UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

JANE DOE, the student; by and through her Parents, K.M. and A.M.,	)	
Plaintiff,	)	No. 3:22-CV-63-KAC-DCP
v.	)	JURY DEMANDED
KNOX COUNTY BOARD OF EDUCATION	)	
Defendant.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

PLAINTIFF, JANE DOE, opposes Defendant's motion for summary judgment for the following reasons.

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1. INTRODUCTION

KCBE *refuses* to grant a classroom accommodation of restricting chewing-gum and food for students with misophonia. For both Jane Doe and Mary Doe, the companion-plaintiff, KCBE views the accommodation as "unenforceable"—regardless of school—because it cannot be *guaranteed* 100% of the time, and it is seen as an attack upon other student's "rights."

For both Jane and Mary, one at L&N, the other at Farragut Middle, KCBE, through its 504 Coordinator, Dr. Odom, refused their identical accommodation on identical grounds. For Jane Doe, Odom said "limiting the right to have snacks is not an option" and "we will not put a ban on

snacks and gum and food." (See KM Decl, ¶2). And for Mary Doe, Odom said, "we will not put a ban on snacks and gum and food." (MG Decl., ¶4). Odom claimed it could not be 100% guaranteed, failproof, and that students would have to be *patted down*. (Odom, p. 17; (EG Decl.¶5, with Transcript and Manually Filed Recording).

Unbeknownst to Jane Doe's family, the assistant principal, Walsh, advised all teachers in writing *not* to enforce the food accommodation, (Ex. 53), even though the principal said to encouraged restrictions on both food and gum. (Allen, pp. 63-64). With these categorical barriers—100% guarantees and third party "rights"—the accommodation became impossible for both students.

The case grew ugly. The head of the Law Department railed against "any judge telling us what we must do," and conflated Jane Doe's misophonia accommodations with masking: "The judge has expanded the ADA and the education realm farther than it has ever been done before…and that is what the fight is on… us[ing] the ADA to stop gum chewing [or] to make 60,000 children wear masks." (Manually Filed Video, 1:14:12 to 1:14:37).

But behind this "fight" lies truth: teachers at L&N *can* restrict chewing gum and food in the classroom. Many did. And Jane Doe succeeded with the accommodation in schools before, as well as after, L&N Stem. (Jane Doe Decl, ¶¶6, 19). But at L&N, she was terrorized through its refusal to implement the accommodation, cyberbullying, harassment, and, eventually, being forced out of school altogether.

As kids these days say, "she kept receipts." And now, with this Response, legal accountability may begin for all of the prejudice, arising not from malice alone, but gross insensitivity. *Board of Trustees v. Garrett*, 531 U.S. 356 (2001)(Kennedy, J., concurring)

2. CONCISE STATEMENT OF GROUNDS JUSTIFYING THE RULING SOUGHT

Title II of the ADA, 42 U.S.C. §12131 *et seq*., prohibits discrimination against "both adults and children with disabilities, in both public schools and other settings," *Fry v. Napoleon Cmty. Sch*., 580 U.S. 154, 159 (2017), by prohibiting any "'public entity'"—including any instrumentality of a State or local government, 42 U.S.C. §12131(1)—from discriminating against any qualified "individual with a disability" in its provision of "services, programs, or activities." 42 U.S.C. §12132. A person alleging a violation of Section 12132 may bring a civil action for injunctive relief or money damages. *Perez v. Sturgis*, 598 U.S. 142 (2023); *Fry*, 580 U.S. at 160.

Per Local Rule 7.1(b), Jane Doe has a disability called misophonia where sounds of gum-chewing and food consumption trigger extreme emotional and behavioral responses: pain and/or flight. (Storch Decl., ¶8). Some, but not all, of Doe's teachers at L&N Stem, a public school in Knoxville, restricted students from eating and chewing gum in Jane Doe's classrooms.

The vice principal, Ms. Walsh, instructed Doe's teachers *not* to restrict food—contrary to the principal's intention.[1] The 504 Coordinator, Daphne Odom, refused to implement the accommodation through a 504 Plan because KCBE could not "guarantee" that another student would "never" chew gum or eat in the classroom. In the two successive misophonia cases, Jane Doe's and Mary Doe's, KCBE forced both students out of the public school system entirely—Jane Doe from L&N Stem; and Mary Doe from Farragut Middle School.

Having endured immense suffering, and private school placement just to obtain her education, Jane Doe brings suit under the ADA and Section 504, along with Constitutional claims.

[1] Ex. 53 (Walsh email)

Reasonable Modification

KCBE contests the ADA-504 reasonable modification Doe requires—no gum-chewing or eating food in her academic classrooms and an extracurricular class. But KCBE's motion is fatally flawed because: (1) KCBE's *actual* reason was a "100%-guarantee" rule, which is not the standard for *reasonable* modifications;[2] (2) her teachers could, and some did, implement the accommodation;[3] (3) the assistant principal directed teachers *not* to comply with the food limitation—contrary to instruction;[4] (4) it does not matter that Jane Doe may hear the sounds *first*;[5] (5) the modification was successful in Jane Doe's schools both before and after L&N Stem;[6] and (6) KCBE used categorical bans of non-existent "third party rights" to violate the ADA.

Nor did KCBE offer an effective alternative to avoid the sound of gum-chewing and eating in the classrooms. It offered accommodations, but not ones that addressed *these* needs.[7] KCBE's "reason"—lack of 100% enforceability—is actually an affirmative defense of fundamental alternation, which it neither pled, nor which it could possibly satisfy at summary judgment, as that burden rests with KCBE.[8] Although deliberate indifference is not required, it would easily be met.[9]

Intentional Discrimination Claim

Not only did the denial of reasonable modification force Jane Doe out of school, but KCBE engaged in intentional discrimination. It uses a per se rule of 100% enforceability, and so-called

[2] Odom depo, p. 17, 19-20; MG Decl, with recording, Storch Decl, ¶12-13.
[3] Jane Doe depo, pp. 42, 61, 56, 66; KM depo, p. 125; Allen depo, pp. 66-67; 89-1, Tiller Decl., ¶6, 7, 9; 89-1, Waxmonsky Decl., ¶6, 8, 9.
[4] Ex. 53, August 12, 2021 email of M. Walsh; Walsh depo, pp. 37-38, 41; Allen depo, p. 63-64.
[5] Storch Decl, ¶14; Jane Doe depo, pp. 33, 34, 43, 44, 281; AP Decl, ¶6.
[6] Jane Doe Decl., ¶¶6,19; Jane Doe depo, pp. 96-97, 119-120, 142, 246; Ex. 19 (Dublin School Plan).
[7] Storch Decl., ¶12; Ex. 11 (504 Plan); Walsh depo, pp. 70-71; Jane Doe, at 47, 37, 53, 266-270.
[8] Jane Doe, at 42, 61; KM, at 125; Allen, at 16-17, 20, 63-64, 66-67; Ex. 53; AP, at ¶6; D.E. 89-1; Second Allen Decl., ¶17; D.E. 89-1, Tiller, ¶7.
[9] Ex. 53 (Walsh email); Walsh, p. 58; AM depo, pp. 51-52; MG Decl. ¶4-5; Odom depo, pp. 17, 31-32, 33, 34, 36; Rysewyk depo, pp. 26, 27, 30, 31-32, 34, 39, 40; Ex. 45)

"third party rights," to make accommodations all-but-impossible. Successively, it forced out two students—same disabling condition, same 504 coordinator (Odom), and same reasons. "It's not a reasonable accommodation. Because we can't pat students down before they come in and search students."[10] The facts and law are firm that 100% guarantees are not the standard.[11]

Disability-Based Harassment

Jane Doe's suffering was so intense that she has brought disability-harassment or retaliatory harassment claims too. These invoke the Board's failure to take action against cyberbullying threats to Jane Doe inside the school, created by its own Board members calling her case #gumgate;[12] KCS staff creating barriers (100% Guarantee and 3rd Party Rights), *supra*, while Jane Doe suffers debilitating harm;[13] and student-peers who harassed Doe at school.[14]

Constitutional Claims

Outside of the ADA-504 claims, Doe has brought constitutional claims: First Amendment retaliation, Equal Protection, and Fourteenth Amendment claims. The First Amendment claim delves deeper into the 100% guarantee and the third-party rights arguments, *supra*, by showing a custom involving the Superintendent's own Task Force findings.[15] These findings—culture of resistance—repeated themselves with both Jane Doe and Mary Doe.

The Equal Protection claim involves L&N, through its school officials (Walsh and Odom, primarily) denying Doe's accommodation, motivated by animus against her particular type of disability and the obligations it imposes on others. And, finally, the Fourteenth Amendment claim

[10] MG Decl, ¶5.
[11] Storch Decl., ¶¶6, 8; Jane Doe depo, pp. 37, 96-96, 133, 142, 333; MG Decl. ¶¶5-6; Allen depo, p. 40.
[12] Ex. 41; Kristy depo, pp. 13, 15, 28, 29, 30, 32, 33, 34, 54, 56, 71; Ex. 44; Ex. 48; Henderson depo, pp. 47-48, 50, 52; Rysewyk depo, pp. 56-67; Storch Decl., ¶¶16-17; Ex. 34 (Complaint to Board); Ex. 36 (Duties of Bd Members Policy); Ex. 37 (Equal Educ. Opportunities Policy); Jane Doe depo, pp. 261, 335-335, 282-283, 285
[13] Ex. 54 (KM plea for help sent to Law Department); KM depo, p. 23; Walsh depo, 83, 87, 88.
[14] AP Decl, ¶5, 7; Jane Doe Decl., ¶15; Jane Doe depo, p. 284.
[15] Rysewyk, p. 26, 27, 31, 32; Ex. 45 (Task Force Findings)

involving bodily integrity is established through unique dangers to Doe's body made foreseeable by repeated pleas for help, with egregious harm repeatedly resulting.

Plaintiff follows the Table of Contents to organize the claims, addressing each claim or defense, with facts, in detail below.

3. SUMMARY JUDGMENT STANDARDS APPLICABLE TO THIS CASE

The material-fact-standard of summary judgment is well known. So Plaintiff references two aspects pertinent to this case. First, on *Plaintiff's* ADA reasonable accommodation burden, this is highly fact specific: "[T]he 'determination of what constitutes [a] reasonable [accommodation] is highly fact-specific, requiring case-by-case inquiry.'"" *Bennett v. Hurley Med. Ctr.*, 86 F.4th 314, 326 (6th Cir. 2023). Therefore, determining that issue is often best left to the factfinder, in this case a jury:

> Whether an accommodation is reasonable is a "highly fact-specific" inquiry often best left for a jury. *Anderson v. City of Blue Ash*, 798 F.3d 338, 356 (6th Cir. 2015); *see also Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998) ("The reasonableness of an accommodation is a fact issue."); *Meachem v. Memphis Light, Gas & Water Div.*, 119 F. Supp. 3d 807, 818 (W.D. Tenn. 2015) ("[W]hether Defendant's offering was a reasonable accommodation is clearly within the purview of the jury."); *EEOC v. Journal Disposition Corp.*, No. 1:10-CV-886, 2011 U.S. Dist. LEXIS 124177, 2011 WL 5118735, at *4 (W.D. Mich. Oct. 27, 2011) ("Whether the accommodation proposed by [plaintiff] was objectively reasonable is a question of fact for a jury.").

Schroeder v. AT&T Mobility Servs., LLC, 568 F. Supp. 3d 889, 893-894 (M.D. Tenn. 2021)

Second, KCBE's defense of fundamental alteration was not plead as an affirmative defense. *That* burden rests with KCBE, not Plaintiff. And that burden is highly factual too, *Shroeder*, at 894. With affirmative defenses, "the defendant must satisfy a demanding standard," and summary judgment is proper "only if the record shows that the defendant established the defense so clearly that no rational jury could have found to the contrary." *Cline v. Dart Transit Co.*, 2023 U.S. App. LEXIS 9521, *11 (6th Cir. 20203).

4. FAILURE TO REASONABLY MODIFY (ACCOMMODATE)

Pages 11-19 of KCBE's motion focus on intentional discrimination although it blurs non-intentional reasonable accommodation, saying KCBE had a "non-discriminatory reason to deny her requested accommodation." (D.E. 88, Memorandum, p. 18). Plaintiff begins with the failure to accommodate claim, then turns to the intentional discrimination claim.

4.1 Jane Doe's Actual Request for Reasonable Accommodation

As KCBE recognizes, a failure to accommodate claim does not require heightened intent. *Knox Cnty v. M.Q.*, 62 F.4th 978, 1000 (6th Cir. 2023)(title II education).[16] In the interest of avoiding misunderstandings, when Doe refers to her "requested accommodation," or "necessary accommodation," she means her request that L&N curtail food and gum, only in *her* academic classrooms, only when she is present, and that she would exempt students who have a medical need of access to food or gum in class. (Jane Doe Decl. ¶4; Jane Doe, 96-97, 142; KM, at 40-41).

The gum and food-consumption classroom accommodation were the key needs because, with those managed, Doe can self-manage "lesser triggers" like drinking or typing. (Jane Doe Decl, ¶4; Jane Doe, at 96-97, 142; 333).[17] She also wanted to attend an extra-curricular "Genius hour." (Jane Doe Decl, ¶4; Jane Doe, at 36-37, 40-41, 200). That would be *after* lunch occurred. (Jane Doe, 40-41). These are *reasonable* not overboard requests, as her mother testified: "No. I mean, we only asked for reasonable accommodations that actually could be controlled. You can't control sniffling, you can't control breathing, you can't control typing, and we wouldn't have asked for that." (A.M., at 50-51).

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[16] This is true in prison cases, housing cases, and employment cases too. *Williamson v. Wheeler*, 2023 U.S. App. LEXIS 20741, *6 (6th Cir. 2023)(prison); *Hollis v. Chestnut Bend Homeowners Ass'n,* 760 F.3d 531, 540 (6th Cir. 2014)(housing); *Kleiber v. Honda of Am. Mfg*., 485 F.3d 862, 868 (6th Cir. 2007)(employment).

[17] KCBE references "drinking" but this was not part of the request. See also Storch Decl, at ¶13, fn3.

At no time did KCBE ask for medical information about Jane Doe's misophonia. (KM, at 81). Coincidentally, the 504 Coordinator, Dr. Daphne Odom, was already familiar with misophonia—she has a child with misophonia, a fact she shared with parents. (Odom, p. 11). As such, she was aware that eating sounds were especially potent misophonia triggers. (Odom, p. 12). And the teachers attest that it was explained to them too. (D.E. 89-1, Tiller, ¶6; Doc. 89-1, Waxmonsky, ¶6). Moreover, Doe's father, KM, also provided an article to KCBE about misophonia triggers. (Ex. 32 (excerpts)). There is no question that KCBE refused the accommodation. (See KM Decl, ¶2)(Odom stating: "limiting the right to have snacks is not an option" and "we will not put a ban on snacks and gum and food.").

To reiterate, Doe's requested accommodation to limit food and gum-chewing was *not* school or campus wide, but rather only in *Jane Doe's* academic classes. (Jane Doe Decl. ¶4; KM depo at 125). That shrinks the square footage to one of 19 classrooms in use at a time, and the number of affected students to a maximum of 35 per class (not hundreds or so in the school). (Walsh depo at 51; Allen depo, pp. 7, 57).

4.2 Facts Raising Reasonableness of the Request and Unreasonable Denial

At the outset, Plaintiff makes the overarching point that KCBE's argument is so internally inconsistent that it defeats itself. On the one hand, it is asking the factfinder to *reject* the eating and gum accommodation because it is "impossible" and "unenforceable," while at the same time (1) the principal *did* encourage no chewing or eating in the classrooms (Allen, at 16-17, 20, 63-64); (2) the L&N rule *does* allow teachers to implement it if they so choose; (D.E. 89-1; Allen Second Decl., ¶17); (3) the gum restriction is a "small concession that we made," (Allen, pp. 63); and (4) many of the teachers *did* implement the food and gum accommodation. (Jane Doe, at 42, 61; KM, at 125; Ex. 53; (D.E. 89-1, Tiller, ¶6).

As one can see, this is incompatible: it's being encouraged and implemented, but at the same time said to be impossible. A literary reference may be useful here, as courts sometimes do: "Sometimes I've believed as many as six impossible things before breakfast." Carroll, L., *Through the Looking-Glass and What Alice Found There* (1899).[18]

Courts rightly reject such incongruences at summary judgment:

> [T]he story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it." ... [That] principle is equally applicable to summary judgment, and we may state it thus: testimony can and should be rejected without a trial if, in the circumstances, no reasonable person would believe it.

Melton v. Tippecanoe Cnty., 838 F.3d 814, 819 (7th Cir. 2016).

In it brief, KCBE makes three arguments about denying the reasonable accommodation. The "first," and by far most lengthy, is a defense upon which it bears the burden: "substantial and fundamental alteration." (D.E. 88, Memorandum, p. 20-24). Because fundamental alteration is an affirmative defense, KCBE stands its cart before its horse. The second is that her request is impossible or ineffective because she alone hears noises. (*Id.* at 24). And the third, an alleged burden on third parties, is also an affirmative defense. (*Id.* at 26).

To better conform to case law, Plaintiff bypasses for now KCBE's unpled affirmative defenses. Beyond the inherent incongruency of its position, Plaintiff begins with at least six reasons the jury can infer the reasonableness of the accommodation: (1) "perfection with 100% guarantee" is *not* the standard; (2) several of L&N's teachers say they *did* implement the modification in Jane Doe's academic classrooms; (3) the assistant principal confusing *everybody*; (4) "she literally hears things" is gaslighting, not an excuse for denying an accommodation; (5) the same modification was effective for Jane Doe both *before* L&N and *after* L&N; and (6) categorical or per se denials used by KCBE violate the ADA.

[18] *Quote at, among others, Williamson v. Recovery Ltd. P'ship*, 826 F.3d 297, 305 (6th Cir. 2016)

4.2.1 The "100% Guarantee" Standard Is Illegal

As the old saw goes, "the only thing certain in life are death and taxes." Jane Doe does not request or require absolute certainty 100% of the time. Yet when asked why she did not agree to implement Doe's necessary accommodation, Dr. Daphne Odom, KCBE's 504 Coordinator from Central Office testified: "We could not guarantee that there would never be a student in one of her classrooms that would not be participating in any type of food or drink." (Odom, p. 17; see also KM Decl, ¶3-4 ("limiting the right to have snacks is not an option" and "We will not put a ban on snacks and gum and food."). Thus, this *perfection-guarantee*, which Doe's family never requested, was the stated reason for her denial.

In her deposition, Odom did mention extenuating circumstances (Odom, p. 19) including the school's culture, physical layout, and "open campus." (Odom, pp. 19-20). But as Odom admits, when she denied the accommodation she "did not know" the parents were *not* requesting a school-wide accommodation. (Odom, p. 20). Again, this was not the request at all.

The100% guarantee excuse distorts and mischaracterizes Doe's accommodation request. Even Odom admits the parents never requested a guarantee of 100% compliance. (Odom, pp. 18-19). And as Odom testified, none of her training on 504 and ADA accommodations suggests that an "accommodation cannot be given unless it is 100-percent fully guaranteed." (Odom, p. 63-64).

Odom's belief about misophonia accommodations—the 100% guarantee—are not unique to L&N at all. In the consolidated claim of Mary Doe, where a student with misophonia *also* sought classroom limitations on gum-chewing and food, but at Farragut Middle School, Odom came down precisely the same way. Elaborating on the guarantee, she decried the accommodation on grounds that "a child could sneak in anything," and "we can't pat students down before they come in and search students." (M.G. Decl, ¶4, 5 with Transcript, and Manually Filed Audio Recording).

Of course, neither Jane Doe nor Mary Doe asked for pat-downs, search and seizures, or 100% guarantees. Society does not remove handicapped parking spaces because, occasionally, persons without disabilities sneak in. Similarly, such rigid application for misophonia accommodations—dogmatic thinking—must be avoided. (Storch Decl., ¶12-13). And, notably, Mary Doe was in middle, not high school. There was no college-like atmosphere, and it had a cafeteria. Yet, Mary Doe received the same excuse.

The law, of course, also recognizes that a reasonable modification "need not be perfect." *S.B. v. Lee*, 566 F. Supp. 3d 835, 856 (E.D. TN 2021). Rather, it must be "effective" to adequately address the unique needs. *Id*; *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, *3 (6th Cir. 2021)("effective" is the standard); see also *Solloway v. Clayton*, 2018 U.S. App. LEXIS 16588 (11th Cir. 2018)("reasonable means feasible, not a "guarantee" that a person would "never encounter" the situation); *Noll v. Int'l Bus. Machs. Corp*., 787 F.3d 89, 94 (2d Cir. 2015) (effective does not mean perfect).

Dr. Eric Storch, Doe's expert witness from Baylor University, explained the nature of misophonia generally and the impact upon Jane Doe, particularly. (Decl. Storch, ¶¶5-8). He addresses the problematic nature of "absolutes" and "dogma." (*Id*. at ¶¶12-13).

Dr. Storch says that in situations involving misophonia accommodations, students demanding "perfect silence," or schools believing it must guarantee "zero eating or gum-chewing events," are exaggerations best avoided. (*Id*. at ¶13). Misophonia does not involve a toxic chemical to be avoided such that a single exposure would cause serious medical harm. (*Id*.).[19] Rather, an enforced

[19] By contrast, food allergies, including airborne and surface exposures to allergens in foods, are common and can be fatal. See D'Andra Millsap Shu, *Food Allergy Bullying as Disability Harassment: Holding Schools Accountable* 92 U. CO. L. Rev. (2021) 1, 3 citing FOOD ALLERGY RESEARCH & EDUC., FOOD ALLERGY FACTS & STATISTICS FOR THE U.S., 1 https://www.foodal- lergy.org/life-with-food-allergies/food-allergy-101/facts-and-statistics [https://perma.cc/J5L7-FMWP] (there are 5.6 million U.S. children with food allergies). Yet, KCS and school districts across the United States are required to accommodate allergic children, even where they cannot guarantee an allergy-free environment, and even where exposure is potentially fatal. See *A.C. ex rel. J.C. v. Shelby County Bd.*

rule against the gum-chewing and food-consumption is reasonably effective *even if* it is occasionally broken by errant students. (*Id*.). In those instances, the school should employ simple reminders or corrective action as it does for dress-code infractions. (Allen Depo, p. 21).

Accordingly, the jury can infer that KCBE denied the reasonable accommodation by substituting an unrealistic and unrequested perfection standard.

4.2.2 Many Teachers *Were* Able to Grant the Accommodation—While Some Refused

The teachers themselves impugn Defendant's "impossibility" excuse. Many successfully implemented the rule. (Allen depo, pp. 66-67). In fact, in Jane Doe's chemistry lab and math classroom, no food and gum were *already* a rule, as Principal Allen had to acknowledge:

> **Q**. So in Jane Doe's lab, her accommodation
> was being met, and you think that when she had --
> **A**. But it wasn't because of her. It was
> because of lab safety protocols.
> **Q.** Well, regardless of what it was because
> of, --
> **A.** I just wanted to throw it out there.
> **Q**. I know you did, but her accommodation was
> met regardless of the reason in the chemistry lab.
> MS. JOHNSON: Object to the form.
> **A.** I would say it probably was.
> **Q.** And the person who taught her math class
> also had a rule for whatever reason that honored her --

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of Educ., 824 F. Supp. 2d 784, 790 (W.D. Tenn. 2011) *reversed on other grounds A.C. v. Shelby Cnty. Bd. of Educ., 711 F.3d 687* (6th Cir. 2013); *S.M. v. School District of Upper Dublin*, 2011 U.S. Dist. LEXIS 93109 ((E.D. Pa. 2011). See also U.S. Department of Education Office of Civil Rights, *Section 504 Protections for Students with Food Allergies* (emphasis in original)

> *What might a school need to do to address a student's food allergy?...*
>
> Section 504 may require a school to provide modifications such as: designating allergy-free eating areas such as peanut-free tables, and providing clearly labeled, dairy-free, or other allergen free food options in school cafeterias, dining halls, and at school events; prohibiting certain foods in classrooms and/or school buildings, and providing notice to students and families about all food allergy-related rules; ensuring eating and learning environments are free of food allergens, including during field trips and extra-curricular activities where possible, by for example, wiping down tables, chairs, and other surfaces before use by the person with an allergy …

https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-food-allergies-202402.pdf (last visited June 16, 2024.

A. Of gum, yeah.

(Allen depo, pp. 66-67).

Mr. Arthur, the math teacher, executed the reasonable accommodation request. (Jane Doe, at 42, 61; KM, at 125). Mr. Arthur even sent an email memorializing what he had done. (Ex. 53). He simply instructed students to spit out gum and, if they were hungry, to eat their food in the hallway before returning to the classroom. (Ex. 53; Walsh at 48, 53). So did Mr. Arnold, the chemistry teacher, although food and gum were already prohibited in the lab where he taught Chemistry. (Jane Doe, at 42). And so too did Mr. Tiller, the English teacher, who declares that he knew about Jane Doe's misophonia-related needs (D.E. 89-1, Tiller, ¶6); and in addition to the 504 Plan, he "went a step further and informed the class that all eating or drinking needed to be done in the hallway." (*Id*. at ¶7). Tiller says he enforced this, and even re-seated a student with a medical need. (*Id*. at ¶9).

Mr. Waxmonsky, the Computer Science teacher, sounds suspiciously like Tiller when he declares that he understood Jane Doe's misophonia-related needs, (Doc. 89-1, Waxmonsky, ¶6), and that he also went beyond the 504 Plan: "I informed my class that they were not to chew gum or eat in the classroom." (*Id*. at ¶8). Waxmonsky says that he, too, enforced this by instructing students to throw away the item or take it elsewhere. (*Id*. at ¶9). Yet Jane Doe says he actually did *not* control the food and gum in his classroom, raising questions of fact. (Jane Doe, pp. 163-164).

Ms. Hall, the history teacher, is conspicuously absent from KCBE's presentation. She simply *refused* to comply: "She was the worst with that." (Jane Doe, at 146). She "didn't control it at all" and she "made no effort." (Jane Doe, at 47, 163). "She did nothing." (Jane Doe, at 47). Up to twenty students would be eating and, when Doe would leave to escape Ms. Hall's classroom. And when she attempted to return – per her "break" accommodation – she returned to the

same uncorrected environment resulting in pointless re-exposure to triggering noises. (Jane Doe, at 146-147). AP, Jane Doe's friend, observed the pain from the triggers, as Jane Doe would confide in her. (AP Decl, ¶6).

4.2.3 The Assistant Principal, Walsh, Prevents the Accommodation

Ms. Hall's deliberate and indifferent non-compliance was buttressed by L&N Administration. In written discovery, Plaintiffs learned that Walsh wrote to all of the teachers and instructed them to disallow only *gum* in their classrooms, but not food: "the other change we need to make is no gum in the classroom." (Ex. 53; Walsh, pp. 37-38). Walsh added that food was still allowed: "We will still allow food and drink." (Ex. 53; Walsh at 38.)(emphasis added). She told neither Jane Doe or her parents what she had done. (Jane Doe Decl, ¶8; KM Decl, ¶5).

The gum was a small concession, per Mr. Allen. (Walsh at 38, 41; Allen, 63-64). Notably, Walsh was establishing *rules*, not teacher discretion, which Allen says contradicted his own instruction to encourage limitations of *both*. (Allen, p. 63-64). The jury can find Walsh's instruction to deny the needed food accommodation is (1) in writing; (2) to Jane Doe's teachers; (3) followed by some of Doe's teachers and certainly by Ms. Hall; (4) causing harm to Jane Doe. (Jane Doe, at 47, 146-147, 163).

4.2.4 The "She Literally Hears Things" Argument

In its brief, KCBE uses what the factfinder might conclude is classic gaslighting: "She literally hears things that others will not hear." (D.E. 88, Memorandum, p. 24). This connotes *imaginary* sounds, as if Jane Doe were "literally" inventing sounds that exist only in her mind.

Accuracy matters. Jane Doe has both misophonia and a sound-sensitivity known as hyperacusis. Her attention does direct to certain sounds. (Jane Doe, at 33). So, it's true she will focus upon those sounds because she is more attentive to them. (Jane Doe, at pp. 33-34, 43). But just

because she hears gum-chewing or Doritos-crunching before, say, Ms. Hall, or even hears the sounds that Ms. Hall may not hear while teaching, *does not mean the sounds do not exist.* Or that the accommodation cannot be enforced. (Storch Decl., ¶14)

Like Arthur or other teachers, "spit it out" is all that is necessary. If Jane Doe hears it first, she simply alerts the teacher to the sound—"tell them where it is." (Jane Doe, at 44). "They should be able to, like find it if I tell them where it is. I don't expect them to know before I know." (Jane Doe, at 44). Again it did work when teachers wanted it to work. (See AP Decl, ¶6).

Jane Doe, all of sixteen at the time, again explains it best. Eating is not *only* discernable by sound:

> [T]hey don't focus on the noises like I do, but I'm assuming if they know about my misophonia, then if they see somebody chewing gum, they would know. It's not just an auditory thing. Like, you can tell when someone's eating because it looks like they're eating.

(Jane Doe, at 44).

Had L&N put a rule in place and enforced it, the problem should have been rare. In other words, *prevention* is paramount. And as Jane Doe explained to counsel, enforcement then becomes easier:

> Q. Do you understand that one of Knox County's main arguments is that your accommodation is very difficult or impossible to enforce because you will hear those noises before your teachers do? Like, what do you think about that? What is your response to that?
>
> A. I think that's wrong. I think if they can enforce it in classrooms that have 3D printers and stuff like that, then they can enforce it in my classrooms.

(Doe, at 281).

The occasional violation is hardly fatal. Having misophonia is not like being exposed to a toxic chemical where single exposures cause great harm. (Storch Decl., ¶14). The factfinder can infer that KCBE is making this overly complicated and legalistic, rather than "effective,"

reasonable, flexible. When teachers want to enforce, or when the chemistry or computer lab equipment requires enforcement, it happens. And when teachers, like Ms. Hall, are resistant, then resistance happens. The jury can easily find the accommodation *reasonable*.

4.2.5 The Same Modification Was Effective Before and After L&N

A fourth reason the jury can infer effectiveness of the accommodation is that it worked in Doe's classrooms before and after L&N. Before L&N, Doe attended Episcopal School of Knoxville (ESK) where they already enforced a no eating or gum-chewing rule. (Decl. of Mary Lovely; Jane Doe Decl., ¶6; Jane Doe, at 96-97, 142). If a student snuck gum or snacks, the school would address it and ("fix" it). (Jane Doe, at 119-120). Doe excelled at ESK, becoming a National Junior Honor Society member, even though her condition was less controlled at the time. (Decl. of Lovely, ¶4; Jane Doe Decl., ¶6).

After L&N, Doe's care plan at the Dublin School specifically includes a restriction on all eating, in her classrooms only. (Jane Doe, at 246; Ex. 19). Like the L&N teachers who complied, it is just a matter of telling students who err to *stop*. (Jane Doe, at 246). At Dublin, doe makes mostly A's and B's. And recently, she was one of two students to win the school's "2024 Griffin Award" recognizing incredible growth.[20] (Jane Doe Decl, ¶19)(Grades are attached)

[20] The Dublin School's Griffin award:

> recognizes the incredible growth of a student as a learner, and their commitment to the learning process. This individual is curious and eager to strengthen their skills in the pursuit of meaningful and successful learning. They push themselves harder than expectations alone would dictate in order to meet the personal goals that they have set for themselves. They persevere in the face of challenge by viewing obstacles as opportunities for reflection, learning and initiative. This student goes above and beyond to understand themselves as a learner and to engage with their learning process.

Dublin School, "2022/23 Report of Giving" available at https://resources.finalsite.net/images/v1709734835/dublinschoolorg/jtpv4bdwjtx1tse0dij/DUB_AR23_10_02_23-FINALFORWEB.pdf

In sum, just like the L&N teachers who successfully restricted eating and gum, teachers at ESK and Dublin succeeded too. These are facts from which the jury can infer the reasonableness of the accommodation (and gross misjudgment in its denial).

> Q.C.'s experience in private school supports that she could have succeeded at Whitaker with reasonable accommodations but was not given that chance. Further, as discussed in Section III.A., *supra*, Plaintiffs' evidence supports that Defendant explicitly segregated Q.C. and other students based on their Down syndrome rather than their aptitude. This evidence, taken in the light most favorable to Plaintiffs, demonstrates more than mere negligence and is sufficient to support a finding of bad faith or gross misjudgment.

Q.C. v. Winston-Salem/Forsyth Cty. Sch. Bd. of Educ., 2022 U.S. Dist. LEXIS 94399, *32 (M.D. N.C. 2022).

4.2.6 Categorical Bans Violate the ADA

In addition to this 100% guarantee belief, KCBE argues a "3rd Party Rights" reason for not implementing the modification in the Section 504 Plan. This is addressed further under "fundamental alteration," where it belongs, but these bans also preclude an *individualized* assessment. They are categorical. The comparison between Jane Doe and Mary Doe—identical condition, identical needs, identical 504 Coordinator, and identical rejection proves categorical thinking. (See KM Decl, ¶2-4; MG Dec., ¶2-4, with audio/transcript).

Under the ADA, entities must make an *individual* assessment of a disabled person's abilities. *Marble v. Tennessee*, 767 Fed. Appx. 647, 652 (6th Cir. 2019); *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001) (citations omitted). A blanket refusal "eviscerates the individualized attention that the Supreme Court has deemed 'essential' in each disability claim." *Cehrs v. Northeast Ohio Alzheimer's Research*, 155 F.3d 775, 782 (6th Cir. 1998) (*citing School Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

Defendant cannot be allowed to deny Doe the opportunity to individually assess her requested specific modification, on the one hand, and, on the other, to rely on pure speculation in arguing that the accommodation could not have been provided "effectively."

4.3 KCBE Failed to Offer An *Effective* Alternative

Defendant seems to believe that if a plaintiff's accommodation is somehow *un*reasonable, or it can show a fundamental alteration, the case ends. That misunderstands the law—fundamentally so. A school district may not sit on its hands, saying "no" to the student's suggested accommodation without offering an effective alternative. When a public entity determines that a modification would work a fundamental alteration or undue burden, it must "take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services.…" 28 C.F.R. § 35.150(a)(3). That did not occur. (See, e.g., Jane Doe Decl, ¶11, 13, 17). Leaving Doe in pain is hardly such an action.

4.3.1. The 504 Plan Omits Eating and Gum-Chewing Limitations—the Key Need

The 504 Student Support Service Plan was put in effect September 3, 2021 right after a 504 meeting of that date. (Walsh at 70-71, 72; Ex. 11). It clearly does not include a ban on chewing gum or eating food. (Walsh at 72; Ex. 11).

The 504 Plan includes *other* accommodations (which KCBE emphasizes). Some of these were pulled from a drop-down software menu. (Odom, pp. 50-53). Some helped with Jane Doe's *migraines*. But none addressed the key need of the gum-chewing and food consumption in academic classrooms, the key need. (See Ex. 11; Jane Doe Decl, ¶11; Storch Decl. ¶12).

According to Principal Allen: "L&N Stem Academy has opted to leave decisions regarding food in the classroom to individual teachers." (D.E. 89-1; Second Allen Decl., ¶17). *That* shows the requested accommodation is feasible. But such an admission is nowhere in the 504 Plan

itself. Rather, Allen's assistant principal, Walsh, on August 12, 2021, informed the teachers the opposite: "We will still *allow* food and drink…." (Ex. 53, Walsh email)(emphasis added).

As a result, Ms. Hall, the history teacher, among others, continually allowed consumption of food in Doe's classes and refused to address it. (Jane Doe, at 47). KCBE offers no declaration from Ms. Hall. With her being the "worst," and making "no effort," Doe was missing half of her instructional time by February of 2022. (Jane Doe, at 53).

To be sure, KCBE and Hall did not *have* to implement Doe's "preferred choice" if alternatives existed. But KCBE, through those other teachers, would have to offer an alternative that is effective for the unique need—one that also restricts the pain-producing sounds of gum-chewing and food-eating. *Hankins v. The Gap,* 84 F.3d 797, 800-01 (6th Cir. 1996).

But as the omissions from the 504 Plan and Jane Doe's testimony show, it did not happen. Giving breaks and requiring hearing aids are *not* effective. (Storch Decl., ¶12). When one reduces sound altogether, through maskers, it restricts classroom learning: the student cannot hear the teacher, work in groups, use the computer audio, etc. (*Id*.) Additionally, misophonia is triggered not just by *hearing* someone chewing, but *seeing* someone chewing too. (*Id*.) Breaks are insufficient because the exposures are not stopped—the exposures create a compounding effect. (*Id*.). Thus, Doe was left to endure the pain or flee.

4.3.2 Being Forced to Endure Pain or Flee Are Not Effective Alternatives

When Jane Doe is triggered she not only experiences dysregulation of her autonomic nervous system (ANS), but she also experiences "physical pain." (Jane Doe, at 37). She has a physiological response from misophonia whereby her muscles tense, she sweats, and she must escape to relieve the reaction. (Jane Doe, at 37; Storch, at ¶8). This is something she cannot control, an involuntary autonomic response. (Jane Doe, at 38). Dr. Storch explains that, emotionally, this

includes distress, anxiety, disgust, fear and/or anger. (Storch, at ¶8). And behaviorally, this involves fleeing to escape and, if the person cannot escape, like Jane Doe, she will suffer "extreme distress." (*Id*.) She did this until she could not longer take it—exhausted, emotionally spent, crying every day, missing class. (Jane Doe Decl. ¶13).

The toll from the consistent lack of accommodation from Hall, and others, on Doe has been tremendous. Doe testified about physical and mental suffering caused by "what happened at L&N." (Doe, pp. 266-267). These type of reactions are to be expected where Jane Doe experiences ongoing sounds of eating and chewing gum. (Storch Decl, ¶15). Still today, she experiences flashbacks, fear of students, hypervigilance, loss of confidence, fearfulness, stress, gastritis and vomiting blood *after* L&N. (Doe, 267-270).

The Sixth Circuit is very clear that defendants forcing an individual to endure pain or injury instead of creating an alternative modification will overcome summary judgment and support a jury verdict. This is particularly well-developed in the ADA-Title I employment cases.

In *EEOC v. Dolgencorp, LLC*,899 F.3d 428 (6th Cir.2018), the cashier, Ms. Atkins, needed access to glucose for her diabetes. Dollar General fired Atkins when she paid for and consumed a $1.69 bottle of orange juice at the store. *Id*. at 432. A Knoxville jury found for Atkins and Dollar General appealed.

Dollar General said that employees "should not chew gum or eat/drink" while at work. *Id*. at 434. Chief Judge Sutton, writing for the Court, explained how Dollar General could have resolved the case simply by offering alternatives if it did not like Atkins' proposal to eat food—like consuming glucose pills at the register. *Id*. "But that's not what it did. The store manager categorically denied Atkins' request, failed to explore any alternatives, and never relayed the matter to a

superior. That was Dollar General's problem, not Atkins'—or at least a reasonable jury could so conclude." *Id.*

The same principle was applied in *Gleed v. AT&T Mobility Services*, 613 Fed. Appx. 535 (6th Cir.2015). The employee requested a chair to prevent circulatory problems in his legs and feet. *Id*. at 537. The employer disagreed with the proposed accommodation, but suggested the employee undergo "the pain or risk to his health," rather than find an alternative. *Id*. That was no accommodation; the employee was entitled to work like the other employees, "without great pain and a heightened risk of infection." *Id*.

In *Talley v. Family Dollar Stores of Ohio, Inc.*, 542 F.3d 1099 (6th Cir. 2008), Ms. Talley proposed a stool to avoid pain, but other employees said it was "unfair" for her to sit. *Id*. at 1108. *Talley* overcame summary judgment by maintaining that "she was not offered an accommodation that would have allowed her to work her shift without pain." *Id*. The lack of an alternative forced Ms. Talley out of work. *Id*. at 1109. "[W]hen an employee makes a repeated request for an accommodation and that request is both denied and no other reasonable alternative is offered, a jury may conclude that the employee's resignation was both intended and foreseeable." *Id*.[21]

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[21] This is not a novel theory. Forced pain is rather obviously *not* an alternative accommodation. See also, *Hill v. Assocs. for Renewal in Educ., Inc.*, No. 12-0823 (JDB), 2014 WL 12538946 (D.D.C. 2018) ("[The employer's assertion] that [plaintiff] did not need the accommodation of a classroom aide because he could perform the essential functions of his job without accommodation, but not without pain . . . is unavailing. A reasonable jury could conclude that forcing [plaintiff] to work with pain when that pain could be alleviated by his requested accommodation violates the ADA."); *EEOC v. Charter Commc'ns*, LLC, 75 F.4th 729, 739 (7th Cir. 2023)(ADA "should not be read as holding that the ADA imposes no duty to offer reasonable accommodations that affect safety or pain that an employee may be motivated to overcome"); *Burnett v. Ocean Props., Ltd.*, 987 F.3d 57, 69 (1st Cir. 2021) (rejecting argument that paraplegic employee's ability to enter workplace made him ineligible for accommodation, given that he could do so only at "risk of bodily injury"); *Bell*, 972 F.3d at 24; *Schroeder v. AT&T Mobility Serus*., LLC, 568 F. Supp. 3d 889, 893 (M.D. Tenn. 2021) (fact that plaintiff was "physically capable of performing his job absent accommodation" did not render service-dog request "automatically unreasonable"); *Olian v. Board of Educ. of City of Chicago*, 631 F.Supp.2d 953, 963 (N.D. Ill. 2009) ("... she produced ample evidence that her disability worsened as a result of the Board's failure to reasonably accommodate her. She testified to increased pain in her throat..."); *Tobin v. Liberty Mut. Ins. Co*., 2007 WL 967860 (D. Mass. 2007) (although employer argued that plaintiff's bipolar disorder and other life problems, and not its failure to accommodate, was the cause of the emotional distress, the jury disagreed; the tortfeasor "takes his victim as he finds him," and an employer can be liable for aggravating a pre-existing emotional condition); *Melluzzo v. Public Advocate*, LLC, 2006 WL 5159197 (M.D. Fla. May 31, 2006) (claims included pain from being

4.4 FUNDAMENTAL ALTERATION

Turning now to the "cart," KCBE's "first" argument is fundamental alteration, *an affirmative defense*. A "demanding standard," it can succeed only where "no rational jury could have found to the contrary." *Cline v. Dart Transit Co.*, 2023 U.S. App. LEXIS 9521, *11 (6th Cir. 20203). That is clearly not met here.

4.4.1 Affirmative Defenses Must be Pled

"'Fundamental alteration' is an affirmative defense under the ADA providing that governmental entities need not accommodate disabled individuals if doing so 'would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens.'" *Hindel v. Husted*, 875 F.3d 344, 348 (6th Cir. 2017)(citing 28 C.F.R. § 35.164)).

Both the undue burden and the fundamental alteration arguments are affirmative defenses provided by the ADA. *Gorman v. Bartch*, 152 F.3d 907, 912 (8th Cir. 1998) (citing 28 C.F.R. § 35.150(a)(3)). Failure to raise an affirmative defense before the district court constitutes waiver of that defense. *Childress v. Fox Assocs*., LLC, 932 F.3d 1165, 1171 (6th Cir. 2019).

KCBE did not plead this affirmative defense, nor did it argue it in any Rule 12(b)(6) motion, instead raising it the first time at summary judgment after discovery has closed. (See D.E. 65, Answer to Third Am. Complaint).

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forced to stand); *Worthington v. City of New Haven*, 994 F. Supp.111, 114 (D. Conn. 1997) (plaintiff may seek damages for becoming totally disabled due to employer's refusal to accommodate her disability while she was its employee).

4.4.2 There is No Fundamental Alteration

Much like reasonableness, facts prevent summary judgment on fundamental alteration. Again, the principal, multiple teachers, and two students, Jane Doe and AP, say it can, and often is, done. (Jane Doe, at 42, 61; KM, at 125; Allen, at 16-17, 20, 63-64, 66-67; Ex. 53; AP, at ¶6; D.E. 89-1; Second Allen Decl., ¶17; D.E. 89-1, Tiller, ¶7). And for her part, Odom, the 504 Coordinator, admits failed to realize Doe was not seeking campus-wide accommodations. (Odom, p. 20). Of course, Odom responded the same to a non-campus school, Farragut Middle. (MG Decl, ¶¶4-5 with transcript; KM Dec., ¶4). In Jane Doe's S-Team meeting, Odom said: "limiting the rights to have snacks is not an option," (KM Decl.,¶3) and in Mary Doe's S-Team meeting, Odom said: "we will not put a ban on snacks and gum and food." (MG Decl., ¶4).

Fundamental alteration makes little sense in this case considering L&N's own principal admits a *lack* of fundamental alteration by leaving the choice up to teachers. (Allen, at 16-17, 20, 63-64; D.E. 89-1; Second Allen Decl., ¶17)("L&N Stem Academy has opted to leave decisions regarding food in the classroom to individual teachers."). Allen even says the banning of chewing gum is a "small concession." (Allen, at 63-64). And, contrary to Walsh (see Ex. 53), he *encouraged* the classroom restrictions on both the food and gum. (Allen, pp. 16-17, 20, 63-64). Administrators do not highly encourage fundamental alterations to one's own school. It makes no sense: KCBE has created an internecine struggle, its legal defense facing off against its own witnesses.

Getting down to brass tacks, Allen thinks that a teacher going to the student eating the food and correcting them is just too difficult. (Allen depo, pp. 42-43). But a *challenge* is not a fundamental alteration. KCBE should know this. *Knox Cnty. v. M.Q.*, 62 F.4th 978, 994 (6th Cir. 2023)("KCS's argument sounds a lot like a claim of impracticality.") And once the rule is actually

implemented, this should be a rare occurrence. Certainly, KCBE has not established its unpled defense as a matter of law.

4.4.3 The "Third-Party Rights" Argument

In what would be considered a fundamental alteration type of argument, KCBE renews its "third-party-rights" argument. (See D.E. 88, Memorandum, p. 26, fn 16). Although this argument has not survived prior rulings in the District and Sixth Circuit, Defendant invokes here again. *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, *4 (6th Cir. 2021).

Defendant's infatuation with the phrase "third-party rights" should have ended on September 24, 2021, when District Judge Greer entered an Order in the Knox County masking case. *S.B. v. Lee*, 566 F. Supp. 3d 835 (E.D. TN 2021). Judge Greer recognized the ADA is not aimed at perfection—"a reasonable accommodation 'need not be 'perfect' or the one 'most strongly preferred' by the [] plaintiff,'" but "effective enough to 'adequately address' a disabled individual's 'unique needs.'" *Id*. at 856 (citations omitted). Judge Greer rejected the argument that wearing masks interferes with the "practices of third parties" because fundamental alteration involves KCBE—not third parties. *Id*. at 863.

The timing of Judge Greer's September 24, 2021 decision is significant. Less than a month later, October 22, 2021, Doe's father wrote to Walsh and again requested the necessary accommodation. (Ex. 54). That same day, Walsh forwarded KM's letter to Dr. Odom. (Walsh at 83; Ex. 70). Another month later, November 30, 2021, not hearing anything, KM followed up to Dr. Odom, stating: "the school's refusal of this accommodation appears shortsighted and, in light of the mask-mandate ruling, probably illegal." (Ex. 73). In response, Odom said the matter had been

forwarded to Ms. Amanda Morse at KCBE's Law Department. (Ex. 73; Walsh, at p. 88).[22] The Law Department did not respond.

As it did with Judge Greer, KCBE cites to an eclectic patchwork of cases. It includes several Title VII cases, ignoring the differences between a high school environment and an employment context, including *US Airways, Inc. v. Barnett*, 535 U.S. 391, 404 (2002) (holding that a reasonable accommodation that violates an established seniority system is not reasonable); and *Henderson v. Delta Airlines, Inc.*, No. 19-10441, 2021 U.S. Dist. LEXIS 24393, at *19 (E.D. Mich. Feb. 9, 2021) (discussing that a reasonable accommodation cannot impact the work schedule or amount of work given to another employee), as if asking Doe's fellow students not to eat or chew gum for an hour or two of their day was somehow equivalent to upsetting a seniority system or denying work hours to an employee. KCBE then cites a housing decision where an individual asked to be allowed to yell and slam doors at an apartment building due to a mental condition. *Groner v. Golden Gate Gardens Apts.*, 250 F.3d 1039, 1041 (6th Cir. 2001).

Not only did Judge Greer reject that argument, but so too did the Sixth Circuit, including KCBE's choice line that "[a] third party's rights do not have to be sacrificed on the altar of reasonable accommodation." *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, *4 (6th Cir. 2021)("We rejected a similar argument in *G.S.*, explaining that the subject schools had previously implemented a mask mandate and highlighting the absence of evidence that these measures were "impractical or impossible for schools to enforce.")

As Judge Greer said, a hardship defense belongs *to the school*, not other students. And it falls under its own weight: some L&N teachers did it and, with the exception of Walsh's email about food, administration was supposed to encourage it.

[22] Odom said "it was addressed to her." (Ex. 73; Walsh at 88). That was *another* error by Odom, as it was not addressed to Ms. Morse. (Ex. 54; Walsh at 88).

5. DAMAGES FROM DISCRIMINATION

Doe will seek damages for the physical harm to her body. And due to the denial of accommodation, and being forced out of school, she must seek the cost of her private education. Where a school denies an accommodation and fails to offer an *effective* alternative, after *Perez v .Sturgis Pub. Sch.*, 598 U.S. 142, 147-48 (2023), the student may seek damages. *Doe v. Franklin Square Union Free Sch. Dist.*, 2024 U.S. App. LEXIS 10045, *33 (2d Cir. 2024); *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1207 (9th Cir. 2016)(addressing damages from failure to reasonably accommodate).[23]

Jane Doe's mother, A.M., recognized Doe's struggle to remain in Knoxville amidst the pain of non-accommodation and the accompanying social media harassment. A.M. was a first responder to Al Qaeda's terrorist attack on the World Trade Center on September 11, 2001. (A.M. at 51).

The South Tower fell on her. (A.M. at 52). Buried but saved, she left New York City to escape PTSD symptoms (becoming a professor at University of Tennessee-Knoxville). (A.M. at 52). So when Doe was having symptoms of PTSD from even driving by L&N Stem, the family decided she must get away from L&N. (A.M. at 52). Thus, this is an additional aspect of damages.[24]

Even if Jane Doe could have remained in Knoxville, Dr. Odom cements that she would have applied her "100% guarantee" rule to any school to defeat the necessary accommodation—

[23] KCBE recognizes that suspensions, denial of opportunities to join sports teams, physical injuries, and disciplinary actions all count as adverse actions. (D.E. 88, Memorandum, p. 47) (*citing Henley v. Tullahoma City Sch. Sys.*, 84 F.App'x 534, 540 (6th Cir. 2003)). Thus, being forced out of school to escape the pain is clearly adverse too.

[24] That decision came only after being unsuccessful in obtaining immediate injunctive relief in Court. KCBE argued that a rule against gum chewing and food consumption was "special education" under the language in the IDEA, getting the case dismissed. That was reversed, but far too late for Jane Doe to have continued suffering without an effective alternative. *Doe v. Knox Cnty. Bd. of Educ.*, 56 F.4th 1076, 1077 (6th Cir. 2023). She had to obtain private school, and seeks those damages as consequence of the failure to accommodate and the discrimination.

not just L&N Stem. It happened to Mary Doe in the same manner, in a more traditional school. (See M.G. Declaration ¶¶4, 5 and Audio Recording).

5.1 Whether Deliberate Indifference Applies to Receive Damages for Failures to Accommodate

KCBE argues that "gross misjudgment, bad faith, or deliberate indifference" is required *for damages.* But as shown above, there is no heightened intent for reasonable accommodation and the damages from its denial. See also, *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (Kennedy, J., concurring)("Prejudice, we are beginning to understand, rises not from malice or hostile animus alone. It may result as well from insensitivity caused by simple want of careful, rational reflection or from some instinctive mechanism to guard against people who appear to be different in some respects from ourselves.")

In fact, as KCBE notes, it is hardly clear that any heightened standard exists at all. That was called into question by *Knox Cnty. v. M.Q.*, 62 F.4th 978, 1002 (6th Cir. 2023). (D.E. 88, Memorandum, p. 27). No heightened bar for damages from failure to accommodate would survive an analysis of the texts of either 504 or the ADA Title II as neither contains any such requirement. But it would be easily met, as shown below.

5.2 Facts From Which to Infer Deliberate Indifference

Even if a deliberate indifference standard did apply, that is different than "malice" and it certainly exists here. "Deliberate indifference" does not require *malice.* Plaintiff agrees with KCBE's statement about deliberate indifference: "a party acts with deliberate indifference if it disregards a 'known or obvious consequence' of its actions." (D.E. 88, Memorandum, p. 28)(citing *Bd of Cty. Comm'rs of Bryan Cty., Okl. v. Brown,* 520 U.S. 397, 410-11 (1997).

This breaks down to two elements: (1) knowledge that harm from the disability is substantially likely; and (2) a failure to act upon that likelihood. *Douglas v. Muzzin,* 2022 U.S. App.

LEXIS 21529, 2022 WL 3088240, at *8 (6th Cir. Aug. 3, 2022); *R.K. ex rel. J.K. v. Bd. of Educ. of Scott Cnty., Ky.*, 637 F. App'x 922, 925 (6th Cir. 2016) (a party acts with deliberate indifference if it disregards a "known or obvious consequence" of its actions, namely that its actions will violate the plaintiff's federally protected rights).

The *Douglas* case nicely illustrates deliberate indifference to a request for reasonable accommodation. The inmate, Douglas, asked for orthopedic shoes for his disability, but the defendant, Muzzin, refused. *Douglas,* 2022 U.S. App. at *26. *That was all it took.* "These facts support the conclusion that Muzzin was deliberately indifferent towards Douglas's disability." *Id*. The defendant "had knowledge that a harm to a federally protected right was substantially likely, and failed to act upon that likelihood by not honoring the requested accommodation." *Id*.

5.2.1 Multiple Students Denied Through the 100% Guarantee Rule

Walsh told Doe's teachers *not* to ban food in Jane Doe's classrooms, while Odom, the 504 Coordinator, created a "100% guarantee" barrier. (Ex. 53; Walsh at 38; Odom, p. 17). Then KCBE faculty and administrators watched as Doe was repeatedly–daily–forced out of classrooms, her health and grades deteriorating. Odom point-blank said that "limiting the right to have snacks is not an option." (KM Decl, ¶3).

In her deposition, Odom says a similar guarantee-rule for Mary Doe was never discussed because Mary Doe's parent "then decided not to continue the meeting." [25] (Odom, at 33-34). She testified: "There was not an opportunity for us to discuss that at all. Parents got up and ended the meeting." (Odom, at 34). And that even discussing the restriction would be prejudging (Odom, at 36).

[25] The meeting was a "Students Supports" meeting, before the formal 504 Team meeting. (Odom, at 32).

Mary Doe's mother retained the recording of the S-Team meeting. (M.G. Decl, with recording). Like with Jane Doe, Odom creates the very same "100% guarantee" standard to intentionally deny food and gum restrictions for a student with misophonia. "We cannot enforce a ban on gum chewing and snacks in the classroom because a child could sneak anything in. We can never enforce that." (MG Decl, ¶4). She said: "We will not put a ban on snacks and gum and food." (*Id*.). As can be heard in the recording, this is just like Jane Doe's situation of Odom using her 100% guarantee rule to rebuff the accommodation—thus, intentionality is easily met.

These facts also show Odom's post hoc argument that factors unique to L&N led her to deny Jane Doe's accommodation was clearly a ruse. This is an ongoing "culture" problem in KCS's Central Office, of administrators using their authority not to support or guide faculty in educating disabled students. That is buttressed by the findings of a specially-created Task Force.

5.2.2 Superintendent's Task Force Finds Culture of Resistance Toward Disabilities

In 2023, superintendent Jon Rysewyk, newly hired in the position, created a "Special Education Task Force." (Rysewyk, p. 26). The Task Force was a multi-lateral group of persons that included KCS special education teachers, a KCS "teacher of the year," and parents of children with special needs within KCS. (*Id*. at pp. 31-32). The Task Force created recommendations and submitted them to Rysewyk. (Ex. 45, Rysewyk, p. 27). *He* requested it.

The Task Force findings and recommendations relative to students with special needs were blistering. The very first one involves the "culture of resistance within KCS Special Education Department Central Office." (Ex. 45, Rysewyk, p. 30). The Task Force recommended developing a "Code of Conduct" to help with interactions with disabled children and their families. (Ex. 45). Rysewyk acknowledges this has not been done. (*Id*. at 32, 34). Nor did KCBE seek help from an inclusion expert, another recommendation. (*Id*. at pp. 39-40).

Why? Because Rysewyk, and thus KCBE, resisted its own Task Force's findings of a culture of resistance. (*Id*. at p. 39). But as the Jane Doe and Mary Doe experiences illustrate, that resistance, emanating from the Central Office, has played out *twice* again—both students experienced illegal standards from the 504 Coordinator about 100% guarantees and "rights" of third parties to chew gum. And instead of adhering to the reasonableness of the law, KCBE has watched Jane Doe suffer, without an *effective* alternative, forced out of the school, up and back to the Sixth Circuit, her parents shouldering enormous expenses in the process. These facts easily raises issues about deliberate indifference to overcome summary judgment.

6. INTENTIONAL DISABILITY DISCRIMINATION

Forcing Doe from the school is not *just* a failure to accommodate, but intentional discrimination too because she was "subjected to discrimination." See, e.g., 28 C.F.R. §35.130(a); §35.130(b)(3)(i). Under Title II and Section 504, a plaintiff must establish "(1) he has a qualifying disability, (2) he is otherwise qualified for a program, and (3) he was excluded from participation in, denied the benefits of, or subjected to discrimination under a program because of his disability. *Finley v. Huss*, 2024 U.S. App. LEXIS 12289, *59 (6th Cir. 2024).

Direct or circumstantial evidence may be used. *Bennett v. Hurley Med. Ctr.*, 86 F.4th 314, 325 (6th Cir. 2023). Here, direct evidence exists: Doe was forced out because KCBE "relied upon the plaintiff's disability in making its…decision." *Monette v. Elec. Data Sys. Corp.*, 90 F.3d 1173, 1178 (6th Cir. 1996). Walsh instructed teachers *not* to make the food accommodation (Ex. 58) while Odom created a 100% rule *based upon* the nature of the disability and accommodation. This caused suffering and the exclusion of Doe from the classroom and, eventually, the school.

Though unnecessary, the result would be the same under the indirect method of *McDonnell Douglas*:

> To establish a prima facie case of intentional discrimination under Title II of the ADA, a plaintiff must show that: (1) she has a disability; (2) she is otherwise qualified; and (3) she was being excluded from participation in, denied the benefits of, or subjected to discrimination under the program because of her disability.

Bennett v. Hurley Med. Ctr., 86 F.4th 314, 325 (6th Cir. 2024); *White v. SKF United States Inc*., 2023 US Dist LEXIS 90875 (E.D. TN 2023)(Crytzer, J.)(denying summary judgment on ADA discrimination claim). If shown, the defendant must offer a "legitimate nondiscrimination reason for its actions," and, if it does, the burden returns to the plaintiff to show the reason is a "pretext for unlawful discrimination." *Id*.

6.1 Prima Facie Case

The prima facie case is not intended to be onerous. *George v. Youngstown State Univ.*, 966 F.3d 446, 460 (6th Cir. 2020). First, KCBE does not argue whether Jane Doe's misophonia is a disability. Second, she is an "otherwise qualified" public school student accepted to the magnet school, L&N Stem Academy. Third, she alleges that, because of her unaccommodated misophonia-needs of food and gum restrictions, she could not participate in classroom instruction like her peers. (Jane Doe, pp. 96-97, 142; 333; Storch Decl., ¶¶10-11). Without the accommodation, she experiences physical pain. (Jane Doe, p. 37; Storch Decl. ¶15). Fourth, as with direct evidence, KCBE excluded her by instructing teachers to deny the food accommodation (Walsh) and then deny both on grounds there cannot be a 100% fool-proof guarantee (Odom).

Although KCBE appears to agree with Plaintiff that only simple intent is required to prove intentional discrimination, these events would create material facts indicating "animus" *toward her disability*. Even stereotyping and negative beliefs can be sufficient proof of "animus." *Get Back Up, Inc. v. City of Detroit*, 725 Fed. Appx. 389, 392 (6th Cir. 2018). "Animus" is directed at the disability itself. It is not directed at the individual, nor should it be confused with "ill will." *Rodriguez v. ConAgra Grocery Prods. Co.*, 436 F.3d 468, 480 (5th Cir. 2006).

6.2 Non-Discriminatory Reason and Pretext

KCBE must present a *legitimate* non-discriminatory reason. As this Court found in *White v. SKF United States, Inc.*, a plaintiff can challenge the legitimacy of the non-discriminatory reason being offered. *White v. SKF United States Inc.*, 2023 U.S. Dist. LEXIS 90875, *34 (E.D. TN 2023). When facts are raised, summary judgment must be denied at this stage. *Id*.

For its alleged non-discriminatory reason, KCBE cites Dr. Odom's deposition. (D.E. 88, Memorandum, p. 15)(citing SUMF ¶54; Odom, pp. 17, 19, 22, 24). The SUMF 54 says the 504 Team determined the accommodation was not "necessary." But the citations to Odom's deposition show her to instead be discussing *enforceability*. (See Odom, p. 17)("but it would be unenforceable for us to ask every teacher to ensure …."). This unenforceability, Odom goes on, was due to "background" factors of school layout, culture/autonomy, and open campus. (*Id*. at pp. 19, 22). Odom errantly contends Doe was requesting a campus-wide accommodation. (*Id*. at 20).[26]

In any event, Doe has demonstrated necessity. The accommodation is "necessary" for her misophonia because she has serious reactions to specific sounds ("triggers"). (Storch Decl, ¶8). This has an emotional and behavioral component: the emotional reaction often includes distress, anxiety, disgust, fear and/or anger; and the behavioral response often involves fleeing to escape the sounds. (*Id*.) When Doe cannot escape the trigger, she suffers extreme distress. (Jane Doe, at 37; Storch, at ¶8; AP Decl, ¶6). The sound of chewing gum is the "worst" for her (Jane Doe, pp. 96, 133, 142). And when Doe cannot escape the trigger, she suffers. (Jane Doe, at 37; Storch, at ¶8; AP Decl, ¶6).

[26] By contrast, the Statement of Undisputed Fact focuses on *necessity*: "Jane Doe's requested accommodation was not *necessary* for her to access L&N Stem's programming…." (SUM ¶54). The Court has not ruled, at this time, whether the Statement of Undisputed Facts is to be stricken.

What Odom is really saying is that the nature of L&N makes it impossible to 100% deliver Doe's accommodation. But she makes this claim on the mistaken idea that Jane Doe had requested accommodations far beyond merely restricting food and gum in her classes. At any rate, that's an affirmative defense because it goes to the "nature of the service, program or activity." 28 C.F.R. §35.130(b)(7)(i). KCBE may not conflate its own burden to prove fundamental alteration into Plaintiff's burden. *Johnson v. Callanen*, 2023 U.S. Dist. LEXIS 115633, *20, fn. 14 (W.D. Tex. 2023). Accordingly, Plaintiff incorporates all of the arguments about fundamental alteration (see §3.4, *supra*).

Doe also produces testimony from another student showing the reasonableness of the accommodation within L&N. AP is a current student at L&N who also attended while Doe was there. AP explains how L&N has a kitchen, with students eating breakfast and lunch at cafeteria-long tables in an area known as the "Commons." (AP Decl. ¶2). They also spread out to other areas. (*Id*. at ¶3). This includes eating outside, where there are still *more* tables and chairs. (*Id*.) Jane Doe simply ate outside, not in the Commons, where the sounds would not bother her. (*Id*.)

Nor do extracurricular hours ("Genius Hours") cause a problem. Lunch is eaten during the first portion of the two sessions, even if an extracurricular course consists of two sessions. (*Id*. at ¶4). This is just as Jane Doe said. (Jane Doe, at 41). Of course, students can eat on their way to school, in the common areas, in hallways, or outside of Doe's academic classrooms too. KCBE never bothered to determine whether hungry long-distance bus-riders were sitting in Jane Doe's classes (Allen depo, p. 40), and KCBE sets no rules about eating on buses anyway. (*Id*. at 40).

The testimony of AP and Doe permit the jury to reject Principal Allen's declarations as being exaggerated in degree. In his first declaration, D.E. 44-1, Allen claimed the accommodation would cause "the entire schedule of the school … to be altered to include time for an additional

five lunch periods," bringing the total to seven. (D.E. 44-1, Allen Decl. ¶ 19). And in his second declaration, he takes a Report out of context to state L&N "would have to completely rearrange its entire master schedule…" (D.E. 89-1, Allen Second Decl., ¶25).

As Plaintiff noted earlier, Allen wishes to encourage behavior that, he says, works a fundamental alteration to the entire school. As a matter of logic, he cannot have it both ways. If Allen encouraged teachers to implement the classroom restrictions on food and gum, as he claims, then he cannot simultaneously believe such restrictions will fundamentally alter L&N's program. To follow his exaggeration, the "entire master schedule" would be altered through his own encouragement.

Exaggerations not only create factual disputes, but they may be indicia of ulterior motive—animus and pretext. Distorting the accommodation to encompass the entire school, not just *her* classrooms, is an example. (Odom, pp. 17, 20). By inflating the request, KCBE creates straw-man difficulties. But just as in *S.B.* where, "in seeking a mask mandate, Plaintiffs [were] not requesting a virus-*free* environment in their schools," Jane Doe was not requesting a noxious-noise-*free* environment. *S.B. v. Lee*, 566 F. Supp. 3d 835, 863 (E.D. Tenn. 2021).

Last, timing is suspicious too. It was not until April of 2022—*some nine months* after the request was made at the beginning of the 2021-2022 school year—that Knox County came forth with its enforceability argument. It was "[d]uring the injunction briefing [that] Knox County explained its rationale for refusing to ban eating and chewing in Doe's classrooms." *Doe v. Knox Cnty. Bd. of Educ.*, 56 F.4th 1076, 1078 (6th Cir. 2023). The principal, Mr. Allen, does not recall *ever* talking to Doe or her parents about unreasonableness or impossibility. (Allen at 48-50). Such excessive delays with new reasons may cause a jury to conclude the defendant is "merely papering

the file." *Sjöstrand v. Ohio State Univ.*, 750 F.3d 596, 600 (6th Cir. 2014). And papering the file would be indicia of malice.

7. DISABILITY HARASSMENT

Given the degree of suffering, and being forced out of school, all caused by the Board, school staff, *and* peers, Doe also brings claims of disability harassment.

7.1 Severe and Pervasive

Harassment is actionable when it is "so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school." *Doe v. Loudon Cnty. Bd. of Educ*., 2024 U.S. Dist. LEXIS 68645, *11 (E.D. TN 2024)(citing *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 258 (6th Cir. 2000)).

In *Doe v. Loudon Cnty,* the sex-based harassment was sufficiently *severe* because of "both physical and verbal harassment" concerning the student's body. *Id*. The sex-based harassment was sufficiently *pervasive* because it lasted from August to December, "months on end." *Id*. at *14. This was also objectively offensive to a reasonable middle-school student. *Id*. at *14-15.

Jane Doe's ongoing mental trauma of "fight or flight," on a daily basis for over six months, is sufficient too. The very nature of her disability, if not accommodate, will cause severe distress. (Storch, at ¶8; Jane Doe, at 37; AP Decl., ¶6). Physical events count toward severity, *Doe*, at *13, while pervasiveness includes ongoing conduct "for months on end." *Id*. Yet KCBE left her to suffer, offering excuse after excuse and litigating this case voraciously.

7.2 The "Before" Claim Defense is Waived

As KCBE states, the Sixth Circuit models disability-based harassment on the analytical framework of Title IX, beginning with *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999). *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 453 (6th Cir. 2008). Under *Davis,* claims have two facets:

"before claims," regarding the school's conduct before the student victims were harassed, and "after" claims, concerning the school's conduct after the student victims were harassed. *Doe v. Loudon Cnty. Bd. of Educ.*, 2024 U.S. Dist. LEXIS 68645, *10 (E.D. TN 2024)(citing *S.C. v. Metro. Gov't of Nashville & Davidson Cnty.*, 86 F.4th 707, 715 (6th Cir. 2023)).

The "before" claim focuses on previous actions creating "vulnerability that leads to further misconduct." *Doe*, at *18. Where the school district fails to move for summary judgment on the "before" claim, addressing it only in reply, summary judgment is waived. *Doe v. Loudon*, at *20.

Concerning the before claim, Doe clearly alleged that "KCBE's ire has been especially directed against accommodations placing obligations on others, like the proposed eating and gum ban and, *before that*, masking requirements." (D.E. 61, Th. Am. Complaint, ¶58)(emphasis added). She alleges that KCBE begrudges an accommodation that affects a right of the majority. *Id.*

Prior to the present case, countless students with disabilities needed assistance from others to safely access the public school. KCBE refused on principle—arguing it was a "third party" accommodation. *S.B. v. Lee*, 566 F. Supp. 3d 835, 863 (E.D. TN 2021). Judge Greer overruled that stance, *id.*, but KCBE persisted and took it to the Court of Appeals. At the Sixth Circuit, it argued its blanket stance: "A reasonable accommodation is inherently *un*reasonable when it impedes the rights of others." (See *M.B. v. KCBE*, No. 21-6007, R. 14, KCBE Motion for Stay, p. 13).

With echoes of this case, KCBE said that enforcing the accommodation through discipline of other students is a "fundamental alteration." (*Id.*). On December 20, 2021, the Sixth Circuit rejected its arguments. *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, *4 (6th Cir. 2021).

KCBE has walked the argument—same words, same rejected cases—right into the present case. Early on, KCBE used the third-party argument to deny the accommodation. (KM, at 100). Alarmingly, on March 9, 2022, KCBE's Law Director, Mr. Buuck, firmly and inexplicably stated

in the mask case, as KCBE's highest ranking legal official: "**We are dead set against <u>any judge</u> telling us what we must do.**" (Manually Filed Video; March 7, 2022 Meeting; 1:52:11-1:52:19).

Director Buuck then commingles third party accommodations of masking and "gum chewing." He actually states: **"The judge has expanded the ADA and the education realm farther than it has ever been done before…and that is what the fight is on. Can you use the ADA to stop gum chewing, to make 60,000 students wear masks?**" (Manually Filed Video, 1:14:12 to 1:14:37). Buuck's comingling is reflected in the minutes of that meeting too: "the ADA could be used to stop gum chewing." (Ex. 44, at KCBE 1035). And through the law department, KCBE continues with the argument to this very day. (D.E. 88, Memorandum, pp. 26-27).

KCBE knew its conduct of banning accommodations based on "rights" of third parties was inaccurate, but they have used it against Jane Doe to cause her endless suffering. KCBE can be "dead set on any judge telling us what we must do"—and KCBE must pay the price. This is sufficient for the "before" claim which, in any event, KCBE has waived. See *Doe v. Loudon*, *20.

7.3 The "After" Claim

Under the Title IX model, a school can be liable for teacher-on-student harassment where "an official [with] authority to address the alleged discrimination and to institute corrective measures…has actual knowledge of discrimination…and fails adequately to respond. *Gebser*, 524 U.S.at 290. Additionally, "schools can face liability for deliberate indifference to known acts of student-on-student sexual harassment." *Doe v. Loudon Cnty. Bd. of Educ.*, 2024 U.S. Dist. LEXIS 68645, *10 (E.D. TN 2024)(citing *S.C. v. Metro. Gov't of Nashville*, 86 F.4th 707, 714 (6th Cir. 2023)). The present case involves a mix of three levels—board level, staff level *and* peer harassment.

7.3.1 <u>Board Level</u>: Board Takes No Action Against Cyberbullying

Persons with misophonia certainly have an unusual condition. In the mainstream, it has been subject to ridicule. (Storch Decl, ¶16). Thus, it is quite foreseeable that calling Doe's legal case "#gumgate" and linking it to the masking litigation would create public threats. (Storch Decl, ¶17).

On February 25, 2022, Kristi Kristy, the Chair of the KCBE Board, reposted a Facebook message *to her Board account* from her personal account. (Ex. 41; Kristy, at 28-29).[27] This post was directly in response to Doe's filing of the lawsuit in this case and her school board constituents inquiries. (Kristy, at 29-30).

Repeating the mocking "#gumgate," Kristy linked Doe's lawsuit seeking accommodations to the highly divisive masking litigation. Kristy then wrote to her constituents on the public platform:

> "Hashtag gum gate is really a thing, compliments of the same law firm responsible for the mandatory mask mandate in KCS."

(Ex. 40, Kristy at 32, 33). While Kristy suggested KCBE needed to find a reasonable accommodation, she exaggerated the accommodation and ended her post: "Also in Knox County, a self-proclaimed satanic children's minister has filed an ethics complaint against three school board members for exercising their first amendment right, but that is a whole other story…" (Ex. 40). Kristy freely admits she "put it on social medial as the school board chair." (Kristy, at 34).

[27] Kristy separates her personal and board member Facebook accounts. (Kristy, at 24). That distinguishes family matters from board business. (Kristy, at 24). Kristy uses her board member account for "board business," although "many times," it also appears on her personal Facebook account. (Kristy, at 25). Her board Facebook account "is strictly for board member business and issues related to the school board" and, while there is some intermingling, "I keep my board page usually related to school stuff…" (Kristy at 25). Thus, to inform the public, Ms. Kristy's school board Facebook page is designated as "Kristi Kristy, Knox County School Board District 9 Representative" whereas her personal Facebook account is designated by her name only. (Kristy at 29).

At the same time, Board member Betsy Henderson publicly posted on her Board Facebook account: "From the lawyers who brought you forced masking, they want to ban chewing in classrooms. I wish I was kidding." (Henderson, at 47-48, 50; Ex. 34, p. 3).[28]

The Board member posts generated threats. On Kristy's page, constituents threatened actions *inside Jane Doe's school environment*:

- "I will go to costco [sic] and buy every damn pack of gum they have and distribute to this little shits [sic] classsmates [sic]." (Ex. 48).
- "Perhaps we should protest outside L&M [sic] and give out free gum and chips," with another saying: "[T]his is the best idea I have ever seen." (Ex. 48).

Doe learned of the posts within a day. (Jane Doe, at 261). The comments called for violence against her. (Doe, at 28-283). *Inside* her school, Doe, a fourteen-year old girl, was terrified that parents of other students would be distributing packs of gum and chips and protesting outside L&N Stem. (Doe Decl, at ¶14). And within only weeks, students did. (Doe Decl., at ¶15). She was also disturbed that posts on a Board member page said they had medical information about her "from an inside source." (Jane Doe, at 285).

On February 28, 2022, a public citizen unknown to Doe or her family, Amanda Collins, filed a Board complaint with KCBE. (Ex. 34; Henderson, at 52). This "Collins complaint" advised the Board and Law Department that Board member social media posts created "bullying, victim blaming, mocking and harassment of the 14-year-old freshman student [Jane Doe]…." (Ex. 34, p. 4).

[28] Betsy Henderson has both a personal and a board member Facebook page too. (Henderson, at 25).The majority of members have professional board Facebook pages. (Henderson, at 25). And like Kristy, Henderson's personal page is for sharing family matters. (Henderson, at 26). Like Kristy, to speak to constituents about "litigation involving the Board," Henderson would use her *Board* page, referred to as her "campaign page." (Henderson, at 26; Ex. 47 ("Betsy Henderson School Board")).

No longer was this an individual Board member issue—it was brought to the attention of the Board itself and the Law Department. The Collins complaint copied the social media posts and what it spawned, including an interview of Jane Doe herself from many years ago "for all to see." (Ex. 34, p. 5). The Collins complaint put the Board on notice of *inside-school* threats being against Doe relating to her disability. (Ex. 34, p. 5).

KCBE Board members have public-facing duties that include: "To represent the board and the school system *to the public* in such a way to promote both interest and support." (Ex. 36; Kristy, at 13, 56)(emphasis added). A Social Media policy was "adopted" by the KCBE and it does not *exclude* Board members. (See Ex. 34). Regardless, the Duties policy requires familiarity with *all* Board policies and "to act … for the good of the school system." (Ex. 36). This includes Board members fully supporting the right of all students to be *free* from discrimination. (Ex. 37; Kristy, at 15,54).

KCBE may believe Doe to claim the Board is *vicariously* liable for the Board member's posts themselves as state action as opposed to individual action. (D.E. 88, Memorandum, p. 35).[29] But Doe is arguing the *Board itself* was on notice of the cyberbullying spawned by Board members and took no action.

Mocking a disability or an accommodation for a disability requires response. *Schuette v. Rand,* 2020 U.S. Dist. LEXIS 241779, *26 (E.D. Mich. 2020); *Borawski v. FCA US LLC,* 2021 U.S. Dist. LEXIS 160538, *28 (E.D. Mich. 2021)("If such statements were made [of calling the plaintiff "FMLA King"], FCA's human resources department should have taken immediate action

[29] It should be noted that Board-member social media posts can be attributed *to the Board itself.* See *Lindke v. Freed,* 144 S.Ct. 756 (2024). This particularly true where it is unclear whether the post is personal or business, with no disclaimers, just as in this case. *Id*. at 769. As Justice Barrett says, those are "fact specific" undertakings. *Id*. That is a matter for the jury.

to stop it, and the supervisors themselves should have been disciplined."); *Ross v. Campbell Soup Co.*, 237 F.3d 701, 707 (6th Cir. 2001)(referring to plaintiff as "back case" and "we can't have anymore of this back thing.")

The Board is not some helpless body where the public "voting them out of office" is the only recourse for wayward actions of members. To the contrary, the Board can take actions against its own members by holding ethics committee meetings, voting, and/or making any resolutions to address misconduct. (Rysewyk, pp. 56-57). And, certainly, the offending Board members themselves can take action to address the threats against Doe, or at the very least pass resolutions requiring the posts be taken down. None of that occurred. (See Jane Doe, pp. 335-336)(Board members did not reach out at all and the posts, to this day, remain visible).

Instead, Board minutes of March 9, 2022 show "all" pending complaints were simply dismissed by the Board on grounds of "*strained political status of community*" and need for revision of policies. (Ex. 44, at "G," Kristy, at 71).[30] Thus, the Board admitted it was dismissing the Collins complaint for "political" reasons, again linking the present case to the masking case, and taking no responsive action (other than, of course, to dismiss the complaints). No policy revisions occurred either. (See Kristy, at p. 72).

This amounts to "an official decision . . . not to remedy the violation"—the inside-school threats against Jane Doe prompted by Board member postings to constituents. *S.C. v. Metro. Gov't of Nashville & Davidson Cnty.*, 86 F.4th 707, 715-716 (6th Cir. 2023)(citing *Foster v. Bd. of Regents of the Univ. of Mich.*, 982 F.3d 960, 968 (6th Cir. 2020) (en banc).

[30] According to Henderson, there is no ethics *policy* for Board members governing inflammatory conduct no matter how incendiary. (Henderson, at 53-54).

7.3.2 Administrative Level: Continued Suffering with Pleas Refused

Ms. Hall, among others, were bolstered by Walsh saying that food did not have to be limited. And so Doe suffered emotionally and behaviorally, consistent with the very nature of her disability. (Storch, ¶¶8, 12, 15).

Walsh made the parents believe, initially, that the school would accommodate, but then messaged the teachers *not* to restrict food. Allen disagrees with what Walsh said. And Odom disagreed with both of them on grounds of 100% enforcement. This utter disarray would land at the Law Department.

By the fall of 2021, Doe's father *pleaded* for help. On October 22, 2021, KM wrote to Walsh herself in a letter titled "Request for Reasonable Accommodation." (Ex. 54). The letter explained that the accommodations in the 504 Plan "do not address the daily issue of the sounds of chewing or eating that cause her to flee the classroom, thus being unable to access her education." (Ex. 54). The letter stated that some teachers have done it, illustrating "it can be done." (Ex. 54). However, *all* teachers must do it, not just some, because "there is cumulative harm." (Ex. 54). He asked that his daughter "not be put through this degree of pain to learn like non-disabled peers." (Ex. 54)

Walsh emailed KM's letter to Dr. Odom for response. (Walsh at 83; Ex. 70). But Dr. Odom advised Walsh that the matter had been sent to KCBE's Law Department, Ms. Amanda Morse, because "it was addressed to her." (Ex. 73; Walsh at 88).

With Walsh signaling Odom, and Odom signaling the Law Department, the Law Department did not respond. By this time, Doe was experiencing weeping, crying, sadness, and migraine spikes. (KM, p. 23). KCBE eventually turned it into a "grievance," and merely stated, of itself, that it "found no evidence" of any violations. (Ex. 33; KM Decl., ¶¶9-10).

With KCBE passing the request like a hot potato, and never offering an effective alternative, Jane Doe's suffering persisted right up to the time she sought relief in Court. Had KCBE instructed teachers not to permit insulin for a child with diabetes, and the child suffered repeated glycemic injuries despite a parent's plea, this too would be "abuse" or "hostile educational environment." Misophonia is not as common but Dr. Odom knew from her own family experience the nature of the condition and the impact of sounds on persons with misophonia. (Odom, pp. 11-12). But she created blanket refusals in two identical cases at different schools. (M.G. Decl, ¶4-5; KM Decl, ¶3).

7.3.3. Peer-Level Harassment

In addition to the Board and the administration, and not just standing alone, Doe *also* had to contend with peer harassment inside the school. A student must show that (1) he was an individual with a disability, (2) he was harassed based on his disability, (3) the harassment was sufficiently severe or pervasive that it altered the condition of his education and created an abusive educational environment, (4) the school knew about the harassment, and (5) the school was deliberately indifferent to the harassment. *S.S. v. Eastern Kentucky Univ.*, 532 F.3d 445, 454 (6th Cir. 2008).

First, KCBE does not contest disability status. Second, the record contains ample evidence that some of Doe's peers harassed her because of her disability. She was called "lawsuit girl" and received threats from students. (Jane Doe, ¶14). These threats were reported by KM to Allen on February 27, 2022, including online threats, one involving a "chokeslam" at school. (KM Decl., ¶11). Students walked around passing out gum to identify her. (AP Decl., ¶5; Jane Doe Decl, ¶15; Jane Doe, 284). This is verified by Doe's friend, AP (See AP Decl, ¶5), and reported on March 4, 2022 by KM. (KM Decl, ¶11).

The harassment escalated by April 10, 2022 to the point Doe was crying and shaking uncontrollably. (*Id*. at ¶11)(with attached April 10, 2022 email)). Her name was put on a list made of Jewish students by the same ringleader ("J") of the chewing gum squad. (AP Decl, ¶7; Jane Doe Decl, ¶16). She feared being hurt at school or home; and she feared her family and/or pets would be harmed. (Jane Doe, ¶16).

Third, the length of the harassment was severe, causing *physical* harm to Doe's body, and it was pervasive, given its length of time.

Fourth, KM's emails gave actual notice.

Fifth, deliberate indifference—disregarding a "known or obvious consequence of its actions"—is met by failed and delayed investigation. *If* there were any investigation, as opposed to emails, it made no difference: "I did not see any effect from the investigations if they had." (Jane Doe, at 284). Moreover, KCBE's "workflow" (documenting its investigation) did not begin until April 13, 2022. (See Ex., KCBE 1172). This was six weeks *after* KM's February 27, 2022 report, easily sufficient to show disregard in light of Doe's suffering. (KM Decl, ¶11). And, notably, J's discipline was for a *different* act, his act of groping another student. (Jane Doe Decl, ¶15).

In sum, Jane Doe endured public bullying brought about by Board members, with no action by the Board; L&N staff deliberately created a painful environment owing to her disability despite pleas for help; *and*, on top of all that, peers harassed her inside the school. With no relief, she was forced out of school altogether simply to get relief from intolerable circumstances, the equivalent of a constructive discharge under Title I of the ADA (employment).

8. RETALIATION UNDER FIRST AMENDMENT

KCBE concedes protective activity with the filing of the lawsuit. Instead, it challenges Plaintiff to raise factual issues regarding: (1) a policy or custom for *Monell* liability; or (2) a failure

to train or supervise. (D.E. 88, Memorandum, pp. 41-42, 43-44). KCBE also alleges Plaintiff cannot raise factual issues regarding: (3) an "adverse action" due to protected speech; and (4) action taken under "color of state law." (*Id*. at 47-49; 50-52). These are addressed in turn below.

8.1 Custom or Policy

KCBE asserts a lack of *Monell* liability for all Section 1983 claims. (D.E. 88, Memorandum, pp. 41-42). However, "municipalities and other local government units … [are] among those persons to whom § 1983 applies." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978). To be sure, *Monell* excludes *respondeat superior* liability. The constitutional deprivation must rest instead on the actions of the municipality itself. *Id*. at 690-91.

"There are at least four avenues a plaintiff may take to prove the existence of a municipality's illegal policy or custom." *Thomas v. City of Chattanooga*¸ 398 F.3d 426, 429 (6th Cir. 2005) (citing *Monell* 436 U.S. at 694). They include "(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal rights violations." *Id*. It may also turn on conduct by final policymakers of the entity. *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986).

Even without an *explicit* policy, municipal liability may be established through a "permanent and well settled" practice. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988). This method focuses on the way things are routinely done that gave rise to the violation of the plaintiff's constitutional rights. *B.H. v. Obion Cty. Bd. of Educ*., 2019 U.S. Dist. LEXIS 212611, *23-24 (W.D. Tenn. 2019).

B.H., supra, also a First Amendment and ADA case, involved a school district's custom of making accusations to the Department of Children's Services arising from a disability:

> Here, Defendant states that it has a "policy" to report all potential signs of child sexual abuse and that its policy goes well beyond "the force of law." As noted by Plaintiffs, the trier of fact could find that Defendant's policy includes reporting behaviors associated with a student's disability and making not well-founded accusations against a parent without ensuring that the school personnel making the report is not doing so for a retaliatory reason. Accordingly, the motion for summary judgment on Plaintiffs' First Amendment retaliation claim is also denied.

B.H., at *23-24.

In *Monistere v. City of Memphis*, 115 F. App'x 845 (6th Cir. 2004), the city's policy of "allowing [police officers] to conduct their investigations without any defined parameters" raised the reasonable inference that either the city's policy allowed for constitutional violations or the officers' violations were so widespread as to become a policy. *Id*. at 851-52.

The custom or policy is KCBE defeating reasonable accommodation requests by invoking the 100%-guarantee requirement and the "third party rights" arguments. As Jane Doe and Mary Doe and the masking-children's cases illustrate, this device is used to make accommodations impossible to receive. It is yet another example of the "culture of resistance" from within KCBE's central office—the findings of the superintendent's own Task Force. (See §4.2.2).

Beginning with the masking case," KCBE has refused to honor accommodations that might involve participation of "third parties." As shown earlier, the Sixth Circuit rejected KCBE's practice. *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, *4 (6th Cir. 2021); *S.B. v. Lee*, 566 F. Supp. 3d 835, 863 (E.D. TN 2021). To this day, KCBE clings to it—up through its motion. (D.E. 88, Memorandum, pp. 26-27; KM, at 100).

And even *after* Jane Doe, Mary Doe sought an identical accommodation for misophonia. While Odom falsely claims the "parents got up and ended the meeting," (Odom, at 34), Odom *actually* denied the accommodation because she said third party students had a right to avoid being "patted down." (EG Decl.¶5, Transcript and Manually Filed Recording). Thus, Plaintiff has shown

three successive factual situations (a class action, Jane Doe's, and Mary Doe's), while KCBE's practice continues through this day. This easily raises material facts about the pattern. See *Beck v. City of Pittsburgh*, 89 F.3d 966, 973 (3d Cir. 1996)(post-event can show custom).

If that were not enough, the record demonstrates how the Superintendent's own Task Force identified a "culture" of reflexive resistance at the central office level to the needs of disabled children and their families. (Ex. 45, Rysewyk, p. 27). A jury could reasonably link the district's well-documented "culture of resistance" to disabled children and their parents with Walsh's and Allen's startling indifference to Doe's accommodation needs; or with Walsh's and Odom's per se and categorical denial of the accommodation under the 100% guarantee rule or "third party rights."

8.2 Lack of Training or Supervision

A municipality's failure to train employees adequately is another way to establish liability. *City of Canton, Ohio v. Harris*, 498 U.S. 378, 388-91 (1989). At summary judgment, Doe must raise factual issues suggesting "the training program at issue is inadequate to the tasks that [school officials] must perform; that the inadequacy is the result of the [recipient's] deliberate indifference; and that the inadequacy is 'closely related to' or 'actually caused' the plaintiff's injury." *Russo v. Cincinnati*, 953 F.2d 1036, 1046 (6th Cir. 1992).

Most commonly, deliberate indifference is raised by "showing that the municipality has failed to act 'in response to repeated complaints of constitutional violations by its officers.'" *Ouza v. City of Dearborn Heights*, 969 F.3d 265, 287 (6th Cir. 2020)(citations omitted). This approach focuses on knowledge of "prior instances of unconstitutional conduct" such that it was "clearly on notice that the training in this particular area was deficient and likely to cause injury" and yet "ignored a history of abuse." *Id*. That applies here as Defendant was clearly on notice that its

categorical denials on grounds of lack of 100% guarantee, or third party rights, were denying safe access to students with inconveniencing disabilities.

KCBE's 504 Coordinator (and that department) *clearly* need training that 100% guarantees are not the standard for reasonableness. KCBE staff as a whole require training—and acceptance of the law—that impositions on third parties do not relieve reasonable accommodations. *M.B. v. Lee*, 2021 U.S. App. LEXIS 37682, *4 (6th Cir. 2021). Even the Board is being misinformed by its own Law Department through false equivalencies of linking mask mandates for all students, staff and visitors for all schools to Doe's request to restrict chewing gum and food only in her classrooms. At a March 2022 Board meeting, the Law Director himself stated: "The judge in this [masking] lawsuit had taken the ADA in the education realm farther than it had ever gone before and this was the first case of this kind in the country." Buuck then conflates masking and this case saying "the ADA could be used to stop gum chewing," and that he is "dead set" against it. (Ex. 44, at KCBE 1035; Kristy, at 59-60; Manually Filed Recording)

In all likelihood, Walsh, Odom, Allen and the teachers have received *some* sort of training on making accommodation. But it's clearly inadequate because categorical bans, whether through 100%-guarantee standards or third party rights, continue to occur.

8.3 Adverse Action and Causal Connection

Doe's parents consistently asked for an accommodation of food and gum-chewing and the immediate, direct, causal response, from Walsh initially, and then from Odom, was refusal. (Ex. 53; Odom, pp. 19-20; KM, at 100). This, in turn, left Jane Doe in severe distress, caused mounting harm, and ultimately forced her out of the school, which is the adverse action.

Making parents feel *they* are the ones with unreasonable requests, as if *they* did something wrong, thus allowing the child to continuing injury, is sufficient for causality.

> The failure to train about interviewing children and responding to allegations of sexual abuse led to the victims in this case feeling as if *they* had done something wrong and feeling that they were punished for reporting the abuse. Moreover, the failure to record and document cases of abuse allowed ML's abuse to continue.
>
> The Court finds that Defendant's failures in this regard amount to deliberate indifference to the safety and needs of students. Therefore, the Court finds that Defendant is liable under 42 U.S.C. § 1983 for its failure to train employees about the proper ways to recognize, report, document, deal with peer-on-peer sexual harassment, and help victims.

Belcher v. Robertson Cty., No. 3-13-0161, 2014 U.S. Dist. LEXIS 165238, at *29-33 (M.D. Tenn. Nov. 26, 2014). The analogy holds true here: KCBE blamed the parents' request, provide no alternative, and the student repeatedly suffered until she could take no more.

8.4 Color of Law (State Action)

Public schools, of course, generally do act under color of state law. *Lindke v. Freed*, 144 S. Ct. 756, 765 (2024)(citing *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U. S. 503, 504-505 (1969)). And local governments are subdivisions of the state. *Lindke*, at fn1.

KCBE's citations to public defenders are unhelpful—they clearly do not act under color of state law. *Georgia v. McCollum*, 504 U.S. 42, 53 (1992). Thus, the 100% guarantee standard and the third-party argument are clearly under color of law. Courts do hold schools responsible for their teachers' discriminatory and retaliatory actions. *See, e.g., C.G. v. Cheatham Cty. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 46604, at *1 (M.D. Tenn. Apr. 6, 2016) (denying summary judgment on First Amendment retaliation claim brought by student and parents against school system based on actions of school principal); *Cockrill v. Metro. Gov't*, 2015 U.S. Dist. LEXIS 3180, at *11-12 (M.D. Tenn. Jan. 9, 2015) (denying summary judgment on First Amendment retaliation claim brought by employee against school system based on actions of school principal). The school district *itself* is responsible for the First Amendment retaliation. *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 403 (6th Cir. 2010).

9. DISABILITY-RETALIATION

For many of the same reasons as her First Amendment retaliation claim, Jane Doe's ADA and 504 retaliation claims should also survive summary judgment. (D.E. Third Am. Complaint, ¶¶88-97). Parental complaints to a school are protected conduct for the child. *Place v. Warren Loc. Sch. Dist. Bd. of Educ.*, 2024 U.S. Dist. LEXIS 39221, *9 (S.D. Ohio 2024); *Wenk v. O'Reilly*, 783 F.3d 585, 594 (6th Cir. 2015)("Schott does not contest that the Wenks' advocacy about M.W.'s educational plan is protected activity."). Advocacy by a parent about their child's education plan is protected activity. *B.H. v. Obion Cty. Bd. of Educ.*, 2019 U.S. Dist. LEXIS 212611, *14-15 (W.D. Tenn. 2019).

Opposing disability discrimination is also a protected activity. *Id*. And "requesting a reasonable accommodation is a protected activity." *Id*. It is well-established that opposing disability discrimination, even when someone else is the victim, is a protected activity. *See Barker v. Riverside Cnty. Office of Educ.*, 584 F.3d 821, 826 (9th Cir. 2009) (citing U.S. Dept. of Educ. Office for Civil Rights); 29 U.S.C. § 794(a) and 29 C.F.R. § 33.13 (Rehabilitation Act); 42 U.S.C. § 12203(a) & 28 C.F.R. § 35.134 (ADA) (protecting "any person" or "any individual" who attempts to enforce the protections of the ADA and Section 504).

KCBE argues that denying an accommodation, alone, cannot be retaliatory because "having an adverse position is not an adverse action." (D.E. 88, Memorandum, p. 31). But the "adverse position" was being renewed constantly *while Doe suffered*. It is this renewal combined with the lack of an *effective alternative* which is adverse. It is one thing to initially deny an accommodation, but quite another to watch a child suffer, ridicule her accommodation request on social media, create no effective alternative, and take no action to protect her amidst suffering, eventually being forced out of school entirely.

The Supreme Court recently relaxed the meaning of adverse actions in the context of Title VII. *Muldrow v. City of St. Louis, Mo.*, 144 S. Ct. 967 (2024). The plaintiff must show "*some harm* respecting an identifiable term or condition of employment." *Id*. at 974 (emphasis added). Justice Kavanaugh, in his concurrence, maintains that the "some harm" requirement requires the plaintiff to show any adverse change to "money, time, satisfaction, schedule, convenience, commuting costs or time, prestige, status, career prospects, interest level, perks, professional relationships, networking opportunities, effects on family obligations, or the like." *Id.* at 980 (Kavanaugh, J., concurring).

It is clear is that the Board did nothing to control Board members inciting harm and staff harming Jane Doe by keeping her suffering. And according to Jane Doe, any investigation of the "peer" harassment made no difference to her environment: "I did not see any effect from the investigations if they had." (Jane Doe, at 284). Doe experiences flashbacks, fear of students, hypervigilance, loss of confidence, fearfulness, stress, gastritis and vomiting blood *after* L&N. (Doe, 267-270). She cannot even go near L&N without triggering flashbacks and other trauma symptoms. (A.M. at 52). Accordingly, she has been "adversely affected."

10. SECTION 1983 AND FOURTEENTH AMENDMENT EQUAL PROTECTION

Separate but parallel actions may be brought under the ADA *and* the Fourteenth Amendment's Equal Protection Clause, as Jane Doe has done here. *Bullington v. Bedford Cty.*, 905 F.3d 467, 472 (6th Cir. 2018).

"The Equal Protection Clause prohibits discrimination by government which either burdens a fundamental right, targets a suspect class, or intentionally treats one differently than others similarly situated without any rational basis for the difference." *Rondigo, L.L.C. v. Township of Richmond*, 641 F.3d 673, 681-82 (6th Cir. 2011). The clause is "essentially a direction that all

persons similarly situated should be treated alike." *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 864 (6th Cir. 2012)(quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

Jane Doe asserts that defendant's policy of refusing her accommodation caused her to be treated differently from her non-disabled peers in that her peers enjoyed easy access to instruction while *she* was prevented from participating in her instruction because of her disability. She maintains that KCBE acted arbitrarily and irrationally against her through an ad hoc policy that denied needed accommodations to individuals with misophonia.

KCBE correctly identifies rational basis review. (D.E. 88, Memorandum, p. 53). "[A] plaintiff can establish the lack of a rational basis if it either (1) "negat[es] every conceivable basis which might support the government action or [(2)] demonstrat[es] that the challenged government action was motivated by animus or ill-will." *EJS Properties, LLC v. City of Toledo*, 698 F.3d 845, 865 (6th Cir. 2012)(*quoting Warren v. City of Athens, Ohio*, 411 F.3d 697 (6th Cir. 2005).

Concerning "animus," this is a subjective, internal mental state. *See Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252, 266 (1977) ("Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available"). And at this summary judgment stage, Doe can meet it.

At the time Doe requested her accommodation, much of the local Knoxville community and KCBE were inflamed by mask mandate protecting students with disability from Covid.[31] *S.B.*

[31] The public record documents the discord and animus. See WBIR, "Knox County Schools votes not to give superintendent power to implement COVID-19 policies, including mask mandate" (Aug. 11, 2021) https://www.wbir.com/article/news/education/knox-county-schools-leaders-to-vote-on-covid-19-safety-policies-relief-funding-and-pay-increases/51-cdb2a1d4-4c75-49b5-85a1-e9d98c389a84; WBIR, "Protesters gather outside some Knox County Schools over mask mandate" (Sept. 28, 2021) https://www.wbir.com/article/news/education/protests-outside-knox-county-schools-over-mask-mandate/51-890f9f24-a7cc-4e32-b262-093282cd6563; Cole Sullivan, "'I think it will be very challenging': Some parents refuse to follow school mask order, KPD monitors plans for

v. Lee, 566 F. Supp. 3d 835, 850-51 (E.D. Tenn. 2021). Judge Greer's opinion documents it: "Even while Governor Lee's executive order was in effect, the Knox County Board of Education convened a special meeting to discuss and vote on a mask mandate, and it formally voted against one. So, it *did* in fact act, and it acted against a mask mandate, and importantly, it is—right now—adhering to its own board-approved policy that does not require masking in its schools." *Id*.

Particular ire was directed to the ADA and the disabled (immuno-compromised) students and their families who successfully argued that under the law other children must be required to wear masks so that they could safely access education. *Id.* From this historical background, the factfinder can reasonably infer that when L&N, through Walsh and Odom, denied Doe's accommodation on third-party rights grounds and the 100% guarantee-rule, that refusal was motivated by animus against her particular type of disability *and the obligations it imposes on others*. This is an impermissible basis for governmental action. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448-49 (1985)(*quoting Palmore* v. *Sidoti*, 466 U.S. 429, 433 (1984)).

"The specific sequence of events leading up to the challenged decision also may shed some light on the decisionmaker's purposes." *Arlington Heights*, at 267. Prior to its encounter with mask mandates and those with misophonia, there is no evidence that Defendant had *previously* found accommodations encroaching on the "rights" of others to be problematic. The many disabled-only parking spaces attest to KCBE's previous ease with such "inconveniencing" rights.

Animus toward Doe erupted when Doe filed her complaint with this court. School Board Members and the public inveighed against Doe. While Defendant attempts slice and dice the events of this case to temporally truncate the public's animus at Jane Doe from the intentional denial of

protests" WBIR (Sept. 27, 2021) https://www.wbir.com/article/news/education/some-parents-refuse-to-follow-school-mask-order/51-c446280d-e1db-4577-8361-1c95fd6f9810

her accommodation, merely an "adverse position," a reasonable fact finder could determine that its continuing refusal to grant Doe's necessary accommodation, which began in July 2021 and has continued through today, is motivated by animus against her disability precisely because it entails some effort, however small, of others.

KCBE merely argues that it *"rationally believed"* Doe's request was unreasonable. (D.E. 88, MSJ, p. 55). For politically unpopular groups—those who inconvenience others—a more searching form of rational basis review is demanded. *Lawrence v. Texas*, 539 U.S. 558, 580 (2003)(O'Connor, J., concurring); *Bassett v. Snyder*, 59 F. Supp. 3d 837, 845 (E.D. Mich. 2014)(citing *Lawrence*). "Negative attitudes," "fear," "irrational prejudice," or even the "urge to call one group 'other'" or "to separate those persons from the rest of the community," can establish animus. *Bassett*, at 845 (citations omitted).

The actions against the two girls with misophonia—identical conditions, identical needs for accommodation, identical S-Team meetings, identical decision-maker in Odom—confirm the animus. Odom "believes" third parties should not be burdened (patted down, as she exaggerates) or that any third party that *ever* chews gum renders the accommodation unenforceable. This is the "negative attitude" and irrational prejudice to be avoided.

The Defendant's own court filings also provide a strong record of animus against Jane Doe. *United States v. Windsor*, 570 U.S. 744, 771 (2013) (congressional intervenor's brief used to prove animus). Despite overwhelming rejection by the courts, including this District and the Sixth Circuit, it has doggedly pursued its groundless third-party rights argument to deny Doe's right to equally benefit from a public education. Still today, KCBE "presents and preserves this issue," using it as a cudgel to deny Doe her right to access a public education.

The Defendant does not have a legitimate interest in standing up for the "rights" of others to chew gum or eat in classrooms. But even if it somehow did, its policy does not survive heightened rational review. School-based restrictions on others are entirely rationale—wearing shoes, a dress code, and even free speech rights can be curtailed in some instances. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). If a school seeks to protect transgender students by requiring use of preferred pronouns, that restriction is rational. *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 684 F. Supp. 3d 684, 690 (S.D. Ohio 2023).

Defendant's "need to feed" argument is no more persuasive. The principal himself said it can be restricted. Certainly eating at all times does not overtake the primary goal of learning. But in pursuit of this policy, it denied Doe's right to learn. Again, Defendant first invoked the need-to-feed argument after the fact, in its brief to the Sixth Circuit. *Doe v. Knox Cnty. Bd. of Educ.*, 56 F.4th 1076, 1078 (6th Cir. 2023) ("During the injunction briefing Knox County explained its rationale for refusing to ban eating and chewing in Doe's classrooms.") The principal, Mr. Allen, does not recall *ever* talking to Doe or her parents about unreasonableness or impossibility. (Allen at 48-50). A court could reasonably determine that such post-hoc justifications point to animus, not rationality.

In sum, there is clear evidence from which to suspect L&N's policy of denying Doe's accommodation request was motivated by animus. And this suspicion is confirmed by a "more searching rational basis" review of the policy itself. KCBE has discriminated against girls with misophonia who request accommodations and the rationales it puts forth are "so full of holes that [they] cannot be taken seriously." *Baskin v. Bogan*, 766 F.3d 648, 656 (7th Cir. 2014). And "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least

mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

11. FOURTEENTH AMENDMENT'S SUBSTANTIVE DUE PROCESS CLAUSE

The second component of the Fourteenth Amendment's due process clause, substantive due process, protects certain inalienable rights and bars certain governmental actions regardless of the procedures used to implement those actions.

> The right to personal security and to bodily integrity bears an impressive constitutional pedigree. As far back as 1891, the Supreme Court recognized that "no right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Doe v. Claiborne County, 103 F.3d 495, 506 (6th Cir. 1996). Where state actors increase the danger from private harm, the municipality may be liable under "the state-created danger doctrine." *Lipman v. Budish*, 974 F.3d 726, 741 (6th Cir. 2020)

KCBE posits all sorts of theoretical claims. (D.E. 88, Memorandum, pp. 59-60). To be clear, the bodily integrity claim involves KCBE's affirmative act of instructing teachers *not* to ban food in Doe's academic classes yet requiring her to "attempt to attend" classes like Ms. Hall's class, where Ms. Hall made no attempt to control food or gum. KCBE required Doe to attend classrooms where it made no effort, or made consistently inadequate efforts, to accommodate her. Plaintiff contends, and the record shows, that Defendant knew attending unaccommodated classes was causing Doe to experience dysregulation (severe fight-or-flight responses) and that repeated forced exposures caused a cumulative harm including exhaustion, exacerbation of her migraine disorder, and mounting trauma. Additionally, KCBE was aware of the emotional and dignitary harms it inflicted on her as she was forced to flee classrooms, day after day for months on end, seen crying on campus by students and faculty. Put differently, Defendant "restrained" Doe by

forcing her into situations knowing those situations would strip her bodily integrity by inducing severe, reflexive physiological suffering, and it did so daily, for months.

The "color of state law" action is also present. Walsh, the vice principal, instructed teachers *not* to ban food and Walsh and Odom, a supervisor, rejected Doe's necessary accommodation, citing "third-party rights" and speculative concerns about "impossibility." Allen, the School Principal, refused to alter the policy, requiring that Doe attend traumatizing classes.

The "customs" are the same as discussed earlier–the repeated invocation of the 100%-guarantee rule and "third party rights" as a reflexive "resistance" to the needs of disabled children and their families. And, finally, facts suggesting intentionality or "deliberate indifference" exist because KCBE knew that bodily harm to Doe would occur and it not only "failed to act upon that likelihood," but Walsh instructed teachers not to ban food, and Allen forced her into triggering situations. *Douglas v. Muzzin*, 2022 U.S. App. LEXIS 21529, 2022 WL 3088240, at *8 (6th Cir. Aug. 3, 2022).

Clearly, a schoolchild's right to bodily integrity includes "the right to be free from sexual abuse." *Id.*; *Tyson v. Cnty. of Sabine*, 42 F.4th 508, 517 (5th Cir. 2022). And physical force is not required. *Tyson*, at 517. But *sexual* abuse is not the limitation of one's right to bodily integrity; more novel situations count too.

For example, an officer spraying a juice-box in the face of a young child presented sufficient facts to proceed to trial. *Kouider v. Parma City Sch. Dist. Bd. of Educ.*, 480 F. Supp. 3d 772, 779 (N.D. Ohio 2020). While "juice-squirting" presented "novel factual circumstances," summary judgment was denied on the student's substantive due process right to bodily integrity. *Id*. at *787. A single use of force against a student causing a bruise can violate the student's Fourteenth Amendment rights to bodily integrity. *Kurilla v. Callahan*, 68 F. Supp.2d 556, 557, 565 (M.D. Pa. 1999)

In this case, facts suggesting an "affirmative act" by Walsh exists;[32] it certainly increased Doe's risk of bodily injury (not only *risk*, but actual harm); the danger was unique to Doe, not the public; it was foreseeable; and it was egregious to repeatedly, knowingly harm her in this manner. See *Lipman, supra; Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998)("The City either knew or clearly should have known that releasing the officers' addresses, phone numbers, and driver's licenses and the officers' families' names, addresses, and phone numbers to defense counsel in the *Russell* case substantially increased the officers' and their families' vulnerability to private acts of vengeance.")

Moreover, where state actors increase the danger from private harm, the municipality may be liable under "the state-created danger doctrine." *Lipman v. Budish*, 974 F.3d 726, 741 (6th Cir. 2020). In this instance School Board Members acted to deride and mischaracterize Jane Doe's necessary accommodation on social media, an act that clearly increased her risk of violence and ridicule inside the school.

12. CONCLUSION

At every turn, Doe has diligently raised material facts when the burden is hers, pointed out the failure by KCBE to raise what are affirmative defenses, and addressed how those burdens cannot possibly be met by KCBE. For all the reasons herein, the motion for summary judgment must be denied on all claims.

[32] "Whether conduct amounts to an 'affirmative act' in this context is at times a difficult question." *Engler*, 862 F.3d at 575. At one end of this spectrum, a failure to act is not enough. *Id.* at 575-76. Instead, to find a state-created danger, the plaintiff must have been "safer *before* the state action than he was *after* it." *Lipman v. Budish*, 974 F.3d 726, 744 (6th Cir. 2020).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that this Response in Opposition to Motion for Summary Judgment was served upon all counsel of record for the Defendants, including Amanda Morse and Jessica Jernigan-Johnson, through the Court's ECF system, with their emails, amanda.morse@knox-county.org, lawdir@knoxcounty.org jessica.johnson@knoxcounty.org, lawdir@knoxcounty.org on June 18, 2024.

/s Justin S. Gilbert