FOOD ALLERGIES: YOUR RIGHT TO BE SAFE
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Atty. Tess O’Brien
Boardman & Clark LLP
M. Tess O’Brien-Heinzen
Attorney, Boardman & Clark
Madison, WI
Goals of Presentation

This presentation will provide the basic framework of the laws that protect individuals with disabilities and will offer guidance for individuals with food allergies on how to navigate under those laws. To that end, the presentation will:

1. Summarize the disability laws applicable to food allergies.
2. Offer guidance on seeking and drafting Section 504 Accommodation Plans in the school setting.
3. Set forth the framework of the ADA and address food allergies in the workplace.
4. Answer frequently asked questions regarding food allergies and the law.
Prevalence of Food Allergies Increasing
   - 15 million people in the United States, including one in 13 children

Land v. Baptist Medical Center, 164 F.3d 423 (8th Cir. 1999).
The seminal decision on food allergies in the school setting. Baptist Medical Center refused to provide day care to Megan Land, a preschooler who had broken out on two occasions at the daycare as a result of a peanut allergy. The Eighth Circuit analyzed whether Megan's allergy constituted a disability under the ADA. The court determined that Megan's peanut allergy was a physical impairment and that eating and breathing are major life activities. But the court struggled with respect to whether the impairment substantially limited Megan's ability to eat and breathe. In the end, the court concluded it did not because as long as she avoided foods with peanuts, she was fine.
Three Statutes

IDEA: Grant Statute – Special Education (K-12 public schools)

Section 504: Anti-Discrimination Statute – Accommodations (schools and employers receiving federal financial assistance)

ADA: Anti-Discrimination Statute – Accommodations/Modifications (public and private schools – not religious and employers with 15 or more employees)
An affirmative law requiring special education and related services for those who qualify under one of the categories of the law.

This is a grant statute and attaches many specific conditions to the receipt of federal IDEA funds.
Public School Students between the ages of 3-21 who are determined by a multidisciplinary team to be eligible within one or more categories of disabilities specified under the IDEA and are in need of special education and related services as a result of his or her disability.

The purpose of the IDEA is to "open the door of public education" to handicapped children, not to educate a handicapped child to his or her highest potential. *Board of Educ. of Sch. Dist. No. 21 v. Ill. St. Bd. of Educ.*, 938 F.2d 712, 715 (7th Cir. 1991).
Eligibility
The term a “Child with a Disability” under IDEA means a child: (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services. (This list is exhaustive).

IEP: Individual Education Program – sets forth provisions for special education and related services.

Food allergies and IDEA
-Food allergy may be “Other health impairment”
-A food allergy is unlikely the sole basis for an IEP. Usually combined with other impairment that affects learning.
Section 504 (Rehabilitation Act of 1973) 
(20 USC §794; 34 CFR Part 104)
Section 504 is a federal law designed to protect the rights of individuals with disabilities in programs and activities that receive Federal financial assistance. Section 504 is an antidiscrimination law as opposed to grant statute and does not provide funding.

No otherwise qualified individual with a disability in the United States . . . shall solely by reason of his or her disability, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . . 20 U.S.C. §794.
Section 504 applies to all public and private K-12 school districts that receive federal financial assistance.

Section 504 requires K-12 districts to provide students with disabilities the opportunity to participate in or benefit from the aid, benefit, or service that is equal to and as effective as that afforded others.
Equal Access

Equal opportunity of a qualified person with a disability to participate in or benefit from educational aid, benefits or services.
Section 504 covers individuals who 1) have a physical or mental impairment which substantially limits one or more major life activities (entitled to no active discrimination and FAPE), 2) have a record of such impairment (entitled to no active discrimination), or 3) have been regarded as having such impairment (entitled to no active discrimination).
Accommodations are set forth in a 504 plan, which identifies the accommodation needed and who is responsible for the accommodation. Accommodations are specific to individuals but might include administering medications, removing certain foods from classrooms, providing alternate snacks, etc.

Individual Health Plan. How does that differ from a 504 plan?

OCR indicates that in many circumstances "health plans" once used to accommodate students may not be enough. Example: A child with a severe peanut allergy who once had a health plan may qualify for a 504.
Related services under Section 504 include transportation, speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, counseling services, orientation and mobility services, medical services for diagnostic or evaluation purposes, school health services and school nurse services, social work services in schools, and parent counseling and training. *This list is not exhaustive and may include other developmental, corrective, or supportive services required to assist a child with a disability benefit from special education.*
Section 504 also requires a district to provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
1. Referral. Parent, school, staff, or student may refer a student for a Section valuation.

2. Section 504 Team. A Section 504 Team is assembled and consists of individuals knowledgeable about the student and the results of appropriate evaluations.


5. Section 504 meeting. Section 504 team and parents meet to discuss eligibility.

6. Determine eligibility. (See below.)

7. If student has disability. Section 504 team will determine if accommodations are necessary.

8. Accommodations necessary. Provide notification to parents and consent for accommodations if necessary.

9. No accommodations necessary. Provide notification to parents if no disability or accommodations not necessary.
In 1990, Congress passed the Americans with Disabilities Act (ADA), the first comprehensive civil rights law for people with disabilities. It has a broad reach and applies to all state and local government programs, including public schools and all places of public accommodation. The ADA also adopted the Section 504 regulations giving the regulations full weight of a federal statute.

The ADA and Section 504 are construed together.
- **Public Law No. 110-325 of 2008**
In 2009, Congress enacted the Americans with Disabilities Act Amendments Act (ADAAA) significantly expanding the protections provided to disabled people under the ADA and Rehabilitation Act. The ADAAA, a bipartisan bill, was passed in response to U.S. Supreme Court decisions that, according to Congress, had "created an inappropriately high level of limitation necessary to obtain coverage under the ADA." The ADAAA sought to reinstate a broad scope of protection under the ADA. As noted, the changes also apply to the Rehabilitation Act. New ADA regulations went into effect in 2011.
ADA -- 42 U.S.C. §12131 (Title II); 29 C.F.R. Part 35
Anti-Discrimination Statute.
Title II - Public Schools
Title III- Private Schools
Religious Schools exempted
Prohibition on discrimination:

\[ \text{No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity. 42 U.S.C. §12132.} \]
Eligibility

ADA covers children who have a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such impairment. The steps to determine eligibility are the same as those set forth for Section 504.
The determination of whether a student is a qualified "person with a disability" under Section 504 (and the ADA) must be made on the basis of an individualized inquiry.
In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district's actions and obligations to ensure equal educational opportunities.

While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made.
Thus, for example, a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II.

Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools,
http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html
Key Amendments

- “The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”

- Congress rejected consideration of mitigating measures.

- Congress directed that an impairment is episodic in nature or in remission is a disability if it would substantially limit a major life activity when active.
Three Steps to Determining Disability

Does the student have a "physical or mental impairment?"

Does it affect a "major life activity?"

Does the impairment "substantially limit" the major life activity?
Section 504 Plans –
Once Eligibility is Established

1. Begin the process.
   - Walk through your student’s day starting from the front doors of the school to leaving at the end of the day.
   - Ask yourself, could my son or daughter be exposed to a food allergen in homeroom, gym, lunch, math, science, etc.?
   - Make a list of dangers in the school.
   - Make a list of how you think your student might be best accommodated and by whom.
   - Be reasonable.
   - Start small.
2. Provide your proposed accommodations to the school. Be prepared to discuss and negotiate the accommodations.
3. Once you have a 504 plan, meet with all your teachers, including specials, aids, etc. to be sure they know what is in your 504 plan.
4. Meet with the teachers every year. Bring your 504 plan.
1. Classroom
   - Allergen free
   - Cleaning protocols
   - Snack protocol
   - Field trip protocol
   - Training
   - Education
   - EPI-pen storage
   - Classroom projects
2. Cafeteria
- Training
- Peanut/tree nut or other allergen-free tables
- Cleaning protocols
- Separate waste baskets
- Maintain lunch bags separately
- Provide two-way communication devices
- Provide advance copies of menus
- Maintain up-to-date information about manufacturers
3. Buses

- Training
- Two-way communication
- No-eating policies
- Assign seating
- Cleaning protocol
4. Extracurricular or after-school activities
   - Post signs on outside of school and gyms
   - Restrict use of food in classrooms used for after-school activities
   - Training
   - Promote allergy awareness
5. Storage/transportation of EPI-pen

- Allow student to carry
- Designate an aid to monitor
- Design process as student moves from one area of school to another

These are only a sampling of potential accommodations. Specific accommodations needed will vary depending on the school, the age of the child, and the type of allergy.
Section 504 and Employers

- Section 504 applies to employers and organizations that receive financial assistance from any Federal department or agency. These organizations and employers may include hospitals, nursing homes, mental health centers, and human service programs.

- Eligibility: Section 504 protects qualified individuals with a disability. People who have a history of, or who are regarded as having a physical or mental impairment that substantially limits one or more major life activities are also covered.
Title I of the ADA applies to employers with 15 or more employees. Prohibits discrimination.

Title III – applies to Places of Public Accommodations.

State laws may be applicable to employers with less employees. E.g. Wisconsin Fair Employment Act covers employers with one or more employee.
ADA issues arise in a variety of contexts. In the employment setting, addressing ADA issues will often include:

- Recognizing Requests for Accommodation
- Pursuing the Interactive Process, which includes determining whether an employee has a disability and addressing reasonable accommodations.
Recognizing Requests for Accommodation

- Requests need not be in writing.
- Employee need not mention disability laws or use term “reasonable accommodation.” There is NO MAGIC language required.
- Generally, employers should not proactively ask whether an accommodation is needed. However, where the employee has a known disability which is suspected of causing workplace issues, it may make sense for the employer to initiate the interactive process.
Determining whether an Employee has a Disability

- Unless the disability is obvious, the employer can request information from the employee’s health care provider about the nature of the disability, the functional limitations caused by the disability, and what reasonable accommodations might exist.
An accommodation is a change in work environment or the way in which things are customarily done that allows the individual to perform his/her position and to enjoy equal employment opportunities. An accommodation is reasonable if it is effective and does not cause the employer undue hardship.
Accommodations for Food Allergies

- Accommodations that may be requested:
  - Keeping certain foods out of the workplace
  - Allowing absenteeism for medical reasons
  - Restricting food at office parties
  - Ventilation
  - Cleaning protocol
Accommodations that may not be required

- Long-term lowering of job standards
- Bumping another employee out of a job
- Repeatedly excusing prohibited behavior on the job
- Indefinite leaves of absence
- Measures that cause the employer undue financial burden: monetary burden or significant operational disruption.
Additional Notes on Employers

- Input from the employee, the employee’s physician, management of the employer, and others may be instructive.
- The employer may choose among reasonable accommodations as long as the chosen accommodation is effective.
1. Are airlines required to comply with the ADA?
2. Can we request our school to be peanut/tree nut free?
3. We attend a private school. Does the ADA or Section 504 apply to our school?
4. Is there a “reasonable accommodation standard” with respect to schools?
5. Is our school required to have a Food Allergy Management Policy?
6. Can a school make changes to an existing 504 plan without our consent?
Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools:
http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html

Frequently Asked Questions About Section 504 and the Education of Children with Disabilities:
http://www2.ed.gov/about/offices/list/ocr/504faq.html
Our Next Webinar

The Epidemiology of Food Allergies

Ruchi Gupta, MD, MPH
Associate Professor of Pediatrics at the Northwestern University Feinberg School of Medicine's Center for Studies

Wednesday, April 9
1:00 – 2:00 PM ET

Member registration opens
Monday, March 17

Open registration begins
Monday, March 24

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