

December 14, 2022

VIA EMAIL

Tennessee Department of Education
Due Process Hearing Request Form
Office of General Counsel
9th Floor, Andrew Johnson Tower
710 James Robertson Parkway
Nashville, Tennessee 37243
(615) 253-5567
dispute.resolution@tn.gov

*Re: Mary Doe, et. al. v. Knox County Board of Education- Request
for Due Process Hearing*

To Whom It May Concern:

Please find enclosed a Due Process Hearing Request in the above referenced matter for filing with the Administrative Procedures Division. Thank you for your attention and assistance in this matter, and should you have any questions, please do not hesitate to contact me.

Sincerely,

s/ Justin S. Gilbert

cc: Jessica Salonus (via email)
Amanda Morse (via email, attorney for Knox County Board of Education)



Tennessee Department of Education Due Process Hearing Request Form

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Nashville, Tennessee 37243
Fax: (615) 253-5567

Parent/Child Information (To be completed by the parent/guardian and submitted to the LEA for processing)		
Name of Child Mary Doe	Child's Date of Birth <i>Month/Day/Year</i> 01/19/2010	Child's Disability misophonia
Name of Parent/Guardian Mother Doe and Father Doe	Address of the Child/Parent/Guardian <i>Street, City, State, ZIP</i> c/o 100 MLK Blvd Suite 501, Chattanooga, TN 37402	
Home Phone	Cell Phone (731) 616-8135	Email Address justin@schoolandworklaw.com
Attorney for Child/Parent/Guardian Justin Gilbert and Jessica Salonus	Address of Attorney <i>Street, City, State, ZIP</i> 100 W. MLK Blvd Suite 501 Chattanooga, TN 37402	
Phone (423) 756-8203	Fax	Email Address justin@schoolandworklaw.com
Due Process Hearing Request initiated by: <input checked="" type="checkbox"/> Parent/Guardian <input type="checkbox"/> LEA (LEA shall provide parent information when initiating the hearing)		Hearing is to be: <input checked="" type="checkbox"/> Open <input checked="" type="checkbox"/> Closed
Provide a complete description of the nature of the problem relating to the identification, evaluation, educational placement (initial or proposed change) or the provision of a free appropriate public education (FAPE). Please see Due Process Complaint filed herewith		
Please provide a proposed resolution to the problem to the extent known and available. Please see Due Process Complaint filed herewith		
Local Education Agency (LEA) Information (To be completed by the school district)		
LEA/Special Education Administrator	Address of LEA <i>Street, City, State, ZIP</i>	
Phone	Fax	Email Address
School Child Attends/Attended	Child's Disability	
Attorney for LEA	Address of Attorney <i>Street, City, State, ZIP</i>	
Phone	Fax	Email address
Date Request Received by LEA	Hearing Location	

**BEFORE THE
TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION**

IN THE MATTER OF)	
MARY DOE, THE STUDENT,)	
BY AND THROUGH)	
HER PARENTS, MOTHER DOE)	
AND FATHER DOE)	
)	
)	
PLAINTIFFS.)	
)	
VS.)	No . _____
)	
)	
KNOX COUNTY BOARD OF EDUCATION)	
)	
DEFENDANT.)	

DUE PROCESS COMPLAINT

COME THE PETITIONERS, through counsel, submitting this Due Process Complaint pursuant to the IDEA, 20 U.S.C. §1415(b)(1). They show:

I. JURISDICTION

1. This case involves “misophonia,” a disorder where physical and emotional harm occurs from hearing the sounds of others *chewing*. The *relief* being sought is a reasonable accommodation: a rule that students must avoid eating food and chewing gum solely in the academic classrooms, absent a medical necessity, along with reimbursement of the private school where Mary Doe has been placed in the interim.

2. At the outset, Petitioners flag the issue whether there is IDEA-jurisdiction in an administrative forum at all. To Petitioner’s knowledge, no hearing officer (administrative law judge) has addressed the question of administrative forum jurisdiction, post-*Perez v. Sturgis*, of a child who does not even believe she is eligible under the IDEA, does not have an IEP, and is not even seeking an IEP or any “specialized instruction” (special education). This matter is only filed herein because a District Court found in a similar case involving misophonia that exhaustion *was* required. In that case, no administrative hearing officer had made any decision on jurisdiction and that case is now pending in the Sixth Circuit. *Doe v. Knox County Bd of Educ.*, No. 22-5317 (6th Cir. 2022).

3. In this case:

- a. Mary Doe has *never even had an IEP* under the IDEA.
- b. Nor is Mary seeking an IEP.
- c. Nor does Mary utilize or require “specialized instruction” under the IDEA. The regular education instruction, without any modifications, meets her academic and functional needs perfectly well.
- d. Rather, Mary is seeking a *reasonable accommodation*—one that is available under Section 504 and the ADA—of her fellow students refraining from chewing gum and eating food in her academic classes, absent a medical necessity (e.g. diabetes). In other words, Mary just needs a rule that students must throw out gum and not eat during academic classes like math, science, English, etc., absent a medical need.

4. In sum, to the extent that a hearing officer under the IDEA can provide the requested relief to Mary, *and* to the extent the IDEA is also the “gravamen,” only *then* would this Court would have jurisdiction under the IDEA for the denial of a free appropriate public education (FAPE). 20 U.S.C. §1415(b)(6)(A); *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 755 (2017). Otherwise, it would lack jurisdiction and the appropriate forum for a pure 504/ADA reasonable accommodation case, without a need for *special education*, is the United States District Court. While Petitioners set forth other claims out of caution, only *IDEA* claims are actually exhausted, not Section 504 or ADA claims. *Perez v. Sturgis Pub. Sch.*, 3 F.4th 236, 240 (6th Cir. 2021) (“[The IDEA] doesn’t require Perez to exhaust his *ADA* claim before bringing it to court. Instead, it requires him to exhaust his corresponding *IDEA* claim.”).

II. PARTIES

5. The Plaintiff is Mary Doe, a seventh-grade student who resides in Knox County with her parents, M.D., her mother, and F.D., her father. Her public zoned school is within Knox County and she was placed in a regular education classroom.

6. Defendant, Knox County Board of Education, is vested with management and control of the Knox County School System. Knox County, which includes Knox County Schools, is the ultimate policy-making body with regard to determinations in the operation of the school system.

III. FACTS

7. Mary is a twelve-year-old seventh grader, and a very strong student. Mary also has misophonia, a disorder that causes her extreme distress upon hearing otherwise normal sounds of

eating and gum chewing when in quiet spaces like her school’s academic classrooms. *See When You Can’t Stand the Sound of Chewing.*¹

8. Mary requires an environmental accommodation in her academic classrooms: avoidance of chewing gum and eating food by others (absent a true medical need). This is entirely reasonable, as Knox County policies and practices already illustrate.

A. FOOD ACCOMMODATIONS ARE NOT AN UNDUE HARDSHIP IN KNOX COUNTY

9. Environmental food accommodations in an academic classroom can be implemented without an undue hardship. They can, and do, work.

10. Many Knox County schools have common-sense policies *already* limiting food in academic classrooms: e.g. Central High School “Food and Drink” Policy: “No food and drink (except water) is permitted in classrooms or other instructional areas except by special permission.” (Ex. A, attached).

11. At another Knox County school, Peanut and Tree nut bans are implemented inside the academic classroom:



¹ <https://www.nytimes.com/2022/09/08/well/misophonia-chewing-noisetreatment.html>.

12. Additionally, a Knox County High School Teacher with migraine headaches, implemented a “fragrance accommodation.” This rule was enforced and respected, with the teacher simply advising all parents of the rule and its reason:

“We are a fragrance free room. If you’re mad, you can take this one out on me :) Strong perfumes and artificial fragrances give me migraines. If you want to smell like Sun Ripened Raspberries, please wait until you leave the room. A couple of times this year a student has sprayed on a lot of body splash in the room, used a very sweet smelling hand sanitizer, etc and it’s made me ill. Not trying to be dramatic, but also not trying to get a migraine.”

13. In the other misophonia case in Knox County (see footnote 1), a math teacher prevented eating and chewing gum in his academic classrooms. Additionally, a no gum or eating policy was implemented in the Technology room where 3d printers and computers are housed.

14. While environmental accommodations for allergies and migraines and expensive computer equipment are acceptable, Knox County ridicules accommodations for *misophonia*. Such “unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are just as disabling as actual impairments.” See, e.g., 29 C.F.R. § Pt. 1630, App. § 1630.2(l).

B. MISOPHONIA

16. Misophonia is a neurological and auditory disorder with emotional consequences.

17. In simple terms, Mary’s brain misinterprets some people-generated sounds, especially the sounds of chewing and eating of others. These sounds, insignificant for most people,

cause *her* fear and anxiety in quiet spaces.² When Mary hears these sounds, her nervous system triggers a fight or flight response. Thus, she cannot safely access her academic classes with the sounds of others engaged in chewing and eating.

18. She needs an accommodation not unlike Central High School’s (and many, many other Knox County schools)— “No food and drink (except water) is permitted in classrooms or other instructional areas except by special permission.”

19. Mary does not require the IDEA, or an IEP, to obtain this accommodation.

C. MARY DOES NOT HAVE OR SEEK AN IEP FOR “SPECIALIZED INSTRUCTION” — SHE NEEDS A REASONABLE ACCOMMODATION THAT IS AVAILABLE IN THE REGULAR EDUCATION CLASSROOM

20. Mary does *not* have an Individual Education Plan (IEP) under the IDEA.

21. Additionally, Knox County has never referred or recommended Mary for an IEP that would create “specialized instruction” under the IDEA.³

22. The regular education classroom, with its regular instruction, meets Mary’s *academic* needs perfectly well. Rather, she requires an environmental accommodation of not chewing or eating during academic instructional time. Not unlike a person who needs a wheelchair

² Mary’s *own* sounds of eating cause no distress. And in large areas with much background noise, like the school cafeteria, Mary can manage her Misophonia. But in quieter places, like the classroom, or even dinner at home, she is unable to bear the sounds. (She eats dinner separately from family).

³ The IDEA, as part of its “free appropriate public education,” requires the delivery of *special education*. 20 U.S.C. § 1401(9). “Special education” means “specially designed *instruction*.” 34 C.F.R. § 300.39(a). See *G.S. v. Lee*, 2021 U.S. Dist. LEXIS 182934, at *33 (W.D. Tenn. Sep. 17, 2021)(“As a result, ‘disabilities that result in a need for reasonable accommodations to access a classroom. . . [i]f they don’t require specialized instruction,’ are not covered under IDEA.”).

ramp to *access* the classroom, Mary needs an environmental accommodation for access, not a change in the actual academic *instruction*.

**D. KNOX COUNTY IS STEEPED IN ATTITUDINAL BARRIERS
TOWARD ACCOMMODATING MISOPHONIA**

23. On September 13, 2022, Mary, through her parents, attended a School Support Team meeting under Section 504 (known as an “S-Team”) where they stated the accommodation request of no gum chewing or eating in the classroom by others absent medical necessity. They also provided an informational handout about misophonia.

24. Knox County’s Section 504 Supervisor and Principal advised the parents that the local school would *not* modify rules about gum chewing and eating in Mary’s academic classrooms. Instead, they would make it *voluntary*—leaving it to every teacher’s own discretion whether to permit gum chewing and eating, classroom by classroom.⁴

25. In response, Knox County’s Section 504 Supervisor said Knox County would “encourage” the teachers to make the accommodation. However, the Supervisor also stated just how unreasonable she believed the requested accommodation to be. According to the Supervisor, the accommodation would be *unenforceable* because “we can’t pat students down before they come in and search students.” With these type of attitudinal barriers, and notwithstanding that pat-downs are not utilized in the many other cases where food or gum is restricted, the 504 Supervisor

⁴ On September 14, 2022, the parents asked Knox County’s 504 Supervisor to advise whether all of the teachers would actually honor an “encouragement” to make classrooms free of chewing gum and food. The Supervisor wrote back with double-speak on September 16, 2022—that it would encourage it but “[w]e will not ask teachers to ban gum chewing and/or eating food in class.” This turned the accommodation right back to every individual teacher’s own discretion.

concluded that she would be “shocked” to see that reasonable accommodation actually included in a 504 plan.

26. The attitudinal barriers, or bias toward misophonia, are not limited to the 504 Supervisor. They are shared up-the-ladder within Knox County. In the previous case involving misophonia and need for accommodation of no chewing or eating (see footnote 1), the Mayor of Knox County ridiculed the accommodation by tagging it “#gumgate” on social media.

27. Members of the publicly elected Knox County Board of Education, too, chimed in about this particular accommodation with their own ridicule. One wrote on social media to the public: “They want to ban chewing in classrooms. I wish I was kidding.” This is a clear example of trying to ire the public at the expense of a child’s serious medical condition, ignoring Knox County’s many Food and Drink policies *already* in place in many schools.

D. DIRECT REFUSAL TO ACCOMMODATE—FOUR MONTHS OF HARM

28. In addition to these attitudinal and stereotyping barriers, Knox County’s 504 Supervisor created a *direct barrier* that blocked the reasonable accommodation from being further discussed. Before the accommodation could even be considered, Knox County required a “four-week period” *without the accommodation*, which it called a “trial period.”

29. Mary cannot endure four weeks of suffering without the accommodation. She is not a guinea pig who is able to undergo four weeks of an experimental “trial period” without the accommodation for her disability. Like a person with diabetes is not required to forego insulin, or a mobility-impaired student a wheelchair, Mary is not required to experience a month of harm through deprivation of the accommodation either.

30. Given the refusal by Knox County to even consider the accommodation without the trial period, Mary Doe could not safely access her academic classes and instruction without experiencing physical and emotional harm.

E. PRIVATE SCHOOL

31. With Knox County blocking the the reasonable accommodation, Mary’s family was required to relocate her to a private school at her family’s cost at a school that would honor the gum and food chewing accommodation. The private school agreed to make the necessary accommodation for Mary without any such trial period. Accordingly, Mary *has* enrolled at the parent’s own expense, and she must now seek reimbursement of the cost.

IV. CAUSES OF ACTION

32. The foregoing facts are incorporated. Plaintiffs bring the following causes of action against Knox County.

A. IDEA

33. *Assuming* that the relief sought—a reasonable accommodation that students refrain from eating and chewing in academic classes, absent medical necessity—is available under IDEA, *and* is the gravamen, then Knox County failed to identify Mary Doe under the IDEA (Child Find) and provide the necessary accommodation for a free appropriate public education (FAPE). For relief, she seeks reimbursement of her private placement and implementation of the accommodation going forward to safely return to the public school.

B. Exhaustion of Other Claims

34. Per the Sixth Circuit, non-IDEA claims under the ADA and Section 504 are not exhausted. It is only the IDEA claim that is exhausted. *Perez v. Sturgis Pub. Sch.*, 3 F.4th 236, 240

(6th Cir. 2021) (“[The IDEA] doesn’t require Perez to exhaust his *ADA* claim before bringing it to court. Instead, it requires him to exhaust his corresponding *IDEA* claim.”).

35. Because *Perez* is currently on appeal to the United States Supreme Court, in an abundance of caution, Petitioners set forth the additional claims to the extent they must be plead or exhausted administratively.

36. Under Section 504 of the Rehabilitation Act, “[n]o otherwise qualified individual with a disability in the United States...shall, solely by reason of his or her 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).

37. Similarly, under the ADA, Knox County may not, by reason of disability, exclude the Plaintiff 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.

38. Under both Section 504 and the ADA, Knox County “shall make reasonable modifications *in policies, practices, or procedures* when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.” 28 CFR §35.130(b)(7)(2001) (504)(emphasis added); *Alexander v. Choate*, 469 U.S. 287, 301 (1985) (Section 504).

39. Under the ADA and Section 504, Defendant is failing to make a reasonable modification under circumstances where it is required, in violation of 28 C.F.R. § 35.130(b)(7), and excluding Plaintiff from the full participation in her 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(b)(1)(i).

40. Finally, Mary enjoys the right as an American public-school student under the Fourteenth Amendment of the United States Constitution to personal security, bodily integrity, and Equal Protection of the Laws. Not unlike a teacher with a disability, see above, she is entitled to the appropriate academic classroom environmental accommodations for her disability to prevent bodily harm. Training is necessary to obtain this.

V. RELIEF SOUGHT

41. Petitioners seek:

(A) Reimbursement of private school;

(B) Going forward, implementation of the reasonable environmental accommodation of no chewing and eating in her academic classrooms, absent a true medical necessity. In the event of medical necessity, then a seating arrangement should be employed (physical distancing).

(C) Appropriate training of personnel to accompany the accommodation.

(D) Recovery for their reasonable attorneys' fees and costs incurred in pursuing this action and for any other relief this Tribunal deems just and appropriate.

GILBERT LAW, PLLC

/s Justin S. Gilbert

Justin S. Gilbert (TN Bar No. 017079)
100 W. Martin Luther King Blvd, Suite 501
Chattanooga, TN 37402
Telephone: 423-756-8203
Facsimile: 423-756-2233
justin@schoolandworklaw.com

&

THE SALONUS FIRM, PLC

/s Jessica F. Salonus

JESSICA F. SALONUS (TN Bar No. 28158)

139 Stonebridge Boulevard

Jackson, TN 38305

Telephone: 731-300-0970

jsalonus@salonusfirm.com

10. The parent/guardian is responsible for picking up an unused medication at the end of the treatment or of the school year.

Failure to follow the medication policy may result in a student having a disciplinary hearing for a Zero Tolerance offense.

TEXTBOOKS

Students are accountable for all free textbooks. Knox County Board of Education must be reimbursed for any books that are damaged, destroyed, or misplaced. Classroom teachers make the decisions regarding book damage.

CAFETERIA/ FOOD AND DRINK POLICY

All food and drinks must be consumed in the cafeteria, unless by special permission. Eating areas are to be left clean and trash-free and trays properly returned to designated area. There is to be NO commercial food deliveries to students on campus during school hours. Visitors are not permitted in the cafeteria during lunch periods without administrative approval. Each student is to use his/her personal cafeteria number only. This number is not to be used by any other student, with or without the permission of the owner. Students must present all food and drink items to a cashier for payment. Food or drink not presented and paid for will be considered stolen, and appropriate disciplinary actions will be assigned. All school behavior guidelines should be followed during lunch. Students must remain in the cafeteria, or in the breezeway during lunch periods. Students should not be in instructional or unsupervised areas.

No food and drink (except water) is permitted in classrooms or other instructional areas except by special permission.

STUDENT SERVICES DEPARTMENT

The Central High School Student Services Department works with the school staff and various agencies to assist students in recognizing and solving educational, career, and personal problems. Counselors will meet in individual conferences or large groups with students to review and discuss courses of study, post-secondary plans, scholarship information, and other areas of concern. Parents are encouraged to communicate with the counselor whenever they have questions or concerns. Services that may be offered include: personal and academic counseling, orientation and registration assistance, college counseling, testing programs, and records maintenance.

CHANGE OF ADDRESS

All students should inform the office of any change of address, telephone number, or guardianship.

GRADUATION REQUIREMENTS

A diploma shall be awarded to students who have earned the prescribed 28 credits and have a satisfactory record of attendance and discipline.

CORE SUBJECTS	Number of Credits
English	4 (English I, II, III, IV)
Mathematics	4 (Algebra I, Geometry, Algebra II, and one higher level math)
Science	3 (Biology, Chemistry or Physics, and one additional lab science)
World History and Geography	1
US History and Geography	1
US Government	.5 (Must take a Civics Exam)
Economics	.5
Phys. Ed and Health	1.5 (Wellness and one additional ½ credit)*

A