No. 22-5317
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JANE DOE, A MINOR STUDENT,
BY AND THROUGH HER PARENTS, K.M. AND A.M.,

PLAINTIFFS-APPELLANTS.

VS.

KNOX COUNTY BOARD OF EDUCATION,

DEFENDANT-APPELLEE.

On Appeal from the United States District Court for the
Eastern District of Tennessee
No. 3:22-cv-63
Hon. District Judge Crytzer

APPELLANT'S MOTION FOR INJUNCTIVE RELIEF AND/OR ACCELERATED HEARING

GILBERT LAW, PLC

Justin S. Gilbert (TN Bar 017079)

100 W. MLK Blvd, St 501
Chattanooga, TN 37402
Telephone: 423.756.8203
justin@schoolandworklaw.com

THE SALONUS FIRM, PLC

Jessica F. Salonus (Tn Bar 28158)

139 Stonebridge Boulevard
Jackson, TN 38305
Telephone: 731.300.0970
jsalonus@salonusfirm.com

SUMMARY

This fascinating case is believed to be a first-of-its kind involving a medical condition known as Misophonia. As Plaintiffs' medical experts from the Baylor College of Medicine and the Duke University Center for Misophonia explain, human-produced sounds of eating and chewing trigger the brain's sympathetic nervous system and cause the person with Misophonia a very severe reaction. They will either choose to "fight" (aggression) or "flight" (escape) when confronted with these sounds.

For Jane Doe, a fourteen-year old student, the necessary academic classroom accommodation is forbidding students from eating or chewing gum in the academic classroom. Jane Doe is not aggressive. Rather, as she explains it, when confronted with these sounds in the classroom:

> "[T]he most difficult sounds are human eating and chewing of gum. When I hear these sounds, I have a physical reaction of my body tensing up. I can only focus on the sounds themselves and I must escape from them. If I do not escape, I become highly agitated (like a panic attack) and I cannot think or concentrate."

(Declaration of Jane Doe to Second Amended Verified Complaint, D.E. 27-2, ¶ 3, PageID# 264).

The accommodation of no eating and chewing in the academic classroom, of course, does not extend to lunch time—Jane Doe eats outside where sounds do not reverberate. And if another student truly has a medical need for food during academic lessons (e.g. a child with diabetes), then Jane Doe simply asks that she be

physically distanced from that person, as her experts suggest. However, the school district refused the accommodation, insisting that individual teachers can do whatever they wish in their classrooms. While some teachers do not allow eating and chewing gum, others do, as if to prove a point of their autonomy.

Jane Doe can enter the school, but she cannot remain when eating and chewing occur inside a classroom. With some teachers, like the History teacher who permits unlimited eating and chewing of gum, Jane Doe fled the classroom 75% of the time. Combined with other classes allowing eating and chewing of gum, she was exhausted by the end of the day simply battling the emotional harm to her nervous system.

Regrettably, after denying an evidentiary hearing, and engaging months of briefing an IDEA-exhaustion issue that was raised *sua sponte* by the District Court, the District Court equated Jane Doe's need for a 504/ADA accommodation with "special education" under the IDEA. The District Court dismissed the case for lack of IDEA exhaustion.

But Jane Doe has never had an IEP. Nor does she need one. She has no IEP goals, no specially designed instruction, and no IEP team. Indeed, she is *not* seeking a different content or delivery of *instruction* in the form of IDEA's "special education," just an accommodation to remain in her regular education classrooms. Much like a widened door or a service dog can be accommodations that allow a child

to access the school, Jane Doe simply needs an accommodation to *remain* in the school. Unfortunately, the District Court conflated 504/ADA with the IDEA, ruling that Jane Doe failed to exhaust administrative remedies under the IDEA.

Because this is clearly not an IDEA case for special education relief, much less a case involving a *"gravamen"* of special education under the IDEA, she has filed a respectful appeal and this motion for injunctive relief.

JURISDICTION

Under 28 U.S.C. §1292(a)(1), interlocutory orders that grant, continue, modify, or refuse to dissolve or modify injunctions are immediately appealable. This exception encompasses orders that: (1) have "the practical effect of [grant]ing an injunction"; (2) threaten a "'serious, perhaps irreparable, consequence'"; and (3) "can be 'effectually challenged' only by immediate appeal." *Carson v. Am. Brands. Inc.*, 450 U.S. 79, 84 (1981). To determine whether an order has the practical effect of an injunction, the focus is the nature and substance of the order, not its label. *City of Jacksonville v. Purdue Pharma L.P. (In re Nat'l Prescription Opiate Litig.)*, 2019 U.S. App. LEXIS 4460, at *4 (6th Cir. Feb. 13, 2019).

Plaintiff has moved in the District Court for an injunction during this appeal pursuant to Fed. R. Civ. P. 8(a)(1)(C). (D.E. 35, 35-1, PageID#377-391). The Court

has denied that relief. (D.E. 50, PageID#491-98). Plaintiff now moves under Fed. R. Civ. P. 8(a)(2) for immediate relief.

STANDARD OF REVIEW

The underlying standard for injunction considers four factors:

> (1) whether the movant has shown a strong likelihood of success on the merits of the controversy, (2) whether the movant is likely to suffer irreparable harm without an injunction, (3) whether an injunction would cause substantial harm to others, and (4) whether an injunction would serve the public interest.

S.B. v. Lee, 2021 U.S. Dist. LEXIS 182674, at *9 (E.D. Tenn. Sep. 24, 2021). "The four factors generally ought to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Id*. at *10. "When the Court, however, is able to determine the propriety of a preliminary injunction by relying on fewer than all four factors, it may do so." *Id*.

On appeal, the standard of review is highly deferential to the District Court's findings, but *will* be disturbed where the District Court relied upon clearly erroneous findings of fact, improperly applied the governing law, or used an erroneous legal standard. As shown below, Plaintiff contends the Court erroneously applied the facts relating to what constitutes "special education" under the IDEA and misunderstood the governing law of *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017). As a result, Jane Doe was exposed to needless suffering that will not abate absent relief.

PROCEDURAL HISTORY

On February 17, 2022, Plaintiff filed a Verified Complaint along with a motion for temporary injunction and preliminary injunction with supporting evidence. (Verified Complaint & Motion for Temporary and Preliminary Injunction, D.E. 1, 2, PageID#1-38).

On March 3, 2022, the parties appeared for a hearing on the motion for temporary restraining order and preliminary injunction before the District Court. Instead of hearing the live witness testimony, including the expert witness testimony and hearing from Jane Doe herself (age 14), the Court raised *sua sponte* the issue of its jurisdiction and exhaustion of administrative remedies pursuant to *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017). The District Court merely held an oral argument with counsel about the *Fry* case, then adjourned by asking the parties for additional briefing limited to *Fry.* (Minutes & Order for Supplemental Briefing, D.E. 21, 22, PageID#200-203).

On March 11, 2022, the parties provided the requested briefing. (Parties, Supplemental Briefing, D.E. 24, 28, PageID#233-38; 273-83). That same day, at 10:24 a.m., the Defendant filed a motion to dismiss under the *Fry* case. (Motion to Dismiss, D.E. 25, PageID#239-45). At 3:45 p.m. on March 11, 2022, the District Court granted Plaintiff's unopposed motion to file a Second Verified Amended Complaint providing even more details. (Order, D.E. 26, PageID#246-47). Then,

at 3:51 p.m., Plaintiff filed the Second Amended Verified Complaint which should have mooted the motion to dismiss. (Second Amended Verified Complaint, D.E. 27-27-4, PageID#248-72).

On March 30, 2022, while still awaiting the relief sought, Jane Doe's father submitted a Declaration accompanied by a supplemental brief. It pointed the District Court to the continuing negative impact upon Jane Doe, with a blow-by-blow account of her last week without the accommodation. (Plaintiff's Supplemental Brief Requesting TRO, D.E. 30-30-1, PageID# 350-54).

On April 13, 2022, now almost two months of suffering, Plaintiff filed a renewed (second) motion for temporary restraining order and preliminary injunction. (Plaintiff's Second and Emergency Motion for TRO, D.E. 31-31-1, PageID# 355-62). Two days later, April 15, 2022, instead of recognizing the Second Amended Verified Complaint mooted the Defendant's motion to dismiss, the District Court *granted* Defendant's motion to dismiss under the *Fry* case. (Order Granting Defendant's Motion to Dismiss, D.E. 32, PageID# 363-73).

Even though Jane Doe has never had, nor needs, an IEP, and is not even eligible for special education under the IDEA, the District Court ruled that otherwise—that she *was eligible* and should have exhausted administrative remedies under the *Fry* case. (*Id.* at PageID# 371-72).

Given the exigent circumstances, that same day, April 15, 2002, Jane Doe filed her Notice of Appeal with this Sixth Circuit. (Notice of Appeal, D.E. 1). As required by Fed. R. App. 8, she also sought an injunction in the District Court during the pendency of her appeal.[1] (Plaintiff's Motion for Preliminary Injunction Pending Appeal, D.E. 35, PageID#377-91).

On June 1, 2022, three and a half months after her original filing seeking injunctive relief, the District Court denied Plaintiff's motion for injunction pending appeal. (Order Denying Plaintiff's Motion for Preliminary Injunction Pending Appeal, D.E. 50, PageID#491-97). The District Court determined, first, that if IDEA exhaustion is jurisdictional, it lacks jurisdiction to enter an injunction. (*Id*. at PageID#494). Second, the District Court determined that even if IDEA exhaustion is not jurisdictional, it is nevertheless "mandatory under the law." (*Id*. at PageID# 495). Thus, the District Court determined that the failure to exhaust, when combined with other facts, weighed against granting an injunction. (*Id*. at PageID#497).

STATEMENT OF THE FACTS

Jane Doe is a highly capable student with an unusual disorder known as "Misophonia." (D.E. 1, Jane Doe Declaration, at ¶¶ 7, 11, PageID#3). Misophonia

---

[1] *See LaPorte v. Gordon*, No. 20-1269, 2020 U.S. App. LEXIS 10951, at *1-2 (6th Cir. Apr. 7, 2020) ("Just because the district court denied an injunction pending its own ultimate determination on the merits does not necessarily mean that the district court would deny an injunction pending the interlocutory appeal to this court.").

involves a heightened autonomic nervous system arousal when confronted with specific sounds, often eating sounds. (D.E. 2-2, Declaration of Dr. Eric Storch of Baylor College of Medicine, at ¶ 5, PageID#35-36).

The behavioral response of the person with Misophonia often involves *fleeing* to escape the sounds because, otherwise, patients will suffer extreme distress. (*Id.* at ¶ 6, PageID# 36). For this reason, the typical classroom reasonable accommodation for persons with Misophonia is forbidding eating or chewing in the academic setting; if another student has a true medical need for food-access (like a person with diabetes), then use of physical distancing should be addressed to meet both interests. (*Id*. at ¶ 7).

According to Dr. Zachary Rosenthal, the Director of the Duke Center for Misophonia and Emotion Regulation, the "triggers" for a person with Misophonia are normally human-produced sounds, often eating or chewing, and the impact on the person with Misophonia can range from irritation and anger, to sympathetic nervous system activation, to escape or aggression. (Rosenthal Declaration, D.E. 19-1, at ¶ 7, PageID# 197).

Consistent with the experts' declarations, for Jane Doe, the sounds of classmates chewing gum and eating food like potato chips cause her to experience an intense neurological reaction to the point that she must flee. (Declaration of Jane Doe, D.E. 8-3, at ¶ 3, PageID# 64). Thus, not unlike a smoking ban, or peanut ban,

she requested a reasonable accommodation under the ADA and Section 504: that, in her academic classes only, students refrain from eating and chewing gum, with an exception for students with any medical need for food. (First Amended Complaint, D.e. 8, at ¶ 19, PageID# 52). Unfortunately, this request conflicts with the school's purported practice of letting every teacher decide rules about eating and chewing gum—"Each teacher establishes his or her own classroom culture with its set of rules and social mores." (Response in Opposition, D.E. 44, p. 18, PageID# 442).

When the District Court raised, *sua sponte*, whether Jane Doe was an eligible student under the IDEA who must exhaust administrative remedies for *special education* under the Individuals with Disabilities Education Act (IDEA), Jane Doe spelled out in her Second Amended Verified Complaint that she does not have *or need* an Individual Education Plan (IEP). (Second Amended Verified Complaint, D.E. 27, ¶¶ 17-23, PageID# 252-54). She cited her strong performance in *regular education*, alluding to winning an East Tennessee award for producing a documentary on women's rights (¶ 20), that she had been admitted to the Duke Tips program for excellent students (¶ 21), and she had won a Model UN award for her resolution arguing against genocide in Africa (¶ 22). In other words, she hardly needed "specially designed instruction" under IDEA, but rather a simple classroom accommodation. (*Id*. at ¶ 23).

While Misophonia is relatively uncommon, the accommodation sought is hardly unusual—students not eating or chewing gum in academic classrooms. In fact, Jane Doe's Math teacher already follows this rule. (*Id*. at ¶ 28, PageID #256). But others, like the History teacher, refused. (*Id.* at ¶ 29, PageID# 256). In History class, where chewing and eating was permitted, Jane Doe was fleeing an estimated 75% of the class to an empty room and, across *all* of the academic classrooms, she was missing approximately half her educational time. (*Id*. at ¶¶ 29, 30, PageID# 256-57). By the end of the day, the constant fleeing wore her out physically and emotionally to the point that she cannot do normal things for a student her age. (*Id*. at ¶ 30, PageID# 256).

Jane Doe provided a Declaration with the Second Verified Amended Complaint. (Declaration of Jane Doe, D.E. 27-2, PageID # 263-67). She declared that "the most difficult sounds are human eating and chewing of gum. When I hear these sounds, I have a physical reaction of my body tensing up. I can only focus on the sounds themselves and I must escape from them. If I do not escape, I become highly agitated (like a panic attack) and I cannot think or concentrate." (*Id*. at ¶ 3, PageID# 264).

Jane Doe reiterated how the accommodation she needs is *de minimis* and easily accomplished. Using Math as an example, she explained how the teacher tells all students to spit out their gum and there will be no eating in his classroom. (*Id*. at

¶ 5, PageID# 265). This works. She does "not have to experience those sounds of eating and chewing gum." (*Id*.) The same is true with classrooms devoted to technology, like three-dimensional printing—there is no eating or chewing gum in those classes for protection of computer and printer devices. (*Id*. at ¶ 8, PageID# 266). Thus, Jane Does "knows for certain, and from experience," that her condition can be accommodated. (*Id*. at ¶ 10, PageID# 266).

Finally, with the exception of Jane Doe's school ("L&N Stem"), other high schools in Knox County already *prohibit* chewing gum and eating in the academic classrooms or instructional areas as a matter of written policy. For example, Central High School's policy provides the exact accommodation Jane Doe needs: "No food and drink (except water) is permitted in classrooms or other instructional areas except by special permission." (Central High School Policy, D.E. 27-3, PageID# 268-70).

As the District Court waited to rule, Jane Doe's father submitted a Declaration updating Jane Doe's status *without an accommodation,* using her last school week as an example. (Declaration of K.M., D.E. 30-1, PageID #353-54). Jane Doe's exhaustion and migraine headaches had reached the point of requiring emergency room treatment with intravenous Compazine and Toradol for the headaches. (*Id*. at ¶ 5, PageID # 354).

By April 11, 2022, still without a ruling, Jane Doe was experiencing embarrassing facial twitches trying to cope with all of the eating in the academic classrooms, continued fleeing of the classroom, and being forced outside when no empty room was available, her fingers numbing in the cold. (Declaration of K.M., D.E. 31-1, ¶¶ 3-4, PageID # 359-60). The family "begged" for the District Court to act and enter an injunction. (*Id*. at ¶ 8, Page ID# 360).

On April 29, 2022, again, still without a ruling, Jane Doe herself filed another Declaration in response to what was submitted by her principal and a special education teacher. (Declaration of Jane Doe, D.E. 48-1, PageID #485-87). She explained that she has never arrived late, has not left due to migraines, and that she has learned to cope with typing noises. (*Id*. at ¶¶ 3-6, PageID# 485). Most pointedly, she states the requested accommodation is limited to her academic classrooms only, not the cafeteria, and not the entire school. (*Id*. at ¶ 7, PageID# 486).

ARGUMENT

This case concerns whether a child suffering severe and ongoing distress that can be relieved through a rather standard accommodation of banning eating food and chewing gum in her academic classrooms, must exhaust *special education* administrative procedures. Critically, Jane Doe has never had an IEP, does not need an IEP, has never sought an IEP, and has no need for "specially designed instruction" different than that being taught to her regular education peers. She merely needs a

reasonable accommodation as a "504-only" student—a limitation on eating and chewing gum in her academic classrooms that is already the applicable standard in most Knox County high schools and several L&N classrooms.[2]

I. EXHAUSTION IS NOT REQUIRED

A. The IDEA Does Not Require Exhaustion Merely Because the Child Needs an Accommodation Under Section 504 and the ADA

At the outset, constant eating and gum chewing have no educational function. A request for a limitation on classroom eating and gum chewing is hardly a demand for "special education" under the IDEA. To the contrary, *discipline* for chewing gum in class is commonplace in education. *See, e.g., Gayemen v. Sch. Dist. of Allentown*, 2016 U.S. Dist. LEXIS 69018, at *29 (E.D. Pa. May 26, 2016) (gum chewing in class is Level I infraction); *Oliveras v. Saranac Lake Cent. Sch. Dist.*, 2014 U.S. Dist. LEXIS 44603, at *24 (N.D.N.Y. Mar. 31, 2014).

An administrative law judge (ALJ) could not fashion the non-IDEA relief Jane Doe needs: a change in school policy to prohibit gum chewing and eating in her academic classes for the L&N school. By the time Jane Doe finally reached an administrative hearing, she would likely encounter a very confused ALJ. What IEP

[2] Having endured as much as she could, Jane Doe filed her federal complaint and request for injunctive relief in February 2022. The District Court refused to any temporary relief, centering on the IDEA for many months. During these months—February through May—Jane Doe was physically and emotionally wrecked without the accommodation. She must have it for the ensuing school year.

goals need adjustment for Jane Doe? (none, she does not even have one); does she need an IEP? (no, she does not); are there instructional changes? (again, no); is a tutor or aide needed? (no); does she need more mainstreaming? (no, she is fully mainstreamed already).

This is simply beyond the ken of an ALJ. "An [ALJ] order requiring MDE to hire or allocate staff and setting forth how that staff will do their job is outside the realm of an Administrative Law Judge's authority under IDEA and instead falls within the scope of equitable powers granted to a court of competent jurisdiction." *A.B. v. Mich. Dep't of Educ.*, 2021 U.S. Dist. LEXIS 218239, at *13-14 (W.D. Mich. Nov. 4, 2021); *S.B. v. Lee*, No. 3:21-CV-00317-JRG-DCP, 2021 U.S. Dist. LEXIS 182674, at *20 (E.D. Tenn. Sep. 24, 2021) ("Plaintiffs were therefore not obligated to exhaust the IDEA's administrative procedures before filing suit in this Court under the ADA. Again, their claim is a failure-to-accommodate claim under the ADA. They request an accommodation of a community-wide mask mandate in Knox County Schools so they can safely access their school buildings."); *see also NOTE: Caution on Exhaustion: The Courts' Misinterpretation of the IDEA's Exhaustion Requirement for Claims Brought by Students Covered by Section 504 of the Rehabilitation Act and the ADA but not by the IDEA*, 44 Conn. L. Rev. 259, 281 (2011).

The IDEA is a federal funding statute for relatively small, enumerated categories of students who require *both* special education *and* related services. 20 U.S.C. § 1401(3)(A). Section 504 and the ADA, by contrast, do not enumerate categories of impairment, but more broadly focus on "major life activities." 42 U.S.C. § 12102(1); 29 U.S.C. § 705(20)(B).[3] Fundamentally, IDEA addresses the proper contours of an individual child's "special education," while Section 504 and the ADA address a child's right to equally access the education being provided to his or her non-disabled peers.

As Justice Kagan recognized in the *Fry* case, "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.

Like *Fry's* complaint, Doe's complaint seeks relief for simple discrimination in the form of access to the classroom through a reasonable accommodation. Circuit

[3] Under the Amendments to the ADA, "[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals . . . to the maximum extent permitted by the terms of [the ADA]." ADA Amendment Acts of 2008, § 4, 122 Stat. at 3555.

Court Judge Daughtrey addressed the simple and reasonable nature of E.F.'s requested ADA/504 accommodation in her *Fry* dissent writing:

> [W]hat *is* clear from the record—the complaint and attached exhibits—is that the request for a service dog would not modify Ehlena's IEP, because that request could be honored *simply by modifying the school policy allowing guide dogs to include service dogs.* That wholly reasonable accommodation – accomplished by a few keystrokes of a computer – would have saved months of wrangling between Ehlena's parents and the school district officials; it would have prevented her absen[ces] … and it would have mooted the question of exhaustion and eliminated the necessity of litigation that has ensued since this action was filed.

Fry v Napoleon Cmty. Sch. et al, 788 F.3d 622, 634 (6th Cir. 2015) (Daughtrey, J., dissenting). So too, a simple modification of L&N's policy to extend the ban on gum and food – which is in place in most Knox County High Schools and in several of L&N's classrooms already – to Doe's academic classes would have mooted the exhaustion question and eliminated the necessity of this litigation. And, like *Fry*, this accommodation would not implicate special education.

But Doe's claim is likely even clearer than *Fry's*, because unlike the student in *Fry*, Doe has *no* IEP and has never contested that she is not receiving a FAPE under the IDEA.

While some students may be eligible under *both* IDEA and Section 504. others, may be eligible *only* under Section 504 and, therefore, do not have, nor need, an IEP. The paradigmatic example is a child with typical cognitive abilities who uses a wheelchair due to physical disabilities. She requires ramps and widened

doorways to access her classrooms, but *not* specially designed instruction and services. Likewise, certain students with diabetes, asthma, arthritis, seizure-disorders, and Misophonia (like Jane Doe), to name a handful, are also not "dually covered" students under IDEA *and* Section 504, but "504-only" students because they only need accommodations to access their instruction.

Notably, Congress did not impose an exhaustion requirement on students covered solely under Section 504 (and ADA title II). Congress chose to require exhaustion *only* where the IDEA, as the "gravamen," could provide relief as well. *Fry*, 137 S. Ct. at 746. That is simply not the case here.

"Statutory interpretation begins with … the text." *Ross v. Blake* 136 S. Ct. 1850, 1856 (2016). And IDEA §1415(*l*)'s exhaustion requirement is conditional: Only *if* the relief from harm is available through the IDEA, is administrative exhaustion required:

> Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, [Section 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the procedures under [the IDEA's impartial due process hearing and appeals provisions] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]

20 U.S.C. §1415(*l*).

While the latter half of this sentence is regularly invoked, it must be balanced with the former. As Judge Daughtrey wrote in her *Fry* dissent, "[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 Cmty. Sch. et al,* 788 F.3d 622, 635 (6th Cir. 2015) (Daughtrey, J., dissenting).

The plain meaning of 20 U.S.C. §1415(*l*) makes it clear that exhaustion of IDEA administrative procedures is only required in those instances where those procedures can provide relief. Because Jane Doe's claim involves only §504 and ADA claims, and does not implicate the denial of an IDEA FAPE, the District Court erred in subjecting her to IDEA exhaustion requirements.

B. The Relief is an *Accommodation*, Not Specially Designed Instruction

1. Prohibiting Eating Food and Chewing Gum in Jane Doe's Academic Classrooms is a Reasonable Accommodation.

Most Knox County high schools already prevent students from chewing gum and eating in academic classrooms. *See e.g.,* (Plaintiff's Reply to KCS Response in Opposition to Plaintiff's Motion for TRO, D.E. 15, fn. 6, Page ID #175) (weblinks to student handbooks of Knox County high schools with policies prohibiting food and drink except water in classrooms); (Central High School Policy, D.E. 23-4,

PageID# 228-30). These policies should hardly come as a surprise, given the academic focus on learning and need for cleanliness in instructional classrooms.

Similarly, L&N Stem prohibits eating and gum chewing in some classrooms, like Math and classrooms with expensive technology like three-dimensional printers. But otherwise, L&N policy allows teachers to choose whether to allow eating and gum chewing in their own classrooms. So, to be precise, Jane Doe seeks a preliminary injunction to extend Knox County Schools' general prohibition on gum and food in classrooms to all of those academic classes in which she is enrolled. And, as with the general prohibition, exceptions would be made in those rare instances where students have a demonstrated medical need for food or gum. By permitting this simple accommodation, the doors of these classrooms remain equally open to Jane Doe so she would no longer be forced to flee more than half of her class time to sit outside the class alone, or on some occasions when space is not available, outside in inclement weather.

Jane Doe's experts have explained how this accommodation is both quite normal and a necessary component for students with Misophonia:

> 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.

(Declaration of Dr. Storch of Baylor College of Medicine, D.E. 2-2, ¶ 7, PageID# 36).

> Impairment in academic functioning caused by misophonia can be mitigated by reasonable accommodations to the environment and (i.e., not instead of) concurrent efforts to improve one's individual coping skills to manage the attentional (i.e. hypervigilance), emotional (i.e., anxiety, anger), physiological (i.e., increased autonomic nervous system functioning such as elevated heart rate), and behavioral (i.e., escape, avoidance, and/or confrontational behavior) components of this condition."

(Declaration of Dr. Rosenthal of Duke University, D.E. 19-1, ¶ 9, PageID# 197).

Jane Doe herself explains how she thrived in middle school with the accommodation in place. (Declaration of Jane Doe, D.E. 27-2, ¶ 4, PageID# 265). At L&N, she attended class regularly, engaged in rigorous Misophonia-specific coping techniques that she learned in therapy, and when practical, used hearing aids that generate white noise to drown out the offending trigger noises. However, coping techniques and hearing aids to drown noises are not sufficient alone; Jane Doe also requires the *accommodation* of no eating food or chewing gum in her academic classrooms. (Declaration of Jane Doe, D.E. 48, ¶¶ 4, 10, PageID# 265-66).

2. Jane Doe Does Not Need, Nor Would She Qualify for Special Education under IDEA.

IDEA concerns provision of "special education" to ensure each child is provided a "free appropriate public education." IDEA defines the meaning of "free

appropriate public education," or FAPE, as "special education and related services that . . . are provided in conformity" with a child's personalized IEP. 20 U.S.C. § 1401(9).

Only children who meet the IDEA's definition of a "child with a disability" may seek relief under the Act. Importantly, the IDEA requires *both* a need for special education *and* related services. *Id.* §1414(b), (d). A child is *not* a "child with a disability" under IDEA if he or she only has an impairment, or "only needs a related service and not special education." 34 C.F.R. § 300.8(a)(2)(i); *M.G. v. Williamson Cty. Sch.*, 720 F. App'x 280, 286-87 (6th Cir. 2018).

IDEA imposes a three-part qualification test. First, at section 20 U.S.C. §1401(3)(A)(i), a child with a disability is defined, in part, as one with "other health impairments, or specific learning disabilities." Jane Doe has always agreed that she *may* be a child with an "Other Health Impairment" due to a "heightened alertness to environmental stimuli." 34 C.F.R. §300.8(c)(9).

But that alone does not suffice for eligibility under the IDEA because, second, she must also *need* "special education" under section (ii). "Special education," in turn, is "*specially designed instruction*, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom...." 20 U.S.C. § 1401(29) (emphasis added). Jane Doe certainly contests

this. Afterall, she excelled in middle school without any specially designed instruction.

And third, she must *also need* "related services." The District Court declared that "as a matter of law, relief under the IDEA is available to" Jane Doe because "social work services" could help with Jane Doe's Misophonia. (Order, D.E. 32, p. 10, PageID# 372). The Court reasoned that "related services" under the IDEA would have helped "Plaintiff, in particular, to benefit from 'special education.'" (*Id.*).

Notably, this is not as "matter of law," as the District Court claimed, but rather, a factual finding, for which *no* evidentiary hearing occurred. (Moreover, it occurred in response to a motion to dismiss where all factual allegations of the non-moving party are to be taken as true.). Had the District Court credited the medical testimony, or even permitted the evidentiary hearing on March 3, 2022, it would have understood that (1) services, alone, do not create IDEA eligibility for an IEP; and (2) Dr. Storch and Dr. Rosenthal explain how Jane Doe simply needs the accommodation to alleviate the distress and remain in the classroom.

This is simply not a "special education" case. A child is *not* a "child with a disability" under IDEA if he or she only has an impairment, or "only needs a related service and not special education." 34 C.F.R. § 300.8(a)(2)(i); *M.G. v. Williamson Cty. Sch.*, 720 F. App'x 280, 286-87 (6th Cir. 2018).

The Fifth Circuit Court of Appeals explains how children like Jane Doe may have *impairments* but not "need" special education under the IDEA. "Case law suggests that where a child is being educated in the regular classrooms of a public school with only minor accommodations and is making educational progress, the child does not 'need' special education within the meaning of the IDEA. *William V. v. Copperas Cove Indep. Sch. Dist.*, 774 F. App'x 253, 253 (5th Cir. 2019); *Jenny V. v. Copperas Cove Indep. Sch. Dist.*, 2019 U.S. Dist. LEXIS 182383, at *17 (W.D. Tex. Oct. 22, 2019).

C. The District Court Conflated Section 504 with IDEA by Broadly Focusing on "Education" Generally

In granting dismissal, the District Court found that the Second Amended Complaint sought relief that was also available to her under IDEA. (Order Granting Motion to Dismiss, D.E. 32, PageID# 370). By framing the inquiry too broadly, the District Court believed Jane Doe needed special education, and even an IEP, because she "seeks an *adaptation to the delivery of her instruction* where specific auditory triggers are removed or limited." (*Id*. at pp. 9-10) (citing Second Amended Complaint, D.E. 27, ¶¶ 15, 36, PageID# 252; 258) (emphasis added). That is incorrect.

In fact, the Verified Second Amended Complaint plainly states the *instruction* itself—the curriculum, materials, and delivery—is just fine. (Second Amended Verified Complaint, D.E. 27, ¶ 18, PageID # 253) ("very good in fact"). She only

needs the elimination of eating and chewing *sounds* in the academic classroom, not instruction. (*Id*. at ¶15, PageID# 252). She is harmed by the refusal to curtail the activities that generate these *sounds*. This has nothing to do with "instruction" in any sense of that term. (*Id*. at ¶ 36, PageID#258).

By generally claiming that certain sounds change the delivery of Jane Doe's "education," the District Court swept too broadly. In fact, a focus of "broadly speaking, educational," is *precisely* how the Supreme Court says the Sixth Circuit "went wrong" in the *Fry* case. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 758 (2017).

Here, the District Court assumed that having students refrain from eating or chewing gum changes the education, in a broad sense. It does not. The lack of uniformity among teachers is the issue. Teachers, of course, are *school employees.* Their "prerogatives" must surely bend to accommodate Jane Doe's right to equally access her academic classrooms. "[I]f a child cannot get inside school," then "he may not achieve the sense of independence conducive to academic (or later to real-world) success." *Fry*, 137 S. Ct. at 736. Similarly, Jane Doe remaining *in the classroom* is not a change in the delivery of the actual *instruction.*

If Jane Doe can be accommodated in math class, and the computers and digital printers can be made safe by banning chewing and eating in those rooms, so too can Jane Doe be made safe in the remaining academic classes she attends. (Declaration

of Jane Doe, D.E. 8-3, ¶8, PageID# 66). Knox County's argument that all students in a STEM school require constant food and gum access are unconvincing particularly when all schools, and L&N STEM in particular, limit access to food and gum in certain circumstances, including the academic classrooms. Thus, all Jane Doe is asking is for L&N to extend its existing policies prohibiting eating and gum in certain classrooms to *her limited academic classes* (again, with the exception of any student whose medical needs require access to food or chewing in class). More poignantly, she simply asks that L&N extends the same protections to her that it currently provides to 3D printers and other expensive equipment.

The District Court's overbreadth in addressing Jane Doe's accommodation request can be seen in its application of the *Fry* clues. Using *Fry,* the District Court asked whether "a different public facility" would have responsibility to provide "educational instruction," and whether KCBOE would have had an obligation "to educate the adult." (Order Granting Motion to Dismiss, D.E. 32, PageID# 370). If the inquiry in *Fry* were framed in this manner, even *Fry* would have answered both questions "no." That is, a different public facility has no obligation to provide a support dog *in order to assist one's education*. And an adult at the school could not press a grievance for *lost educational benefit* from disallowing a support dog. The District Court's framing became self-fulfilling.

Rather, when framing the question appropriately by looking at the actual requested accommodation, the student in *Fry* "could have filed essentially the same complaint if a public library or theater had refused admittance to [the service dog]." *Fry,* 137 S.Ct. at 758-59. And an "adult visitor to the school could have leveled much the same charges if prevented from entering with his service dog." *Id.* Indeed, on remand, that is precisely what the District Court in *Fry* found—that exhaustion was not required because E.F. was denied "access to school with her service dog." *E.F. v. Napoleon Cmty. Sch.*, 371 F. Supp. 3d 387, 404 (E.D. Mich. 2019).

Jane Doe, too, could request that a public library provide *her* with a reading space free of eating and gum chewing (almost all libraries disallow eating and chewing gum anyway, just like almost all Knox County schools). And a school employee with Misophonia—like a teacher—could ask for non-medically necessary food and gum to be forbidden in the teacher's academic classroom.

Accordingly, Jane Doe's case is purely an accommodation case, which under *Fry*, does not require exhaustion at all:

> [I]f, in a suit brought under a different statute, the *remedy sought* is not for the denial of a FAPE, then exhaustion of the IDEA's procedures is not required. After all, the plaintiff could not get any relief from those procedures: 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. **A school's conduct toward such a child — say, some refusal to make an accommodation — might injure her in ways unrelated to a FAPE, which are addressed in statutes other than the IDEA.** A complaint

> seeking redress for those other harms, independent of any FAPE denial, is not subject to § 1415(*l*)'s exhaustion rule because, once again, the only "relief" the IDEA makes "available" is relief for the denial of a FAPE.

Fry v. Napoleon Cmty. Sch., 137 S. Ct. 743, 754-55 (2017) (emphasis added).

Whether a student is seeking entry into the classroom or, as with Jane Doe to *remain* in the classroom, does not matter. In either instance, the accommodation does not affect the instruction being delivered; it simply allows the student to access the instruction. To be sure, this is likely the first claim under the ADA and Section 504 involving reasonable accommodations for Misophonia. While the Court does not have the luxury of knowing how libraries and theaters accommodate individuals like Doe, some might raise eyebrows at the accommodations necessary for persons with Misophonia. But if so, that reflects not the unreasonableness of such accommodations, but an all-too-prevalent prejudice against invisible or unknown disabilities, and the tendency to imagine the world as it is, not how it might be.

D. The Gravamen is Not IDEA FAPE

Even if Jane Doe were somehow eligible for an IEP *and* needed specially designed instruction, this *still* does not mean her claim is subject to IDEA exhaustion. After all, E.F., the *Fry* plaintiff, did have an IEP. And with due respect, this Sixth Circuit stressed that 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 "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. Again, 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 stronger still, Doe not only lacks an IEP, she has never contested that she is not receiving appropriate instruction.

The District Court relied upon the Sixth Circuit's *Perez* decision, citing language in that case about how the school's failures kept him from "participating and benefitting from classroom *instruction*." (Order Granting Motion to Dismiss,

D.E. 32, at Page ID# 369) (citing *Perez v. Sturgis Pub. Schs.,* 3 F.4th 236, 240 (6th Cir. 2021) (emphasis added). But underlying facts matter when applying cases. The facts of this case differ from *Perez,* creating distinct legal issues.

As the Sixth Circuit explained, *Perez*, who is deaf and a native Spanish speaker, and who was an IDEA-eligible child, was provided a classroom aid who "was not trained to work with deaf students and did not know sign language." *Perez*, 3 F.4th at 246. Hence, *Perez*'s claim was that the educational *instruction* he received was inadequate because the school failed to provide a positive instructional intervention—sign language from a person that was Spanish speaking. Thus, this Court found that *Perez* sat through years of instruction that he was unable to benefit from because it was not "specially designed" to fit his needs as an individual who was both deaf and a Spanish speaker. *Id.* Accordingly, the actual holding of *Perez* simply says that an IDEA-eligible student cannot settle an existing IDEA claim without fully exhausting the administrative process, and *then* proceed to court under the ADA and Section 504.

By *stark* contrast, Jane Doe has no IDEA claim, nor is she eligible for, or require an IEP. In fact, her Complaint says the education at L&N Stem is entirely adequate, and even exemplary. Thus, *her* claim is that the school's refusal to provide *accommodations*, not the right *instruction,* prevents her from accessing that education. Whereas the student in *Perez* sat through years of instruction *inadequate*

to his needs, Jane Doe is forced again and again to flee perfectly *adequate* instruction due to the near-constant eating and gum noises inside her classrooms.

In *Fry*, the Supreme Court also suggested the history of the proceedings be considered. *Fry*, 137 S.Ct. at 758. The history behind the proceedings, such as filing due process initially prior to federal court filings, *could* be an indicator could that FAPE under IDEA is being sought (though the concurring opinion questions this). *Id.* at 757, 759. Or the converse may be true too.

In this case, Jane Doe has never had, or sought, or needed, an IEP. She has been attending schools in Knox County for ten of the last twelve years, but Knox County Schools never identified her as a child with a disability under its IDEA child-find obligations. (Reply to Response to Motion for Preliminary Injunction Pending Appeal, D.E. 48, PageID# 479). And she has never filed for due process. Instead, after her accommodation request was turned down repeatedly and definitively, she filed initially in the District Court, and while she was disallowed an evidentiary hearing, she put forth declarations from experts in Misophonia explaining the clinical presentation of Misophonia, the typical accommodations, and how Jane Doe can succeed "if the accelerants of eating and chewing in the classroom are relieved." (Declaration of Dr. Storch, D.E. 2-2, ¶ 12, PageID# 38; see also Declaration of Dr. Rosenthal, D.E. 19-1, PageID# 196-97).

Moreover, the issue of IDEA exhaustion was not raised by Knox County. (See D.E. 12, Response). Rather, it was raised by the District Court, *sua sponte,* prompting Knox County to file a motion to dismiss. Thus, the history of the proceedings show Jane Doe never initiated a due process action as she has consistently maintained her claims arise under Section 504 and the ADA for equal access and reasonable accommodation.

E. Gifted Education Under the IDEA Is Not an Issue

The District Court's second reason for exhaustion is also an issue raised by neither party. Specially, the Court asserted that intellectually gifted children can be entitled to special education under the IDEA, so Jane Doe must be IDEA-eligible for this reason.

Perhaps the District Court believed Jane Doe was pleading her strong performance in regular education to suggest that "special education" is not available for the highly intellectually capable ("gifted") students. (Order Granting Motion to Dismiss, D.E. 32, PageID# 372). That misunderstands the issue. The District Court is correct that the IDEA provides for gifted instruction, but it errs in assuming Doe qualifies for such special education.

The Tennessee Rules of State Board of Education defines "intellectually gifted" students as those "whose intellectual abilities, creativity, and potential for achievement are so outstanding that the child's needs exceed differentiated general

education programing, adversely affects educational performance and requires specifically designed instruction or support services."[4]

While Jane Doe is intellectually adept, she has never asserted (nor has Knox County) that she should be considered "intellectually gifted" under Tennessee law. In fact, no one has ever suggested that Jane Doe needs a gifted curriculum—different than her peers—in order to receive protection from eating or gum chewing in her regular education classrooms. Rather, Jane Doe was simply showing that she is an ambitious and highly capable student. (Plaintiff's Second Amended Verified Complaint, D.E. 27, ¶¶ 20-22, PageID #253-54).

Moreover, just like an "other health impairment," giftedness alone is not enough for eligibility under the IDEA. Instead, that ability must "adversely affect[] educational performance *and* require[] specifically designed instruction or services." *See* fn. 3 (emphasis added). There is no evidence that Jane Doe's "needs exceed differentiated general education programing," that her abilities adversely "affect[] her educational performance," or that she needs special instruction or support services to address her outstanding abilities. To the contrary, Jane Doe pleads that her regular educational instruction would meet her needs if she were provided a simple accommodation prohibiting eating food or chewing gum in her classrooms so that she can remain in the classroom to receive it. Thus, she argues that she does

[4] Rules of State Board of Education, Ch 0520-10-09-.02 (11)

not need a *change in delivery* or *modification* of the instruction itself, just access to that instruction itself.

Jane Doe became a National Merit Jr. Honors Society Member *without an IEP for specialized instruction.* (Second Amended Verified Complaint, D.E. 27, ¶¶ 23; 26, PageID# 254-55). She has never sought an IEP for "giftedness," nor did the school suggest one. Accordingly, potential eligibility under IDEA for "giftedness" is not the basis for her Second Amended Complaint, much less the "gravamen" under *Fry.*

F. Related Services

As a third reason for requiring exhaustion, the Court reasoned that "related services" under the IDEA would have helped "Plaintiff, in particular, to benefit from 'special education.'" (Order Granting Motion to Dismiss, D.E. 32, PageID# 372). However, Plaintiff needs no special education at all; she merely requests a cessation of gum chewing and eating in the academic classrooms—not counseling for the harm caused by a denial of the accommodation.

The District Court seems to admit that the denial of the accommodation is harming Jane Doe, but believes the IDEA can help with *that harm*. But absent the harm L&N continues to inflict, there is no indication Doe would need any services at all. Again, during her in-person middle school experience wherein the accommodation of no eating or gum chewing was provided, Jane Doe was a well-

adjusted and successful student. In essence then, the District Court seeks to avoid a reasonable accommodation to the classroom environment through the imposition of counseling and other intrusive services.

However, a person with asthma would not seek daily services of breathing treatments when the removal of smoking is what she needs. *Seaman v. Virginia*, 2022 U.S. Dist. LEXIS 52136, at *71 (W.D. Va. Mar. 23, 2022)(citing a smoking ban as accommodation). And a person with a peanut allergy would not undergo services for daily anaphylaxis when cessation of peanut products or a peanut-free lunch table is what she needs. Likewise, a person with paralysis would not undergo futile coaching to walk when a wheelchair ramp is what he needs.

In any event, Jane Doe would never qualify for specially designed instruction. Related services, by themselves, do not meet the definition of special education under the IDEA. And as stated above, one cannot qualify under the IDEA for a related service without a need for special education too. 34 C.F.R. § 300.8(a)(2)(i).

II. THE FACTORS FOR RELIEF EASILY FAVOR JANE DOE

The standard for injunction considers four factors:

> (1) whether the movant has shown a strong likelihood of success on the merits of the controversy, (2) whether the movant is likely to suffer irreparable harm without an injunction, (3) whether an injunction would cause substantial harm to others, and (4) whether an injunction would serve the public interest.

S.B. v. Lee, 2021 U.S. Dist. LEXIS 182674, at *9 (E.D. Tenn. Sep. 24, 2021) "The four factors generally ought "to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Id*. at *10. "When the Court, however, is able to determine the propriety of a preliminary injunction by relying on fewer than all four factors, it may do so." *Id*.

In granting the motion to dismiss, the District Court never reached these factors. However, they are easily satisfied in Jane Doe's favor.

The record shows Jane Doe has undergone substantial suffering since seeking an injunction in February of 2022—pain, headaches, emergency room visit, physical exhaustion, and loss of up to, or greater than, 50% of all educational time.[5] She still faces the same intransigence with the high school— which continues to privilege teachers' prerogatives over her disability rights to prohibit eating and chewing gum in her academic classrooms, frustrating her accommodation.

Reasonably modifying policies that require others to act or refrain from acting is appropriate. *See, e.g.*, *R.K. v. Lee*, 2021 U.S. Dist. LEXIS 204078, at *39 (M.D. Tenn. Oct. 22, 2021) ("A universal masking requirement instituted by a school is a reasonable modification that would enable disabled students to have safe and equal

---

[5] As discussed above, under the *Fry* case, the District Court postponed ruling and refused to hear from her live experts. The District Court granted a motion to dismiss (that was superseded by a subsequent Complaint), and it took until June 1, 2022 to deny the motion for injunctive relief on appeal.

access to the necessary in-person school programs, services, and activities."). And as Jane Doe has repeatedly expressed, if another student truly has a medical need to eat or chew in the classroom, then in such a rare circumstance that student and Jane Doe could be placed at a maximum distance from each other.

The likelihood of success is present in this case because: (1) Jane Doe cannot control her reflexive neurological reaction to the normal sounds of chewing and eating because Misophonia is incurable; (2) without accommodations, she will either deteriorate or flee (as overwhelmingly demonstrated); and (3) she is made to suffer medically, emotionally, and educationally.

With the reasonable accommodation of forbidding eating and chewing gum in the academic classroom, Jane Doe is able to engage in in-school learning without deteriorating or fleeing. This has been successful in the past and can be going forward. Exceptions are available for any student who truly must, due to a medical need, eat or chew gum in the classroom.

In addition to likelihood of success, Plaintiffs must show irreparable harm absent an injunction. *R.K. v. Lee*, 2021 U.S. Dist. LEXIS 204078, at *49 (M.D. Tenn. Oct. 22, 2021). Jane Doe has been, and will continue to be, irreparably harmed psychologically and academically without this accommodation. Unlike most persons, her brain *cannot* cope with those sounds in her vicinity. There is no third-party *legal* "right to chew gum" or "eat" in the academic classroom (this is not

the lunchroom), absent a medical need. And, as mentioned, Plaintiff is excepting a true medical need for any student who must have access to gum or food. On the other hand, the injunction would not cause Defendant harm, much less "irreparable harm." After all, the Math teacher and teachers in technological-rich computer rooms already implement a no-eating or gum-chewing rule, as do many of Defendant's other high schools.[6]

"When the defendants are governmental entities, the equities and public interest analyses merge[.]" *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749. Here, the public interest is "served by the enforcement of the ADA." *Wilborn ex rel. Wilborn v. Martin*, 965 F. Supp. 2d 834, 848 (M.D. Tenn. 2013); *G.S. v. Lee*, 2021 U.S. Dist. LEXIS 168479, at *26 (W.D. Tenn. Sep. 3, 2021)(citing *Neinast v. Bd. of Trs. of the Columbus Metro. Library*, 346 F.3d 585, 594 (6th Cir. 2003). The public interest thus requires an injunction to effectuate the ADA's broad "remedial purposes." *Hostettler v. College of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018). And "the school systems have statutory authority to impose [reasonable accommodations] to protect their constituencies and to support public health." *RK v. Lee*, 2021 U.S. Dist. LEXIS 204078, at *52.

---

[6] *See* Plaintiff's Reply to KCS Response in Opposition to Plaintiff's Motion for TRO, D.E. 15, fn. 6, Page ID #175 (weblinks to student handbooks of Knox County high schools with policies prohibiting food and drink except water in classrooms); (Central High School Policy, D.E. 23-4, PageID# 228-30).

III. ACCELERATION OF ORAL ARGUMENT IS REQUESTED

As a possible alternative, the District Court's decision denying the injunction on appeal was issued at the conclusion of this school year. This Court's current briefing deadline for Plaintiff/Appellant is June 15, 2022. (Briefing Letter, D.E. 12). Jane Doe will return to school in mid-August of 2022. Accordingly, advancing the oral argument or remaining briefing schedule could allow a decision on the merits at, or close to, the start of the school year.

CONCLUSION

Jane Doe is eligible under Section 504 and the ADA, not the IDEA. Her actual need—the gravamen—is one that an IDEA-ALJ cannot provide: requiring resistant teachers to forbid eating and chewing gum in academic settings so that she does not have to constantly flee the classroom. Thus, for all of the reasons expressed above, she requests this Motion be granted for issuance of an injunction during appeal; or alternatively, that this matter be advanced on the Court's oral argument calendar.

Respectfully submitted,

GILBERT LAW, PLC

s/Justin S. Gilbert
Justin S. Gilbert (TN Bar No. 017079)
100 W. Martin Luther King Blvd, Suite 502
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

ATTORNEYS FOR PLAINTIFF-APPELLANT

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i). As provided in Federal Rule of Appellate Procedure 32(f), the brief contains 9,405 words. This brief has been prepared in proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

/s Jessica F. Salonus

CERTIFICATE OF SERVICE

I certify that the foregoing Motion has been filed via the Sixth Circuit Court's electronic filing procedures, including to defense counsel, Amanda Morse, on this the 9th day of June, 2022.

/s Jessica F. Salonus

APPENDIX OF RELEVANT DISTRICT COURT DOCUMENTS

Case No. 3:22-cv-00063

Record Entry Number	Description of Record	Page ID#
1—1-3	Verified Complaint	1-18
2—2-2	Plaintiffs' Motion and Memorandum for Temporary Restraining Order and Preliminary Injunction	21-38
7	Order Regarding Hearing on Plaintiffs' Motion for TRO	45-46
8—8-3	First Amended Verified Complaint	47-67
12—12-1	Defendant's Response in Opposition to Plaintiffs' Motion for TRO	74-153
15	Plaintiffs' Reply to Defendant's Response in Opposition to Plaintiffs' Motion for TRO	167-178
19—19-1	Plaintiffs' Supplement to Motion for TRO	193-197
21	Minute Entry for Hearing on TRO	200
22	Order for Supplemental Briefing	201-202
23—23-5	Plaintiffs' Unopposed Motion to Amend Complaint	203-232
24	Defendant's Supplemental Brief	233-238
25	Defendant's Motion to Dismiss	239-245
26	Order Granting Plaintiffs' Motion to Amend Complaint	246-47
27—27-4	Second Amended Verified Complaint	248-272
28	Plaintiffs' Supplemental Brief	273-283
30—30-1	Plaintiffs' Supplemental Brief Requesting TRO	350-354
31—31-1	Plaintiffs' Second and Emergency Motion for TRO and Preliminary Injunction	355-362
32	Order Granting Defendant's Motion to Dismiss	363-373
33	Judgment	374
34	Plaintiffs' Emergency Notice of Interlocutory Appeal	375-76
35	Plaintiffs' Motion for Preliminary Injunction Pending Appeal	377-391
36	Plaintiffs' Motion for Expedited Briefing by April 20, 2022	392-394

37	Plaintiffs' Memorandum in Support of Injunction Pending Appeal	395-406
39	Order Regarding Motion to Expedite Briefing	410-11
40	Defendant's Response in Opposition to Plaintiff's Motion for Expedited Briefing	412-413
42	Plaintiffs' Reply to Defendant's Response in Opposition to Plaintiffs' Motion for Expedited Briefing	418-421
43	Order Denying Plaintiffs' Motion for Expedited Briefing	422-424
44—44-2	Defendant's Response in Opposition to Plaintiffs' Motion for Preliminary Injunction Pending Appeal	425-452
48	Plaintiffs' Reply to Defendant's Response to Plaintiffs' Motion for Injunction Pending Appeal	475-487
50	Order Denying Plaintiffs' Motion for Preliminary Injunction Pending Appeal	491-497