



It's Not Just Peanuts: Allergens and the Law

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ASBA Annual School Law Conference 2019

Applicable Laws

- Section 504 of the Rehabilitation Act of 1973
 - Requires public schools to provide a free appropriate public education to each qualified person with a disability within their jurisdiction
 - An appropriate education consists of regular or special education and related aids or services designed to meet the educational needs of disabled students as adequately as those of nondisabled peers
 - Schools typically document these services in a Section 504 accommodation plan

Applicable Laws

- Title II of the Americans with Disabilities Act of 1990
 - Prohibits schools from excluding disabled students from participation in or denial of benefits of the services, programs, or activities of or be discriminated against disabled students because of their disabilities
 - The Office for Civil Rights has consistently found that Title II of the ADA establishes a FAPE obligation
 - A school's obligations and duties under Section 504 and Title II of the ADA are generally the same

Applicable Laws

- ADA Amendments Act of 2009
 - Did not change the basic definition of disability:
 - A student qualifies for Section 504 and ADA protections if he/she:
 - has a physical or mental impairment that substantially limits a major life activity;
 - has a record of such an impairment; or
 - is regarded as having such an impairment

Applicable Laws

- ADA Amendments Act of 2009 (ADAAA)
 - Added several provisions to reinstate the broad scope of protection under Section 504 and the ADA
 - Rejected *Sutton v. United Air Lines, Inc.*
 - Court found that mitigating measures must be considered when determining whether an impairment substantially limits a major life activity
 - Congress felt that *Sutton* decision narrowed the broad scope of protection that the ADA was intended to afford

Applicable Laws

- ADAAA rejected *Toyota Motor Mfg. v. Williams*
 - Court found that “substantially limits” only occurs when the impairment prevents or severely restricts the employee from doing activities that are of central importance to most people’s lives
 - Congress felt that *Toyota* further narrowed the broad scope of protection intended to be afforded by the ADA and Court’s interpretation of “substantially limits” required a “greater degree of limitation” than was intended by Congress

Applicable Laws

- ADAAA expanded list of “major life activities” to both statutes
 - Non-exhaustive list includes:
 - Caring for self
 - Seeing
 - Breathing
 - Eating
 - Concentrating
 - Walking
 - Speaking
 - Learning
 - Sleeping
 - Thinking
 - Performing manual tasks
 - Hearing
 - Working
 - Communicating

Applicable Laws

- Individuals with Disabilities in Education Act (IDEA)
 - Gives children with disabilities an individual entitlement to a free, appropriate public education (FAPE)
 - Provides parents with certain procedural safeguards
 - Includes Other Health Impairment (OHI) classification

Applicable Laws

- Individuals with Disabilities in Education Act (IDEA)
 - Other Health Impairment means “having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that:
 - Is due to chronic or acute health problems . . . ; and
 - Adversely affects a child’s educational performance.”

34 C.F.R. § 300.8(c)(9)

Food Allergies

The following major food allergens account for 90 percent of all food-based allergic reactions:

- Peanuts
- Wheat
- Crustacean shellfish (e.g., crab, lobster, or shrimp)
- Milk
- Soy
- Tree nuts (e.g., almonds, pecans or walnuts)
- Eggs
- Fish
- Ingredient containing an allergen

- U.S. Food and Drug Administration - Food Allergies: What You Need to Know: (<http://www.fda.gov/food/ingredientspackaginglabeling/foodallergens/ucm079311.htm>)

Food Allergies

- Immune system attacks by releasing histamine and other chemicals, triggering an allergic reaction
 - Symptoms can range from mild to severe
 - Severe reactions may include obstructive swelling of lips, tongue, or throat, loss of consciousness, shortness of breath, chest pain, turning blue, drop in blood pressure, and trouble swallowing

Food Allergies

- Severe symptoms may be signs of anaphylaxis
 - May threaten breathing and blood reaction, and can result in death
 - Administering epinephrine (adrenaline) can reverse symptoms, but a delay in as little as 30 minutes can result in death

Food Allergies

- Food intolerance
 - Have difficulties digesting certain foods
 - Different from food allergies and celiac disease because it doesn't trigger an immunological response

Food Allergies

- Celiac disease is not a food allergy
 - Inherited autoimmune disorder
 - Doesn't have potential to trigger an immediate life-threatening reaction
 - Eating gluten triggers an immune response that attacks the small intestine, resulting in damage to the intestine's lining and prevents body from properly absorbing nutrients

Chemical Sensitivity and Allergies to Substances in School Environment

- Students who are chemically sensitive may become ill when exposed to chemicals found in certain products
 - Pesticides
 - Fragrances/Perfumes
 - New Carpets
 - New Paint
 - Cleaning/Laundry Products

Chemical Sensitivity and Allergies to Substances in School Environment

- Chemically sensitive students can display symptoms after exposure to even small amounts of substances
 - Can range from mild to severe
 - Severe symptoms referred to as multiple chemical sensitivity (MCS)
 - Symptoms can include headache, fatigue, dizziness, nausea, congestion, sore throat, chest pain, changes in heart rhythm, breathing problems, difficulty concentrating, memory problems and mood changes

Chemical Sensitivity and Allergies to Substances in School Environment

- Some students may be sensitive to other substances in the school environment
 - Mold
 - Dust
 - Animal dander
- Mold allergy can trigger symptoms such as sneezing, runny nose, or nasal congestion
- Certain molds may trigger a severe asthma attack

Eligibility under Section 504

- Student with food allergies, chemicals sensitivities, and/or allergies to environmental substances may be eligible if the food allergies substantially limit major bodily functions of breathing, respiratory function, and immune system function
- May also limit the major life activity of learning if a student has frequent disability-related absences that negatively impact student's grades

Eligibility under Section 504

- Determination of whether condition is substantially limiting must be made without consideration of mitigating measures used by student to determine whether the student has a disability
- Impairments that are episodic or in remission are disabilities if they would substantially limit a major life activity when active

Eligibility under IDEA

- May be eligible on the basis of chronic or acute allergies or chemical sensitivity under OHI
 - Condition must limit student's strength, vitality, or alertness; and
 - Condition must adversely affect student's educational performance

Evaluation

- Required under both Section 504 and the IDEA
 - Team must draw on information from a variety of sources (34 C.F.R. § 104.35(c))
 - Information sources include:
 - Physician's reports and recommendations
 - Parental input
 - Teacher input
 - Records from the school nurse

Evaluation

- Team should consider:
 - Nature and severity of student's allergies
 - Types of exposure resulting in allergic reaction
 - Relative effects of each type of exposure on the student
 - Measures necessary to provide for student's safety as well as inclusion with classmates
 - Recommended treatment/response for each type of exposure, including time requirements to provide such treatment, dosage of epinephrine, and when to call 911

Virginia Beach City (VA) Pub. Schs., 65 IDELR 304
(OCR 2015)

Evaluation

- Must obtain medical data (existing or new medical assessment) to:
 - Determine severity of the condition and
 - Develop appropriate accommodations
- If needed to determine student's eligibility or develop an appropriate plan, district must obtain and review it as part of evaluation.

Prevail Acad. (MI), 109 LRP 30937 (OCR 03/07/09)

Placement and Accommodations

- Section 504 - Obligation to provide a safe environment
 - As safe for students with disabilities as they are for nondisabled students

Virginia Beach (VA) City Pub. Schs., 59 IDELR 54
(OCR 2012)

Placement and Accommodations

- IDEA
 - Least restrictive environment

The IDEA's legal standard “does not require a risk free environment, but a reasonably safe environment.”

*In re: Student with a Disability, 113 LRP 39197
(SEA NY 08/09/13)*

Placement and Accommodations

- Accommodations for food allergies
 - Dependent on student's individual needs
 - May include:
 - Allergen-free table (*Cascade Sch. Dist.*, 37 IDELR 300 (SEA OR 2002))
 - Requiring students to wash hands before entering classroom (*Encinitas (CA) Union Sch. Dist.*, 114 LRP 23545 (OCR 01/29/14))
 - Banning particular food items from classroom (*Rockwood (MO) R-VI Sch. Dist.*, 48 IDELR 137 (OCR 2006))

Placement and Accommodations

- Accommodations for food allergies (cont.)
 - Restricting types of foods served in cafeteria (*Maplewood (NY) Sch. Dist.*, 107 LRP 33561 (OCR 09/25/06))
 - Training staff members (*South Washington County Indep. Sch. Dist #833*, 114 LRP 9742 (SEA MN 1/30/14))
 - Providing access to epinephrine auto-injector (*Cascade Sch. Dist.*, 37 IDELR 300 (SEA OR 2002))
 - Monitoring student at lunch by school nurse (*South Allegheny (PA) Sch. Dist.*, 31 IDELR 57 (OCR 1998))

Placement and Accommodations

- Accommodations for food allergies (cont.)
 - Notifying parents of menus/ingredient lists (*Marquette Area (MI) Pub. Schs.*, 64 IDELR 317 (OCR 2014); *Sonoma Valley (CA) Unified Sch. Dist.*, 49 IDELR 76 (OCR 2007))
 - Planning for emergencies (*Saluda (SC) Sch. Dist. One*, 47 IDELR 22 (OCR 2006))
 - Notifying other parents to remind children not to share food at school (*Encinitas (CA) Union Sch. Dist.*, 114 LRP 23545 (OCR 01/29/14))
 - Holding information session for classmates regarding disability and guidelines for lunchtime behavior (*South Allegheny (PA) Sch. Dist.*, 31 IDELR 57 (OCR 1998))

Section 504 Plans

- Peanut allergies
 - Should contain following elements or reference documents that contain them:
 - Policies, procedures, and/or protocols governing peanut/tree nut allergies risk management in each type of school program and activity, including classroom and common use rooms and other regular activities (recess, bus, field trips, extracurricular school-sponsored activities)

Section 504 Plans

- Peanut allergies (cont.)
 - Emergency response policies, procedures and/or protocols covering all school programs and activities in which student may have a reaction (address proper handling and administration of epinephrine and staff responsible for emergency responses)
 - Provision that staff responsible for custodial supervision/care of student (including substitutes) will receive comprehensive training on allergies and implementation of student's plan; establish training content and when, how often, for how long, and who conducts training)

Section 504 Plans

- Peanut allergies (cont.)
 - Provision that at least one fully trained staff person be at school during regular school hours and at all school-related activities attended by student who can administer epinephrine consistent with policies, procedures, and protocols
 - Provisions setting out all PTA-related responsibilities of parents and students in all school programs and activities and effective process for communicating PTA-related responsibilities to them, and sanctions for any harassment by other students because of allergies

Saluda (SC) Sch. Dist. One, 47 IDELR 22 (OCR 2006)

Section 504 Plans

- Peanut allergies (cont.)
 - Arizona law permits school employees who are trained in administration of epinephrine auto-injectors to administer or assist in the administration of epinephrine auto-injectors to a pupil or an adult whom the employee believes in good faith to be exhibiting symptoms of anaphylactic shock while at school or at school-sponsored activities.
 - Schools may stock two or more juvenile doses and two or more adult doses of epinephrine auto-injectors at each school

Section 504 Plans

- Peanut allergies (cont.)
 - School employees are immune from civil liability with respect to all decisions made and actions taken that are based on good faith implementation of the requirements of this section, except in cases of gross negligence, wilful misconduct or intentional wrongdoing.

A.R.S. § 15-157

Section 504 Plans

- **Wheat/gluten allergy**
 - OCR found 504 plan for student met it standards in plan that included:
 - Permanent laminated bathroom pass
 - Lunch menu with gluten-free choices
 - Gluten-free curriculum for cooking class
 - Letter advising parents or presence of student with wheat and gluten allergies
 - List of safe snacks for student's teachers
 - Signed agenda to help with organizational issues due to absenteeism

Section 504 Plans

- **Wheat/gluten allergy (cont.)**
 - Parent to call school regarding late/missed assignments and alert staff about issues that may affect school performance that day
 - Case manager to review plan with student and help student develop advocacy skills
 - Procedure by which the parents could notify both in-district and out-of-district groups that student planned to attend particular event group hosting on school grounds

Tolland (CT) School District, 46 IDELR 171 (OCR 2006)

Section 504 Plans

- Chemical Sensitivity/Allergies to Environmental Substances
 - Cleaning
 - Staff training
 - Use of allergen-free cleaners
 - Medical monitoring by school nurse
 - Scent-free policies
 - Hiring environmental consultant

South Windsor (CT) Pub. Schs., 37 IDELR 133 (OCR 2002); *Edgecombe County (NC) Pub. Schs.*, 110 LRP 57408 (OCR 01/21/09); *Walpole Pub. Schs.*, 26 IDELR 976 (SEA MA 1997)

Section 504 Plans

- **Accommodation Plan for Student with Severe Chemical Sensitivities/Allergies**
 - Evaluation of environment by specialist
 - Portable air filters in classroom setting
 - Notification to staff and students requesting they refrain from use of products with scents, use natural fiber clothing, refrain from use of products with formaldehyde, etc.
 - Designated restroom cleaned and stocked with products appropriate for chemically free or reduced environment

Section 504 Plans

- Accommodation Plan for Student with Severe Chemical Sensitivities/Allergies (cont.)
 - Advance notice to student's family and staff of planned maintenance/renovations that might involve materials offensive to a chemically reduced environment
 - Outdoor physical education activity in area not treated with pesticides or fertilizers

Salem-Keizer Sch. Dist., 26 IDELR 508 (SEA OR 1997)

Section 504 Plans

- Animal allergies
 - Need to accommodate students who may be severely allergic to animal currently in school or that district plans to allow in school
 - Only required if student eligible under 504 or IDEA
 - Complete ban may be required for severe pet dander allergy

Section 504 Plans

- Service Animals present special difficulties
 - Can only remove service animal when animal is out of control, not housebroken, or poses a direct threat to the health or safety of others 28 CFR 35.139
 - Does presence of service animal pose a direct threat to student with animal allergies?

Section 504 Plans

- Service Animals present special difficulties
 - Direct threat analysis under Title II
 - “[m]ust make an individualized assessment, based on reasonable judgment that relies on current medical knowledge or on the best available objective evidence, to ascertain: the nature, duration, and severity of the risk; the probability that the potential injury will actually occur; and whether reasonable modifications of policies, practices, or procedures or the provision of auxiliary aids or services will mitigate risk.”
 - 28 CFR 35.139(b)

Section 504 Plans

- Service Animals present special difficulties
 - Where the needs of a student with allergies and a student with a service animal conflict, the school should, if possible, accommodate both students by “assigning them to different locations within a classroom or to different rooms in the School building.”

In re: Student with a Disability, 114 LRP 32429 (OCR 04/02/14)

Resources

- USDA—FNS, *Accommodating Children with Disabilities in the School Meal Programs, Guidance for School Food Service Professionals*, July 25, 2017 (available at <https://fns-prod.azureedge.net/sites/default/files/cn/SP40-2017a1.pdf>)
- J. L. Pfrommer, *Accommodating Students with Allergies and Chemical Sensitivities: Steps for Legal Compliance* (LRP Publications 2015)



Questions??????

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Deanna is a founding partner of Rader Mayrose, LLP. She has a recognized expertise representing school districts, charter schools, and private schools on a comprehensive range of issues including employment law, compliance with federal and state statutes applicable to public schools, such as IDEA, FERPA, Title IX, Arizona's Open Meeting Law, and Public Records Law. Her experience also includes investigations related to allegations of child abuse and unprofessional conduct, negotiating with the Arizona Attorney General's Office, Arizona Department of Education, and Arizona State Board for Charter Schools to resolve notices of intent to revoke charters and alleged violations of the Open Meeting Law, statutes pertaining to special education, and other laws applicable to public schools. She has assisted in resolving disputes during the IEP process and has defended schools in special education due process hearing. Deanna also provides training to employers and school administrators regarding personnel policies and handbooks, employee discipline and termination, and student and employee harassment and discrimination.

Her practice emphasizes advising clients in a wide variety of matters, including board development, training, and conduct, officer and director disputes, risk assessment, company investigations, discrimination, employment contracts, sexual harassment, disability, retaliation, misappropriation of trade secrets, enforcement and defense of post-employment restrictive covenants, policy development, employee training, reductions in force, wage-and-hour disputes, and compliance issues, including FMLA, FLSA, ADA, ADEA, and Title VII. Deanna is an experienced litigator, representing and defending employers, schools, and companies in state and federal court.



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Jamie L. Mayrose is a founding member of Rader Mayrose, LLP. She recently received a top ranking by her peers in the area of School and Education law. Her practice focuses on charter schools and other non-profits. Ms. Mayrose believes in effective pre-suit dispute prevention and resolution and, when necessary, aggressive litigation. She works closely with her clients to advise them on a wide variety of matters, including student discipline, employment disputes, IEP/due process proceedings, vendor contracts, and general liability matters. Oftentimes, this advice can avoid costly lawsuits. However, when disputes cannot be resolved without litigation, Ms. Mayrose is an effective, persuasive litigator and willing to fight for her clients.



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