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

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

PLAINTIFFS' REPLY TO KNOX COUNTY BOARD OF EDUCATION'S RESPONSE TO MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COME THE PLAINTIFFS, JANE DOE, et. al., and submit this Reply to Knox County Board of Education's ("Knox County") Response to Motion for Preliminary Injunction.

I. DISCRIMINATION REQUIRES IMMEDIATE ACCESS TO THE COURTS

In her influential book, *Making All the Difference: Inclusion, Exclusion and American Law* (1990), Martha Minnow begins by describing how "Human beings use labels to describe and sort their perceptions of the world. Particular labels chosen in American culture can carry social and moral consequences while burying the choices and responsibility for those consequences." *Id.* at 4. Those labels, in turn, may perpetuate *prejudice. Id.* at 6.

Jane Doe, at fifteen, is experiencing this. The town mayor fans her case as "gum gate" across social media channels, making her disability a pot-shot.[1] Knox County, in its Response, invokes a parade of horribles (what *can't* be done, instead of what *can)*—referring to nail biting, "mouth noises in general," "skin scratching," persons "moving their mouths," "chewing their lip," etc., as if to make accommodation seem impossible.

Using labels or exaggerations creates a negative perception about a fifteen-year-old who can, in fact, manage a unique disability—as if *she* is unreasonable or that *she* is hurting others' rights with her disability. This is precisely why the ADA is important. When the interactive process is broken, as it is here, access to the Courts—this federal Court—is critical. That is perhaps particularly true here, in what appears to be a case of first impression for a student with Misophonia.

[1] Glenn Jacobs, February 27, 2022 Twitter Message, *available at* https://twitter.com/GlennJacobsTN/status/1498102018619191296?s=20&t=J8KYxwjoKGd7MFSQSnocXQ (last visited March 1, 2022).

II. IDEA EXHAUSTION IS NOT REQUIRED FOR LIMITATIONS ON CHEWING GUM AND EATING FOOD

In its Order of February 23, 2022, the Court asked Knox County to address exhaustion of remedies under the IDEA with the Sixth Circuit's *Perez* case and the Supreme Court's *Fry* case.[2] Seizing an opportunity to seek dismissal, Knox County argues that having to escape from chewing and eating sounds means, in a broad and sweeping sense, that Jane Doe *should have* an IEP and she *should* seek remedies for special education under the IDEA. The argument is misplaced.

To the contrary, both *Perez* and *Fry* involved children who did, in fact, have IEPs under the IDEA. Being dually covered under IDEA and Section 504/ADA, the *Fry* and *Perez* students were eligible under the IDEA *and* for reasonable accommodations under Section 504/ADA.

That is not so here. Jane Doe is a single-covered student under ADA/504. She has no IEP, no rights to IDEA-FAPE, and she cannot demand a due process hearing under the IDEA. Jane Does is known as a "504-only" student, one who lacks an IEP and is *not* seeking special education relief under the IDEA. She has properly filed her suit in District Court.

In *Fry,* a student with cerebral palsy, and an IEP, requested use of her service dog at school. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017). The Supreme Court said the Sixth Circuit "went wrong" by using a sweeping standard of whether the service dog was, "broadly speaking, educational in nature." *Id.* at 753, 758. The fact that the dog would boost the student's "sense of independence and social confidence" in the school setting was not the correct inquiry. *Id.* at 758.

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[2] Section 504 and the ADA themselves contain no exhaustion requirements. The requirement of exhaustion of remedies is found in a different statute, the IDEA. *E.g., B.H. v. Portage Pub. Sch. Bd. of Educ.*, 2009 U.S. Dist. LEXIS 7604, at *13 (W.D. Mich. Feb. 2, 2009).

The correct inquiry is whether the claim "charges, and seeks relief for, the denial of a FAPE." *Id.* On remand, the District Court found the request for a service dog was *not* seeking relief for denial of FAPE. *E.F. v. Napoleon Cmty. Sch.*, 371 F. Supp. 3d 387, 404 (E.D. Mich. 2019).

In *Perez*, a hearing-impaired student, also having an IEP, filed an administrative claim under the IDEA. *Perez v. Sturgis Pub. Sch.*, 3 F.4th 236 (6th Cir. 2021). The student *settled* that IDEA claim for "sign language instruction," then brought an additional suit in federal court solely under the ADA. Having settled the FAPE-related claims, but not having made an administrative record about the sign language instruction, he could not pursue his ADA claims separately. As the Sixth Circuit said, one cannot "forgo IDEA claims and sue under another statute." *Id.* at 240.

As Judge Thapar explained in *Perez*, though it is unconventional, it is only the IDEA claim that must be exhausted, not the separate ADA/504 claim:

> That may seem strange—since when do we graft exhaustion requirements from one law onto another? We usually don't. But the provision is not a conventional exhaustion requirement: It doesn't require Perez to exhaust his *ADA* claim before bringing it to court. Instead, it requires him to exhaust his corresponding *IDEA* claim. So Perez can sue under "other [f]ederal laws protecting the rights of children with disabilities"—including the ADA—but he must first complete the IDEA's full administrative process. 20 U.S.C. § 1415(*l*).

Id.

Knox County does not address *Perez* as the Court requested. It's important. Here, Jane Doe has no "corresponding IDEA claim" to exhaust as *Perez* says. She cannot exhaust an ADA/504 claim *through an IDEA* claim because, again, she has no IEP or IDEA-FAPE claim. Unlike the sign language instruction sought in *Perez,* she has no "corresponding IDEA claim." *Id.*

She is truly a "standalone" ADA/504 claimant. She simply needs a modification forbidding gum-chewing and eating in classroom settings and extracurriculars—not unlike every other school.[3]

And that only makes sense. The IDEA's definition of FAPE ultimately focuses on specialized *instruction.* 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). A ban on eating and chewing gum in academic classrooms has nothing to do with *instruction.* Just as the Sixth Circuit "went wrong" in *Fry* by expanding the meaning of FAPE, so does Knox County in its brief.

Finally, even if Jane Doe had an IEP and an IDEA claim, which she does not, resort to the *Fry* "clues" to distinguish IDEA-FAPE from 504/ADA access claims would resolve in her favor. First, "could the plaintiff have brought 'essentially the same claim' against a different kind of public facility, like a public theater or library? . . . And, second, could an adult at the school, like an employee or a visitor, have 'pressed essentially the same grievance?'" *Perez*, 3 F.4th at 240-41.

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[3] A recipient of federal funds that operates a public elementary or secondary education program: shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.

34 C.F.R. § 104.37(a)(1).

Nonacademic and extracurricular services and activities may include:

> counseling services, physical recreational athletics, *transportation*, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

Id. at § 104.37(a)(2)

These "clues" do not fit this case perfectly because Jane Doe is required by compulsory education laws to attend school upon pain of being truant. She is *not* required to attend a library or a public theater. But supposing that she were, she certainly could request that a room in the library or private viewing room in a theater be gum-free or eating-free during the period she was required to be there.

Moreover, an adult or visitor with Misophonia could request no eating or chewing gum in a public room too. This type of accommodation provides a Misophone with access to a public room without pain, headaches, extreme anger, and experiencing flight or fight syndrome. The *gravamen* involves being able to access the location. *G.S. v. Lee*, 2021 U.S. Dist. LEXIS 168479, at *21 (W.D. Tenn. Sep. 3, 2021) (The "gravamen" of Plaintiffs' claims is their access to education through a reasonable modification — indeed, one supported by the County's own Health Department and applicable to Plaintiffs' schools. As such, this claim rightfully must be considered an ADA and Rehabilitation Act claim, not one under the IDEA. No exhaustion requirements apply here."). Or, as Judge Greer put it, exhaustion is not required because "they request an accommodation of a community-wide mask mandate in Knox County Schools so they can safely access their school buildings." *S.B. v. Lee*, 2021 U.S. Dist. LEXIS 182674, at *20 (E.D. Tenn. Sep. 24, 2021).

The nature of the access limitations from Misophonia, without accommodations, is demonstrated throughout the First Amended Complaint. (See D.E. 8, Am. Complaint, ¶¶ 7, 14, 17, 23, 13[2], 17[2], 18[2], 20[2]).[4] This also shows the physical harm and the gap in learning, created by the denial of the accommodations and access to the same classroom instruction received

[4] As Defendant points out, Plaintiffs did not catch that the auto-numbering word processing feature repeated paragraphs 13-24, so the [2] indicates the second set of paragraph numbers.

by her non-disabled peers, as opposed to denial of specialized *instruction.* Strangely, almost as if it did not read the Complaint, Knox County states that Jane Doe *is* "attending school, she is attending her classes, she is accessing KCBOE's programming." (Doc. 12, Response, p. 17). Jane Doe is "missing approximately half her educational time. She is finding an "empty room," or else sitting by herself outside for more than 50% of her educational time, simply to escape the eating and chewing of gum in academic classes." (Doc. 8, Am. Complaint, ¶23). She is physically and emotionally whipped by the end of the day. (*Id.*)

The refrain from constant eating and chewing is normative for educational classrooms, which Plaintiff will show. But even if it were not, the mask cases are helpful because the accommodation does involve reasonable acts *by others.* (Instead of a normal refrain from eating or chewing in an academic classroom, the mask cases required an affirmative act of wearing a mask to reduce spread of COVID-19).

There have now been four District Court preliminary injunctions, from all three of Tennessee's Districts, finding that accommodation requests for third party masking are appropriate in federal court without IDEA exhaustion. *G.S. v. Lee*, 2021 U.S. Dist. LEXIS 168479 (W.D. Tenn. Sept. 3, 2021); *S.B. v. Lee*, 2021 U.S. Dist. LEXIS 195663 (E.D. Tenn. October 12, 2021); *R.K. v. Lee*, 2021 U.S. Dist. LEXIS 204078 (M.D. Tenn. Oct. 22, 2021); and *R.K. v. Lee II*, 2021 U.S. Dist. LEXIS 236817 (M.D. Tenn. Dec. 10, 2021) (hereinafter *R.K. II*)(this case).[5] Like

[5] Shelby County, in the *G.S.* case, was the first case. Judge instructed Shelby County to follow the mask mandate recommended by the county health department. *G.S. v. Lee*, 2021 U.S. Dist. LEXIS 168479 (W.D. Tenn. Sept. 3, 2021). Knox County, in the *S.B. by M.B.* case, was the second case. Judge Greer instructed Knox County to return to its mask mandate that was successful previously. *S.B. v. Lee*, 2021 U.S. Dist. LEXIS 182674, at *1 (E.D. Tenn. Sep. 24, 2021). Williamson County and the Franklin Special School District, *R.K,* were the third case. Like Judge Lipman and Judge Greer, Judge Crenshaw returned authority of reasonable accommodations to

the "threat of threat of exposure to unmasked children with COVID-19 is present in non-educational areas of schools as well as in other public facilities," the threat of exposure to persons eating and chewing gum is present in non-educational rooms or rooms in other public facilities. If Jane Doe is required to be in those rooms, she is entitled to an accommodation.

No matter how the case is analyzed, exhaustion is not required. That is, the non-educational nature is even further removed than the service dog in *Fry* and, certainly, the sign language instruction in *Perez*. First, under a purely textual analysis, Jane Doe falls outside the text of the IDEA because she does not require "specially designed instruction" and, indeed, has no IEP or corresponding IDEA rights to assert. Second, under the case law, *Perez,* it is not the 504 and ADA claims which are even being exhausted—it would have to be an IDEA claim (which does not exist). And, third, even by resorting to the "clues" for dually covered students (which Jane Doe is not), her claim is an access case.

III. KNOX COUNTY'S "CHOICE ACCOMMODATION" ARGUMENT IS MISPLACED

Knox County's chief argument, it seems, is that Jane Doe is seeking an accommodation "she prefers," and all of Knox County's *other accommodations* were sufficient. (D.E. 12, Response, pp. 10-11).

First, Knox County does, in fact, have numerous school handbooks in its schools which prevent gum chewing and eating. Below is just one example of many:

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the parents and school districts. *R.K. v. Lee*, 2021 U.S. Dist. LEXIS 204078 (M.D. Tenn. Oct. 22, 2021).

CAFETERIA GUIDELINES AND RULES FOR FOOD AND DRINK

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

● All food and drinks must be consumed in DESIGNATED AREAS only unless by special permission. [6]

There cannot possibly be anything unreasonable, unusual, or harmful about such a policy being implemented at L&N Stem.

But as important, Knox County's reasoning about a person with a disability "choosing" an accommodation was soundly rejected in *Fry* itself, when the school argued that a "human aide" instead of a service dog could follow the student from class to class. "In the words of one administrator, Wonder should be barred from Ezra Eby because all of E. F.'s "physical and

[6] 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=57376&ViewID=C9E0416E-F0E7-4626-AA7B-C14D59F72F85&RenderLoc=0&FlexDataID=111270&PageID=23367&Comments=true.

academic needs [were] being met through the services/programs/ accommodations" that the school had already agreed to." *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 751 (2017).

On remand, in *Fry*, the District Court buried the idea that a school district can dictate alternative accommodations:

> Defendants are not entitled to summary judgment on Plaintiff's failure-to-accommodate claim because E.F. had access to the school and its programs via a human aide provided to her by the school. A public school is bound by the provisions of the ADA and does not have carte blanche to accommodate in any way it chooses when a covered individual has requested another accommodation. As persuasively explained in *Alboniga*:
>
> [R]efusing Plaintiff's requested accommodation if it is reasonable in favor of one the School Board prefers is akin to allowing a public entity to dictate the type of services a disabled person needs in contravention of that person's own decisions regarding his own life and care. As the *Sabal* court reasoned, it would be like refusing a blind person access for her service animal because, in the public entity's view, a cane works fine. That result would be would be absurd. The analysis, under Title II of the ADA . . .must focus only on whether the requested accommodation is reasonable under the specific circumstances particular to the individual in question. *See Terrell v. USAir*, 132 F.3d 621, 626 (11th Cir. 1998) ("Whether an accommodation is reasonable depends on specific circumstances"); *Crowder v. Kitagawa*, 81 F.3d 1480, 1485 (9th Cir. 1996) (holding in a Title II ADA case that whether a proposed accommodation is 'reasonable' is a question of fact.) *Alboniga*, 87 F. Supp. 3d at 1341.
>
> To accept Defendants' position would be to ignore the mandate of the ADA that requires public entities provide a requested "reasonable accommodation" when doing so is not unduly burdensome.

E.F. v. Napoleon Cmty. Sch., 2019 U.S. Dist. LEXIS 164075, at *43-44 (E.D. Mich. Sep. 25, 2019). In any event, the school district has *not* accommodated the constant and ongoing consumption on food and chewing gum in the academic classrooms like it has in every other high school.

For the remaining arguments, and this being a Reply brief, Plaintiffs defer to the arguments already made in its initial Memorandum. For all these reasons, this case is

properly brought in this District Court and the injunction should issue conforming to language in other high schools—easily doable, common sensical, and necessary for this young student.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on March 2, 2022, I served this Motion on defense counsel, Amanda Morse, amanda.morse@knoxcounty.org through the Court's ECF filing system.

/s Justin S. Gilbert