IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Daniel D. Domenico

Civil Action No. 1:21-cv-02621-DDD

SCHUMÉ NAVARRO,

Plaintiff,

v.

CHERRY CREEK SCHOOL DISTRICT NO. 5,

Defendant.

ORDER GRANTING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Before the Court is Plaintiff Schumé Navarro's motion for a preliminary injunction restraining Defendant Cherry Creek School District No. 5 from enforcing the Tri-County Health Department's mask-wearing requirement as to Ms. Navarro. (Doc. 2.) For the following reasons, the motion is granted.

FACTUAL BACKGROUND

Defendant Cherry Creek School District No. 5 is located in Arapahoe County, Colorado. Due to the COVID-19 pandemic, the Tri-County Health Department for Colorado's Adams, Arapahoe, and Douglas Counties has issued a public-health order that requires "[a]ll individuals 2 years of age and older [to] wear a **Face Covering** while in any indoor **School Setting**" in the Tri-County area. (Doc. 2-10 at 2.) "Face Covering" is defined in the order as "a covering made of cloth, fabric, or other soft or permeable material, without holes, that covers only the nose and mouth and surrounding areas of the lower face." (*Id.* at 2-3.)

"School Setting" is defined as "any indoor facility used for pre-kindergarten through 12th grade instruction of academic or extracurricular activities . . . . includ[ing] all buildings where school-based or sponsored activities are performed . . . ." (*Id.* at 3.)

The public-health order permits an exemption from its face-covering requirements, however, for

> Individuals who cannot medically tolerate a Face Covering and who have submitted to the School . . . a statement provided by a Colorado-licensed medical provider on the provider's letterhead including the following:
>
> a. Medical provider's printed name, license number, address, phone number;
>
> b. Signature of the medical provider;
>
> c. Identification of the medical condition preventing the individual from wearing a mask and any recommended alternative to the mask.

(*Id.*) The order does not define "Colorado-licensed medical provider," but the Tri-County Health Department's "Frequently Asked Questions" document regarding the order states that "Colorado-licensed medical provider" "has the same meaning as 'health care practitioner' as defined in CO ST § 24-10-103[.] 'Health care practitioner' means a physician, dentist, clinical psychologist, or any other person acting at the direction or under the supervision or control of any such persons."[1] (Doc. 2-3 at 8.)

Ms. Navarro is a candidate for a seat on the District's school board. The District scheduled six candidate forums in advance of the upcoming

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[1] The referenced statute is part of the Colorado Governmental Immunity Act, which defines the circumstances under which the state, its political subdivisions, and its public employees may be held liable for personal injuries to private persons. *See* Colo. Rev. Stat. §§ 24-10-101 to 24-10-120.

November 2, 2021 school board election. These forums are held at District facilities, including District schools, and students are sometimes present at the forums or in the common areas of the facilities where the forums are held.

Ms. Navarro alleges, in her verified complaint, that she is unable to wear certain face coverings due to two disabilities: (1) a psychological disorder stemming from severe child-abuse incidents that included suffocation; and (2) a nasal deformity that makes it difficult for her to breathe even when not wearing a face covering. (Doc. 3 ¶¶ 1-3.)

On September 13, the day before the District's September 14 candidate forum, Ms. Navarro provided the District with a signed statement from her Licensed Professional Counselor, Suzanne Simpson, on Ms. Simpson's letterhead that included Ms. Simpson's address and phone number, stating that Ms. Navarro

> Cannot medically tolerate a face covering due to a prior suffocation trauma that she has experienced. Based, on this history, I feel she would need an exemption from having to wear a mask.
>
> I have a Colorado license LPC #2122. The mental health diagnostic code I have in file on her is 209.28 F43.23.[2]

[2] "F43.23" is a code from the *International Classification of Diseases, 10th Revision, Clinical Modification* that indicates an "[a]djustment disorder with mixed anxiety and depressed mood." *Tabular List of Diseases: F43.23*, https://icd10cmtool. cdc. gov/?fy=FY2022&query=F43.23.

> If you have any further questions you can contact me at my office number below.

(Doc. 2-2 at 4.)[3]

The District responded to Ms. Navarro the same day, stating:

> The District is in receipt of your mask exemption request and has reviewed your submission. Unfortunately, your submission is not compliant with the requirements of the Tri-County Health Department public health order for requesting mask exemptions. Specifically, the guidance requires a letter from a Colorado licensed medical provider. The term "Colorado licensed medical provider" has the same meaning as "health care practitioner" under C.R.S. § 24-10-103, which includes physicians, dentists, and clinical psychologists working under their supervision. The letter you provided is from Ms. Simpson, who is a licensed professional counselor. Licensed professional counselors do not fit within the definition quoted above. Therefore, CCSD must deny your exemption request as being non-complaint with Tri-County's order.
>
> If you would like to submit a letter from a qualified Colorado licensed medical provider, CCSD will reconsider your request. . . .
>
> In the meantime, we need you to comply with Tri-County order and wear an appropriate Face Covering at all activities within CCSD facilities including Board meetings.

(Doc. 2-4 at 1.)

Ms. Navarro was refused entry to the September 14 candidate forum until she put on a face mask. According to Ms. Navarro, "wearing the

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[3] Ms. Navarro also provided the District with a printout from her online UCHealth portal indicating that her health issues include recurrent sinusitis, seasonal allergies, shortness of breath, trauma in childhood, deviated nasal septum, nasal valve blockage, and acquired nasal deformity. (Doc. 2-2 at 3.) But Ms. Navarro has publicly stated that "my doctors at UCHealth, they will not give an exemption." (Doc. 16, Ex. A-1.)

mask caused her to have difficulty breathing, substantial anxiety, and overwhelming distraction," and as a result, "she was unable to concentrate and adequately answer voter questions," and she cried on stage due to her anxiety and to having been reprimanded by the forum moderator for not wearing the mask properly. (Doc. 3 ¶¶ 14-18.)

Another candidate forum was held on September 21, and Ms. Navarro did not attend. Approximately an hour and a half prior to the scheduled September 22 forum, Ms. Navarro's attorney wrote to the District requesting accommodations on Ms. Navarro's behalf. (Doc. 12-1 ¶ 15.) The accommodations suggested by Ms. Navarro's attorney included wearing a semi-porous mask. (*Id.*) Approximately an hour before the forum began, he suggested the possibility of remote participation. (*Id.*) According to the District, remote participation could not have been arranged with so little notice, but in any event, the District told Ms. Navarro's attorney that it would not consider her request for accommodations until Ms. Navarro provided "the information required by the [public-health order] for an exemption." (*Id.*) Ms. Navarro passed out campaign literature outside the building where the September 22 forum was held, but she did not attempt to gain entry to the forum. (*Id.*)

In advance of the scheduled September 28 forum, the District made arrangements for Ms. Navarro to participate remotely via a video monitor on stage, from which she would have been able to communicate with the audience. Ms. Navarro chose not to participate in the September 28 forum. She did, however, attend the September 30 candidate forum by video. (*Id.* ¶¶ 16-17.) The scheduled October 7 candidate forum is the final forum prior to the election. Ms. Navarro seeks a preliminary injunction that would permit her to attend this last form in person, without wearing a facial covering. She contends the District's actions violate Title II of the Americans with Disabilities Act, Section 504 of the

Rehabilitation Act of 1973, and the Colorado Anti-Discrimination Act. (Doc. 3 ¶ 30.)

PRELIMINARY INJUNCTION STANDARD

"A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *Mrs. Fields Franchising, LLC v. MFGPC*, 941 F.3d 1221, 1232 (10th Cir. 2019). One may be granted "only when the movant's right to relief is clear and unequivocal." *McDonnell v. City & Cty. of Denver*, 878 F.3d 1247, 1257 (10th Cir. 2018).

To succeed on a motion for preliminary injunction, Ms. Navarro must show: (1) that she is "substantially likely to succeed on the merits"; (2) that she will "suffer irreparable injury" if the court denies the injunction;[4] (3) that her "threatened injury" without the injunction outweighs the District's under the injunction; and (4) that the injunction is not "adverse to the public interest." *Mrs. Fields*, 941 F.3d at 1232; *accord Winter*

[4] Ms. Navarro suggests that ADA plaintiffs need not establish irreparable injury to obtain a preliminary injunction. (Doc. 15 at 8.) She cites *Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639 (10th Cir. 2004) for this proposition. (*Id.*) In *Star Fuel*, the Tenth Circuit stated that a movant need not show irreparable injury to obtain a preliminary injunction in cases where evidence shows that a defendant is "engaged in, or about to be engaged in, [an] act or practices prohibited by a statute [that] provides for injunctive relief to prevent such violations." 362 F.3d at 651-52. But the Circuit has since clarified that the irreparable harm requirement is excused "only when a party is seeking an injunction under a statute that *mandates* injunctive relief as a remedy for a violation," but not "[w]hen, by contrast, a statute merely *authorizes* injunctive relief." *First W. Cap. Mgmt. Co. v. Malamed*, 874 F.3d 1136, 1140 (10th Cir. 2017). The ADA authorizes but does not mandate injunctive relief as a remedy. *See* 42 U.S.C. § 12133; *Suda v. Christensen & Larsen Inv.*, No. 2:18-CV-443 TS, 2018 WL 6069177, at *2 (D. Utah Nov. 20, 2018).

v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).[5] The third and fourth preliminary-injunction factors "merge" when the government is the party opposing the injunction. *Nken v. Holder*, 556 U.S. 418, 435 (2009).

If the injunction sought is of a "disfavored" type, the moving party faces a heavier burden and must make a "strong showing" that the first and third factors weigh in its favor. *Mrs. Fields*, 941 F.3d at 1232. A disfavored preliminary injunction is one that: (1) mandates action (rather than prohibiting it); (2) changes the status quo; or (3) grants all the relief that the moving party could expect from a trial win. *Id.* The parties here dispute whether the injunction Ms. Navarro seeks mandates action or changes the status quo. (*See* Doc. 11 at 8; Doc. 15 at 7-8.) The Court need not resolve that question, because Ms. Navarro has made a showing as to her likelihood of success on the merits and threatened irreparable harm sufficient to satisfy even the heightened standard required for disfavored injunctions.

DISCUSSION

I. Likelihood of Success on the Merits

A. Applicable Law

As noted above, Ms. Navarro's complaint alleges claims under Title II of the ADA, Section 504 of the Rehabilitation Act, and CADA. The

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[5] Ms. Navarro also suggests that "in cases where the second, third, and fourth factors are strongly in the moving party's favor, a party may satisfy the first requirement merely by showing 'a fair ground for litigation.'" (Doc. 2 ¶ 18 (citing *Seneca-Cayuga Tribe v. Okla. Ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989)).) But that is no longer the law in the Tenth Circuit after the Supreme Court's decision in *Winter*. *N.M. Dep't of Game & Fish v. U.S. Dep't of the Interior*, 854 F.3d 1236, 1246 (10th Cir. 2017).

language of Title II of the ADA tracks the language of Section 504 of the Rehabilitation Act, and thus jurisprudence interpreting either Title II or Section 504 is applicable to both. *Cohon ex rel. Bass v. N.M. Dep't of Health*, 646 F.3d 717, 725-26 (10th Cir. 2011). Because the statutes "involve the same substantive standards," claims brought under both statutes are analyzed together. *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schs.*, 565 F.3d 1232, 1245 (10th Cir. 2009). Similarly, "[a] court that hears civil suits pursuant to [CADA] shall apply the same standards and defenses that are available under the [ADA] and its related amendments and implementing regulations." C.R.S. § 24-34-802. Accordingly, the Court will analyze Ms. Navarro's likelihood of success on all her claims together.

In order to prove a violation of Title II, Section 504, or CADA, a plaintiff must demonstrate that: (1) he or she is a qualified individual with a disability; (2) he or she was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and (3) such exclusion, denial of benefits, or discrimination was by reason of the plaintiff's disability.[6] *Gohier v. Enright*, 186 F.3d 1216, 1219 (10th Cir. 1999); *see also* 42 U.S.C. § 12132; 29 U.S.C. § 794(a); C.R.S. § 24-34-801(1)(d).

B. Analysis

The term "qualified individual with a disability" means "an individual with a disability who, with or without reasonable modifications to

[6] For purposes of this motion, the parties do not appear to dispute that the District is a "public entity" under the ADA and CADA, *see* 42 U.S.C. § 12131(1); C.R.S. § 24-34-301(5.4), or that the District's operations are a "program or activity receiving Federal financial assistance" under the Rehabilitation Act, *see* 29 U.S.C. § 794.

rules, policies, or practices . . . meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). "Disability" means "a physical or mental impairment that substantially limits one or more major life activities of [an] individual." 42 U.S.C. § 12102(1)(A). "[M]ajor life activities include, but are not limited to . . . concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2)(A). "The definition of disability . . . shall be construed in favor of broad coverage of individuals" under the ADA. 42 U.S.C. § 12102(4)(A).

Ms. Navarro has provided essentially unrebutted evidence that she has a mental health disability that limits her ability to concentrate, think, and communicate while wearing a mask. The District states that it "questioned" the exemption letter provided by her Licensed Professional Counselor based on statements that Ms. Navarro made on social media. But Ms. Navarro's social-media statements do not contradict her assertion that wearing a face covering causes her psychological distress as a result of her childhood trauma. Stating that "I don't wear [a mask] because I don't want to comply to all of this" is not inconsistent with not wanting to wear a mask for medical reasons. And while Ms. Navarro did at one point post a photo of herself wearing a mask, the caption associated with that photo stated that she was "desperate enough to comply" with her gym's mask mandate because she had not been able to work out for a year, and that "[o]f course I got a headache bc I can't breathe and they make no accommodations for medical exemptions." (Doc. 12-3.)

The District makes two primary arguments in response to Ms. Navarro's motion: (1) it was permissible for the District to request additional documentation of Ms. Navarro's disability prior to granting an accommodation; and (2) Ms. Navarro is not a "qualified" individual with a

disability because she poses a significant risk to others by not wearing a mask. Neither is convincing.

As to the documentation issue, the Court is sympathetic to the fact that the District was attempting to comply with the requirements of the Tri-County Health Department's public-health order and associated Frequently Asked Questions document. But the order itself only requires "a statement provided by a Colorado-licensed medical provider." (Doc. 2-10 at 4.) And under Colorado law, Licensed Professional Counselors are mental health professionals licensed by the State to provide mental health and psychological evaluation, assessment, diagnosis, and treatment to individuals. *See* Colo. Rev. Stat. 12-245-603. It is only the Tri-County Health Department's Frequently Asked Questions document that, somewhat strangely, narrows that definition to a category of medical professionals listed in the Colorado Governmental Immunity Act. *See supra* note 1 and accompanying text.

The public-health order and the associated Frequently Asked Questions document cannot define or govern the District's obligations under the ADA. As the order itself states, its requirements "shall be applied in a manner consistent with the Americans with Disabilities Act . . . the Colorado Anti-Discrimination Act . . . and any other applicable federal or State law." (Doc. 2-10 at 4.) It is unclear what additional documentation, beyond a letter from Ms. Navarro's treating professional counselor, would have satisfied the District that Ms. Navarro's mental health condition constitutes a disability under the ADA. At the preliminary-injunction stage, the Court is satisfied that Ms. Navarro has demonstrated a substantial likelihood of success in showing that she is an individual with a disability.

As the District points out, however, that does not resolve the issue. The Department of Justice has promulgated regulations to implement Title II of the ADA, which provide that public entities must "make reasonable modifications[7] in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability . . . ." 28 C.F.R. § 35.130(b)(7)(i). A public entity need not, however, "permit an individual to participate in or benefit from the services, programs, or activities of that public entity when that individual poses a direct threat to the health or safety of others." 28 C.F.R. § 35.139(a). "Direct threat means a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices or procedures . . . ." 28 C.F.R. § 35.104. Whether an individual with a disability is "qualified" to ADA protection in the "direct threat" context therefore turns on whether there is a reasonable modification to a public entity's rules or policies that would alleviate the health and safety concerns at issue. *See Osborne v. Baxter Healthcare Corp.*, 798 F.3d 1260, 1269 (10th Cir. 2015).

The District's position is apparently that not wearing a mask presents such a significant and serious risk of COVID-19 transmission in a school setting, where many children are not eligible for vaccination, that no modification of the face-covering policy aside from remote attendance would alleviate that risk. It also argues that Ms. Navarro's request for accommodation is moot because the District has now arranged for her remote attendance at candidate forums. The District notes that the

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[7] The term "reasonable modification" as used in Title II of the ADA "is essentially equivalent" to the term "reasonable accommodation" as used in Title I. *Robertson*, 500 F.3d at 1195 n.8. In Title II cases, the Tenth Circuit has used the terms interchangeably. *Id.*

letter it received from Ms. Navarro's counselor did not recommend any alternative to mask wearing.

But even if school board candidate forums in fact are frequented by many unvaccinated children, the District has apparently granted mask exemptions to a limited number of students and staff without requiring them to attend school remotely. (Doc 15 at 3.) This alone undermines the District's argument that no modification or accommodation can eliminate the threat posed by unmasked individuals. And the District has not explained why other accommodations such as requiring social distancing or requiring Ms. Navarro to be tested or to affirm that she is not experiencing COVID-19 symptoms before entering a forum would not be adequate to alleviate the risk of transmission associated with her not wearing a mask. Given that the District (via the Tri-County public-health order) recognizes that exemptions to the mask requirement can be appropriate, it is contrary to its own policy to argue that Ms. Navarro's in-person participation in its candidate forums is significantly different than it would be if her letter requesting an exemption came from a physician, dentist, or clinical psychologist as opposed to her treating counselor who is licensed by the State to diagnose and treat mental health issues. The Court finds that Ms. Navarro has demonstrated a substantial likelihood of success in showing that she is a qualified individual with a disability.

And while the District's offer of remote attendance is better than offering no accommodation at all, the purpose of the ADA is "to assure equality of opportunity [and] full participation" for disabled individuals. 42 U.S.C. § 12101(a). That is, the ADA is meant to ensure that, to the extent possible, disabilities, including mental health disabilities, do not stand in the way of citizens' ability to fully participate in civic life. It can hardly be argued that video participation by a candidate is equal to in-

person interaction with voters in a political forum. The Court therefore finds that Ms. Navarro is likely to succeed in showing that she was excluded from participation in the District's candidate forums by reason of her disability.

II. Irreparable Harm

The Court agrees with Ms. Navarro that video conferences are an inadequate substitute for in-person interaction in the context of a political campaign when other participants are in person. Participating in candidate forums remotely by video might put Ms. Navarro at a disadvantage compared to candidates who are permitted to build a rapport with forum attendees through in-person interactions. This is the type of injury that cannot be compensated with money damages after the election. Ms. Navarro has demonstrated that she will likely suffer irreparable injury in the absence of a preliminary injunction.

III. Balance of Harms and the Public Interest

The Court must balance the potential harm to the District and the public from allowing Ms. Navarro to attend candidate forums unmasked against the potential harm to Ms. Navarro in not being allowed to attend the forums in person.

No doubt the District and the public have a strong interest in minimizing the spread of COVID-19. But the potential transmission risk from one unmasked attendee seated on a stage with substantial social distancing from members of the public, students, and other candidates seems small. At this stage of the pandemic, many businesses are now permitting customers to patronize indoor settings without a mask.

On the other hand, Ms. Navarro has a strong interest in being allowed to participate fully and on equal footing in these forums alongside

the other school board candidates. What is more, the District and the public also have an interest in equal participation by school board candidates on the eve of an election.

The Court finds the balance of harms weighs in Ms. Navarro's favor.

CONCLUSION

It is ORDERED that:

Plaintiff Schumé Navarro's Emergency Motion for Temporary Restraining Order & Preliminary Injunction (Doc. 2) is GRANTED IN PART as to her request for a preliminary injunction;

Defendant Cherry Creek School District No. 5, its officers, agents, servants, employees, and attorneys, and any other persons who are in active concert or participation with it are PRELIMINARILY ENJOINED from enforcing the Tri-County Health Department face-covering policy as to Plaintiff Navarro at its remaining school board candidate forums;

The Court determines, in its discretion,[8] that it is appropriate to waive the Federal Rule of Civil Procedure 65(c) security requirement in this case; and

Plaintiff Navarro must at all times maintain a minimum of six feet of social distance between herself and any members of the public, other

[8] *See Oil Corp. v. Transwestern Pipeline Co.*, 825 F.2d 1461, 1462 & n.1 (10th Cir. 1987); *Winnebago Tribe of Neb. v. Stovall*, 341 F.3d 1202, 1206 (10th Cir. 2003); *Brumfiel v. U.S. Bank*, No. 12-cv-02716-WJM, 2013 WL 1874186, at *7 (D. Colo. May 6, 2013).

school board candidates, and students who may be present while she is in any indoor School Setting.

DATED: October 7, 2021

BY THE COURT:

Hon. Daniel D. Domenico