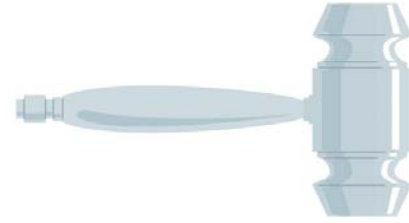


# Legal Corner



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

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

**Editor's Note:** This article was too large to be printed in one edition, so it was divided into two parts. This is Part II. Part I was printed in the previous 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 February 2009 edition of the *Pennsylvania Administrator*, I wrote about the recent amendments to the Americans with Disabilities Act (ADA) 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> As I stated in Part I, for the 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>

### **The “First Responder”**

If a child has an allergic reaction, then an appropriate and prompt response is necessary. Language to ensure that there is someone available to provide a

proper first response may be as follows:

**FIRST RESPONDER.** The SCHOOL DISTRICT will have one or more FIRST RESPONDERS available and present: **(i)** at school; **(ii)** on any school bus to which [insert name of child] is assigned; **(iii)** at SCHOOL-SPONSORED EVENTS that [insert name of child] is required to attend; and **(iv)** at school-sponsored events that [insert name of child] elects to attend provided that [insert name of child] or his parents provide written advance notice at least one day in advance to the principal that [insert name of child] will be attending the event.

### **Training of School Personnel**

Proper training of school personnel is one of the required elements of any Service Agreement pertaining to a child with severe food allergies. The Service Agreement must identify who will be trained, who will provide the training and what the training will consist of. Language that may be appropriate for this purpose is as follows:

*“Training of School Personnel*

**Emergency Procedures.** SCHOOL PERSONNEL will be trained specifically in [insert name of child]’s emergency procedures and responsible for facilitating the provision of emergency treatment in the event the NURSE is unable to respond immediately to the scene. Any such individual who completes the training

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qualifies as a “FIRST RESPONDER” for purposes of this AGREEMENT.

### **In-Service Training**

The NURSE will provide in-service training for SCHOOL PERSONNEL regarding [insert appropriate descriptors, such as—life-threatening food allergies, symptoms, risk reduction procedures, emergency procedures and the administration of an EpiPen].

The NURSE will track attendance of these sessions to ensure that SCHOOL PERSONNEL receives training.

The NURSE will educate SCHOOL PERSONNEL in avoiding accidental exposures and administering epinephrine to halt the progression of anaphylaxis.

The NURSE will provide SCHOOL PERSONNEL with information on food allergy reactions in schools, including information as to risks, including life threatening risks.

The NURSE will stress to SCHOOL PERSONNEL that students such as [insert name of child] cannot come in contact [insert appropriate language, such as—with even trace amounts of peanut or tree nut ingredients] during lunch, other meals, class projects, parties, holidays and celebrations, arts, crafts, science experiments, cooking and snacks.”

### **Notice to Other Parents**

The most important action that a school can take is to prevent the child from being exposed to any allergen. It is a good idea to notify other parents that certain foods will not be permitted as part of the preventative protocols. As stated earlier in this article, each situation must be evaluated on its own merits. A school may determine to be nut free entirely, in which case all parents must be notified. A school may determine to have only nut-free classrooms for those classrooms to which the student is assigned. Language dealing with notice to parents might be couched as follows:

**Notice to Other Parents.** All parents of students in [insert name of child]’s classes will be notified that due to severe student food allergies, UNSAFE FOOD(S) will not be permitted in the classroom. This notification will occur at the beginning of the school year and reminders will be provided prior to classroom parties and included with report cards each semester.

A notice regarding this will also be posted outside the classroom. A FIRST RESPONDER will examine all food that is to be distributed to students in the class to ensure that no UNSAFE FOOD(S) is distributed.

### **The Classroom**

The Service Agreement needs to address what will be done in all classrooms to which the student is assigned. Language that may be appropriate is as follows:

#### **NO UNSAFE FOOD(S) IN CLASSROOM.**

Teachers are to be directed that **NO UNSAFE FOOD(S)** may be brought into any classroom to which [insert name of child] is assigned, whether he is in the classroom or not. This is to be accomplished in the following manner: **(i)** teachers will be trained as to this requirement; **(ii)** teachers will periodically remind students; **(iii)** a notice will be posted outside of the classroom; and **(iv)** letters or notices will periodically be sent home with students.

If students bring UNSAFE FOOD(S) into the classroom and it is discovered by the teacher, arrangements will be made to ensure that [insert name of child] is not exposed to the UNSAFE FOOD(S).

**Disclosure of Information.** To help ensure his safety, [insert student's name] Parents will allow staff to be shown [insert name of child]'s photo identification and provided with his personal medical information on a need-to-know basis. However, staff will also be reminded to maintain confidentiality in accordance with applicable law.

### **The Cafeteria**

Naturally, special consideration needs to be given to the cafeteria and the cafeteria staff. The provisions of the Service Agreement pertaining to the cafeteria and the cafeteria staff may be in a separate section or in the training section of the Service Agreement. Language that may be suitable is as follows:

**“Special Instructions to Cafeteria Staff.** The SCHOOL DISTRICT will train cafeteria staff as follows: **(i)** [insert appropriate descriptions, such as—on reading ingredient labels and avoiding cross-contamination (For example: **(a)** a knife that is used to spread peanut butter cannot simply be wiped off and then reused to cut a ham sandwich that will be served to a peanut allergic child; and **(b)** a spatula that was used to transfer walnut cookies cannot be reused on sugar cookies

that will be served to a child with tree nut allergies; **(ii)** the importance of sanitizing lunch trays, using designated cutting boards for nut-free food preparation, etc.; **(iii)** the requirement to check the nut-free table as stated subsequently in this Service Agreement; and **(iv)** recognizing the symptoms of Allergic Reactions and the need to initiate the facilitation or provision of emergency treatment].

**Nut-Free Table.**<sup>5</sup> A designated clearly labeled “nut-free” cafeteria table will be provided to [insert name of child] at SCHOOL and at any SCHOOL SPONSORED EVENT where a meal is to be eaten by the students. This table must be sanitized between each lunch period with a spray sanitizer and paper towels. As soon as students sit at the nut free table, their lunches will be checked by trained staff for UNSAFE FOOD(S). A written protocol, attached hereto and outlining this procedure will be displayed for all staff members monitoring this table.

**Computer Alert.** There will be a tree nut and peanut allergy alert on the school lunch computer system when [insert name of child] purchases food in the cafeteria. Cafeteria staff will consult an updated list of UNSAFE FOODS items which will be posted at the cafeteria check-out line to ensure that [insert name of child] does not inadvertently purchase UNSAFE FOOD(S).”

### **The School Bus**

Unlike IDEA which requires transportation to students who are entitled to special education, neither Section 504 nor Chapter 15 requires transportation if the child is not otherwise entitled to transportation and his or her disability does not prevent the child from getting to school. However, if the child is otherwise entitled to be bussed, either to or from school or to or from activities, then the child must be bussed safely. The Service Agreement must contain provisions as to how that will occur. Language that may be appropriate for that purpose is as follows:

#### **School Bus Rules**

FOOD WILL NOT BE PERMITTED on any school bus or other motor vehicle to which [insert name of child] is assigned. This will be accomplished by: **(i)** a notice posted on and



in the bus that food may not be taken out of wrappers or containers or consumed on the bus; (ii) the bus driver being trained that food may not be taken out of wrappers or consumed on the bus; and (iii) notices be sent home with students periodically.

[Insert name of child]'s bus driver will be trained as a FIRST RESPONDER. If [insert name of child]'s regular bus driver is absent and another FIRST RESPONDER cannot be found to drive or ride on the bus, the SCHOOL DISTRICT transportation staff will make a reasonable attempt to notify a parent in advance so that he/she may personally transport [insert name of child].

### **Access to All Activities and Programs**

It goes without saying that children with severe food allergies have the right to attend and participate in a safe environment in all of the school's activities and programs. Therefore, the Service Agreement must address the safety measures that will be taken with respect to activities outside of the classroom. Language that may be appropriate is as follows:

#### *Field Trips*

If one of the parents is chaperoning a field trip, that parent will bring [insert name of child]'s "home kit" as well as a cell phone. If neither parent is chaperoning a field trip, [insert name of child]'s chaperone will carry his "homeroom kit" as well as a cell phone.

For all field trips, a medical kit and FIRST RESPONDER will accompany [insert name of child]'s group during the entire outing. [Insert name of child]'s chaperone will also carry the names and phone numbers of area hospitals.

A FIRST RESPONDER will be assigned to all field trips, unless the child's parent is chaperoning a field trip."

**Special Activities or Functions.** At least one week prior to a special school activity or function, a written plan will be submitted by the school team to the SCHOOL NURSE and the principal. The plan will outline proposed ac-

commodations to ensure that [insert name of child] can fully access and participate in the planned event.

**Chaperones.** Parents will be permitted to chaperone field trips and act as homeroom parents. For purposes of this AGREEMENT, whenever one or both of [insert name of child]'s parents act as a chaperone or a homeroom parent, their presence will be deemed to fulfill the SCHOOL DISTRICT'S responsibility to have a FIRST RESPONDER in the class or at the activity.

**First Responders/Field Trips.** If Parents are unable to attend a field trip, they will notify the NURSE in writing as soon as possible so that a FIRST RESPONDER can be appointed as [insert name of child]'s field trip chaperone.

### **Responding to Symptoms**

Obviously, the goal is preventative. All of the protocols, training and procedures are being put in place to ensure that the child is not exposed to an allergen and does not develop symptoms. However, the Service Agreement must contain provisions dealing with how symptoms will be responded to by school personnel. The following kinds of provisions may be appropriate.

#### **Responding to Symptoms**

If [insert name of child] exhibits symptoms of [insert a description of the symptoms, such as—allergies or asthma or articulates distress], he will be escorted to the medical suite unless the severity of symptoms warrants an immediate response. If symptoms warrant an immediate response, the NURSE will be contacted to report to the scene with [insert name of child]'s emergency medical kit.

While [insert name of child] is outdoors during the school day or at a SCHOOL SPONSORED EVENT, a FIRST RESPONDER will be in reasonably close proximity to [insert name of child] and will carry a cell phone or walkie-talkie in order to readily communicate with the NURSE or emergency personnel as may be appropriate. If [insert name of child] is unable to walk to the medical suite, an ambulance is to be summoned immediately.

**Inhaler and EpiPen.** As per his signed “School District Parent/Doctor Request for Authorization to Carry Own Medication Inhaler or EpiPen” form, [insert name of child] will be permitted to carry an inhaler in his backpack.

Nothing in this AGREEMENT is intended to require any school employee from performing any service that would be prohibited to that employee under any applicable professional practice act.

### **Conclusion**

This article makes it clear that responding to requests for accommodations by children with food



allergies is an important endeavor that must be handled in a comprehensive and thoughtful manner.

*Part I appeared in the May 2009 edition of the Pennsylvania Administrator.*

### **Endnotes**

<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> 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.