THAT DO NOT RECEIVE FEDERAL FINANCIAL ASSISTANCE**

Proposed *Amicus* Jordan Carpenter is a resident of Shelby County, a religious person, a parent of schoolchildren in Shelby County, Tennessee, and an advocate for the free exercise of religion under the law. The COVID-19 pandemic introduced an opportunity for increased government regulation of schools in the name of public health, including from Defendant Shelby County and Defendant Lee. These Defendants issued several orders pursuant to their respective statutory authority, and the resultant regulatory framework gave parents of K-12 students the right to opt their children out of wearing face coverings at school. The rights of all Shelby County parents under that framework are now at stake in this case, and Mr. Carpenter believes the Court should be aware of a narrow subset of parents whose rights *cannot* be encumbered pursuant to the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (Section 504).

Plaintiffs seek to use federal disability law, *i.e.*, ADA and Section 504, to prevent their children’s exclusion “from public educational programs and activities.” (ECF No. 54 at PageID 1175.) They also seek to certify a class of “[a]ll current and future K-12 students attending public school in Shelby County, Tennessee.” (ECF No. 16 at PageID 86.) Mr. Carpenter cannot and does not challenge the rights asserted by Plaintiffs or certification of the proposed class. He does, however, note that there exists a class of K-12 schoolchildren, discussed *infra*, who (1) do not attend schools subject to relevant regulation under ADA and Section 504 and (2) are not part of Plaintiffs’ proposed class.

On September 3, 2021, this Court issued an Order Granting Plaintiffs’ Motion for Temporary Restraining Order (ECF No. 34.), enjoining Defendant Lee “from enforcing Executive Order No. 84 in Shelby County or allowing parents to opt out of Defendant Shelby County’s mask mandate, as currently specified under Shelby County Health Order No. 25” and ordering Defendant Shelby County “to enforce its Health Orders without exception for Governor Lee’s Executive Order No. 84.” (*Id.* at PageID 290.) If in fact the temporary restraining order (TRO) issued by the Court on September 3, 2021, enjoins Defendant Lee from enforcing Executive Order No. 84 and orders Defendant Shelby County to enforce its Health Orders *as all three pertain to private, religious schools*, then the TRO extends beyond the relief sought by Plaintiffs in this case and beyond what the law allows under ADA and Section 504.¹

Americans with Disabilities Act

In the ADA, Congress set forth prohibitions against disability-based discrimination in employment (Title I, 42 U.S.C. §§ 12111-12117), public services furnished by governmental entities (Title II, 42 U.S.C. §§ 12131-12165), and public accommodations provided by private entities (Title III, 42 U.S.C. §§ 12181-12189). . . . Title III . . . provides that “[n]o individual shall be discriminated

¹ “Because the ADA sets forth the same remedies, procedures, and rights as the Rehabilitation Act, see 42 U.S.C. § 12133, claims brought under both statutes may be analyzed together.” *Thompson v. Williamson Cty.*, 219 F.3d 555, 557 n.3 (6th Cir. 2000) (citing *Maddox v. University of Tenn.*, 62 F.3d 843, 846 n.2 (6th Cir. 1995)).

against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns . . . or operates a place of public accommodation.” 42 U.S.C. § 12182(a). Private schools, including undergraduate and postgraduate institutions, and other places of education, are public accommodations. *Id.* § 12181(7)(J). Title III prohibits public accommodations from discriminating against the disabled by, “directly, or through contractual, licensing, or other arrangements,” denying individuals on the basis of disability the opportunity “to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity,” or providing them with an “opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.” *Id.* § 12182(b)(1)(A)(i)-(ii). *See also* 28 C.F.R. § 36.202(a)-(b).

Nat’l Ass’n of the Deaf v. Harvard Univ., 377 F. Supp. 3d 49, 56 (D. Mass. 2019).

“Religious organizations and entities controlled by religious organizations have no obligations under the ADA. Even when a religious organization carries out activities that would otherwise make it a public accommodation, the religious organization is exempt from ADA coverage.” 28 CFR PART 36 APPENDIX C (emphasis added).

Without question, Plaintiffs could not have sought relief under Title I or Title II of ADA if they were enrolled in one of Shelby County’s many private schools. Title III of ADA would entitle Plaintiffs to relief if they were enrolled in a private school *only if* that private school were not a religious organization or were not controlled by a religious organization. This is because Title III, which prohibits discrimination on the basis of disability in places of public accommodation, expressly exempts “religious organizations or entities controlled by religious organizations.” 42 U.S.C. § 12187. Federal courts have dismissed complaints filed pursuant to ADA when the defendant private schools made showings that they were religious organizations or were controlled by religious organizations. *Compare Sky R. v. Haddonfield Friends Sch.*, Civil Action No. 14-5730, 2016 U.S. Dist. LEXIS 43002, at *32 (D.N.J. Mar. 31, 2016) (finding that a Quaker school was a “religious organization or controlled by a religious organization” and entitled to the religious

exemption to Title III of ADA after evidence of business organization, the school’s mission, and head of school’s testimony), and *White v. Denver Seminary*, 157 F. Supp. 2d 1171, 1174 (D. Colo. 2001) (finding that an evangelical graduate school “founded on and steeped in Biblical teachings” was a “pervasively religious organization” and entitled to the religious exemption to Title III of ADA), with *Sloan v. Cmty. Christian Day Sch., LLC*, No. 3-15-0551, 2015 U.S. Dist. LEXIS 166911, at *7-8 (M.D. Tenn. Dec. 11, 2015) (finding that a school “not owned, affiliated with, or financially supported by any recognized religious group” was not entitled to the religious exemption to Title III of ADA).

Section 504 of the Rehabilitation Act

The elements of a cause of action under section 504 are as follows: (1) The plaintiff is a “handicapped person” under the Act; (2) The plaintiff is “otherwise qualified” for participation in the program; (3) The plaintiff is being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap; and **(4) The relevant program or activity is receiving Federal financial assistance.**

Doherty v. S. Coll. of Optometry, 862 F.2d 570, 573 (6th Cir. 1988), *cert. denied*, 493 U.S. 810 (1989) (emphasis added).

Plaintiffs could not have sought relief under Section 504 if they were enrolled in a Shelby County school that did not receive federal financial assistance. A recent case is illustrative on this point. In *Andrea R. v. Diocese of Birmingham in Ala.*, the judge denied relief to the plaintiff under Section 504 because the defendants in that case (a religious school and the supporting Catholic diocese) “do[] not receive financial assistance directly from the federal government and did not receive financial assistance directly from the federal government during the 2018-2019 school year, when [the child] was enrolled as a student at the school.” No. 2:19-cv-00752-SGC, 2020 U.S. Dist. LEXIS 237017, at *8-9 (N.D. Ala. Dec. 17, 2020). “[T]he plaintiff [was] unable to prove an essential element of her Section 504 claim, which therefore fails as a matter of law.” *Id.* at *8-9.

CONCLUSION

Plaintiffs in this case would not have a cause of action pursuant to ADA or Section 504 against a private, religious school that is (1) entitled to the religious exemption to Title III of ADA and (2) not “receiving Federal financial assistance.” Any of the Court’s orders regarding injunctive relief that enjoin Defendant Lee from enforcing Executive Order No. 84 or order Defendant Shelby County to enforce its Health Orders without exception for Defendant Lee’s executive order, must recognize the special privilege provided to the thousands of parents in Shelby County who enroll their children in private schools that have no obligations under ADA or Section 504.

ADA and Section 504 apply in full force to schools that are not religious entities and that “receive Federal financial assistance,” but they do not apply to many schools in Shelby County. This appears to be why Plaintiffs have proposed a class of “K-12 students attending public school in Shelby County, Tennessee.” Proposed *Amicus* believes expressly limiting the reach of any decisions in this case to “Plaintiffs and those similarly situated under the Americans with Disabilities Act and Section 504,” (ECF No. 54 at PageID 1192), would best serve the rights of the Parties, the rule of law, and the public interest.

Dated: September 13, 2021

Respectfully submitted,

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