Food Allergies: Nuts?

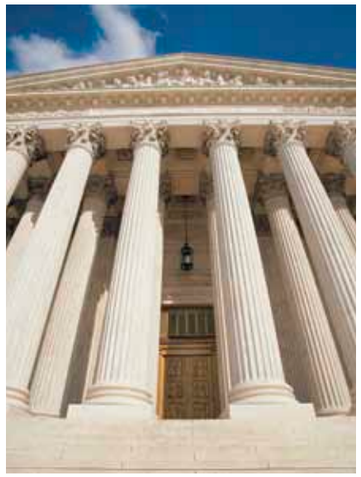
Food allergies, especially peanut and tree-nut allergies, are on the rise in terms of both national numbers and parental concerns. The typical legal issues concern eligibility and entitlement under Section 504 of the Rehabilitation Act and its fraternal twin, the Americans with Disabilities Act (ADA). The following case and accompanying question-and-answer discussion illustrate major recent issues.

The Case

Early in the 2010-2011 school year, Hevel Elementary School in southern Michigan implemented a nut-free policy in response to a student with a life-threatening allergy that was aggravated by airborne exposure to peanuts and tree nuts. After the student's physician deemed the student's 504 plan to be ineffective in eliminating the risk of serious harm, the school revised the 504 plan and implemented a new policy on nut allergies. If a student brought a nut product to school, staff responded by removing and substituting the food item, requiring the student to wash his or her hands, and sending an individual explanatory notice to the parent. The school issued an explanatory notice to families that, without identifying the allergic student, referred to Section 504 and listed approved food items.

In November 2010, several parents notified the district that they would not comply with the ban due to the conflicting nutritional needs of their children. A week later, they escorted their children to school with nut products and remained present to prevent school staff from removing these items. As a result, the student with the life-threatening nut allergy missed school, and the school revised her plan and the policy to assure her protection.

One of the protesting parents filed suit in state court against the principal, superintendent, and members of the 504 team, including the school nurse. She contended that the nut-free policy infringed on her and her daughter's constitutional rights and breached the defendants' fiduciary duties. The alleged violations included a.) failing to recognize the nutritional or medical needs of her child and b.) subjecting her and her daughter to discriminatory



harassment and retaliation to get them to comply with the policy. Her requested relief was to enjoin the schoolwide ban on nut products and to obtain monetary damages.

At the trial court proceeding for a preliminary or permanent injunction, the plaintiff-parent informed the judge that the absence of nut products would compromise the health of her daughter due to her individual dietary restrictions. She further advised the court that she had requested, and the district had denied, a 504 plan for her child. In turn, the district defendants submitted a letter from the other student's physician, who is a specialist in pediatric allergy and immunology, stating that the student had continued to experience airborne exposure flare-ups during the previous year's less intrusive 504 plan accommodations and that peanut products in the school cafeteria was the suspected cause.

The superintendent submitted an affidavit explaining that, pursuant to a board of education vote, she contacted the U.S. Department of Education's Office for Civil Rights (OCR) in September 2010 for guidance. OCR reportedly confirmed that Section 504 provided protection for students with severe allergies and, in contrast, it was not aware of any law that required a school district to accommodate a student who wished to consume nut products at school.

The trial court granted the defendants' motion for summary judgment, thus disposing of the case. The parent filed an appeal with Michigan's intermediate court of appeals.

What do you think was the appellate court's decision?

In *Liebau v. Romeo Community Schools* (2013), the Michigan Court of Appeals affirmed the trial court's decision. The court rejected each of the plaintiff parent's claims. First, the court concluded that since she had not appealed the denial of Section 504 eligibility for her child, she lacked standing to base her claims, including alleged retaliation, upon Section 504.

Second, in response to her argument that she could not be bound by a 504 plan to which she and her daughter were not parties, the court concluded that contract theory is not applicable here. State law for the safety and welfare of students gives the school board broad authority to issue a schoolwide ban on nut products as part of the health provisions of a 504 plan. The court similarly made short shrift of the plaintiff's equal protection claim, concluding that the differential treatment for students with disabilities was rationally related to a legitimate governmental interest.

Next, the court rejected the plaintiff's Fourth Amendment claim of unlawful search and seizure, reasoning that a.) the advance general notice lessened the individual privacy interest, b.) the search for banned items was not excessively intrusive in light of the other student's life-threatening interest, and c.) the protesting parents' notice of noncompliance and the staff's observations for compliance sufficed for the requisite reasonable suspicion.

If the district had denied a 504 plan to the first student or if the plaintiff parent had appealed the district's denial for the second student, what would be the likely adjudicative decision as to the eligibility of each student under Section 504?

As a threshold, procedural matter, principals need to be aware that parents have a right to an impartial hearing under Section 504, similar to the right of parents under the Individuals with Disabilities Education Act (IDEA). The difference is that in the several states that do not provide jurisdiction for their IDEA hearing officers to decide such "pure" (i.e., not IDEA-intertwined) issues, the school district has the responsibility for arranging an impartial hearing under Section 504.

As to the likely outcome of such a hearing and/or a court proceeding, the issue is whether either student meets the Section 504 (and ADA) definition of disability: a.) physical or mental impairment that limits b.) a major life activity c.) to a substantial extent. The ADA amendments that went into effect on January 1, 2009, increased the likelihood of eligibility in such cases in the following ways:

- Expanding the nonexhaustive list of major life activities to expressly include eating and major bodily functions;
- Directing that the determination of whether the limitation is substantial be without mitigating measures, such as hand-washing and EpiPens; and also
- Directing that the determination of substantial be based, for episodic impairments, at the active time.

The first student clearly qualifies under parts "a" (diagnosed allergy) and "b" (eating) and—based on the life-threatening aspect of the diagnosis—"c." The only question might be whether this risk assessment was credible in terms of merely a theoretical possibility or a practical reality. The school may find it prudent to have its nurse examine the source and contents of the diagnosis and, where clearly questionable, contract with a specialized physician for a second opinion. The plaintiff parent's child would have difficulty meeting any of these requirements based on the limited facts in this case.

If the school personnel had reason to suspect that a child had a food allergy (or other physical or mental impairment) that limited a major life activity substantially but the parent had not provided a medical diagnosis, is the school excused from determining eligibility?

No. "Child find" applies under Section 504 just as it does under the IDEA. The key is the reasonable-suspicion trigger for an evaluation. OCR has made clear that if a medical diagnosis is needed, the district is responsible for obtaining the evaluation.

State law for the safety and welfare of students gives the school board broad authority to issue a schoolwide ban on nut products as part of the health provisions of a 504 plan.

For a child with a peanut or tree-nut allergy that is severe enough to qualify as substantial, must the 504 plan include such a schoolwide ban?

Like eligibility, the resulting entitlement is an individual matter. The pertinent cases to date have been at the hearing officer level, and the outcomes have varied considerably depending on the specific child and the school. However, most have found less extensive accommodations as meeting the district's obligation to provide free appropriate public education under Section 504. For example, a hearing officer in Oregon upheld the district's 504 plan, rather than the more extensive provisions that the parents sought, for a child with life-threatening peanut and tree nut allergies (*Cascade School District*, 2002). More recently, a hearing officer in Massachusetts ruled in favor of the parents but their proposal was for a peanut/tree nut free classroom (*Mystic Valley Regional Charter School*, 2004).

Does the school have any specific responsibilities for a child with a peanut or tree-nut allergy that is not severe enough to qualify as substantial?

Other than its procedural safeguards for a child reasonably suspected of qualifying, such as notice and an evaluation, Section 504 would not apply. Nevertheless, providing reasonable accommodations for such students, either via an individual health plan or a more informal arrangement, makes good sense.

Conclusion

Peanut and tree-nut allergies are an example of health conditions, including allergies to milk or wheat products and diabetes, that are not only on the rise in children but also increasingly within the scope of Section 504 as a result of the ADA amendments. School leaders need to avoid the opposite extremes of limiting 504 plans to learning-related impairments and granting eligibility and entitlements as consolation prizes for insistent parents, instead providing carefully crafted policies and procedures for accurate compliance with Section 504 and the ADA and implementing sensible professional practices for other students. Such a balanced approach will alleviate, although not eliminate, the competing concerns of the parents in our main case. P

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