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 BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellants respectfully request oral argument in this matter, one involving the first impression of the disability of Misophonia.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER

STATEMENT REGARDING JURISDICTION

This Court of Appeals has jurisdiction arising from the District Court's grant of a motion to dismiss pursuant to Pursuant to 28 U.S.C. §1291, and its denial of a motion for injunctive relief under 28 U.S.C. §1292(a). This Court's review is *de novo*. *Troy Stacy Enter. v. Cincinnati Ins. Co.*, 2022 U.S. App. LEXIS 15881, at *7 (6th Cir. June 8, 2022).

STATEMENT OF ISSUES ON APPEAL

When a school district refuses to allow a simple *accommodation* of no eating and no gum chewing in academic classrooms, causing an otherwise very capable student with Misophonia (*who has no IEP*) a continuing mental injury and flight from school, must she seek "special education" under the IDEA by exhausting administrative remedies?

STATEMENT OF THE CASE

This case is believed to be a first-of-its-kind involving a Section 504 disability known as Misophonia. It illustrates the serious harm—pain, panic attacks, flight, emergency room visits, exclusion from class—that accompany this disability when met with a school district's stubborn refusal to understand and deliver a simple accommodation.

Understanding the accommodation requires an understanding of *Misophonia.* Plaintiffs' experts from the Baylor College of Medicine and the Duke University Center for Misophonia explain how 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.

Fourteen-year-old Jane Doe is not aggressive. When she hears the piercing sounds of eating or chewing gum, she must *escape* her academic classrooms. As she explains it:

> "[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).

Thus, for the disability of Misophonia, Jane Doe requires the quite reasonable accommodation of no eating or chewing gum *in her academic classrooms*. Her requested accommodation does not include 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.

While this no eating or chewing gum accommodation is actually *the rule* at every single high school in Knox County already, except for Jane Doe's, the school district stubbornly refuses to grant this accommodation to Jane Doe. Instead, it endorses the harm Jane Doe experiences when other students are eating round-the-clock in almost every academic classroom—potato chips, French fries, and all sorts of gum and candies.

Consequently, Jane Doe can enter the school, but she cannot *remain* when eating and chewing occur inside a classroom. For example, her History teacher permits unlimited eating and chewing of gum and Jane Doe fled that classroom 75% of the time. By the end of the day, the effect on her system is too much. Her nervous system is exhausted battling the school district's failure to adopt a standard rule.

Regrettably, after denying an evidentiary hearing, and engaging months of briefing an IDEA-exhaustion issue—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.

Importantly, the school district has never given Jane Doe an IEP for "special education," and specially designed instruction despite her attendance in Knox County Schools ten of the past twelve years. She does not need one. And never has. Thus, an ALJ could not address a change in IEP goals, or specially designed instruction, and there is no IEP team making any decisions. Rather, Jane Doe is battling the school district's refusal to grant an accommodation that just happens to be needed inside the classroom. That is quite different than seeking an IEP for special education, a different content or delivery of *instruction.*

Much like a school district who stubbornly refuses to widen a door, or permit a service dog to access the school, Jane Doe just needs an accommodation to *remain* in the school. Unfortunately, the District Court conflated 504/ADA with the IDEA, ruling that Jane Doe *was* somehow eligible under the IDEA and that she failed to exhaust administrative remedies under the IDEA. Because that is legally incorrect, she files this respectful appeal along with a previously filed motion for injunctive relief pending appeal.

STATEMENT OF THE FACTS

Jane Doe is a highly capable student with an unusual disorder known as "Misophonia." (Complaint, D.E. 1, ¶¶ 7, 11, PageID# 3). Misophonia involves a heightened autonomic nervous system arousal when confronted with specific sounds, often eating sounds. (Declaration of Dr. Eric Storch of Baylor College of Medicine, D.E. 2-2, ¶ 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 to forbid 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). However, 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).

Jane Doe neither has nor needs an Individual Education Plan (IEP). (Second Amended Verified Complaint, D.E. 27, ¶¶ 17-23, PageID# 252-54). She performed well in *regular education*, winning an East Tennessee award for producing a documentary on women's rights (¶ 20), was admitted to the Duke Tips program for excellent students (¶ 21), and she 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, PageID# 254).

Unfortunately for Jane Doe, who required sensitivity to an unusual disability, Knox County's Mayor, its highest ranking official, holds strong views about her case and aired them publicly. Known as the former professional wrestler "Kane,"[1] on February 25, 2022, the Mayor published Jane Doe's legal case on Twitter and labeled it with the hashtag "gum gate." (Reply Brief, D.E. 15, PageID#168); *available at* https://twitter.com/glennjacobstn/status/1497236340601151488 (last visited June 14, 2022).

By March of 2022, students willfully ate and chewed gum in Jane Doe's academic classes—Cheetos corn chips, breakfast in first period, Panera Bread meal. (Declaration of K.M., D.E. 30-1, PageID #353-54). And as a result, Jane Doe's fleeing increased, she experienced migraines, and was treated at East Tennessee Children's Emergency Department. (*Id*.)

By April of 2022, other students began *deliberately targeting* Jane Doe—smacking their gum to purposefully trigger her. (Declaration of K.M., D.E. 31-1, PageID #359). In addition to the typical harm, this caused Jane Doe embarrassing facial twitches too. (*Id*.) Students were "constantly eating as if academic classes are snack-times all the time." (*Id*.) In History class, Jane Doe was fleeing an estimated

[1] *See WWE Network, "Kane Bio" https://www.wwe.com/superstars/kane* (last visited 6/13/2022): "At 7 feet tall and weighing in at more than 300 pounds, Kane is a monstrous abomination that seems to have been extracted directly from your childhood nightmares."

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 could not do normal things for a student her age. (*Id*. at ¶ 30, PageID# 256).

Jane Doe knew for certain that forbidding eating and chewing gum in the academic classrooms was *not* an undue hardship to enforce. First, Jane Doe's Math teacher already followed this commonsense rule by ordering everyone to put their gum in the trash upon entering his class, and prohibiting eating. (*Id*. at ¶ 28, PageID #256; Declaration of Jane Doe, D.E. 27-2, ¶8, PageID # 266).

Second, Knox County imposed a "no eating or gum chewing" rule for L&N classrooms with expensive technology, like three-dimensional printers and computers. (*Id*.)

Third, the other high schools in Knox County do prohibit chewing gum and eating in the academic classrooms or instructional areas as a matter of written policy: "No food and drink (except water) is permitted in classrooms or other instructional areas except by special permission." *See e.g.,* (Central High School Policy, D.E. 27-3, PageID# 268-70).

The family, who sought the injunction in February of 2022, "begged" the District Court to act. (*Id*. at ¶ 8, Page ID# 360; Plaintiff's Second and Emergency

Motion for TRO, D.E. 31—31-1, PageID# 355-62). Two days later, April 15, 2022, the District Court *granted* Defendant's motion to dismiss for lack of exhaustion of administrative remedies 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 otherwise—that she *was eligible* and should have exhausted administrative remedies under the *Fry* case. (*Id.* at PageID# 371-72).

SUMMARY OF THE ARGUMENT

This case involves a school district's stubborn refusal to accept that Jane Doe's Misophonia requires her *academic* classrooms—math, science, history, English—to be free of smacking gum and eating food. It is little to ask. But without this refrain, Misophonia causes Jane Doe's brain to experience "fright or flight," and flees the classroom to escape. The District Court dismissed her case for lack of IDEA special-education administrative exhaustion, as if she needed "special education" and an IEP.

That decision is wrong on so many fronts. Jane Doe has no IEP, and does not need one. She is not seeking any *special education under the IDEA at all.* There are no IEP goals to change, no mainstreaming to be sought, and no change in the *regular education* curriculum whatsoever. As a "504-only" student, she simply needs other students to refrain from eating and chewing gum in her academic

classrooms (not the lunchroom, of course). That way, she, too, can access the regular education classroom.

In every school *except* Jane Doe's, the commonsense rule of no eating and chewing gum prevails in the academic classrooms. But at Jane Doe's school, some teachers are resistant. And as a result, students smack loudly trying to trigger her, and the County Mayor publicly ridicules her disability as "gum gate" on social media. She has suffered substantially, including hospitalization. Accordingly, with help of expert witnesses from the Baylor College of Medicine and the Duke Center for Misophonia, she appears before this Court asking for help in upholding Section 504 and the ADA in order to be successful in high school.

STANDARD OF REVIEW

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 clearly misunderstood the governing law of *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743 (2017).

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 first exhaust *special education* administrative procedures before bringing her Section 504 and ADA claims in district court for relief. 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 other Knox County high schools and several of Jane Doe's own classrooms.

I. EXHAUSTION IS NOT REQUIRED

A. Cessation of Gum Chewing and Eating Food Is Not Educational

At the outset, constant eating and gum chewing in the academic classrooms have no educational function. So 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 possibly fashion the non-IDEA relief Jane Doe needs: a prohibition of gum chewing and eating in her academic classes. By the time Jane Doe finally reached an administrative hearing, she would likely encounter a very confused ALJ. What IEP 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).

It is only an actionable IDEA claim, not the ADA claim, that must be exhausted. The IDEA "is not a conventional exhaustion requirement: It doesn't require [the plaintiff] to exhaust his ADA claim before bringing it to court. Instead, it requires him to exhaust his corresponding IDEA claim." *Perez v. Sturgis Pub. Sch.*, 3 F.4th 236, 240 (6th Cir. 2021)

Asking an ALJ to prohibit gum chewing and eating is outside the IDEA and 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*,

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).

B. Understanding the Critical Difference Between IDEA and Section 504

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).[2] Fundamentally, IDEA addresses the proper contours of an individual child's "special education," while Section 504 and

[2] 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.

the ADA address a child's right to equally access the education being provided to his or her non-disabled peers.

"A school's Section 504 Child Find obligations exist independently from its Child Find obligations under IDEA." *E.P. v. Twin Valley Sch. Dist.*, 517 F. Supp. 3d 347, 361 (E.D. Pa. 2021). That independence of Section 504 is important because coverage under §504 is far broader than the IDEA:

> While "both statutes require the states to provide disabled children with a FAPE and impose child find obligations," "[a] principal difference between section 504 and the IDEA relates to the specific students covered by the statutes." *B.H. v. Portage Pub. Sch. Bd. of Educ.*, No. 1:08-cv-293, 2009 U.S. Dist. LEXIS 7604, 2009 WL 277051, at *6 (W.D. Mich. Feb. 2, 2009). Section 504 prohibits discrimination against students with disabilities as defined in 34 C.F.R. § 104.3(j), while the IDEA protects the "subsection" of those students who also "need special education and related services as a result of that disability." *B.H.*, 2009 U.S. Dist. LEXIS 7604, 2009 WL 277051, at *6; *see also* 20 U.S.C. § 1401(3)(A). Accordingly, all students who qualify for special education under the IDEA are also protected by § 504, but not all students with disabilities under § 504 are eligible for special education under the IDEA. *B.H.*, 2009 U.S. Dist. LEXIS 7604, 2009 WL 277051, at *6.

Id.

This District Court got it backwards. If Jane Doe were truly covered by IDEA and needed "special education," then, yes, she would be covered by Section 504. But the District Court believed Jane Doe's needs for an accommodation of no eating—under Section 504—would be available under IDEA too. That is error, for

it conflates IDEA's special education with Section 504's avoidance of disability discrimination through reasonable accommodations.

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.

Jane Doe wants to remain in and learn inside her academic classrooms just like her non-disabled peers can do. To do that, she does not require a change in the instruction, or special education, but an accommodation of no eating and chewing gum in those classes. That way, she can remain there.

That Jane Doe is not seeking an IEP, or a modification of an IEP, is similar to Judge Daughtrey's observation in her *Fry* dissent:

> [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).

A simple modification enforcing a rule against gum and food in the academic classes would (1) require students to put away their Cheetos, gum, and other items upon entering the learning classroom; (2) override the Mayor's ridicule of the accommodation as "gum gate;" (3) penalize, rather than endorse, disability harassment by students smacking gum in Jane Doe's face; and (4) allow Jane Doe to *learn* in the academic classrooms, as such classrooms are certainly intended. But without such relief, a highly capable student will continue to spiral in high school—pain, headaches, emergency room visits, physical exhaustion, and loss of up to, or greater than, 50% of all educational time.

This should not be a difficult case legally. 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 under IDEA. Likewise, certain students with diabetes, asthma, arthritis, seizure-disorders, and Misophonia (like Jane Doe), to name a handful, usually will not require special education under IDEA merely by virtue of these disabilities alone. They are "504-only" students because they only need accommodations to access their instruction.[3]

[3] "Many children have physical or mental impairments, but they do not need to receive special education in order to learn, so they are not covered under the terms of the Act. For example, a child who needs a wheelchair for mobility would meet

Turning to text of IDEA §1415(l), Congress did not impose a blanket exhaustion requirement on students covered solely under Section 504 (and ADA title II). The text does not require Jane Doe to exhaust administrative remedies. Rather, Congress *chose* to require exhaustion *only* where the IDEA, as the "gravamen," could provide relief as well. *Fry*, 137 S. Ct. at 746.

"Statutory interpretation begins with … the text." *Ross v. Blake* 136 S. Ct. 1850, 1856 (2016). The IDEA §1415(*l*)'s exhaustion requirement is clearly 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*).

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the ADA's definition of a person with disabilities, but if she does not need special education, she is outside the coverage of IDEA. Similarly, children with mental conditions that limit major life activities unrelated to learning or with borderline effects on learning may not qualify for the Act's protection. These children may be entitled to services or to program modifications pursuant to the ADA, but they would not be able to make a claim under IDEA…." Mark C. Weber, *Disability Harassment* (2007)

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.

History bears this out. In adding 20 U.S.C. §1415(*l*) to the *Handicapped Children's Protection Act* the United Sates Congress rejected the Supreme Court's decision in *Smith v. Robinson*, 468 U.S. 2, 104 S. Ct. 3457 (1984), which held that all disability education cases were to be pursued only under IDEA, thereby precluding claims under §504. As the Senate Report submitted by Senator Orin Hatch stated:

> Specifically, in *Smith v. Robinson,* the Court ruled that when a remedy "provided under section 504 is provided with more clarity and precision under EHA, a plaintiff may not circumvent or enlarge on the remedies available under EHA by resort to section 504." The Court reasoned that

> the comprehensiveness and detail with which EHA addresses the provision of special education for handicapped children implies that Congress intended to limit remedies to those explicitly provided for in the EHA.

S. Rep. No. 99-112 at 2 (1985).

Senator Simon, an author of the original legislation, offered a particularly thoughtful explanation of §1415 (*l*), worth quoting:

> The Supreme Court reasoned that when Congress adopted the comprehensive enforcement mechanism for the protection of handicapped children's rights in Public Law 94-142, we superseded and eliminated rights previously enacted under other laws. This reasoning was particularly faulty, and in passing §415, Congress is rejecting that reasoning. As legislative approaches to protecting the rights of handicapped persons grow, and we adopt new laws, we are building upon the existing laws, with the full knowledge of those laws and with the assumption that their provisions remain in effect as the context for new legislation. When there is intent to modify, limit, or supersede existing law, Congress does not hesitate to do so explicitly. Just as Congresses' enactment of title VII of the Civil Rights Act of 1964 did not deprive women and minorities of existing provisions against discrimination, the enactment of Public Law 94-142 in no way deprived handicapped children of existing constitutional and statutory provisions protecting their rights.

S. Cong. Rec. 99th Cong. 2d Sess. Vol 132 at 16825 (July 17, 1986).

Thus, Congress clearly intended IDEA to supplement, not supersede, the rights already provided under §504. And it never intended to abrogate those rights later provided by the ADA. Congressman Williams, an original cosponsor, explained §1415 (l) was intended to "reaffirm … the viability of the Rehabilitation Act of 1973, 42 U.S.C. 1983 and other statutes as separate vehicles for ensuring the

rights of handicapped children." Cong. Rec. 99th Cong. vol. 131 at 31370 (Nov. 12, 1985). Senator Weicker, another original co-sponsor of Public law 94-142, which became IDEA, explained that it was intended to clarify that "nothing in [IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available to the parents of handicapped children under the Constitution, section 504, or other Federal statutes prohibiting discrimination." *Handicapped Children's Protection Act: Hearings on S. 415 Before the Committee on Labor and Human Resources*, 99th Cong. 2 (1985).

Congress certainly did not intend for a case like Doe's to be constrained by IDEA's administrative process. As Congressman Miller explained:

> Neither I nor others who wrote the law intended that parents should be forced to expend valuable time and money exhausting unreasonable or unlawful administrative hurdles. …
> It is important to note that there are certain situations in which it is not appropriate to require the exhaustion of [IDEA] administrative remedies before filing a civil law suit. These include complaints that … an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law, or where it would otherwise be futile to use the due process procedures (that is, where the hearing officer lacks the authority to grant the relief sought); and [where] an emergency situation exists (that is, failure to provide services during the pendency of proceedings, or a complaint concerning summer school placement which would not likely be resolved in time for the student to take advantage of the program).

H.R. Cong. Rec. 99th Cong. vol. 131 at 31376 (Nov. 12, 1985).

The intention of the IDEA was never to limit non-IDEA claims where Jane Doe is suffering physiological, psychological, and loss of educational access that cannot be remedied through "special education." As described above, the failure to accommodate her Misophonia has led her to miss most of her instruction and has caused her anxiety to spike, exacerbated her Misophonia, led to increased headache pain, and required emergency medical treatment. Thus, Doe's is exactly the type of claim Congress intended to *excuse* from the requirement to exhaust administrative remedies. *See e.g.*, *A.N. v. Mart Indep. Sch. Dist.*, No. W-13-CV-002, 2013 U.S. Dist. LEXIS 191295, at *14 (W.D. Tex. Dec. 23, 2013) ("IDEA's exhaustion requirement was [not] intended to penalize disabled students for their disability, … [because] [t]he IDEA is not an anti-discrimination statute and cannot be used as an absolute shield against all federal claims of a disabled student.").

C. Cessation of Chewing Gum and Eating Food is an Urgent *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, Jane Doe's school prohibits eating and gum chewing in some classrooms, like Math, and classrooms with expensive technology like three-dimensional printers. But other teachers do not require a refrain from eating, resulting in what *now* amounts to students deliberately targeting Jane Doe through eating, smacking, and chewing.

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 Jane Doe is enrolled. Exceptions would be made in those rare instances where students have a demonstrated medical need for food or gum. By permitting this simple accommodation, Jane Doe would no longer be forced to flee more than half of her class time, experience debilitating fright and headaches, sit outside alone, or on some occasions, 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).

This works. Complementing the experts' opinions, Jane Doe thrived in middle school when she had the accommodation in place. (Declaration of Jane Doe, D.E. 27-2, ¶ 4, PageID# 265). She uses Misophonia-specific coping techniques learned in therapy, and earphones pumping white noise, but she still 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).

D. A Deeper Understanding of What Is Actually Meant by IDEA *Special Education*, and How Jane Doe Does Not Qualify

The IDEA ensures children with qualifying disabilities are entitled to special education that is "free" and "appropriate" for their needs. The 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).

First, only children who meet the IDEA's definition of a "child with a disability" may seek relief under the Act. Importantly, to invoke protection of the IDEA, the child must have *both* a need for special education *and* related services. *Id.* §1414(b), (d). In other words, 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).

Jane Doe certainly has an impairment, as a child with an "other health impairment." 20 U.S.C. §1401(3)(A)(i). She has a "heightened alertness to environmental stimuli." 34 C.F.R. §300.8(c)(9). But she falls out of eligibility because she does not require *special education*, which is defined as "*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).

Here, the District Court went astray. The District Court suggested that what Jane Doe needs is "an *adaptation to the delivery of her instruction* where specific auditory triggers are removed or limited." (Order Granting Motion to Dismiss, D.E. 32, PageID# 370, at pp. 9-10) (citing Second Amended Complaint, D.E. 27, ¶¶ 15, 36, PageID# 252; 258) (emphasis added). But removing the sounds of Cheetos, or Doritos, or ham sandwiches, or smacking gum is not *instruction at all.* 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"). Eliminating eating and chewing *sounds* do not change or vary the teacher's instruction. (*Id*. at ¶15, PageID# 252, 258).

Notably, in trying to understand *Fry,* the District Court went back to a pre-*Fry* analysis. 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). The District Court assumed that having students refrain from eating or chewing gum changes the education, in a broad sense.

The District Court's overbreadth in addressing Jane Doe's accommodation request can be seen in how it applied the *Fry* clues. It set up its own answer. 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).

The flaw is in the framing. If the inquiry in *Fry* had been framed in this same manner of asking whether non-educational entities must provide "educational instruction," 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, not an IDEA 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).

To be sure, this is likely the first claim under the ADA and Section 504 involving reasonable accommodations for Misophonia. For disabilities, particularly less common ones, *labels* are often used to sort our human perceptions. Minnow, Martha, *Making All the Difference: Inclusion, Exclusion and American Law* (1990), at p. 4. Unfortunately, labels can perpetuate discrimination instead of deeper understanding. *Id*. at 6. For the Mayor of Knox County, Jane Doe's needs are not legitimate—they are "gum gate." But once her disability is actually *understood*, the accommodation can be too. While wheelchair ramps are now common, this case offers an advance for persons with Misophonia. [4]

The need for greater understanding, of course, is not limited to a high school in Knoxville, Tennessee whose mayor makes fun of Jane Doe's disability on Twitter.

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[4] *See e.*g., website, So Quiet: "Knox Co. Misophonia Accommodations Case" at: https://www.soquiet.org/knox (providing updates, court documents, and declaring "[w]e stand today in support of 'Jane Doe' & her family in Knox County, Tennessee").

There is universality. "[D]isability is an evolving concept … that results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others." United Nations, "Convention on the Rights of Persons with Disabilities," Dec. 13, 2006, U.N.T.S 2515 (emphasis added).

Jane Doe was highly successful at her middle school, which controlled eating in the classroom. This environmental accommodation plus lack of attitudinal barriers allowed her to achieve. In contrast, in high school at L&N Stem school, the environmental barrier is not removed, and she suffers attitudinal barriers as well. This heightens her disability.

But in no event does Jane Doe require "specially designed instruction" under the IDEA. 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). Again, she simply needs the accommodation.

E. Harming Jane Doe In Order to Enable IDEA "Services"

A child does not qualify under IDEA if she "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). Nonetheless, tragically, the District Court declared that "social work services" could help with Jane Doe's Misophonia. (Order, D.E. 32, p. 10, PageID# 372).

Had the District Court credited the medical testimony, or even permitted an 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 services will *not* suffice—an accommodation of no eating and chewing is required. "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 …" (Declaration of Dr. Rosenthal of Duke University, D.E. 19-1, ¶ 9, PageID# 197) (emphasis in original)

Disturbing is the notion that certain teachers may permit students to eat and even deliberately smack gum in Jane Doe's face or in her classroom, *causing her* an injury, such that "social work services" might help with the injury that could have been avoided in the first place. With due respect, this is an offensive argument.

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. Providing a human aide in lieu of a service dog is not appropriate either. *Fry,* 137 S. Ct. at 756-58 (accessing one's education involves dignity, and a human aide is no substitute).

Jane Doe does not need a social worker to help her panic attacks and flight. She needs the buffet of Cheetos, Doritos, ham sandwiches, and gum-smacking to be removed while the American Revolution and Shakespeare are being taught. 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).

F. Even if Jane Doe Needed an IEP for *Special Education*, It Still Is Not the "Gravamen."

It is not possible for Jane Doe to make a *valid* assumption that she needs special education. But for purposes of a hypothetical only, if the District Court's assumption that removal of "auditory triggers" somehow amounts to specially designed *instruction* requiring an IEP under the IDEA, such gum chewing and eating-removal does not make the IDEA the "gravamen."

The Supreme Court held "that exhaustion is not necessary when the *gravamen* of the plaintiff's suit is something other than the denial of the IDEA's core guarantee —what the Act calls a "free appropriate public education." 20 U.S.C. § 1412(a)(1)(A); *Fry*, 137 S.Ct. at 743. Gravamen means "the material *or significant part* of a grievance or complaint," *Webster's Collegiate Dictionary* 11th ed. p. 546, or "[t]he *substantial point* or *essence of* a claim …." *Black's Law Dictionary,* p. 708 (7th ed. 1999), or "[t]he essential or most serious part of an accusation; the part that bears most heavily on the accused." *Oxford Shorter* vol. 1, 1143 (5th ed. 1994) (emphases added). Thus, *Fry* asks whether the *essence* of Doe's claim implicates the denial of a FAPE, not whether an active imagination could conjure circumstances in which special education and related services might be provided.

The *Fry* plaintiff did have an IEP. And with due respect, this Sixth Circuit erred in stressing 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)*. 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 (emphasis added).

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. Therefore, it is not possible that her case tilts more toward the IDEA than it does toward Section 504.

Jane Does certainly knows her disability; it is part of her. She is "an expert about her own life." *See* Joel Michael Reynolds, *Three Things Clinicians Should Know About Disability,* 20 AMA J Ethics no. 12: E1181, 84 (Dec. 2018) (professionals must "recognize the authority of people with disabilities as experts about their own lives … and to elevate their voices.") The Supreme Court agrees, recognizing the authority of the person with a disability: "§1415(l) treats the plaintiff as 'the master of the claim" and exhaustion is "based on that choice." *Fry* at 755.

Fry gives a strong legal nod to the plaintiff's intent by looking to "the history of the proceedings." *Fry*, at 757. "In particular, a court may consider that a plaintiff has previously invoked the IDEA's formal procedures to handle the dispute — thus

starting to exhaust the Act's remedies before switching midstream." *Id*. "A plaintiff's initial choice to pursue that process may suggest that she is indeed seeking relief for the denial of a FAPE — with the shift to judicial proceedings prior to full exhaustion reflecting only strategic calculations about how to maximize the prospects of such a remedy." *Fry* 137 S. Ct. at 757.

The District Court accorded no weight to the proceedings in this case. Initially, the issue of IDEA exhaustion was not even raised by Knox County. (See D.E. 12, Response). Rather, this was an issue of the District Court's own making, *sua sponte,* one that encouraged Knox County to file a motion to dismiss. 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. But instead of *crediting* Doe's decision not to file for due process, the District Court used this as a basis for denying the preliminary injunction during the appeal. (Order Denying Preliminary Injunction Pending Appeal, D.E. 50, PageID# 496) ("The fact that Doe has, to date, ***chosen*** not to engage in this applicable process that could fully resolve this dispute cuts against her suggestion that she will necessarily suffer irreparable harm absent an injunction.") (double emphasis in original).

The District Court seems to have placed too much emphasis 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). While that may be true in an isolated sentence, the underlying facts of *Perez*—involving *special instruction* for a student who is deaf—are far removed from the present case.

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. The school failed to provide a positive instructional intervention, sign language by a person speaking Spanish. *Perez* sat through years of instruction that he could not understand because it was not "specially designed" for his needs. *Id.* In the end, the actual holding of *Perez* says that an IDEA-eligible student cannot settle his existing IDEA claim without a due process hearing, 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, nor does she 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.

G. The District Court's Attempt to Qualify Jane Doe for an IEP through *Gifted Education* Fails

The District Court also said that IDEA exhaustion is required because IDEA offers special education to gifted students. Notably, this issue also was not raised by either party. 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*.

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). The District Court is correct that the IDEA provides for gifted instruction, but it errs in assuming Doe qualifies for such special education. 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).

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."[5]

Jane Doe is intellectually adept, but 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). She argues that she does not need a *change in delivery* or *modification* of the instruction itself, just access to that instruction.

Moreover, just like an "other health impairment," giftedness alone would 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.

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

II. JANE DOE MEETS CRITERIA FOR INJUNCTIVE RELIEF

A. History of Proceedings

The District Court was presented with the application for injunctive relief on February 17, 2022. (Verified Complaint, Motion for Preliminary Injunction, D.E. 1, 2, PageID #1-38). With continuing harm to the Plaintiff in the interim, including hospitalization, the District Court finally denied the motion for injunctive relief on April 15, 2022 by entering an Order of Dismissal. (Order Granting Defendant's Motion to Dismiss, D.E. 32, PageID# 363-73).

With harm continuing, on June 1, 2022, the District Court denied Plaintiffs' motion for injunctive relief pending this appeal. (Order, D.E. 50, PageID# 491-97). Plaintiff is entitled to injunctive relief requiring Defendant to provide a reasonable accommodation in her academic classrooms of no eating and no gum chewing absent a medical necessity.

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*.

B. Jane Doe Will Continue to Be Harmed Without Injunctive Relief

Due to her disability, Jane Doe cannot safely remain in her classrooms without a reasonable accommodation that forbids eating and chewing gum. Reasonably modifying policies that require actions or refrain of actions by others 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 access to the necessary in-person school programs, services, and activities."). Nor is there any "third party right" to trump the ADA and Section 504. *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, at *4-5 (6th Cir. Dec. 20, 2021); *S.B. v. Lee*, 2021 U.S. Dist. LEXIS 182674, at *63 (E.D. Tenn. Sep. 24, 2021). Moreover, Jane Doe has repeatedly expressed that if another student truly has a medical need to eat or chew in the classroom, then in such a rare circumstances that student and Jane Doe could be placed at a maximum distance from each other.

Similar to masking cases, unaccommodated Misophonia represents an invisible barrier to her classroom access.[6] An injunction eliminates this barrier, Jane

[6] "[T]he invisible barrier that COVID-19 places between [disabled students] and their classrooms [is] necessarily [no] different from a physical

Doe's pain, being sent into inclement weather, being excluded from academic classrooms more than half the time, being tormented by the literal gum smacking in her classroom, and by smacking of a different sort from Knox County's high ranking official on Twitter. In short, it allows her to succeed in these important high school years by simply requiring other students to observe a rule taken for granted in the other schools.

The COVID masking cases have *some* similarity in the sense that non-instructional actions by other students are required for Jane Doe's protection. ("Each teacher establishes his or her own classroom culture with its set of rules and social mores.") (D.E. 44, Response, p. 18, PageID# 442). But there are very important differences, too, between this case and the universal masking cases.

First, this is a single-plaintiff case in limited academic classrooms, not a universal masking case for an entire school system. Second, the lack of uniformity is owing to a stubborn school rule allowing *teacher prerogatives.* Teachers' "prerogatives"—i.e. school policy—must surely bend to accommodate Doe's rights

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barrier that a stairwell places between wheelchair-bound students and their classrooms[.]" *Id*. "'After all, if [a] child cannot get inside the school,' for whatever the reason, then 'he cannot receive instruction there' and 'he may not achieve the sense of independence conducive to academic (or later to real-world) success.'" *Id*. (Greer, J.) (citing *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756, 197 L. Ed. 2d 46 (2017)). *R.K. v. Lee*, 2021 U.S. Dist. LEXIS 204078, at **36-37 (M.D. Tenn. Oct. 22, 2021).

under Section 504 and the ADA. Third, Jane Doe's claim is a *negative* non-instructional intervention: prohibiting eating and gum in her academic classrooms. She does not request, and does not need, any *positive* modification to the quite adequate instruction already being delivered to all students in her classes.

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 Jane Doe Declaration, D.E. 8-3, ¶8, PageID# 66).

Arguments that all students in a magnet STEM school require constant food and gum access are unconvincing. All schools, and even Jane Doe's L&N STEM in particular, limit access to food and gum in certain circumstances, including the academic classrooms. Again, teachers have "prerogative." All Jane Doe is asking for is uniformity for *her limited academic classes.*

In granting the motion to dismiss, the District Court never reached considering the preliminary injunction factors. However, they easily play out in Jane Doe's favor. The record shows Jane Doe has already undergone substantial suffering since seeking an injunction in February of 2022—pain, headaches, emergency room visit, physical exhaustion, public ridicule, and loss of up to, or greater than, 50% of all educational time. She is but a freshman in high school, and still faces the same intransigencies going forward.

The likelihood of success is present because: (1) Jane Doe cannot control her brain-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 and educationally.

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 these accommodations. Unlike most persons, her brain *cannot* cope with those sounds in her vicinity.

By contrast there is no harm to the school district. 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.[7] Jane Doe simply seeks uniformity. No other child is injured by such uniformity, particularly given that an exception for medical necessity is available. To quote Dr. Storch:

> 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

[7] *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).

> 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.

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

"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 (2009). Here, the public has an interest in protecting public health. *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). Enforcement of the ADA is also in the public interest. *Id*. (citing *Hostettler v. College of Wooster*, 895 F.3d 844, 853 (6th Cir. 2008)). And "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.

The public interest is also "served by the enforcement of the ADA." *Wilborn ex rel. Wilborn v. Martin*, 965 F. Supp. 2d 834, 848 (M.D. Tenn. 2013). Thus, the public interest requires an injunction to effectuate the ADA's broad "remedial purposes." *Hostettler v. College of Wooster*, 895 F.3d 844, 853 (6th Cir. 2018).

III. CONCLUSION

Jane Doe is eligible for accommodations under Section 504 and the ADA, but not for special education under the IDEA. She has no IDEA-IEP and does not need one. In fact, forcing her into special education would be a disservice. Her true need is an *accommodation* so that she can enjoy regular education, not special education, with her non-disabled peers.

Rather than experiencing continued pain, or puns from government officials, Jane Doe's Misophonia requires a simple understanding that, for her unique needs, limitations on eating and chewing gum are necessary in her academic classrooms. Given that her request is for the academic classrooms only, not during lunches, and that exceptions may be made for true medical needs, if any, the request is infinitely reasonable. For the reasons expressed above, she requests the District Court's denial of the injunction and the dismissal be reversed.

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 10,303 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 Appellant Brief has been filed via the Sixth Circuit Court's electronic filing procedures, including to defense counsel, Amanda Morse, on this the 15th 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	246-247
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	410-411
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