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Introduction and Comment*

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Allergies in Schools: A Changing Legal Landscape

The number of school age children with severe allergies is increasing rapidly. The Centers for Disease Control and Prevention estimates that between 1997 and 2007 there was an 18% increase in the number of children diagnosed with food allergies alone.¹ Allergies to other substances, such as latex, animal dander, dust mites, insect bites, and medicine, also present unique challenges for school districts.

Individuals who have experienced or witnessed another individual suffering an allergic reaction or anaphylaxis can readily understand the gravity and danger involved. School officials generally utilize a three-pronged approach to address allergies in their schools: 1) prevention, 2) preparedness, and 3) response.

“Individuals who have experienced or witnessed another individual suffering an allergic reaction or anaphylaxis can readily understand the gravity and danger involved.”

Applicable Federal Laws

A brief summary of applicable federal laws is a necessary starting point because it helps explain the scope and depth of the protections that children with allergies are entitled to in the school setting. Section 504 of the Rehabilitation Act of 1973 (section 504)² prohibits discrimination on the basis of disability among recipients of federal financial assistance from the U.S. Department of Education. A student with allergies is entitled to receive a free, appropriate, public education and accommodations under a section 504 Plan if the student demonstrates 1) a mental

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or physical impairment, 2) that substantially limits, 3) one or more major life activities.

With the passage of the ADA Amendments Act of 2008,³ the definition of “substantially limits” was significantly broadened to include disabilities that are “inactive” or in remission. The amendments generally support section 504 entitlement for students with allergies because an allergic reaction will “substantially limit” the major life activity of “breathing” when anaphylaxis occurs. Allergic reactions can also impair bodily functions other than breathing (*e.g.*, blood pressure, blood circulation, etc.). It is commonly (not universally) accepted that a diagnosis of an allergy (no matter the type) will entitle a student to section 504 protections.⁴ A written section 504 plan, developed by the student’s section 504 team, specifically addresses the unique needs of the child.⁵

The Individuals with Disabilities Education Improvement Act (IDEA)⁶ requires that school districts provide eligible students with a free, appropriate, public education in the least restrictive environment. A student is eligible to receive special education and related services under an IEP (Individualized Education Plan) pursuant to the IDEA if the student meets the criteria for one of fourteen disabling conditions. Allergies typically fall under the “Other Health Impaired” or OHI category, which is defined as having limited strength, vitality, or alertness (including a heightened alertness to environmental stimuli), that results in limited alertness with respect to the educational environment, and that is due to chronic or acute health problems. To establish eligibility under the IDEA, the allergy must also adversely affect the student’s educational performance.

Developing Case Law

Allergies in schools present a myriad of issues that are cutting-edge, complex, fact-dependent, and emotional. The following highlights specific issues arising in the field with a focus on common themes and practical advice.

Consider information provided by parents

It is critical for school districts to consider information provided by parents, even in situations where the school district doesn’t agree with the information. Considering information is different from agreeing with the information. A related issue occurs when parents claim their child has an allergy but do not provide “proof” of the allergy or a medical diagnosis. The OCR has clarified that a physician’s medical diagnosis may be considered by a section 504 team, but a diagnosis may not be required. The section 504 regulations stress that school districts must draw upon a variety of sources in interpreting evaluation data and making placement decisions.⁷

Hearing officers, judges, and the OCR consistently praise school districts for keeping an open mind and accommodating allergies that are not substantiated with medical documentation. For example, a hearing officer in New Hampshire held that a school district acted reasonably when it treated the student as if he had a latex allergy, even though it never received any confirmation of the diagnosis. *Middleton School District*, 108 LRP 25266 (SEA Mass. 2007).

Seek input from medical providers

A state hearing officer from Connecticut held that a student with severe allergies (milk, house dust, cat and dog dander, soy, and mold) was not entitled to reimbursement for a unilateral placement in a private day school. *Trumbull Board of Education*, 106 LRP 10866 (SEA Conn. 2004). The hearing officer favorably noted the board’s decision to hire an Industrial Hygienist to monitor the school’s air quality and who made the following recommendations, which the school district implemented:

- Keep at least two windows open in each classroom when the school is occupied and/or open windows periodically to bring in fresh outside air.
- Remove the carpets in classrooms that have been identified with high fungal, bacterial, or dust mite allergen levels.
- Continue working on implementing earlier recommendations (cleaning heater fins, cleaning dust under gym stage, etc).
- Implement a formal cleaning plan that lists the cleaning tasks that will be performed along with the frequency for completion.
- Remove the soft porous building materials in the Reading Room that were repeatedly exposed to moisture from roof leaks.

Draft reasonable accommodations

The health plan must clearly and succinctly list the steps to be taken in the event the student is exposed to an allergen. The plan itself should be shared with all staff members who have contact with the student throughout the day, including lunchroom staff, coaches, bus drivers, substitutes, etc.

A definitive list of reasonable accommodations is impossible to generate because the reasonableness of a given accommodation will, to a large extent, be dependent on the severity of the student’s allergy and his/her unique needs. It stands to reason that the more severe the allergy, the more detailed and stringent the accommodations will be. Examples of reasonable accommodations include:

- Assigning a designated seat on the bus for a student with an allergy, so as to limit her exposure to other students on the bus who had contact with the allergen.
- Sending a notice to all parents informing them an anonymous student has an allergy and requesting that parents help ensure that the allergen is not brought onto school grounds.
- Requiring students and staff to wash their hands after lunch, before entering the classroom, after touching an allergen (e.g., latex, peanuts, etc.).
- Initiating a walkie talkie protocol in which the student is allowed to carry a walkie-talkie on school grounds to report the existence of an allergen.
- Purchasing latex-free supplies (bandages, gloves, erasers, etc.).
- Prohibiting latex balloons on school grounds.
- Daily vacuuming of the classroom carpet, daily washing of the classroom desks, hand-washing for all individuals.
- Providing air filters for classrooms, requiring staff and pupils to remove their shoes before entering classrooms, maintaining restroom cleanliness, and prohibiting foods containing the allergen in question.

Schools need not implement all of the accommodations sought by parents

The responsibility to develop reasonable accommodation results from an interactive process between the student and the school that is conducted in good faith. *Beck v. University of Wisc. Bd. of Regents*, 75 F3d 1130, 1135 (7th Cir. 1996) (quoting 29 C.F.R. §1630.29(o)(3) 1995).

School districts often make the mistake of agreeing to accommodations that are not reasonable because parents are insistent that the accommodation be provided. A good example of this occurred in *Smith v. Tangipahoa Parish School Board*, 46 IDELR 282 (D.Ct. LA2006). The parents asked that the school district wash the public road that ran in front of the school their child attended every time a horse walked on it – the student was allergic to horse dander. The school district agreed and worked in cooperation with the local fire department, which washed the road a few times, but then stopped. The judge explained that school districts need not honor all of a parent’s accommodation requests when developing a section 504 plan. The judge observed that the district’s actions in notifying staff members, ensuring that the student took her medications, and making an EpiPen® readily available, were the only accommodations required under the law. See also, *K.U. v. Alvin Independent Sch. Dist.*, 991 F.Supp. 599 (S.D. Tex. 1998) (noting that “perfect accordance with parents’ wishes is not a requirement of section 504”).

Is it a reasonable accommodation to require a “peanut-free classroom”?

Maybe. In *Mystic Valley Regional Charter School*, 40 IDELR 275 (SEA Mass. 2004), the hearing officer criticized the school district for failing to create a peanut-free classroom for a first-grade student with life-threatening allergies to peanut and tree nut products. The school district took some steps that the hearing officer approved of, including asking parents not to send peanuts or peanut products to school, requiring all staff and students to wash their hands before and after eating, providing staff training on anaphylactic reactions and how to administer medication, and washing all tables and desks after food was eaten.

The hearing officer ultimately held that the student was entitled to be educated in a peanut-free classroom. She explained that young children share food impulsively and that even if the student could advocate for himself, that did not relieve school officials from providing him a safe environment. The hearing officer faulted the school district for holding a class party that featured Asian food with nuts. The student sat at a table in the classroom by himself during the party, which the hearing officer held was discriminatory: “[the student was] entitled to equal access to a pool of other students during snacks and lunchtime so that he [could] learn appropriate social pragmatics in a natural environment, simultaneously with the rest of the age like peers in his class.” The hearing officer held that the school district failed to demonstrate that a peanut ban in the classroom would fundamentally alter the nature of the school’s program.

Restricting participation in classes is disfavored

In a 2009 OCR case, the parent of a student with a latex allergy filed a complaint with the OCR alleging that the school district failed to allow the student to take chemistry as agreed to in her section 504 plan. The school district admitted the section 504 plan specified that she would take chemistry; however, school officials determined after the plan was written that they could not guarantee that the chemistry lab would be latex-free. Instead, the school district offered to pay for an online chemistry course as an “alternative avenue” for her credits. The OCR found that the school district improperly disregarded the student’s section 504 plan and required the school district to allow the student to take the chemistry class in a latex-free environment. *Franklin County (TN) Public Schools*, 52 IDELR 143 (OCR 2009).

A Minnesota school district violated the IDEA when a chemistry teacher repeatedly conducted an experiment using balloons in a class with a student who was allergic to latex. The student had a section 504 plan that described her latex allergy in detail, of which the teacher in question was

aware. The student sat far away from the experiments as they were being conducted. During a class break, a number of students made water balloons and tossed them around the classroom, resulting in broken balloons. The teacher allowed the student to leave the room upon request. Students continued to play with the balloons in class over the next few weeks. The hearing officer held that the teacher acted directly contrary to the directives contained in the student's section 504 plan. *Robbinsdale Indep. Sch. Dist. No. 281*, 106 LRP 14303 (SEA Minn. 2004).

Similarly, in *Bethlehem (NY) Central School District*, 109 LRP 30964 (OCR 2009), the OCR held that the school district violated section 504 when it refused to allow a student to enroll in a culinary arts course. The school district reasoned that it could not accommodate the student's allergies to peanuts, dairy products, eggs, kiwis, and crab in the class, one that involved cooking and otherwise working with food. The OCR found it persuasive that the student's allergist had no objections to the student's participation in the course. The OCR also faulted the school district for not raising the issue with the student's section 504 team: "The district's decision to obtain additional information from the allergist was not made by a group of knowledgeable persons pursuant to the procedural requirements of section 504."

Inform other students, parents, school groups, etc., of the allergy plan, if appropriate

In a 2009 decision from Tennessee, the OCR favorably viewed the school district's decision to post notices at the entrances of the school signifying it was a "latex-free building." In addition, all vendors, visitors, and substitutes at the school were required to sign a facilities use form acknowledging that they were aware of the school's latex-free environment. *Franklin County (TN) Pub. Schs.*, 109 LRP 26598 (OCR 2009).

In a 2006 resolution agreement involving the Kansas City, Nebraska, School District, a parent filed an OCR complaint against the school district because her child was unable to participate in an after-school event sponsored by the local PTA (Parent Teacher Association). The OCR required the school district to notify all PTA's and other similar groups that latex balloons were not to be used as decorations because a number of students had latex allergies that would prohibit their participation. *Omaha (NE) Pub. Schs.*, 107 LRP 36147, (OCR 2006).

The issue of after-school events was also addressed in a 2006 OCR opinion originating from Connecticut. The OCR determined that there was no evidence of a section 504 violation. The school district established a procedure that allowed the parents of a student with a gluten allergy to notify school groups if their daughter was planning on attending an event. The school district agreed to ensure that the group hosting the event made gluten-free foods

available for consumption or purchase. Groups that failed to comply would lose their building use privileges. *Tolland (CT) Sch. Dist.*, 46 IDELR 171 (OCR 2006)

Schools must use caution when writing letters to other parents so as not to disclose any personally identifiable information about the student with the allergy (unless the parents have consented). Also, at least one hearing officer criticized a school district for describing a student's peanut allergy as "severe," and not "life threatening." *Mystic Valley Reg'l Charter Sch.*, 40 IDELR 275 (SEA Mass. 2004).

Location/carrying of EpiPen® or en or oral antihistamine

The following is a slight caution about "epinephrine handoff systems." Some school districts allow EpiPens® to be passed between staff members during the day, where the potential for a mishap is great. It is generally recognized that having the child carry the EpiPen® (e.g., in an EpiPen® belt or pack worn around the waist) is a better solution that will act to limit the school district's liability. (See *Manalapan-Englishtown Regional Board of Education*, 107 LRP 27925 (SEANJ 2007) wherein the hearing officer cautioned against passing EpiPens® between staff members: "Due to the number of handoffs and people involved in the process, there is a greater risk of leaving the epinephrine either at school or on the bus.").

Train students

In an OCR decision issued in 2008, the OCR found that a New York school district was not liable for disability harassment as a result of teasing that two brothers experienced because of their peanut allergies. The OCR found that the school district promptly responded when other students ridiculed the boys (e.g., taunting statements like "peanut butter boys" and "don't make me get peanut butter"). In finding in favor of the school district, the OCR particularly highlighted the fact that the principal met with all fifth- and sixth-grade students and explained why teasing and threats about peanut allergies were unacceptable. *Greenport (NY) Union Free Sch. Dist.*, 50 IDELR 290 (OCR 2008).

Create "staging areas" for allergens

When an allergen is errantly brought into a school, school officials must develop and implement a plan that allows them to take possession of the item and secure it in a safe location. For example, when latex birthday balloons are delivered to a student by her parents, the front office should take the gift to a previously identified "staging area," e.g., the principal or assistant principal's office. The student with the latex allergy should be instructed not to enter the "staging area" at any time. The student for whom the gift was intended can retrieve her gift at the conclu-

sion of the school day for transit home. As an aside, under no circumstance should the balloons be “popped”; this creates an extremely dangerous situation where the latex particulates may be inhaled. *Middleton Sch. Dist.*, 108 LRP 25266 (SEA Mass. 2007).

Contingency plans in other settings

Special consideration must be made involving transportation. As the hearing officer in a due process hearing arising out of New Jersey reasoned regarding the transportation of a student with a peanut allergy:

If an allergic reaction begins, expeditious administration of the EpiPen® can control it. Peanuts are a common food and people, especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that [an allergic student] whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen® and, thereby allow the student to avoid the above-described problems. [The student] is too young to be responsible to monitor himself and to administer his own EpiPen®. Therefore, a nurse, aide or other trained adult is required for those purposes. *Manalapan-Englishtown Regional Board of Education*, 107 LRP 27925 (SEA NJ 2007)

School districts and their counsel should endeavor to remain up-to-date regarding this growing line of case law in the field of allergies in schools. As the number of students with allergies increases, the number of disputes will only continue to rise. ■

Endnotes

- ¹ Source: <http://www.cdc.gov/nchs/data/databriefs/db10.htm>.
- ² 29 U.S.C. §794 et. seq.
- ³ Pub. L. 110-325.
- ⁴ Prior to the 2008 amendments, courts frequently found that allergies were not disabilities under section 504 (see *Smith v. Tangipahoa Parish Sch. Bd.*, 46 IDELR 282 (D.Ct. LA 2006), footnote 9).
- ⁵ Schools commonly draft “health – safety – emergency

plans” instead of section 504 plans. Whether these types of plans suffice under the law is a question that should be directed to legal counsel. The relevant issue is that procedural safeguards are provided to parents pursuant to section 504; procedural safeguards do not typically accompany other types of written plans.

⁶ 20 U.S.C. §1400 et. seq.

⁷ *Frequently Asked Questions About Section 504 and the Education of Children with Disabilities*, OCR, Questions 18-24, <http://www2.ed.gov/about/offices/list/ocr/504faq.html>.

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