UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JANE DOE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 3:22-CV-63-KAC-DCP**
	)	
KNOX COUNTY BOARD OF EDUCATION,	)	
	)	
Defendant.	)	

RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION PENDING APPEAL

Defendant Knox County Board of Education ("KCBOE") respectfully submits this Response in Opposition to Plaintiff's Motion for a Preliminary Injunction pending appeal. Because the factors that the Court must consider do not weigh in favor of the Plaintiff, KCBOE respectfully requests that the Court deny this motion. In further support of this motion, KCBOE relies on the declarations attached as Exhibit 1 and Exhibit 2 and states as follows:

STATEMENT OF THE FACTS[1]

Plaintiff Jane Doe is a freshman student at L&N STEM Academy in the Knox County School system.[2] [Doc. 27]. L&N STEM Academy is a magnet high school focused on the disciplines of science, technology, engineering, and math in the Knox County School system. [Declaration of James Allen]. The academic program is based on full-year classes with a typical course load of 8 simultaneous classes. [Id., ¶¶21-30]. L&N STEM Academy further uses an integrated curriculum and project-based instruction with 1:1 technology implemented throughout

[1] Filed simultaneously with this Response is a Motion to for leave to file under seal Ms. Doe's medical records and ESK Plan as attached to the Declaration of Mr. Allen and Dr. Odom. Her 504 Plan is already under seal.
[2] L&N STEM Academy is a school of choice and Ms. Doe is actually zoned for Fulton High School. KCBOE will note that as a school, Fulton Highschool does prohibit food (other than water) in its classrooms.

the school. L&N STEM Academy has created a unique school culture that focuses on freedom of expression, student initiative, unique teaching methods and openness to foster student growth and creativity. [Id.]. There are thirty-eight (38) students with Individualized Education Plans ("IEPs") and nineteen (19) students with 504s at L&N STEM Academy. [Declaration of James Allen, ¶5]; [Declaration of Dr. Odom]. The school operates like a small college with many student common areas, food truck availability, vending machines and the ability to leave campus when necessary. [Id., ¶¶21-30]. The culture of the L&N STEM Academy is to provide students with a great deal of academic and personal autonomy. [Id.] In essence, students there receive the physical academic freedom that most students do not encounter until college. [Id.] L&N STEM Academy made the deliberate choice to not ban food and drink in its classrooms (leaving that decision to individual teachers) for several practical reasons.

First, there are 583 students are L&N STEM Academy. [Declaration of James Allen, ¶5]. However, there is no dedicated cafeteria at L&N STEM Academy, and the student gathering area, "The Commons," can only comfortably seat 70-90 students. [Id., ¶¶18-20] Students are therefore allowed to take their lunch and eat throughout the building, including during most academic classes that overlap lunch as well as during student driven Genius Hours. [Id.] There are only two lunch periods and if students were required to eat only in the cafeteria, the entire schedule of the school would have to be altered to include time for an additional five lunch periods. [Id.] [3]

Additionally, L&N STEM Academy is the only school in Knox County that accepts students from the surrounding school systems. [Declaration of James Allen, ¶¶21-30] At this time, students from nine different counties attend L&N STEM Academy. [Id.] As a result, there are students attending L&N STEM who commute as much as 3 hours per day to and from the school.

[3] State law requires that students receive a minimum of twenty-five (25) minutes to eat lunch.

[Id.] L&N STEM operates on a unique schedule operating from 9:30AM to 4:30PM, with alternating classes Tuesday-Friday. [Id.] The schedule on Monday is further modified with shortened classes to allow time for students to attend Digital Labs, Genius Hours, work study programs or off campus classes. [Id.] This unique schedule also means that students who participate in extracurricular activities often have to go to those activities directly following school, as most of those organizations assume students will be on the normal 8:30 to 3:30 schedule. [Id.] All of this means that students may not be able to eat anywhere other than on campus for more than 12-hours a day. [Id.] To limit food consumption to lunch period in such a scenario is simply unworkable. [Id.]

Likewise, Genius Hours are student clubs that take place outside of class. [Id.] The focus of any particular Genius Hour is voted upon by students and are primarily student operated. [Id.] They cover a range of topics from Student Government to Jewelry Making. [Id.] These Genius Hours are purposefully scheduled to overlap one or both lunch periods to maximize student social engagement while minimizing the impact on the academic schedule. [Id.] Several of the Genius Hours have up to 80 or more students coming in at different portions of the meeting. [Id.] It would be virtually impossible to limit eating to only one time period of the meeting without forcing numerous students to either skip eating entirely, or not be able to participate in the meeting. [Id. ¶25]

From a programming perspective, allowing snacking outside the "lunch" room, increases focus, helps with stress and keeps the students from being distracted by hunger during their incredibly rigorous day. [Id. ¶¶16-17; 21-30] The curriculum and rigor of L&N STEM Academy often leads its freshman students to fall behind in its very fast paced, self-directed classes at first. [Id.] The curriculum and rigor of L&N STEM Academy staff regularly compile a list of struggling

Freshman to monitor and assist them in improving their grades. [Id.] However, many students are unable to maintain their grades at the curriculum and rigor of L&N STEM Academy and return to their zoned schools. [Id.]

Ms. Doe asserts that she suffers from misophonia which causes her emotional distress in the presence of certain sounds. [Declaration of James Allen, ¶¶6-13]; [Declaration of Dr. Odom]. Although Ms. Doe has self-identified "eating sounds" as her main "triggers," school and medical documentation note that Ms. Doe is triggered by "mouth noises" in general such as eating and drinking, loud breathing/yawning, sniffling, typing, pen clicking et. al. [Declaration of James Allen, Attachment 2, Pgs. 1, 4, 5]. In fact, according to her medication records, chewing, skin rubbing together and scratching are all equally triggering to her. [Id.]; [Declaration of Dr. Odom]. Ms. Doe asserts that prior to attending L&N STEM Academy she was a straight-A student at her private middle school and enjoyed many academic achievements. [Doc. 27, ¶¶21-22, *et. al*.] Ms. Doe asserts in her Complaint that her private middle school banned eating in its classrooms and therefore she "rarely" had to leave the classroom. [Doc. 27, ¶26] However, the "Safety Plan," Ms. Doe provided to L&N STEM Academy, does not include such a provision and her own medical records reflect that she had to leave the classroom during middle school up to four times a day or remained for "instruction" only. [Declaration of James Allen, Attachment 1; Attachment 2, Pgs. 1, 4, 5].

Ms. Doe also suffers from extreme migraines and these migraines have impacted her school attendance as well. [Doc. 14]; [Declaration of James Allen, ¶¶6-10]; [Declaration of Dr. Odom]. She often arrives to school late due to migraines and was hospitalized for three weeks this school year in order to receive inpatient pain management for her migraines. [Id.].

In recognition of the very real challenges faced by the Plaintiff, Ms. Doe has a 504 plan at L&N STEM Academy that provides her the following accommodations while at school:

- Preferential seating away from distractions.
- Use of noise cancelling device or microphone on the teacher to amplify the teacher's voice.
- Reduction of classroom distractions.
- Student is allowed additional movement and/or water breaks.
- Breaks from the classroom when needed.
- Alternative location for lunch.
- Extra time to complete assignments and testing.
- Copies of notes and materials used in class when she was not present.
- Alternate assignments and assessments when needed by student due to absences from class.
- Testing done in an alternate location or setting.

[Doc. 14, Sealed Document]; [Declaration of Dr. Odom]; [Declaration of James Allen, ¶¶6-13]. As part of that 504-planning process Ms. Doe provided L&N STEM Academy with medical records, her "plan" from her prior school, and two medical notes regarding her migraines and misophonia. [Declaration of James Allen, ¶¶6-13]. None of those documents recommended banning eating, chewing, or similar activities in Ms. Doe's classrooms. [Declaration of James Allen; Attachment 2]; [Doc. 14]. Generally, Ms. Doe's teachers have asked that students refrain from unnecessary snacking in the classroom while Ms. Doe is present. [Declaration of Dr. Odom]; [Declaration of James Allen, ¶¶11-13]. However, Ms. Doe has reported numerous that she continues to hear eating/chewing in the classroom that requires her to leave the classroom. [Id.]. L&N STEM Academy staff who were present at the time have not been able to hear any such noises. [Declaration of James Allen, ¶¶11-13].

Ms. Doe is passing the majority of her classes at L&N STEM Academy. However, Ms. Doe asserts that pursuant to the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, the only way she can be granted "access" to KCBOE programming is for

KCBOE to ban chewing/eating in all of her academic classes and in an elective "Genius Hour" offered at the school that overlaps the lunch period. [Doc. 27].

LEGAL STANDARD

Generally, a federal district court is deprived of jurisdiction once a notice of appeal of that order is filed. *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (holding that "a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously"); *see also Welch v. Fritz*, 909 F.2d 1330, 1331 (6th Cir. 1990) (holding that after a notice the district court's subsequent denial of a motion for reconsideration would ordinarily be a "nullity). However, "[u]ndoubtedly, after appeal, the trial court may, if the purposes of Justice require, **preserve the status quo** until decision by the appellate court." *Newton v. Cons. Gas Co.*, 258 U.S. 165, 177 (1922) (emphasis added). But the trial court "may not finally adjudicate substantial rights directly involved in the appeal." *Id.*

"A preliminary injunction is an extraordinary remedy which should be granted only if the movant carries his or her burden of proving that the circumstances clearly demand it." *Overstreet v. Lexington-Fayette Urban Cnty. Gov't.*, 305 F.3d 566, 572 (6th Cir. 2002). In evaluating whether a preliminary injunction should be granted pending appeal, court considers the same four factors that are traditionally considered in evaluating whether to grant a preliminary injunction. *See Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985); These factors as: (1) the likelihood that the party seeking the injunction will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a preliminary injunction; (3) the proposed that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm'n*, 812 F.2d 288, 290 (6th Cir. 1987). "These factors are not prerequisites that must be met, but are interrelated

considerations that must be balanced together." *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

ARGUMENT

The Court should deny Plaintiff's motion for an injunction pending appeal because she cannot demonstrate a likelihood of success on the merits, others will harmed by an injunction, and public interest weighs against granting the injunction. Therefore, KCBOE requests that the Court deny Plaintiff's motion.

I. The Plaintiff Cannot Show a Substantial Likelihood of Success on the Merits.

As has been extensively briefed in this case, Plaintiff cannot establish a strong likelihood of success on the merits because she has failed to exhaust her administrative remedies as required by the Individuals with Disabilities Education Act ("IDEA").[4] In order to obtain an injunction pending appeal, the movant "must ordinarily demonstrate to a reviewing court that there is a likelihood of reversal." *Id.* at 153. At a bare minimum, the movant must show "serious questions going to the merits." *Id.* at 154 (quoting *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)).

Plaintiff failed to exhaust her administrative remedies under the IDEA and thus, the District Court properly dismissed her Complaint. While Plaintiff claims she is not seeking relief under the IDEA, KCBOE asserts that the gravamen of Plaintiff's Complaint is that she has been denied a free and appropriate public education ("FAPE"). In *Fry v. Napoleon Community Schools*, the Supreme Court explained that "Section 1415(1) requires that a plaintiff exhaust the IDEA's

[4] For the sake of brevity, KCBOE will not fully reargue this point here. KCBOE incorporates by reference its Response in Opposition to Plaintiff's Motion for a Preliminary Injunction or Temporary Restraining Order [Doc. 10] and its Motion to Dismiss [Doc. 25]. KCBOE will note that the Motion to Dismiss was properly before the Court. The Motion to Dismiss specifically asserted that the Amended Complaint did not cure the defect alleged and cited to the "new" allegations of the Amended Complaint.

procedures before filing an action under the ADA, the Rehabilitation Act, or similar laws when (but only when) her suit 'seek[s] relief that is also available' under the IDEA." *Fry v. Napoleon Cmty. Schs.*, 137 S. Ct. 743, 752 (2017) (alterations original). The Court further explained that "in determining whether a suit indeed 'seeks relief" that is available under the IDEA, "a court should look at the substance or gravamen of the plaintiff's complaint." *Id.* at 752. *Fry* also proposed two questions to determine if the gravamen of the complaint involves the provision of FAPE. "First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, public theatre or library?." *Id.* at 756. "[S]econd, could an adult at the school—say, an employee or visitor—have pressed the same grievance?" *Id.* Following *Fry*, the Sixth Circuit decided *Perez v. Sturgis Public Schools*, using the framework established by *Fry* to evaluate a Plaintiff's claim. 3 F.4th 236 (6th Cir. 2021). The Sixth Circuit determined that the gravamen of the complaint was that the plaintiff was "denied an adequate education." *Id.* at 240. The Sixth Circuit cautioned that the "**focus of the analysis is not the kind of relief the plaintiff wants**, but the kind of harm he wants relief from." *Id.* at 241. "Relief available under the IDEA means relief for the events, conditions, or consequences of which the person complains, not necessarily relief of the kind the person prefers." *Id.* (internal citations and quotations omitted).

Here, the Court correctly applied the framework established by *Fry* and *Perez* by evaluating the harm that the Plaintiff sought to remedy. [Doc. 32, PageID # 369-371]. The Court correctly concluded:

> The precise harm that Plaintiff seeks to remedy is the alleged lack of "meaningful access" to an "adequate education" in her classrooms and a Genius Hour during which she would participate in an educational activity. *See Perez*, 3 F.4th at 240. As pled, without cessation of the sounds associated with chewing and eating during class, [Doc. 27, ¶ 15], Plaintiff cannot receive "her education in the academic classrooms [*Id.* ¶ 39]. L&N's alleged failure to modify or adapt Plaintiff's

> instructions Plaintiff's instruction has kept her from "participating and benefitting from classroom instruction." *See Perez*, 3 F.4th at 240. Because the harm Plaintiff alleges "is the denial of the public education," this lawsuit "falls within the scope" of the IDEA's exhaustion requirement. *See id.*at 241 (citing *Fry*, 137 S. Ct. at 754).

[Doc. 32 PageID # 370].

Because this Court correctly held that Plaintiff's complaint alleges a denial of FAPE and that she failed to exhaust her administrative remedies as required by the IDEA, Plaintiff is unlikely to prevail on appeal.

In addition, the Court correctly rejected Plaintiff's argument that she "does not qualify as a 'child with a disability' under the IDEA," and, therefore, does not seek relief available under the IDEA. [Doc. 28 at 1]. A child qualifies as a "child with a disability" under the IDEA if the child (1) has an intellectual disability, specific learning disability, or **other health impairment**; and (2) "by reason thereof, needs special education and related services." 34 C.F.R. § 300.8(a)(1). Ms. Doe's asserted that she is simply too high achieving to need "special education" and thus does not meet the second prong of the eligibility determination. However, the IDEA *has not* limited eligibility to students with low cognitive ability or intelligence.[5]

[5] Plaintiff seems to be defining special education to only mean alterations to the academic standards being taught but, special education is just "specially designed instruction…to meet the unique needs of a child with a disability." 20 U.S.C.S. § 1401(29). Those unique needs are not limited to "academic" needs. Indeed, in developing an IEP for a student, school teams **must** consider the "academic, developmental, and functional needs of the child." 34 C.F.R. § 300.324. *See also S.B. v. Murfreesboro City Sch.*, No. 3-15-0106, 2016 U.S. Dist. LEXIS 31675, at *19 (M.D. Tenn. Mar. 11, 2016)(" Therefore, he was entitled to instruction designed to meet *his unique needs*, which were emotional and behavioral, at no cost to the parents."); *Somberg v. Utica Cmty. Schs*, No. 13-11810, 2016 U.S. Dist. LEXIS 41771, at *12 (E.D. Mich. Mar. 30, 2016)(student with social and emotional needs rather than ourely academic); *Johnson v. Metro Davidson Cty. Sch. Sys.*, 108 F. Supp. 2d 906, 918 (M.D. Tenn. 2000)("[educational performance] pertains to the child's diminished academic performance in the classroom, impaired school learning experience, and/or failure to master skill subjects.")

There are 13 categories of potential eligibility under the IDEA including one which could apply to Ms. Doe. 20 U.S.C.S. § 1401. The implementing regulations define a student with an "other health impairment" as "having limited strength, vitality, or alertness, **including a heightened alertness to environmental stimuli**, that results in limited alertness with respect to the educational environment…..that adversely affects a child's educational performance." 34 C.F.R. § 300.8(c)(9)(**emphasis** added). Tennessee has further expanded on this definition to include "**a heightened alertness to environmental stimuli** …**that adversely affects a child's educational performance**," and, a student having "a chronic or acute health problem that requires specially designed instruction due to….impaired organizational or work skills; inability to manage or complete tasks; excessive health related absenteeism…." Tenn. Rules and Regs. 0520-01-09-.03(12)(a-b). Clearly, Ms. Doe's misophonia is a condition that creates a *heightened alertness* to environmental stimuli. In fact, her primary allegation is that her heightened alertness affects her ability to concentrate/stay in her classes thereby causing a "learning gap." In short, if her misophonia is adversely affecting her educational performance, she may be eligible for FAPE under the IDEA and that is the issue she must exhaust before bringing her ADA/Section 504 claims. Thus, Plaintiff is unlikely to prevail on appeal and cannot show "serious doubts" as to the merits of this case. *Griepentrog*, 945 F.2d at 153.

PLAINTIFF CANNOT STATE A CLAIM UNDER THE ADA OR SECTION 504.

Finally, assuming that Plaintiff does not need to exhaust her remedies under the IDEA, Plaintiff is still unlikely to succeed on the merits because Plaintiff has failed to state a claim of discrimination under the ADA or Section 504. Ms. Doe currently has a 504 plan that provides her the following accommodations while at school:

- Preferential seating away from distractions.

- Wearing a noise cancelling device herself and/or having the teacher use a microphone to amplify the teacher's voice.[6]
- Reduction of classroom distractions.
- Student is allowed additional movement and/or water breaks.
- Breaks from the classroom when needed.
- Alternative location for lunch.
- Extra time to complete assignments and testing.
- Copies of notes and materials used in class when she was not present.
- Alternate assignments and assessments when needed by student due to absences from class.
- Testing done in an alternate location or setting.

Because KCBOE has provided reasonable accommodations that address Plaintiff's concerns regarding her misophonia and migraines, it has satisfied the requirements of the ADA and Section 504.

Under the relevant law, a disabled person is "otherwise qualified" for a program if she could meet its requirements with a reasonable accommodation. *See Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432, 435 (6th Cir. 1998); *see also* 29 U.S.C. § 794(d); 28 C.F.R. § 41.53. "And when that holds true, a denial of the requested accommodation may amount to unlawful discrimination." *Doe*, 926 F.3d at 243. However, a plaintiff is not entitled to "every accommodation he requests or the accommodation of his choice." *Yaldo v. Wayne State Univ.*, 266 F. Supp. 3d 988, 1010 (E.D. Mich. 2017). A person is entitled *only* to a "reasonable" public accommodation of his disability, and *not* to the "best possible" accommodation. *Campbell v. Bd. of Educ. of the Centerline Sch. Dist.*, 58 F. App'x 162, 167 (6th Cir. 2003)(unpublished)(citing *Dong ex rel. Dong v. Bd. of Educ.*, 197 F.3d 793, 800 (6th Cir. 1999)); *Hankins v. Gap, Inc.*, 84 F.3d 797, 800-01 (6th Cir. 1996)("As the Supreme Court has held in analogous circumstances, an employee cannot [demand] a specific accommodation if another

[6] The teacher's microphoned voice could be directly transmitted to the student's headset via Bluetooth technology.

reasonable accommodation is instead provided."). Therefore, when an individual already has "meaningful access" to a benefit to which he or she is entitled, no additional accommodation, "reasonable" or not, need be provided. *A.M. v. N.Y.C. Dep't of Educ.*, 840 F. Supp. 2d 660, 680 (E.D.N.Y. 2012); *see also Keller v. Chippewa Cty.*, 860 F. App'x 381, 386-87 (6th Cir. 2021) ("Though Keller may not have received the precise type of medical treatment that he would have preferred, undisputed facts show that he received 'meaningful access' to medical treatment.")

In short, if KCBOE is already providing a reasonable accommodation, then no further accommodations are required by law. *Gaines v. Runyon*, 107 F.3d 1171, 1178 (6th Cir. 1997) ("The Rehabilitation Act does not impose a duty to provide every accommodation requested.").

PLAINTIFF'S REQUESTED ACCOMMODATION IS INHERENTLY UNREASONABLE

Despite allegations to the contrary, this case is not about whether KCBOE has a "policy" regarding food in classrooms, or whether teachers can or cannot ban eating in their individual classes; the question for this Court is whether the ADA or Section 504 of the Rehabilitation Act requires a ban on other students engaging in the normal activities of eating, drinking, or chewing when Plaintiff is in the classroom or attending an optional elective study hall.[7] Plaintiff has asserted that the ADA requires modifications to *the behavior of other students* as *her* reasonable accommodation. Plaintiff's only support for this theory is a citation to a preliminary injunction regarding mask mandates that has no precedential value for this Court and was not even decided on the merits.

KCOBE asserts that a reasonable accommodation is inherently *un*reasonable when it impedes the rights of others. "A third party's 'rights [do] not have to be sacrificed on the altar of

[7] Note that this 80-minute study hall is specifically designed to coincide with lunch, and sometimes even overlaps two lunch blocks, yet Plaintiff's suggested accommodation is that all students truncate their lunch to fifteen minutes to accommodate her needs.

reasonable accommodation.'" *Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 492 (6th Cir. 2019)(quoting *Temple v. Gunsalus*, No. 95-3175, 1996 U.S. App. LEXIS 24994 (6th Cir. Sept. 20, 1996).[8]

This principle has been applied numerous times in Title VII cases. *See, e.g., US Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002) (holding that a reasonable accommodation that violates an established seniority system is not reasonable); *Henderson v. Delta Airlines, Inc.*, No. 19-10441, 2021 U.S. Dist. LEXIS 24393, at *19 (E.D. Mich. Feb. 9, 2021) (discussing that a reasonable accommodation cannot impact the work schedule or amount of work given to another employee); *Averett v. Honda of Am. Mfg.*, No. 2:07-cv-1167, 2010 U.S. Dist. LEXIS 11307, at *30-31 (S.D. Ohio Feb. 9, 2010) and *Mitchell v. Univ. Med. Ctr., Inc.*, No. 3:07CV-414-H, 2010 U.S. Dist. LEXIS 80194, at *21-23 (W.D. Ky. Aug. 9, 2010) (both holding that it is not a reasonable accommodation to infringe on the religious freedom of other employees); *McDonald v. Potter*, No. 1:06-CV-1 Lee, 2007 U.S. Dist. LEXIS 57983, at *94 (E.D. Tenn. Aug. 7, 2007) (discussing how a mandatory scent-free policy would be burdensome and unworkable).

This is applied with equal force in cases concerning the Fair Housing Act ("FHA"). The FHA makes it unlawful "[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of" that person. Additionally, the FHA defines "discrimination" to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." *Davis*, 945 F.3d at 489. The FHA adopted the concept of a "reasonable accommodation" from § 504 of the Rehabilitation Act, and therefore the FHA engages in a similar

[8] This case involved interpretation of the Fair Housing Act, but courts have borrowed the analysis of "reasonable accommodation" under the FHA from the §504 of the Rehabilitation Act. See further analysis, *infra*.

analysis of "reasonable." *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1044 (6th Cir. 2001). In characterizing a "reasonable accommodation" under the FHA, the Sixth Circuit has explained:

> The word 'accommodation' means 'adjustment.' 1 *Oxford English Dictionary* 79 (2d ed. 1989); *The American Heritage Dictionary of the English Language* 11 (3d ed. 1992). Like the word 'modification,' therefore, 'accommodation' is not an apt word choice if Congress sought to allow "fundamental changes" to a housing policy. Consider two examples: One would naturally say that a blind tenant requests an accommodation from an apartment's 'no pets' policy if the tenant seeks an exemption for a seeing eye dog. But one would not naturally say that a tenant with allergies requests an accommodation from an apartment's 'pet friendly' policy if the tenant seeks a total pet ban. The former tenant seeks a *one-off adjustment*; the latter seeks a *complete change*. The word 'accommodation' includes the first, but not the second, request.

Davis, 945 F.3d at 490 (internal citations removed)(*emphasis* in original).

In determining whether a policy constitutes a reasonable accommodation under the FHA, courts routinely reject accommodations that interfere with the rights of third parties. *Id.* at 492 (holding that a tenant's request to ban smoking in the condominium complex where she resided to ease her asthma symptoms was not a reasonable accommodation because the smoking ban fundamentally altered the complex's smoking policy and "would intrude on the rights of third parties"). Similarly, the Sixth Circuit has also rejected a tenant's request to force his neighbor out of the apartment complex in violation her lease to accommodate tenant's mental-illness-induced screaming and door slamming at all hours of the night. *Groner*, 250 F.3d at 1046-47. As the Court explained, "[b]ecause [the apartment complex] has a legitimate interest in ensuring the quiet enjoyment of all its tenants, and …there [was] no showing of a reasonable accommodation that would have enabled Groner to remain in his apartment *without significantly disturbing another* tenant," the tenant's request was denied. *Id.* at 1047; *see also*, *Temple*, 1996 U.S. App. LEXIS 24994 at *2 (unpublished table decision) (holding that the Fair Housing Act did not require a

landlord to evict a neighboring tenant in order to accommodate the plaintiff's multiple-chemical-sensitivity disorder) (*Emphasis* added).

The only way to enforce Plaintiff's desired "reasonable accommodation" is to directly impact the rights of other students in her classroom; this is inherently *unreasonable* and poses an undue burden to KCBOE. To illustrate a contrasting situation, significant allergies are a fairly common issue for students, and schools often provide reasonable accommodations for students with significant allergies. These reasonable accommodations are typically limited to discouraging students from bringing the allergen to school or providing allergen-free options for the student to pick from, as opposed to blanket bans specifically because they would be difficult to police.[9]

Likewise, when a student with asthma wanted a mandatory rule banning fragrances in the building, the Court held that "a mandatory policy also limits the choices of the non-disabled population at [school]." *Hunt v. St. Peter Sch.*, 963 F. Supp. 843, 853 (W.D. Mo. 1997). The school already had a voluntary fragrance-free policy in place as a reasonable accommodation. The Court looked to employment law cases and noted "an employer is not required to make accommodations that would violate the rights of other employees." *Id*. "There is nothing in the Act to suggest that the non-disabled population was expected to give up or substantially alter their lifestyle." *Id*. The Court opined at great length of the benefits of a voluntary scent free policy versus a mandatory policy:

[9] *Office for Civil Rights*, 107 LRP 71146, (March 22, 2007) (The district addressed the parents' food contamination concerns by advising a teacher to cease offering food to students as a reward, reminding classmates to bring peanut-free snacks, and only providing closed milk cartons to students versus opened ones that are more likely to contain allergens.); *Office for Civil Rights*, 120 LRP 25590, (June 12, 2020) (district resolved a claim by agreeing to provide allergen-free food to a student at school and school events); *see also Oregon State Educational Agency*, 102 LRP 34074, (November 12, 2002) (school district posting signs in student's classroom reminding students to wash their hands after handling allergens was a reasonable accommodation and the school did not have to impose a blanket prohibition on any food product because it would an undue administrative burden for the district to police the behavior of parents)(copies of the above are attached to this motion).

> A mandatory policy, however, goes far beyond educating parents, students and teachers about Stephanie's allergies. Plaintiffs fail to recognize that a voluntary policy gives the school substantial flexibility and continued control over the management of their program. If the policy becomes mandatory, the school must enforce it or risk leading students and staff to conclude that compliance with the rules is not really required. Schools, like courts, are at risk of undermining the credibility of the institution when they make orders that cannot be enforced. Plaintiffs also fail to recognize that a mandatory rule is often resisted more vigorously than a voluntary policy.
> …
> Plaintiffs attempt to minimize the foregoing concerns by pointing to the dress code policy at St. Peter, and they suggest that it would be a simple matter to add scents to the things which the students could not wear. The fallacy in the argument is that a violation of the dress code is quickly apparent. Scents are more personal and would require a closer inspection than would be comfortable for either the administrator or the interloper. Sniffing may be appropriate in the wild kingdom but not in an elementary school.
> …
> The burden of such a mandatory policy is best illustrated by Mrs. Hunt's own response when confronted with irritants outside the school. On Easter weekend in 1996, Stephanie played in houses where dogs and cats were present. Mrs. Hunt did not require those dogs or cats to be removed, nor did she forbid Stephanie to play where she would be exposed to irritants. Likewise, on that same weekend, Mrs. Hunt did not require her relatives to leave a family gathering because some of them were wearing scents. Instead, Stephanie played in the basement while the adults remained upstairs.

Id at 852-53. This analysis is especially relevant in the light of the fact that Plaintiff is highly triggered by mouth noises in general, as well as sounds like skin rubbing together, sniffing and typing. Because Plaintiff's requested accommodation is not reasonable, she cannot state a claim under the ADA or Section 504.

PLAINTIFF'S REQUESTED ACCOMMODATION CANNOT BE EFFECTIVELY PROVIDED

Finally, assuming that Plaintiff's requested accommodation is somehow reasonable, KCBOE cannot effectively provide it. If KCBOE could not have provided the reasonable accommodation requested by Plaintiffs, *it cannot have violated* either the ADA or Section 504. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 409, 99 S. Ct. 2361, 2369 (1979) (finding no violation where the plaintiff could not have benefited from any reasonable accommodation). Ms.

Doe suffers from misophonia, specifically a heightened awareness of noises like mouth noises, skin rubbing together, typing. By her own accounts, when Ms. Doe hears these "triggering" noises, she is triggered and has to take the time to calm down from the triggering event. The problem is that Ms. Doe hears noises that the typical brain filters out. She *literally* hears things that others will not hear. L&N STEM Academy staff have observed this very phenomenon wherein Ms. Doe will say she hears "chewing," but staff do not hear it, cannot locate the sound and cannot identify anyone actually chewing. Ms. Doe's father has even expressed frustration with this to KCBOE staff reporting that he is aware that only Ms. Doe can hear the noises as she is the one with misophonia. How is KCBOE to enforce a ban on sounds they cannot hear?

Even if there were a complete food ban, if a student forgets and eats a chip before remembering, Ms. Doe is already triggered. KCBOE could be violating by not hearing a noise, that only she can hear, *before* she hears it?[10] It is completely unrealistic.

II. Balancing the Harms Weighs Against Plaintiff's Request for a Preliminary Injunction.

In evaluating the harm that will occur upon whether or not the stay is granted, courts generally consider three factors: "(1) the substantiality of the injury alleged; (2) the likelihood of its occurrence; and (3) the adequacy of the proof provided." *Griepentrog*, 945 F.2d at 153. At this time, Plaintiff is attending school, attending classes, accessing KCBOE programming, and is being provided reasonable accommodations under her 504-plan. By contrast, the issuance of an injunction would cause substantial harm to KCBOE's programming. Plaintiff's requested relief

[10] Additionally, if the sound of "chewing" could be removed completely, would she not also be triggered by the sound of skin rubbing together or scratching? Her medical records suggests that those are equally problematic. Moreover, even if that impossible feat was accomplished, there is no guarantee it would increase Ms. Doe's "access" to the classroom as she has numerous absences, including a three-week hospitalization, for her migraines.

would not "preserve the status quo" between the parties but would place an affirmative obligation on KCBOE which would fundamentally alter KCBOE's programming and the student experience at L&N STEM Academy. For this reason, this Court should deny Plaintiff's request for an injunction. *See Newton*, 258 U.S. at 177.

The issuance of an injunction would cause substantial harm to KCBOE's programming. L&N STEM Academy is a unique program, and it has chosen its policies for a reason. L&N STEM Academy relies on its teachers' authority to individually direct their classrooms. Each teacher establishes his or her own classroom culture with its set of rules and social mores. Some teachers lean more towards individual freedom, while some are stricter. But inhibiting these teachers' options in the manner requested by the Plaintiff directly infringes on their ability to teach.

L&N STEM Academy has chosen to encourage students to eat in a more social fashion throughout the building and at different times. Partially, this is a programmatic effort to decrease student stress and make their lives easier, but it is also practical. L&N STEM Academy students have longer hours than other schools and requiring them to eat only during an assigned lunch would be ineffective and cruel.[11] Furthermore, L&N STEM Academy simply cannot fit that many students into two lunch periods and would have to adjust its entire schedule to add in more lunch periods. This would impact 583 students and potentially eliminate many of the Genius Hours as that time would have to be added back for academic instruction.

Finally, as discussed above, the requested injunction would cause an undue burden on L&N STEM Academy staff just from the difficulty in enforcing a mandatory "chewing" ban in any classroom Plaintiff is in. How much time will a teacher spend searching out "mouth noises" audible

[11] Similarly, KCBOE objects to the theory that only students with a "medical" condition will demonstrate a need to eat food or snack. Defendants hope that this Court will take judicial notice that teenagers eat at prodigious rates. Forcing other children to sit next to Plaintiff hungry just to avoid them making "mouth noises," *is* harmful.

only to Plaintiff due to her sensitivity? This problem is compounded in the purely elective "fun" time that is the Genius Hour which deliberately overlaps the lunch hour.

All of this must be balanced against the alleged "harm" of Ms. Doe, wherein for the first time in her life, she may not pass all of her classes. However, this is certainly not an irrevocable "harm," as it is a fate endured by many freshmen at L&N STEM Academy as they adjust to a totally new learning style. If Ms. Doe wishes to avoid it, she could attend her zoned school, which does prohibit food in classrooms.

III. Public Interest Weighs in Favor of Permitting KCBOE to Determine its Own Programming.

Moreover, the public interest lies in letting KCBOE determine its own programming and in letting the judicial process work as it is intended. KCBOE has purposefully cultivated a specific student culture at L&N STEM Academy which emphasizes student autonomy balanced with rigorous academic requirements. Allowing one student to upset this balance would be unfair and detrimental to the remaining 537 students who benefit from L&N STEM Academy's policies and learning environment. Public policy is furthered when schools have the authority to implement policies which are in the student body's best interest.

Further, Plaintiff has argued that public interest lies in enforcing the ADA and Section 504. Yet, Plaintiff has a 504 plan that grants her accommodations in the classroom. This case is not about whether the ADA is to be "enforced," but about differences in opinion as to what is the appropriate reasonable accommodation and whether the Plaintiff has brought claims under the IDEA. Such questions are legal one which can be adequately addressed on appeal. No Plaintiff is entitled to a temporary restraining order "as of right." *Winter* at 24. "[T]he proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment motion." *Leary*, 228 F.3d at 739. "A plaintiff must affirmatively

demonstrate his entitlement to injunctive relief." *Roden*, 2018 U.S. Dist. LEXIS at *6-7. Plaintiff has failed to do so.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically on the date recorded by the Court's electronic filing system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular United States Mail, postage prepaid. Parties may access this filing through the Court's electronic filing system.

s/Amanda Lynn Morse
Amanda Lynn Morse