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

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

PLAINTIFF'S MEMORANDUM IN SUPPORT
OF INJUNCTION PENDING APPEAL

COMES THE PLAINTIFF, JANE DOE, *et. al.,* filing this Memorandum in Support of Injunction Pending Appeal. She shows:

I. STANDARD

Plaintiff has filed a Notice of Emergency Appeal to the Sixth Circuit because she maintains that she is not seeking relief for the denial of a Free Appropriate Public Education (FAPE) under the Individuals with Disabilities Education Act (IDEA). While it may appear unusual to seek an injunction pending appeal from a District Court who just denied an injunction, the case law suggests this is the proper course. See *LaPorte v. Gordon*, 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.").

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.*

II. BACKGROUND

On February 17, 2022, and again on April 13, 2022, Plaintiff Jane Doe sought a temporary restraining order or preliminary injunction seeking the accommodation of no eating or chewing gum in her academic classrooms. (D.E. 2, 31).

Today, April 15, 2022, the Court granted a Motion to Dismiss filed by the Defendant and dismissed the case without prejudice for lack of administrative exhaustion. (D.E. 32, 33). The Court indicated the administrative docketing system made the precise timing of the filings unclear. (D.E. 32, p. 4). However, the "Notice of Electronic filings" show the Motion to Dismiss filed at 10:24 a.m. on March 11, 2022; the Order Granting Motion to Amend Complaint was not filed until 3:45 p.m. on March 11, 2022; and the Second Amended Complaint was filed at 3:51 p.m. on March 11, 2022. Thereafter, the motion to dismiss was never renewed. In any event, the Court recognized the active briefing by both parties on the substantive issue of administrative exhaustion.

In granting the dismissal, the Court found that the Second Amended Complaint sought relief that was also available to her under the IDEA. (D.E. 31, Memorandum, p. 8). Instead of focusing on the narrow relief of cessation of eating and chewing gum in academic classrooms, like

the policy in all other schools, the Court wrote more broadly, reasoning that Plaintiff was seeking "'meaningful access' to an 'adequate education' in her classrooms and a Genuis Hour…." (*Id.*)

Having framed the matter broadly, the Court *disagreed* with Plaintiff's assertion that she does not qualify as a child with a disability under the IDEA and *disagreed* that Jane Doe is not seeking relief available to her under the IDEA. (*Id.*) The Court reasoned, first, that Jane Doe requires "specially designed *instruction*" that does not involve "specific auditory triggers." (*Id.* at pp. 9-10) (citing 34 C.F.R. §300.39(b)(3)). The Court believed it was "L&N's alleged failure to modify or adapt Plaintiff's *instruction* [that] has kept her from 'participating and benefitting from classroom instruction.'" (*Id.* at p. 8) (citing *Perez v. Sturgis Pub. Schs.,* 3 F.4th 236 (6th Cir. 2021)). Second, the Court reasoned that intellectually gifted children are entitled to special education. And third, the Court reasoned that "related services" under the IDEA would have helped "Plaintiff, in particular, to benefit from 'special education.'" (*Id.* at 10).

Jane Doe respectfully contends that these reasons are mistaken both as a matter of law and fact, and, therefore, requests an injunction pending the Sixth Circuit appeal. Each reason is addressed in turn.

III. ARGUMENT

A. JANE DOE DOES NOT NEED *INSTRUCTION* THAT LACKS GUM CHEWING OR EATING

By framing the inquiry broadly, the Court believed Jane Doe "seeks an adaptation to the delivery of her instruction where specific auditory triggers are removed or limited." (*Id.* at pp. 9-10) (citing D.E. 27, Second Amended Complaint ¶¶ 15, 36). But removing eating or chewing because it harms Jane Doe is no more "instruction" than removing peanut butter, or smoking, or asbestos. In fact, the Second Amended says the *instruction* itself—the curriculum, materials, and

delivery—is just fine. (D.E. 27, ¶ 18) (stating the instruction is "very good in fact"). Paragraph 15 addresses the eating and chewing sounds, not instruction. And paragraph 36 says that by not accommodating these sounds, she is harmed, nothing about instruction. (*Id.* at ¶¶ 15; 36).

The "education," broadly speaking, requires removal of chewing gum and eating in the classroom. But it is not the ninth-grade delivery of *instruction* that involves the "specific auditory triggers" of eating or chewing gum. The *instruction* does not need to change—which is precisely why eating and chewing gum can be eliminated *without* changing the academic instruction.

Just like a peanut free table, a non-smoking classroom, use of a service dog, a room with children wearing masks, a room without asbestos, or a widened door to the classroom, do not change the actual *instruction* being delivered, neither does Jane Doe's request for cessation of eating and chewing. In fact, eating and chewing gum is already banned in other schools within Knox County, without creating a different method of delivery of *instruction*. *Id*. at ¶25 (citing for example Central High School Policy: "No food and drink (except water) is permitted in classrooms or other instructional areas except by special permission."). Further, as Plaintiff's Complaint shows, it is prohibited in certain classrooms at her own school of L&N. (D.E. 27, ¶ 28).

But claiming that certain sounds, broadly, change the delivery of Jane Doe's "education," the Court sweeps too broadly—"broadly speaking, educational," is precisely how the Sixth Circuit "went wrong" in the *Fry* case. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 758 (2017). Here, the Court, too, is assuming that students refraining from eating or chewing gum changes the delivery of education, broadly. It does not, any more than a service dog changes it. It is different. But it is not a change in the delivery of the *instruction.*

The Court relied upon the *Perez* decision, citing language in that school's failures kept him from "participating and benefitting from classroom *instruction*." (*Id*. at 7) (citing *Perez,* at 240) (emphasis added). But the Court, in *Perez,* was not referring to "specially designed *instruction,*" as a term of art. Perez needed, and did not receive, a Spanish-fluent sign language interpreter to modify the instruction being delivered. His classroom aide did not even *know* sign language. Thus, Perez's claim was that the educational instruction he received was inadequate because the school failed to provide a positive instructional intervention—sign language—involving expense to the school district.

By contrast, Jane Doe argues that the education presented is entirely adequate and even exemplary. *Her* claim is that the school's refusal to provide *accommodations*, not the right *instruction,* prevents her from accessing that education. Again and again, Jane Doe is forced by eating and gum noises to flee perfectly *adequate* instruction. *Id.* And according to all indications, she would excel in school if she could simply access the same instruction already being provided in her classrooms, with an accommodation. Thus, Doe's claim involves a negative non-instructional intervention: the cessation of eating and gum in her classrooms. That involves no expense to the school district.

The Court's overbreadth can be seen in its application of the *Fry* clues too. This 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." (D.E. 32, Memorandum, p. 8). 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 a support dog. This Court's framing became self-fulfilling.

Rather, 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 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). Doe, too, could request that a public library provide *her* with a reading space free of eating and gum chewing. And school employee with Misophonia—like a teacher—could ask for non-medically necessary food and gum to be forbidden in that teacher's academic classroom.

In sum, Jane Doe's case is also one of refusing to make an *accommodation* that is quite separate from any specially designed *instruction*. For this type of case, *Fry* does not require exhaustion:

> 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).

B. PLAINTIFF HAS NOT ARGUED GIFTEDNESS REQUIRES A DIFFERENT INSTRUCTION

The Court believed Plaintiff to argue that special education is not available to children who are intellectually gifted and that, by stating her academic achievements, such was broadly asserting that intellectually capable students cannot be eligible. (D.E. 32, Memorandum, p. 10).

Plaintiff has never made any such an argument. Nor has she argued that *she* is gifted under the IDEA such that the regular curriculum was not meeting her needs. To the contrary, Plaintiff has illustrated, with undisputed facts, how she has succeeded wildly within the existing educational curricula, such that she needs no change to the instruction.[1]

C. RELATED SERVICES "TO BENEFIT FROM SPECIAL EDUCATION" ARE NOT NEEDED EITHER

Last, the Court assumed that "social work services" or other services could help with Jane Doe's Misophonia. This, too, misunderstands the Complaint.

First, and perhaps most fundamentally, Jane Doe is not asking for L&N Stem to continue denying an accommodation so that she continues being injured, and *then,* providing her a service for the continuing injuries that it permits (e.g. a social worker, counseling, or therapy). Rather, she is seeking an accommodation that totally *prevents* the harm in the first instance—cessation of eating and chewing gum. For example, a person with asthma would not seek daily services of breathing treatments when the removal of smoking is what she needs. A person with a peanut allergy would not undergo services for daily anaphylaxis when cessation of peanut products is what she needs.

Second, as the Court recognizes, related services, by themselves, do not meet the definition of special education under the IDEA. Only children who meet the Act's definition of a "child with a disability," which requires *both* special education *and* related services, may qualify. *Id.* § 1414(b),

[1] Jane Doe was "a straight A student" the years prior, who recently won a prize for her documentary film of the history of women's rights. She was a "National Merit Jr. Honors Society Member," who was accepted into the Duke Tips program for advanced students. In terms of leadership, she excelled there too, having the most service hours for transcribing documents for the National Archives in Maryland. She works well academically with others too. In 2019, her team won best resolution for the State of Tennessee Model UN, arguing against genocide in Burkina Faso, West Africa. (D.E. 27, ¶¶ 19-23).

(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).

At section 20 U.S.C. §1401(3)(A)(i), Jane Doe has agreed that she may be a child with an "Other Health Impairment" due to her "heightened alertness to environmental stimuli." 34 C.F.R. §300.8(c)(9). She has never contested that. But that alone does not suffice for special education because 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).

That returns the analysis to the first issue, above. Again, the cessation of eating and chewing gum in the academic classroom is simply *not* specially designed instruction. Accordingly, the harm Jane Doe is experiencing is not remedied by providing her with "special education" through an Individual Education Plan (IEP) under the IDEA, nor is it the *gravamen* of her case. She is a 504-only student who does *not* require specially designed instruction, just an accommodation.

D. HISTORY OF THE PROCEEDINGS

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. And she has never filed for due process. Instead, she filed initially in this District Court and, with it, put forth testimony from an expert in Misophonia, Dr. Eric Storch, 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." (D.E. 2-2, ¶12 Storch Decl). She also provided a Declaration from Dr. Rosenthal of the Duke Center for Misophonia and Emotion Regulation (CMER) which explained how the human sounds of eating manifest in persons with Misophonia and how it can be accommodated. (D.E. 19; 19-1).

The issue of the IDEA exhaustion was not raised by Knox County either. (See D.E. 12, Response). It was raised by the Court, *sua sponte,* prompting Knox County to file a motion to dismiss. Thus, there is no indication that the history of the proceedings suggest Jane Doe initiated a due process action—while all indications are to the contrary.

E. APPLICATION OF FACTORS

Having dismissed without prejudice, and not having reached the merits, the Court did not address the injunction factors. However, the harms Jane Doe is continuing to experience are set forth in her Declaration, the three Declarations from K.M., and the Declaration from Dr. Storch.

First, Jane Doe is extremely likely to succeed because she cannot control her brain-reaction to gum chewing and eating, it is so easy for Knox County to cure, consistent with its other schools' policies prohibiting same in its academic classrooms.

Second, there is irreparable harm occurring without an injunction. She has been left out in the cold, left without a classroom, required emergency room treatment, and has been denied *access* to an equal education itself.

Third, the public has an interest in protecting public health and enforcing the ADA. *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)). "[T]he school systems have statutory authority to impose [reasonable accommodations] to protect their constituencies and to support public health." *R.K. v. Lee*, 2021 U.S. Dist. LEXIS 204078, at *52 (M.D. Tenn. Oct. 22, 2021). Moreover, 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).

CONCLUSION

Jane Doe has suffered considerable and ever-escalating harm since seeking relief on February 17, 2022, as the Second Amended Complaint, the Supplemental Briefing, the Second TRO, and Declarations all illustrate. (D.E. 27, 28, 31). This includes having to flee the school, being left outside, and exacerbations of migraines requiring emergency room treatment, (D.E. 30-1; 31-1). Because she is likely to succeed, and exhaustion of administrative remedies is not required, Plaintiff requests the Court issue an injunction to protect the child during the life of the Sixth Circuit Appeal by granting the requested accommodation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on April 15, 2022, I served this Memorandum on defense counsel, Amanda Morse, amanda.morse@knoxcounty.org through the Court's ECF filing system.

/s Jessica F. Salonus