

**BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION**  
**DIVISION OF SPECIAL EDUCATION**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>M.D. &amp; F.D., THE PARENTS, <i>and</i></b>	)	
<b>M.D., THE STUDENT,</b>	)	
	)	
<b>        Petitioners,</b>	)	
	)	
<b>v.</b>	)	<b>No. 07.03-225516J</b>
	)	
<b>KNOX COUNTY SCHOOLS,</b>	)	
	)	
<b>        Respondent.</b>	)	

**RESPONSE TO MOTION TO DETERMINE JURISDICTION**

Respondent Knox County Schools (“KCS”) submits this Response to the Motion to Determine Jurisdiction. KCS responds as follows:

PETITIONER MUST EXHAUST HER ADMINISTRATIVE REMEDIES AS REQUIRED BY THE IDEA

In her Due Process Complaint, Petitioner has stated numerous times that she was not making any claims under the IDEA and asserted that her claims to not fall under the IDEA’s requirement that students with disabilities receive a “free and appropriate public education,” (“FAPE”). [Due Process Complaint, ¶¶2, 3, 20-22]. Moreover, Petitioner asserts that because she is not seeking an “instructional’ change, then there are no remedies available under the IDEA. [Motion to Determine Jurisdiction, P. 1-2].

In support of this contention, Petitioner relies on the recent decision from the Sixth Circuit in *Doe v. Knox Cty. Bd. of Educ.*, No. 22-5317, 2023 U.S. App. LEXIS 114 (6th Cir. Jan. 4, 2023).<sup>1</sup> However, Petitioners’ argument that the existence of *Doe* ends the inquiry for this Tribunal

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<sup>1</sup> As Petitioner noted, that case also involved KCS. KCS is still determining whether it will seek review of that decision by the United States Supreme Court. KCS asserts that the Sixth Circuit incorrectly relied upon the Plaintiff’s in that matter that they were not seeking “special education,”

is not accurate. Even in *Doe*, the Sixth Circuit acknowledged that the exhaustion inquiry must be done on a case-by-case basis as it is “a complaint-centered [analysis].” *Doe*, 2023 U.S. App. LEXIS at \*12-13. To conduct that analysis, KCS would urge this tribunal to consider the questions laid out in *Fry. Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154 (2017).

What matters is the crux—or, in legal-speak, the gravamen—of the plaintiff’s complaint, setting aside any attempts at artful pleading.

That inquiry makes central the plaintiff’s own claims, as §1415(*l*) explicitly requires. [11] The statutory language asks whether a lawsuit in fact ‘seeks’ relief available under the IDEA—not, as a stricter exhaustion statute might, whether the suit ‘could have sought’ relief available under the IDEA (or, what is much the same, whether any remedies ‘are’ available under that law). See Brief for United States as *Amicus Curiae* 20 (contrasting §1415(*l*) with the exhaustion provision in the Prison Litigation Reform Act, 42 U. S. C. §1997e(a)). In effect, §1415(*l*) treats the plaintiff as ‘the master of the claim’: She identifies its remedial basis—and is subject to exhaustion or not based on that choice. *Caterpillar Inc. v. Williams*, 482 U. S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318, and n. 7 (1987). A court deciding whether §1415(*l*) applies must therefore examine whether a plaintiff’s complaint—the principal instrument by which she describes her case—seeks relief for the denial of an appropriate education.

*Id.* Additionally, this Tribunal “should consider [the] substance, not [the] surface [of the complaint].” *Id.* at.169.

KCS asserts that the gravamen of her complaint is an alleged denial of FAPE. By way of summary, the IDEA was enacted by Congress “to ensure that all children with disabilities have available to them a free appropriate public education (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living.” 20 U.S.C. Section 1400 (d)(1)(A). In order to provide FAPE, a district must offer an educational program “that is reasonably calculated to enable a child to make progress

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or “instructional” changes to determine that the complaint did not “seek” relief available under the IDEA. *Doe v. Knox Cty. Bd. of Educ.*, 2023 U.S. App. LEXIS at \*26. As referenced in this pleading, there is extensive case law suggesting that courts need to consider the “gravamen” of the harm alleged not the merely the “relief” sought by students.

appropriate in light of the child's circumstances.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999 (U.S. 2017).

This is not a situation where Ms. Doe alleges that she cannot safely access a school building. *See e.g. Doe v. Perkiomen Valley Sch. Dist.*, No. 22-cv-287, 2022 U.S. Dist. LEXIS 21079, at \*24-25 (E.D. Pa. Feb. 7, 2022)(“Because this case concerns Plaintiffs’ alleged inability to access on-site school learning, due to the optional masking policy, at its core, it involves accessing the facility rather than accessing the curriculum. The case is therefore not a FAPE-based claim and no administrative exhaustion requirement applies.”)(emphasis added). In fact, the only “access” M.D. alleges she is being denied under Section 504 is access to “instructional time,” or “instruction.” [Due Process Complaint, ¶17, 18, 22 et. al.]

Furthermore, M.D.’s contention that she is seeking only a “non-instructional accommodation” rather than special education or services under the IDEA is not relevant to the inquiry. (“The key is how to understand the word ‘relief.’ At the most basic level, we say that people come to court for relief when they have been wronged. The court's goal is to rectify that wrong—to provide relief. ...’relief available’ under the IDEA means relief for the events, condition, or consequences of which the person complains, **not necessarily relief of the kind the person prefers.**” *Perez v. Sturgis Pub. Sch.*, No. 20-1076, 2021 U.S. App. LEXIS 19004, at \*9 (6th Cir. June 25, 2021)). “If the harm is the denial of the public education, then the lawsuit falls within the scope of section 1415(l).” *Id.* at \*10.

The only evidence that M.D. puts forth that she is being denied “access” to her education is that she is to be a “very strong student” who needs an accommodation to access her classroom. [Due Process Complaint, ¶7]. However, there are no allegations that M.D. cannot physically access her classrooms. Indeed, the complaint contains no allegations that M.D. has ever been denied

access to her classrooms, or the classroom instruction. Instead, it suggests that the regular classroom, without any changes whatsoever, has always met her educational needs. [Due Process Complaint, ¶22]. Instead, the complaint implies that without her requested accommodation, M.D. *might* experience a denial of access to “instruction,” rather than to the public facility itself. *See L.G. v. Bd. of Educ.*, 775 F. App'x 227, 230-231 (6th Cir. 2019)(“L.G. asserts that his complaint seeks relief for the discriminatory denial of *access* to an education, that this discrimination is distinct from the denial of a FAPE....Despite his emphasis on the word ‘access,’ L.G. has not shown that the discrimination he alleges relates to a denial of ‘equal access to public facilities’ or was otherwise what the Supreme Court referred to as ‘simple discrimination.’”). “L.G. has not used the words [IEP] and insists that he is not complaining about the lack of a FAPE. But neither his omission of these phrases nor his use of the word ‘access’ changes the fact that L.G. “is in essence contesting the adequacy of a special education program.” *Id.*

*Fry* proposes two questions to determine if the gravamen of a case involves consideration of FAPE. *Fry v. Napoleon Cmty. Sch.*, 137 S. Ct. 743, 756 (2017). “First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?” *Id.* Clearly that answer is no in this case. Petitioner Doe cannot go into a public theater or public library and assert that the sound of other people chewing/drinking is impacting *her ability to learn*. Surely, M.D. will argue that she could possibly demand a quiet room to read in as an accommodation, but there is no requirement by the library to instruct M.D. in how to read, and that is the issue here. M.D. is not saying she cannot physically attend classes, but rather than she will not receive appropriate instruction without her requested accommodation.

“[S]econd, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?” *Id.* The answer to this question is also “No.” An adult visitor or employee at a public school could not bring a claim against a school *for failing to educate them, or that other student’s actions are impeding their learning.*

KCS asserts that *Fry v. Napoleon Cmty. Sch.*, 197 L.Ed.2d 46, 51 (U.S. 2017), clearly places applies to this matter and Plaintiff must exhaust her administrative remedies before advancing to other courts.

PETITIONER HAS NOT ESTABLISHED THAT SHE IS ELIGIBLE FOR THE PROTECTIONS OF THE IDEA OR SECTION 504, AND THAT IS THE ISSUE THAT REQUIRES EXHAUSTION

Frankly, Petitioner may have failed to state a claim under either the IDEA or Section 504 because she has not alleged any actual harm that has been caused by her alleged denial of “access” to instruction. The Due Process Complaint specifically notes that M.D. is a student who has never struggled academically, and whose needs have always been met by the regular education classroom with no accommodations. [Due Process Complaint, ¶¶ 7, 20-22]. Although M.D. *asserts* that she has a disability under Section 504, the parties agree that M.D. has never been evaluated under any relevant federal law. Likewise, M.D. merely asserts that she is not a student eligible under the IDEA. However, that is not something M.D. can simply state; an evaluation is **required** before a student can be eligible for the protections of the IDEA or Section 504. 34 C.F.R. § 300.301-306; 34 C.F.R. § 104.35.

The only student who would have the ability to state that he is not eligible for FAPE under the IDEA, is a student *without* disabilities, and even then, that would be debatable.<sup>2</sup> Otherwise, such a determination is a highly factual inquiry that should be made by a school-based team of

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<sup>2</sup> Importantly, M.D. is specifically claiming to have a disability.

professionals or an Administrative Law Judge as part of an administrative hearing on the matter. 34 CFR 300.306(a). There is a two-part test for determine eligibility under the IDEA. A child qualifies as a “child with a disability” under the IDEA if the child (1) has an intellectual disability, specific learning disability, or **other health impairment**; and (2) “by reason thereof, needs special education and related services.”<sup>3</sup> 34 C.F.R. § 300.8(a)(1).

There are 13 categories of potential eligibility under the IDEA including one which could apply to Petitioner Doe. 20 U.S.C.S. § 1401. The implementing regulations define a student with an “other health impairment” as “having limited strength, vitality, or alertness, **including a heightened alertness to environmental stimuli**, that results in limited alertness with respect to the educational environment.....that adversely affects a child’s educational performance.” 34 C.F.R. § 300.8(c)(9)(**emphasis added**). Tennessee has further expanded on this definition to include “**a heightened alertness to environmental stimuli ...that adversely affects a child’s educational performance,**” and, a student having “a chronic or acute health problem that requires specially designed instruction due to.... impaired organizational or work skills; inability to manage or complete tasks; excessive health related absenteeism....” Tenn. Rules and Regs. 0520-01-09-.03(12)(a-b). Clearly, M.D.’s alleged misophonia is a condition that creates a *heightened alertness*

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<sup>3</sup> Petitioner seems to be defining special education to only mean alterations to the academic standards being taught but, special education is just “specially designed instruction...to meet the unique needs of a child with a disability.” 20 U.S.C.S. § 1401(29). Those unique needs are not limited to “academic” needs. Indeed, in developing an IEP for a student, school teams **must** consider the “academic, developmental, and functional needs of the child.” 34 C.F.R. § 300.324. *See also S.B. v. Murfreesboro City Sch.*, No. 3-15-0106, 2016 U.S. Dist. LEXIS 31675, at \*19 (M.D. Tenn. Mar. 11, 2016)(“ Therefore, he was entitled to instruction designed to meet *his unique needs*, which were emotional and behavioral, at no cost to the parents.”); *Somberg v. Utica Cmty. Schs*, No. 13-11810, 2016 U.S. Dist. LEXIS 41771, at \*12 (E.D. Mich. Mar. 30, 2016)(student with social and emotional needs rather than ourely academic); *Johnson v. Metro Davidson Cty. Sch. Sys.*, 108 F. Supp. 2d 906, 918 (M.D. Tenn. 2000)(“[educational performance] pertains to the child's diminished academic performance in the classroom, impaired school learning experience, and/or failure to master skill subjects.”)

to environmental stimuli. In short, if her misophonia would adversely affect her educational performance, she may be eligible for FAPE under the IDEA and that is the issue she must exhaust before bringing her ADA/Section 504 claims. Moreover, **it does not matter that** M.D. does not want special education services, or even that she may refuse special education services if an evaluation determined she needed them. *See E. D. v. Palmyra R-I Sch. Dist.*, 911 F.3d 938, 941 (8th Cir. 2019)(where a parent was required to exhaust their administrative remedies regarding their allegedly *non-instructional* accommodation request that the student’s iPad be used in all classrooms, because that was a remedy an IEP could provide along with other services and supports.) The Eighth Circuit stated that, “it makes no difference that they refused all services under the IDEA. Opting out of IDEA services does not unlock a pathway around exhaustion.”

To further this Tribunal’s ability to determine its jurisdiction, KCS has simultaneously with this pleading, filed a motion to seek a mental evaluation of M.D.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 13, 2023, a copy of the foregoing was emailed to the Office of the Secretary of State. A copy was provided by email to Counsel for Petitioner.

s/Amanda Lynn Morse  
Amanda Lynn Morse