**IN THE UNITED STATES DISTRICT COURT**
**FOR THE EASTERN DISTRICT OF TENNESSEE**
**KNOXVILLE**

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| **IN THE MATTER OF** | | |
| **JANE DOE, THE STUDENT,** | ) | |
| **BY AND THROUGH** | ) | |
| **HER PARENTS, K.M. AND A.M.** | ) | |
| | ) | |
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| **PLAINTIFFS.** | ) | **JUDGE CRYTZER** |
| | ) | |
| **VS.** | ) | No. 3:22-cv-63-KAC-DCP |
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| **KNOX COUNTY BOARD OF EDUC.** | ) | |
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| **DEFENDANT.** | ) | |

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# PLAINTIFFS' REPLY TO KNOX COUNTY BOARD OF EDUCATION'S RESPONSE TO MOTION FOR INJUNCTION PENDING APPEAL

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**COME THE PLAINTIFFS, JANE DOE, et. al.**, and submit this Reply to KCBOE's Response (D.E. 44).

## I. INTRODUCTION

Jane Doe seeks injunctive relief from the violation of her rights under the ADA and §504. KCBOE argues she entered the wrong court, that she must exhaust administrative processes first. However, even KCBOE would concede that a Hearing Officer, at the end of an administrative process, holds no power to grant the relief she seeks.

It cannot be that every disabled child seeking injunctive relief for serious and ongoing harm, whose education is in some way *tangentially* affected by that disability, must exhaust a "ponderous" administrative process to remove a discriminatory obstacle with an accommodation. *Sch. Comm. Of Town of Burlington, Mass. v. Dep't of Ed. of Mass.*, 471 U.S. 359, 370 (1985) (referring the IDEA as "ponderous"). That abstraction would result in *every* child with a disability being sent to administrative forums.

This case presents the question: What is the *right place* for a student with a disability seeking a very limited accommodation, in this instance, a ban on eating and gum chewing in *her* academic classrooms, in order to avoid suffering from her disability? Not a ban in *every* class, just a handful; and not a ban during lunchtime, just select academic classes. In fact, some classes *already* have the ban, like Jane's math class, illustrating just how feasible this is. And, for that matter, practically every other academic classroom in Knox County schools—besides L&N STEM—bans food in the classrooms. (See D.E. 27-3, p. 3).[1] Jane Doe is merely asking that the food and gum policy in place for many of L&N's classrooms (as it is elsewhere in Knox County Schools) be extended to all of *her* academic classrooms.

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[1] *See also* (Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for TRO and Preliminary Injunction (D.E. 15, p. 9, PAGE ID#175) (Complete copies of the full contents of these student handbooks are available on each school's respective websites *available at* South-Doyle High School Student Handbook, https://www.knoxschools.org/domain/5911#12, Karns High School Student Handbook, https://www.knoxschools.org/domain/1645, Central High School Student Handbook, https://www.knoxschools.org/cms/lib/TN01917079/ Centricity/Domain/75/CHS_Student_Handbook_17-18.pdf, Bearden High School, https://www.knoxschools.org/domain/9016, Gibbs High School, https://www.knoxschools.org/domain/10178, West High School, https://www.knoxschools.org/site/default.aspx?PageType=3&ModuleInstanceID=5737 6&ViewID=C9E0416E-F0E7-4626-AA7B-C14D59F72F85&RenderLoc =0&FlexDataID=111270&PageID=23367&Comments=true).

## II. TEACHER-CHOICE ON EATING AND CHEWING GUM MUST YIELD TO THE ADA AND SECTION 504

KCBOE has copied verbatim much of its Sixth Circuit universal masking briefing for its Response. (Compare 21-6007, D.E. 22, United States Court of Appeals for the Sixth Circuit). There is a *similarity*. In the universal masking cases, parents decided whether to allow kids to opt out of masking. That lack of uniformity frustrated the accommodation for children with disabilities. Similarly, KCBOE leaves it to every teacher whether to allow kids to eat and chew gum in their classrooms. ("Each teacher establishes his or her own classroom culture with its set of rules and social mores.")(D.E. 44, Response, p. 18). That lack of uniformity frustrates Jane Doe's accommodation in certain academic classes.[2]

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[2] Notably, KCBOE's "third party" arguments were rejected. There is no "third party right" to trump the ADA and Section 504. *S.B. v. Lee*, 2021 U.S. Dist. LEXIS 182674, at *63 (E.D. Tenn. Sep. 24, 2021). The Sixth Circuit rejected this very argument by KCBOE:

> Finally, the Board argues that Plaintiffs' proposed accommodation is unreasonable because it impermissibly burdens the rights of third parties. *See, e.g., Davis v. Echo Valley Condo. Ass'n*, 945 F.3d 483, 492 (6th Cir. 2019) ("[A] third party's 'rights [do] not have to be sacrificed on the altar of reasonable accommodation.'" (second alteration in original) (quoting *Groner v. Golden Gate Gardens Apartments*, 250 F.3d 1039, 1046 (6th Cir. 2001)). We rejected a similar argument in *G.S.*, explaining that the subject schools had previously implemented a mask mandate and highlighting the absence of evidence that these measures were "impractical or impossible for schools to enforce." *G.S.*, 2021 U.S. App. LEXIS 34512, 2021 WL 5411218, at *3. Likewise, the record in this case "does not demonstrate that the Knox County Board of Education actually did experience any meaningful problems in response to [its prior] mask mandate." *S.B.*, 2021 U.S. Dist. LEXIS 195663, 2021 WL 4755619, at *20. The Board itself acknowledges that, since the district court issued its preliminary injunction in this case, "the number of students engaging in obvious non-compliance is less than 1% of the student population." Mot. to Stay at 13.

*M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, at *4-5 (6th Cir. Dec. 20, 2021).

But there are important differences, too, between this case and the universal masking cases. This is a single-plaintiff case, not a universal masking case for an entire school system. And the lack of uniformity is not a parental choice, but a *teacher* choice. The teachers making the rules are *school employees*. Therefore, teachers' "prerogatives"—i.e. school policy—must surely bend to accommodate Doe's rights under §504 and the ADA.

If Jane Doe can be accommodated in math class, and the computers and digital printers can be made safe by banning chewing and eating, so too can Jane Doe be made safe in the few remaining academic classes she attends. (See D.E. 8-3, Jane Doe Declaration, ¶8). Arguments that all students in a magnet STEM school require constant food and gum access are unconvincing. All schools, and L&N STEM in particular, limit access to food and gum in certain circumstances, including the academic classrooms. Teachers have "prerogative." All Jane Doe is asking is for L&N to extend existing policies—create uniformity—for *her limited academic classes*.

KCBOE's response makes one thing crystal clear: Jane Doe would be turned away "empty handed" in an administrative forum. *Fry*, 137 S. Ct. 743, 754-55 (2017) ("A hearing officer, as just explained, would have to send her away empty-handed. And that is true even when the suit arises directly from a school's treatment of a child with a disability — and so could be said to relate in some way to her education."). Not once in its Response does KCBOE assert that an IDEA administrative hearing officer could fashion relief in the form of an IEP stating that the remaining teachers must ban gum chewing and eating.

That should come as no surprise. Such an accommodation is needed purely for Jane Doe's *equal access* to academic classes as her non-disabled peers and does not involve any specially designed instruction. This is precisely why Jane Doe does not *have* an IEP, does not *need* any specially designed instruction, and why she has not claimed that KCBOE has been violating IDEA Child Find for the entire school year.

Even if Jane Doe 1) were eligible for an IEP, and 2) could benefit from specially designed instruction plus services, this *still* does not mean her claim is subject to IDEA exhaustion. After all, E.F., the *Fry* plaintiff, did have an IEP. And as the Sixth Circuit pointed out, matters concerning service animals in the school could also be "addressed through changes to an IEP." *Fry*, 788 F.3d 622, 627 (6th Cir. 2015) (*rev'd).* Yet the Supreme Court did not uphold the Circuit Court's dismissal and instead "vacate[d] the judgment of the Court of Appeals" and remanded for additional fact finding. *Fry* 137 S.Ct. at 748.

The Supreme Court stressed in *Fry* that "asking whether the gravamen of [a student's] complaint charges, and seeks relief for, the denial of a FAPE" is different from merely asking whether the student's complaint is "broadly speaking, 'educational' in nature." *Id.* at 758. As Justice Kagan clarified, "the IDEA guarantees individually tailored educational services, while Title II and §504 promise non-discriminatory access to public institutions. That is not to deny some overlap in coverage: The same conduct might violate all three statutes. … But still … a complaint brought under Title II and §504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation." *Fry*, 137 S.Ct. at 756.

*Fry* asks whether the *essence* of Doe's claim implicates the denial of a FAPE, not whether an active imagination, or school declarations, could *conjure* circumstances in

which services might be provided. Like Fry's complaint, Doe's seeks relief for simple discrimination in the form of access to the classroom. But Doe's claim is even stronger, for unlike Fry, she has no IEP, and she has never contested that she is receiving appropriate instruction.

Doe's request may be, "broadly speaking, educational in nature," but that does not mean a student is denied a "FAPE." Like a peanut ban, a smoking ban, use of an inhaler, use of insulin, or use of a service dog to calm a student, the crux of Jane's requested accommodation is not specially designed instruction, but merely an accommodation to allow equal *access* to the instructional classroom.

As Sixth Circuit Court Judge Daughtrey argued in her *Fry* dissent before the Sixth Circuit reversed the majority opinion, "[t]his deliberate carve-out would have no meaning if any and every aspect of a child's development could be said to be 'educational' and therefore related to FAPE, requiring an inclusion in an IEP, and imposing an extra impediment to the remediation of a disabled child's civil rights." *Fry v Napoleon Comty. Sch. et al,* 788 F.3d 622, 635 (6th Cir. 2015)(Daughtrey, J. dissenting); *see also Sophie G. v. Wilson County Schs.,* 2018 U.S. App. LEXIS 19036 (6th Cir. 2018) (Section 504 and ADA claims of equal access are appropriate even if "tangentially" related to the IDEA).

Removing eating or chewing in limited classrooms because they harm Jane Doe is no more "adaptation to the delivery of her instruction" than removing peanut butter from designated tables or creating a separate smoking area would be. It does not require any adaptation of the *instruction*. (See D.E. 37, Plaintiff's Memorandum in Support of Injunction, pp. 3-4 (adequacy of all Jane Doe's instruction)).

Finally, as demonstrated above, resort to a hearing officer would be a "futile" exercise because an administrative hearing officer cannot afford the requested relief.

Exhaustion is excepted "when the use of administrative procedures would be futile or inadequate to protect the plaintiff's rights and when the plaintiff was not given full notice of his procedural rights under the IDEA." *F.C. v. Tenn. Dep't of Educ.*, 745 F. App'x 605, 608 (6th Cir. 2018).

## III. HARM

In its Response, Knox County alleges its harm is "inhibiting these teachers' options…." (D.E. 44, Response, p. 18). Yet teacher freedom does not contemplate injuring someone else when it can be readily avoided.

The extreme stress experienced by Misophonia patients is well documented in the clinical research and this record. As Dr. Storch explains:

> 7. The Misophonia patient's reaction to the specific sounds (or "triggers") often involves fleeing to escape the sounds. If they cannot escape, they will suffer extreme distress. Most Misophonia patients try to cope with sound triggers by removing themselves from the environment, turning on music/white noise to drown out the specific sounds, or the use of earplugs.
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> 8. The classroom setting provides unique challenges for youth patients with Misophonia. One cannot turn on music, escape the classroom, or use earplugs and also receive the classroom instruction. Where the specific trigger can be identified, such as eating or chewing gum, the school may create a forbiddance on eating or chewing in the academic setting (with tolerances for those having medical necessities). *If* chewing and eating in the academic setting is medically *necessary* for another student(s), then use of physical distancing, like a seating chart, may be attempted to meet both interests. Of course, care should be taken to ensure the Misophonia patient is not always placed in the back of a room, or corner, or isolated in a stigmatizing fashion.

(D.E. 2-2, Dr. Storch decl., ¶7, PAGE ID#36).

The declarations submitted by KCBOE exaggerate Jane Doe's needs, do not recognize her progress, or simply misstate events. Therefore, it was important to Jane Doe to address those aspects of the Declarations that are inaccurate. (See Jane Doe

Declaration hereto). She is a courageous young lady who simply needs an assist from a handful of teachers. Without it, there is no question she will continue to be harmed. This has been demonstrated in the last months.

In a March 30, 2022 Declaration, Jane Doe's father described in detail the recent events of uncontrolled classroom eating, and the cumulative impact on Jane Doe. (D.E. 30-1, ¶4, PAGE ID#353-54). Specifically, he explained how as a result of the incessant triggering from eating and chewing gum in her classes, Jane Doe's exhaustion and *related* migraine headaches reached the point of requiring emergency room treatment with intravenous Compazine and Toradol, still without any accommodation. (*Id*. at ¶5, PAGE ID#354).

More recently, by April 13, 2022, without a uniform standard, students began *deliberately smacking gum* to trigger Jane Doe. (D.E. 31-1, K.M. Declaration, ¶3, PAGE ID#359-60). Jane Doe was experiencing embarrassing facial twitches induced by her condition as she tried to cope with the eating and chewing. She continues to flee the classroom, often forced outside when no empty room was available, reporting numbing fingers in the cold. (*Id*. at ¶4). This has become every Misophone's worst nightmare.

That Knox County has provided "other" accommodations to Jane Doe is unavailing. This is not a matter of a "preferred" accommodation, but an *effective* one. As Dr. Rosenthal of Duke Center for Misophonia and Emotion Regulation states, accommodating Misophonia is not a matter of this *or* that, but rather environmental accommodations "and (i.e. not instead of)" other accommodations. (D.E. 19-1)(emphasis in original).

By contrast, imposing a ban on eating and chewing gum in Jane's academic classes poses no *genuine* harm to L&N STEM students, only manufactured harm. Per school

policy, the only change would be to teacher "prerogatives." That cannot trump the serious clinical harm that Jane Doe continues to endure daily. She should not be sent home, away from school, when a simple accommodation can both easily relieve her suffering *and* allow her to receive an in-person education.

This case is the perfect vehicle for the Court to relieve the suffering with an injunction pending appeal, as it will protect Jane Doe both *during* the appeal, and *imminently,* as she tries to maintain both her health and grades during her freshman year of high school. For these reasons, she requests the injunction pending appeal be GRANTED.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that the foregoing has been filed via the Court's electronic filing procedures, including to defense counsel, Amanda Morse, on this 29th day of April 2022.

/s Jessica F. Salonus