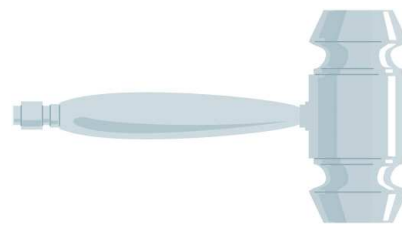


# Legal Corner



By Michael I. Levin, Esq., PAESSP General Counsel

## ***Building a Service Agreement for Children with Severe Food Allergies – Part I***

**Editor's Note:** This article is too long to be printed in one edition, so it will be divided into two parts. This is Part I and Part II will be printed in the next issue of *the Pennsylvania Administrator*. In addition, there are two appendices to the article which can be found on the association's web site at [http://www.paessp.org/documents/2009-02-16\\_Calendarization\\_of\\_Duties.pdf](http://www.paessp.org/documents/2009-02-16_Calendarization_of_Duties.pdf) and [http://www.paessp.org/documents/Appendix\\_A\\_Medical\\_Statement\\_for\\_Students.pdf](http://www.paessp.org/documents/Appendix_A_Medical_Statement_for_Students.pdf).



In the previous edition of the *Pennsylvania Administrator*, I wrote about the recent amendments to the Americans with Disabilities Act and concentrated my remarks to how those amendments implicate the employment setting. However, the ADA Amendments Act of 2008 also amends and greatly expands the definition of the term

“disability” as it applies to Section 504 of the Rehabilitation Act.<sup>1</sup> Succinctly stated, many more children will qualify as having a disability and many more may be eligible to have a Section 504 Service Agreement pursuant to Chapter 15 of the State Board regulations. 22 Pa. Code, Chapter 15.<sup>2</sup>

Children who are entitled to a Section 504 Service Agreement pursuant to Chapter 15 of the State Board regulations are those children who have allergies and who cannot attend school safely without accommodations being provided by the school.<sup>3</sup> For purposes of this article, I am going to assume that the child has a severe food allergy that is life threatening and that the school must provide accommodations to ensure that the student can attend school safely. What should be done and how should it be done?<sup>4</sup>

### **Documenting the Nature and Extent of the Food Allergy**

It is incumbent upon the school to obtain sufficient documentation to establish that the student has a

severe, life-threatening food allergy. There is no requirement that the school accept the parent's word, or rely on inconclusive or ambiguous documentation. Chapter 15 authorizes the school to request the necessary documentation. Chapter 15 provides:

“(c) If the school district needs additional information before it can make a specific recommendation concerning the related aids, services or accommodations needed by the student, the district may ask the parents to provide additional medical records which the parents may have and to grant the district permission to evaluate the student.

(d) The school district initiated request to evaluate a student shall specifically identify the procedures and types of tests which it proposes to use to evaluate the student and inform the parents that they have the right to give or withhold their written consent to these evaluations.” 22 Pa.Code §15.5.

If the parents refuse to provide necessary medical documentation or to permit an evaluation by the school, unlike certain circumstances under the IDEA where the school is not permitted to initiate due process in an effort to compel cooperation, Chapter 15 expressly allows the school to initiate due process. Chapter 15 provides:

“(a) If the parents and the school district agree as to what related aids, services or accommodations should or should no longer be provided to the protected handicapped student, the district and parents shall enter into or modify a service agreement. The service agreement shall be written and executed by a representative of the school district and one or both parents. Oral agreements may not be relied upon. The agreement shall set forth the specific related aids, services or accommodations the student shall receive, or if an agreement is being modified, the modified services the student shall receive. The agreement shall also specify the date the services shall begin, the date the services shall be discontinued, and, when appropriate, the procedures to be followed in the event of a medical emergency.” 22 Pa.Code §15.7.

Much like an Individualized Education Plan (IEP), a service agreement must be written properly and take into account relevant factors. When dealing with safety issues, especially those that might be life threatening, extra care and attention should be devoted to “getting it right.” No school administrator would ever want to suffer the consequences of a student’s tragic death because the service agreement was not properly written or implemented. The issues that need to be considered and the language that can address those issues may look like the following.<sup>1</sup>

### **Defined Terms**

To protect both the child and the school—the child from danger and the school from legal liability—it is necessary to be precise. The use of defined terms will add clarity. The following terms may be appropriate in a Service Agreement written for a child with severe food allergies.

“Definitions. As used in this AGREEMENT, when capitalized, the following phrases shall have the definitions stated unless the context clearly indicates otherwise:

“AGREEMENT” means this Section 504 Service Agreement and any supplement or addendum that is mutually agreed upon and signed by both parties.



“FIRST RESPONDER” means the adult responsible for providing or facilitating the provision of emergency treatment. A FIRST RESPONDER may be and INCLUDES a: (i) school district administrator; (ii) teacher; (iii) nurse; (iv) aide; (v) bus driver; (vi) food service worker; (vii) athletic coach or trainer; or (viii) a chaperone; on condition that any such individual has been provided with the training described in this Service Agreement and has been provided with the FIRST RESPONDER protocol attached hereto. A FIRST RESPONDER is not required to be a licensed health care professional.

“FOOD WILL NOT BE PERMITTED” means that the SCHOOL DISTRICT will establish and enforce rules that children will not be allowed to take food out of their wrappers or eat food. The phrase does not mean that students or others cannot transport food to school or activities in appropriate wrappers or containers; nor is it a guarantee that the rules and enforcement will be 100% effective.

“INCLUDES” and “INCLUDING” means inclusive of and not limited by or by way of example and not limitation.

“NURSE” means a school nurse primarily assigned to the school which [insert name of child] attends.

“SAFE SNACKS” means the snacks provided by the parents to the teacher(s) to be used by [insert name

of child] pursuant to his discretion whenever snacks are being eaten in the class or at any activities.

“SCHOOL” means the school to which [insert name of child] is assigned.

“SCHOOL DISTRICT” means the [insert name] School District.

“SCHOOL PERSONNEL” means: (i) all of the food service workers regularly assigned to the SCHOOL; (ii) the Principal of the SCHOOL; (iii) the Assistant Principal of the SCHOOL; (iv) [insert name of child]’s regular bus driver; (v) all teachers whose classes or activities [insert name of child] is regularly assigned; (vi) all teachers of “specials” to whom [insert name of child] is regularly assigned; (vii) any support staff who are assigned to [insert name of child] or any of his/her classes or activities.

“SCHOOL-SPONSORED EVENT(S)” means any activity or program for which the SCHOOL DISTRICT is responsible under Section 504 of the Rehabilitation Act.

“UNSAFE FOOD(S)” means foods containing [insert a description of the unsafe foods, such as: nut products, packaged foods containing peanut or tree nut ingredients or warnings, as well as unlabeled or homemade foods].”

### **Parental Notice and Duties**

Safeguarding students is not a one-way street. Parents, guardians or others with custody of the child have certain duties. Moreover, medical conditions are not static. When parents have information that the child’s medical condition has changed and that the change may implicate accommodations necessary to safeguard the child, such information ought to be provided to the school. Sample language that might be appropriate could be as follows.

“Prior to the first day of school (and prior to this AGREEMENT going into

effect initially) and with any new prescriptions during the school year, parents will supply the SCHOOL NURSE with updated medical protocols and appropriate district medical forms as well as prescribed medications in their original pharmacy containers pursuant to SCHOOL DISTRICT policy, a copy of which is attached hereto. (By attaching the policy to this AGREEMENT, the parties are not intending to preclude the SCHOOL DISTRICT from changing the policy in the ordinary course. Attaching the policy is for the exclusive purpose of ensuring that the Parents have been provided a copy of the current policy.)

Parents will supply and maintain SAFE SNACKS to be kept in [insert name of child]’s homeroom.”

The parents will also fulfill the other duties set forth hereinafter.”

### **Ensuring That Someone is “In Charge”**

Proper compliance with and implementation of a Service Agreement will not just happen. One or more individuals must be in charge and fully responsible for ensuring that the Service Agreement is implemented by all who are responsible for following the prescriptions in a Service Agreement. In the case of severe food allergies, the failure or refusal of just one person to do what is required may be deadly. Logical choices for this role are the building principal or assistant principal. It must be someone with supervisory authority who has the power to compel employees to comply with and implement the Service Agreement. Language which may be



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appropriate to ensure that someone is in charge might be as follows.

“Designation of Coordinator; Coordinator Duties. The SCHOOL DISTRICT shall designate a coordinator who shall be responsible for ensuring and documenting that:

FIRST RESPONDERS are designated and available: (i) on any bus to which [insert name of child] is assigned, (ii) in all classes in which he/she is assigned, (iii) in the cafeteria when he/she is assigned lunch, (iv) at any activity to which [insert name of child] is assigned, (v) in the playground during the school day or assigned activities;

Training as required by this AGREEMENT is and has been provided;

The NURSE has documented that medical suite oxygen tank and other emergency equipment are in proper working order.”

Simply stating that someone is in charge is not enough. The administrator who is identified as being in charge must actively ensure that the Service Agreement is being implemented by everyone who is assigned responsibilities under the agreement—the nurse, the bus driver, the cafeteria workers, the parents and the teacher(s). Moreover, personnel change. New and substitute personnel must be instructed that the Service Agreement exists and that they have duties under the Service Agreement. When dealing with severe food allergies and potential life and death issues, I suggest that it is appropriate to take action to eliminate or reduce risk. I suggest that a checklist be prepared based on the duties contained in the Service Agreement. I describe these checklists “calendarizations” because they identify what needs to be done and when in the school year it needs to be done. **A sample calendarization of a severe food allergy Service Agreement (Appendix “B”) is available at [http://www.paessp.org/documents/2009-02-16\\_Calendarization\\_of\\_Duties.pdf](http://www.paessp.org/documents/2009-02-16_Calendarization_of_Duties.pdf)**

## The Central Role of the School Nurse

As a health care professional, the school nurse will always have a central role in providing services and accommodations to the child and ensuring a safe environment for the child. The duties of the school nurse must be clearly and unambiguously stated in the Service Agreement. The following is an example of language that might be appropriate.

“A NURSE is to be on school grounds during school hours.

### NURSE Duties

The NURSE will ensure that the medical suite oxygen tank and other emergency equipment are in proper working order throughout the school year.

The NURSE will log all of [insert name of child]’s medical suite visits and inform the parents when [insert name of child]’s medications are used or become expired.

The NURSE will also fulfill the other duties set forth hereinafter as applicable to the NURSE.”<sup>2</sup>

### Medical Instructions

Medical instructions [insert appropriate description, such as from Dr. \_\_\_ and attached to this Service Agreement as Appendix “A” dated 11/19/2008] are to be followed. Required documentation/scripts/orders must accompany all medications and will be provided by parents.

## Medication and Medical Apparatus

Although it is clear that public school entities must provide the necessary accommodations and services to enable a student with severe food allergies to attend school safely, it is also clear that the school is not required to provide medication or personal devices—that is the responsibility of the parents or others. However, the Service Agreement needs to address the medications and medical apparatus that will be provided and to identify who will be providing what. Language that may be appropriate for this purpose is as follows.



### Medical Kits

The parents will provide the following medical kits and supplies for [insert name of child]:

- a “medical suite kit;”
- a “homeroom kit;” and
- a “school bus kit.”

Each medical kit will contain: emergency medications provided by parents and instructions provided by [insert name of child]’s physicians or such other physicians chosen by the parents, and given to the SCHOOL DISTRICT by parents; and emergency phone numbers.

The “medical suite kit” will contain emergency medical instructions, [insert the medication and devices to be included in the kit, such as—two EpiPens, Benadryl, vials of Albuteral Sulfate or Xopenex and a personal nebulizer].

The “homeroom kit” will contain emergency medical instructions, [insert

the medication and devices to be included in the kit, such as—two EpiPens, Benadryl and an inhaler].

The “school bus kit” will contain emergency medical instructions, [insert the medication and devices to be included in the kit, such as—two EpiPens, Benadryl and an inhaler]. The school bus driver will also have a working, two-way radio or cell phone readily available.

In addition to [insert name of child]’s three school kits, [insert name of child] has a portable “home kit” which contains emergency instructions, [insert the medication and devices to be included in the kit, such as—two EpiPens, Benadryl, vials of Albuterol Sulfate or Xopenex and a battery operated nebulizer, which [insert name of child] may keep with him/her].

*Part II will appear in the September 2009 edition of the Pennsylvania Administrator.*

### Footnotes

<sup>1</sup> Because of the ADA Amendments Act of 2008, all school districts need to review their forms and protocols for determining whether a child is a child with a disability as defined under the new standards. The analysis is now different and the forms and protocols used must be revised. The employees who are responsible for determining whether a child is a child with a disability for purposes of Section 504 and Chapter 15 must receive proper training.

<sup>2</sup> The complete set of the Pennsylvania Code can be found at <http://www.pacode.com>.

<sup>3</sup> There are numerous sophisticated and complex legal issues surrounding whether a student qualifies for accommodations. Under the ADA Amendments Act of 2008, a public school entity is not permitted to take into account ameliorative measures, such as medication, in determining whether a student has a disability. However, if a child can simply take allergy medication and attend school safely without the necessity for accommodations being provided by the student, it would appear, or at least is arguable, that the student does not need a Section 504 Service Agreement. Each situation must be independently evaluated, but the point is that just because a student has an allergy does not necessarily mean that the child qualifies for a Section 504 Service Agreement.

<sup>4</sup> When considering what needs to be done, not only is Section 504 and Chapter 15 implicated, but so too are rules and requirements established by the United States Department of Agriculture. Suggested reading includes the following: USDA’s Accommodating Children with Special Dietary Needs in the School Nutrition Programs: [http://www.fns.usda.gov/cnd/guidance/special\\_dietary\\_needs.pdf](http://www.fns.usda.gov/cnd/guidance/special_dietary_needs.pdf); National Food Service Management Institute’s Meeting Children’s Special Food and Nutrition Needs in Child Nutrition Programs: [http://www.olemiss.edu/depts/nfsmi/Information/special\\_food\\_and\\_nutrition\\_needs/index.html](http://www.olemiss.edu/depts/nfsmi/Information/special_food_and_nutrition_needs/index.html); School Nutrition Association’s allergy information resources web site: <http://www.schoolnutrition.org/Content.aspx?id=634>.

<sup>5</sup> A concept that must be remembered is that each Service Agreement must be individually tailored to meet the needs of the student. One size does not fit all. Although I am providing suggested language, the language is designed more to stimulate thought on the issues being addressed rather than recommend that this is the best language to use in any given situation.

<sup>6</sup> Chapter 15 does not dictate the format or structure for a Service Agreement. Therefore, public school entities have a high degree of flexibility in deciding how to structure the contents of a Service Agreement. In this regard, all of the duties of the school nurse could be included in this section of the Service Agreement, or the nurses duties as they relate to particular topics such as staff training could be set forth topically.

<sup>7</sup> For purposes of these examples, we will assume that the nature of the food allergy is a “nut allergy.” Naturally, if the child has a different type of food allergy, the language being suggested should be changed.