

1999

Mr. Peanut Goes to Court: Accomodating an Individuals Peanut Allergy in Schools and Day Care Centers under the Americans wtih Disabilities Act

Marie Plicka

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>



Part of the [Disability Law Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

Note, Mr. Peanut Goes to Court: Accomodating an Individuals Peanut Allergy in Schools and Day Care Centers under the Americans wtih Disabilities Act, 14 J.L. & Health 87 (1999-2000)

This Note is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

MR. PEANUT GOES TO COURT: ACCOMMODATING AN
INDIVIDUALS PEANUT ALLERGY IN SCHOOLS AND DAY
CARE CENTERS UNDER THE AMERICANS WITH
DISABILITIES ACT

I.	INTRODUCTION	87
II.	BACKGROUND ON PEANUT ALLERGY	89
III.	THE ADA IN A NUTSHELL	91
	A. <i>Introduction to the ADA</i>	91
	B. <i>The Statute and the Regulations</i>	92
	1. Title II.....	94
	2. Title III.....	95
IV.	ANALYSIS OF THE APPLICATION OF THE ADA TO PEANUT ALLERGY	96
	A. <i>Exhausting All Remedies Under The Individuals With Disabilities Education Act Before Bringing a Claim Under Title II of the ADA</i>	96
	B. <i>Peanut Allergy and the ADA: Who is Disabled?</i>	99
V.	THE COST OF ACCOMMODATION ON SCHOOLS AND DAY CARE CENTERS: WHEN WILL ACCOMMODATION BE REQUIRED & HOW MUCH WILL BE ENOUGH?	102
VI.	CONCLUSION.....	106

I. INTRODUCTION

Recently, the Department of Transportation, “DOT,” declared peanut allergy a “disability” under the Air Carrier Access Act,¹ a 1986 law that guarantees disabled passengers access to airliners, and which can be considered the air travel equivalent of the Americans With Disabilities Act, (“ADA.”)² In doing so, the DOT sent letters to ten of the major airlines explaining that a medically diagnosed allergy to peanuts constitutes a “disability” under the Carrier Act.³ Accordingly, the DOT created “peanut-free zones” or “buffer zones,” where peanuts would not be served, on commercial air flights in order to protect passengers who notify the airline in advance of their documented allergy to peanuts.⁴

¹Air Carriers Access Act, 49 U.S.C. § 1301 (1994). This act applies directly to the airline industry and parallels the language and interpretive case law of the ADA.

²Kathleen Doheny, *Airline Policy on Peanuts is Mixed Bag after DOT Raised Allergy Concerns*, L.A. TIMES, Dec. 13, 1998, at L-12.

³*Id.*

⁴*Id.* Such “buffer zones” were meant to be contained to the first couple rows in an airplane and were to be a voluntary restriction against passengers.

In response, Congress, pressured by lobbyists for the peanut industry, attached a repealer to the 1999 Omnibus Appropriations Bill that prohibits the DOT from spending any money to implement "peanut free zones" and further requires the DOT to submit to Congress "a peer reviewed scientific study" which documents the severe allergic reactions before the DOT can once again move for "peanut free zones."⁵ Even after Congress' response, the DOT is still recommending "buffer zones" on commercial flights; however, without funding, enforcement of the zones has become impossible.⁶

The airline industry is not the only one being affected by peanut allergies. There are many schools in such states as New York and Maryland that have banned peanuts and peanut by-products such as peanut butter from classrooms and cafeterias in fear of potential ADA claims.⁷ School administrators at Trevor Day School in Manhattan have gone so far as to ban anyone from bringing peanuts in any form into the school.⁸ If this is not enough, in some schools, parents have repainted classroom walls after peanut science projects in fear of residual peanut particles.⁹ Some parents have become upset by these bans because they feel that the bans disrupt the day-to-day activities of school, while other parents feel that the ban on peanut butter denies their children an inexpensive source of protein.

Why have peanut allergies become such a hot topic? Approximately 1.5 million Americans are allergic to peanuts and other nuts.¹⁰ While some individuals who are allergic to peanuts may exhibit only an itchy rash, it is estimated that twenty percent of these individual are so severely allergic that a reaction can be fatal.¹¹ This is obviously no laughing matter to the individuals who are allergic to peanuts, particularly because peanuts and peanut by-products are in many foods that one would not necessarily associate with peanuts. To compound the fact, reactions to peanuts can be touched off by actually eating peanuts, or a by-product of peanuts, or even by casual contact with their residue, such as shaking hands with an individual that has just eaten a peanut butter and jelly sandwich.¹²

The question becomes how society can balance the rights of those allergic to peanuts against the rights of those who are not allergic. It is clear that non-allergic individuals out number those who are allergic. It is also not generally disputed that

⁵Pub. L. No. 105-277, 112 Stat. 2681, Oct. 21, 1998.

⁶Doheny, *supra* note 2.

⁷See, Dave Rossie, *Schools Change Menu for Peanut Allergic*, FLORIDA TODAY, October 15, 1998 at 12A; Erika D. Petterman, *Growing up peanut-free; Allergy: Schools are trying to help a growing number of children who are allergic to peanuts*, BALTIMORE SUN, Nov. 1, 1998 at 1B.

⁸Rossie, *supra* note 7.

⁹Barbara Hagenbaugh Reuters, *Peanut Industry Rebuffs Calls for Bans*, ROCKY MOUNTAIN NEWS, Sept. 28, 1998 at 30A.

¹⁰Brigitte Greenberg, *Community Debates Peanut Allergies*, ASSOCIATED PRESS NEWSWIRES, Feb. 15, 1999, at 02:06:00.

¹¹*Id.*

¹²*Helping allergic kids avoid temptation*, THE NEWS & OBSERVER RALEIGH, N.C., Nov. 4, 1998 at F7.

individuals who are allergic to peanuts can suffer severe reactions, which may send them into fatal shock.

The Eighth Circuit recently decided a case in which a mother of a child that suffers from peanut allergy filed suit against a day care center for not accommodating her child's allergy.¹³ While the majority held that the child's allergy to peanuts did not constitute a disability under the ADA,¹⁴ the dissent believed that there was an issue of fact as to whether the child's food allergy to peanuts substantially limited her ability to function and therefore acted as a disability.¹⁵

The issue of whether peanut allergy is a disability under the ADA is far from settled. It is likely that this recent case is only a stepping stone to further litigation. It has now become a question of whether an individual's food allergy to peanuts can ever rise to a high enough level of severity that a court will recognize it as a disability, and if so what the consequences of the court's decision will be. Accommodation will become a key factor in the analysis of peanut allergy under the ADA. Courts will need to consider how far schools and day care centers will need to go to accommodate individuals allergic to peanuts.

This article explores the ADA and the interpretive case law, as it pertains to schools and day care centers, in hopes of better understanding the purpose of the statute as well as to predict its future. Part II of this article provides a brief explanation of peanut allergies. Part III contains an overview of Title II and Title III of the ADA and their interpretive regulations. Part IV analyzes whether an individual asserting a Title II claim under the ADA, where the relief sought is also available under the Individual with Disabilities Education Act, must first exhaust all of the administrative procedures under Individual with Disabilities Education Act before asserting his or her ADA claim. Part IV also analyzes, through relevant case law, the application of the Title II and Title III of the ADA to individuals suffering from peanut allergy. Part V analyzes when accommodation will be necessary and the cost of such accommodation under the ADA and proposes a case-by-case analysis of peanut allergy cases in order to protect the rights and needs of the severely allergic and to balance those needs against the rights of non-allergic individuals.

II. BACKGROUND ON PEANUT ALLERGIES

The average American consumes an estimated eleven pounds of peanut products each year.¹⁶ It has been further estimated that 1.5 million Americans are allergic to peanuts.¹⁷ Out of this number, approximately twenty percent are allergic to the point

¹³Land v. Baptist Medical Ctr., 164 F.3d 423 (8th Cir. 1999).

¹⁴*Id.*

¹⁵*Id.*

¹⁶Hugh A. Sampson, M.D., *Managing Peanut Allergy*, BMJ, 1996; 312:1050. About 55% of this figure can be attributed to peanut butter while the rests is in the form of candies, baked goods, and table nuts. *Id.*

¹⁷Brigitte Greenberg, *Community Debates Peanut Allergies*, ASSOCIATED PRESS NEWSWIRE, Feb. 15, 1999, at 02:06:00. Statistics provided by Dr. Hugh Sampson, director of the Jaffe Allergy Institute at Mount Sinai Hospital in New York. It also appears that the number of individual's suffering from peanut allergies has increases over the past two decades. *Supra* note 14.

that an attack can be fatal.¹⁸ As little as half a peanut can cause a fatal reaction for severely allergic individuals.¹⁹ Unlike many other food allergies, peanuts do not only pose a problem when ingested; rather, the mere touch or smell of peanuts can cause an attack.²⁰

A food allergy occurs when an individual's immune system creates IgE antibodies to a certain food and these antibodies react with the food causing the body to release histamine and other chemicals which cause the outward symptoms of the allergic reaction such as hives.²¹ Eight foods cause an estimated 90% of all allergic reactions due to food.²² They are milk, eggs, wheat, peanuts,²³ soy, tree nuts, fish, and shellfish.²⁴

Currently there is no cure for food allergies and, consequently the only way to prevent a reaction from occurring is by avoiding the food that causes the reaction.²⁵ If an individual who is allergic to peanuts accidentally ingests a peanut product, this individual will suffer an anaphylactic²⁶ reaction that may include: hives, swelling of the lips or tongue, difficulty swallowing, tightness in the throat and chest, itchiness, drooling, wheezing, choking, coughing, voice change, sneezing, nausea, vomiting, cramps, diarrhea, dizziness, pallor, and loss of consciousness.²⁷ Anaphylaxis can proceed very rapidly.²⁸ Symptoms may begin within minutes to one hour after the ingestion of peanuts.²⁹

When an individual suffers a severe anaphylactic reaction that results in the swelling of the breathing tube and possible loss of consciousness, the individual must be immediately treated with an injection of epinephrine (adrenaline) and taken to the

¹⁸Greenberg, *supra* note 17.

¹⁹Kirit Parikh, M.D., *Food Allergy* (visited Feb. 20, 1999) <http://www.kparikh.com/jamin/facts_fiction.html>.

²⁰Greenberg, *supra* note 17.

²¹Parikh, *supra* note 19.

²²*Id.*

²³It should be noted however, that generally an allergy to peanuts does not include an allergy to peanut oil. John Weisnagel, M.D. *Peanut allergy: where do we stand?* (visited Feb. 15, 1999) <<http://www.allerg.qc.ca/peanutallergy.htm>>. This is because people allergic to peanuts are allergic to the protein in peanuts and most peanut oils, unless contaminated, do not contain peanut proteins. *Id.*

²⁴Parikh, *supra* note 19.

²⁵*Id.*

²⁶Anaphylaxis represents a broad range of clinical events from sneezing to shock dependent upon the sensitive organ which results from a release of histamine and other mediators causing organ dysfunction such as cardiac, respiratory, GI, dermatologic, and neurologic. Mary C. Tobin, *Anaphylaxis*, (visited Feb. 18, 1999) <<http://www.meddean.luc.edu/lumen/MedEd/medicine/Allergy/mktana.html>>.

²⁷Weisnagel, *supra* note 23.

²⁸*Id.*

²⁹Parikh, *supra* note 19.

emergency room.³⁰ Self-administration kits such as EpiPen and Anakit are available to individuals with peanut allergy and can be administered by the individual themselves during an attack, or by someone else trained to administer the shot.³¹ A shot of epinephrine will temporarily alleviate the symptoms of the attack and allow an individual an extra ten or fifteen minutes to get to the hospital.³² It has been estimated that approximately one third of all emergency-room visits for anaphylaxis may be due to peanut allergies.³³

The Centers for Disease Control reported eighty-eight deaths accredited to all food allergies, including allergies to peanuts, from 1979 to 1995.³⁴ Many people feel that the number of fatalities due to food allergies is underreported and that in fact up to 0.5 to 1.0 percent of all Americans actually suffer from peanut allergies.³⁵ These individuals also believe that an estimated 125 people die every year from food allergies, the majority of these fatal attacks caused by peanut allergy.³⁶

III. THE ADA IN A NUTSHELL

A. Introduction to the ADA

The ADA was passed into law on July 26, 1990, in response to the longtime discrimination against individuals with disabilities.³⁷ On enacting the ADA, Congress found that approximately 43 million Americans have one or more physical or mental disability and that “historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continues to be a serious and pervasive social problem.”³⁸ To further enumerate its reasons for enacting the statute, Congress stated that the purpose of the ADA was to “provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”³⁹

Before the enactment of the ADA, the Rehabilitation Act of 1973⁴⁰ had been in place to prevent discrimination against individuals with disabilities. The

³⁰Weisnagel, *supra* note 23.

³¹*Id.*

³²*Peanuts Lethal to Children*, PRESS, Feb. 11, 1999.

³³Weisnagel, *supra* note 23.

³⁴Anemona Hartocollis, *Nothing's Safe: Some Schools Ban Peanut Butter as Allergy Threat*, N.Y. TIMES, Sept. 23, 1998, at A4.

³⁵*Id.* This statistic is support by allergist from the Food Allergy Network which is an eight-year old advocacy group out headquartered out of Fairfax, Virginia which supports the contention the peanut allergies are a disability. *Id.*

³⁶*Id.*

³⁷Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101-12213 (1994)).

³⁸42 U.S.C. § 12101(a) (1994).

³⁹42 U.S.C. § 12101(b)(1) (1994).

⁴⁰29 U.S.C. § 794 (1994).

Rehabilitation Act however only applied to federal financial assistance recipients, while the ADA broadened the protection offered to disabled individuals by removing the federal financial assistance requirement and extending the law to include state and local governments, as well as a majority of the private sector.⁴¹ The ADA did not nullify the Rehabilitation Act; rather, the two now coexist, allowing a disabled individual to assert claims under both Acts.

*B. The Statute and the Regulations*⁴²

The ADA is divided into Titles dependent upon which area of society the statute is regulating. Title I of the Act applies to employment.⁴³ Title II of the Act deals with state and local governments including public schools.⁴⁴ Title III of the Act pertains to public accommodations, including private schools and day care centers.⁴⁵ This article will deal with Title II and Title III of the Act and specifically as they pertain to schools and day care centers.

Under the ADA an individual is disabled, if he or she has “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such impairment; [or](C) [is] being regarded as having such impairment.”⁴⁶ This definition of disability is very broad and can in some

⁴¹Wendy E. Parmet et al., *Accommodating Vulnerabilities to Environmental Tobacco Smoke: A Prism for Understanding the ADA*, 12 J.L. & HEALTH 1 (1998).

⁴²As previously stated, this article focuses on Title II, prohibiting discrimination in public services including public schools, and Title III, prohibiting discrimination in public accommodations including private schools and day care centers. These two Titles are very similar, and as such, many of the definitions and analysis involved will parallel each other allowing for a simultaneous discussion of numerous issues.

⁴³42 U.S.C. § 12111 (1994). Exceptions to Title I include: workplaces with under 15 employees, the United States, Indian Tribes, or bona fide private membership clubs with federal tax exempt status. 42 U.S.C. § 12111(5) (1994).

⁴⁴42 U.S.C. § 12131 (1994).

⁴⁵42 U.S.C. § 12181 (1994). The following is a list of services and facilities that were included in the Act: inns, hotels, motels restaurants, bars, motion picture houses, theaters, concert halls, stadiums, auditoriums, convention centers, lecture halls, bakeries, grocery stores, clothing stores, hardware stores, shopping centers, laundromats, dry-cleaners, banks, barber shops, beauty shops, travel services, shoe repair services, funeral parlors, gas stations, office of an accountants or lawyers, pharmacies, insurance offices, professional office of a health care providers, hospitals, terminal, depots, public transportation, museums, libraries, galleries, or parks, zoos, amusement parks, nursery, elementary, secondary, undergraduate, or postgraduate private schools, day care centers, senior citizen centers, homeless shelters, food banks, adoption agencies, gymnasiums, health spas, bowling alleys, golf courses. *Id.* It should be noted that the list is not an exhaustive list but rather only illustrative in nature. It should also be noted that airlines and housing establishments are not included in the list. The airline industry, as previously stated, is regulated by the Air Carriers Fair Access Act, 49 U.S.C. § 1301 (1994). Housing discrimination is prohibited by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§ 3601-3619 (1994).

⁴⁶42 U.S.C. § 12102(2) (1994). The regulations to both Title II and Title III of the Act define a record of impairment as “has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.” 28 C.F.R. § 35.104(3) (1998); 28 C.F.R. § 36.104(3) (1998). The regulations define “regarded as

instances seem all encompassing. For this reason, courts have struggled to interpret the definition to best effectuate the purpose of the Act.

Courts have long used regulations promulgated by the Department of Justice to determine who is disabled under the ADA; however, the Supreme Court has recently cast doubt on the amount of deference that should be placed on such regulations.⁴⁷ In a Title I case where the Court was asked to determine whether corrective and mitigating measures should be considered in determining whether an individual is disabled under the ADA, the Court stated that “No agency...has been given authority to issue regulations implementing the general applicable provisions of the ADA, see §§ 12101-12101, which fall outside of Titles I-V. Most notably, no agency has been delegated authority to interpret the term ‘disability.’” But because both parties accepted the regulations as being valid, the Court did not consider their validity or the amount of deference that they should be given.⁴⁸

The Court did however determine that whether a person has a disability under the ADA is an individualized inquiry, and that a “disability” exists “only where an impairment ‘substantially limits’ a major life activity, not where it ‘might,’ ‘could,’ or ‘would,’ be substantially limiting if measures were not taken.”⁴⁹ Further, “A person whose physical or mental impairment is corrected by medication or other measures does not have an impairment that presently ‘substantially limits’ a major life activity.”⁵⁰

Since the Supreme Court has only stated that it is unsure how much deference should be placed in the ADA interpretive regulations, these regulations may still be used to analyze a potential ADA claim, and in fact for the moment, the regulations still remain the best interpretive guidance available. That being said, regulations promulgated by the Department of Justice for Title II⁵¹ and Title III⁵² define physical or mental impairment as “any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body

having such an impairment” as “(i) [h]as a physical or mental impairment that does not substantially limit major life activities but that is treated by the public [private] entity as constituting such a limitation; (ii) has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of other toward such impairment; or (iii) has none of the impairments defined in paragraph (1) of this definition but it treated by a public [private] entity as having such an impairment.” 28 C.F.R. § 35.104(4) (1998); 28 C.F.R. § 36.104(4) (1998).

⁴⁷*Sutton v. United Airlines, Inc.*, 119 S. Ct. 2139 (1999). In this case the Petitioners were severely myopic twin sisters who have uncorrected vision of 20/200 or worse, but with corrective measures they both function at a level identical to individuals without myopathy. *Id.* The Petitioners file a Title I ADA disability discrimination claim after they had been denied employment with United Airlines, Inc. because they did not meet the minimum requirement of uncorrected visual acuity of 20/100 or better. The Court held that the Petitioners were not “disabled” under the ADA. *Id.*

⁴⁸*Id.*

⁴⁹*Id.* at 2146.

⁵⁰*Id.* at 2147.

⁵¹28 C.F.R. § 35.101 (1998).

⁵²28 C.F.R. § 36.101 (1998).

systems: Neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin, and endocrine.”⁵³ An individual suffering from peanut allergies would in most instances assert a claim that he or she had a physical impairment of the respiratory system. It could however be fathomed that an individual suffering from a milder case of peanut allergies could try to assert a claim that he or she suffers a physical impairment of the skin due to an itchy rash produced by an allergic reaction to peanuts.

Under the regulations, a physical or mental impairment includes “such contagious and non-contagious diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, specific learning disabilities, HIV disease (whether symptomatic or asymptomatic) tuberculosis, drug addiction and alcoholism.”⁵⁴ The regulations caution that this list is not meant to be exhaustive, but, rather, only illustrative in nature.⁵⁵ This being said, even though it does not seem that an allergy to peanuts necessarily fits into one of these categories, this will not by itself bar an individual who is allergic to peanuts from asserting a claim that he or she is disabled under the ADA.

As previously stated, the term major life activity plays a crucial role in determining who is by definition disabled under the ADA. The regulations have defined a major life activity as such functions as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.⁵⁶ While, in extreme circumstances, individuals may argue that an allergy to peanuts may affect the allergic individual’s ability to learn, which is listed above as one of the accepted major life activities, in most cases individuals with peanut allergies will rest their claim on a substantial limitation of the major life activity of breathing. Other affected individuals may argue eating constitutes a major life activity under the category of caring for oneself.

At this point in the discussion it becomes beneficial to divide the analysis of these two Titles into two parts because, as it will become clear in the next two sections, this is where the two Title begin to differ in statutory language and in the regulatory interpretation. The first section that follows will discuss the pertinent statutory language and regulations of Title II. The second section will discuss the statutory language and regulations of Title III.

1. Title II

Under Title II of the ADA, “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁵⁷ Title II protects individuals with disabilities from discrimination by State and local governments, any department, agency, special

⁵³28 C.F.R. § 35.104(1)(i)(A) (1998); 28 C.F.R. § 36.104(1)(i) (1998).

⁵⁴28 C.F.R. § 35.104(1)(i)(B)(ii) (1998); 28 C.F.R. § 36.104(iii) (1998).

⁵⁵28 C.F.R. § 35.104(1)(i)(B)(ii) (1998); 28 C.F.R. § 36.104(iii) (1998).

⁵⁶28 C.F.R. § 35.104(2) (1998); 28 C.F.R. § 36.104(2) (1998).

⁵⁷42 U.S.C. § 12132 (1994).

purpose district or any other State or local government instrumentality, as well as the National Railroad Passenger Corporation and any other commuter authority covered under section 502(8) of Title 45.⁵⁸ Public school districts fall under the category of special purpose district.⁵⁹

As the Act is written, Title II applies to a “qualified individual with a disability.”⁶⁰ Title II defines a “qualified individual” as

an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.⁶¹

One can intuitively see that the term “reasonable modification” becomes very important in the analysis of a Title II claim. For instance, even if an individual who suffers from peanut allergy is deemed disabled under ADA’s definition, it does not mean that this individual will qualify for protection under the Act. This is because, under the regulations, the ADA only requires “reasonable modification” which does not include making modifications that would fundamentally alter the nature of the service.⁶²

2. Title III

The statutory language and interpretive regulations of Title III of the ADA contain more explanatory language than those of Title II of the Act. Title III of the ADA prohibits discrimination against any disabled individual in the “full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a public place of accommodation.”⁶³ Under Title III, private schools, consisting of elementary, secondary, undergraduate or graduate, as well as day care centers, are prohibited from discriminating against disabled individuals.⁶⁴

While Title II gives a general description of what type of activities are prohibited under the Act, Title III provides a much more in-depth list of prohibited activity. General activities prohibited under Title III are 1) denial of participation, 2) participation that results in unequal benefit, or 3) participation that results in a different or separate benefit.⁶⁵

⁵⁸42 U.S.C. § 12131(1) (1994).

⁵⁹*See*, *Urban v. Jefferson Cty. Sch. Dist.*, 89 F.3d 720 (10th Cir. 1996) (applying Title II to a public school district).

⁶⁰42 U.S.C. § 12131(2) (1994).

⁶¹*Id.*

⁶²28 C.F.R. § 35.130(b)(9) (1996).

⁶³42 U.S.C. § 12182(a) (1994).

⁶⁴42 U.S.C. § 12181(7)(K) (1994).

⁶⁵42 U.S.C. § 12182(B)(1)(A) (1994).

Once again, as under Title II, just because an individual meets the requirements of the definition of “disabled” under the Act, does not mean that the individual is entitled to protection under Title III. Under Title III, a place of public accommodation, i.e. a private school or day care center, does not have to make “reasonable modifications” if such modification would result in an “undue burden” on the facility, the modification would “alter the nature” of the good, service, facility, etc., or where the modification is not “readily achievable”.⁶⁶

The regulations have defined “undue burden” as requiring an action that will cause significant difficulty or expense.⁶⁷ The regulations provide factors to be considered when deciding whether requiring a facility to modify itself will cause an “undue burden,” or whether such a modification is “readily achievable”. These factors include the nature and cost of the modification, the overall financial resources of the facility, the number of employees at the facility, as well as legitimate safety requirements for the facility.⁶⁸

Now that all the necessary groundwork is laid, the next step will be to analyze the above statute and regulations along with applicable case law to determine whether an individual with a peanut allergy can be declared disabled under Title II or Title III of the ADA. This discussion will include what, if any, remedies under the Individuals with Disabilities Education Act have to be exhausted before bringing a claim under the ADA; who is truly disabled under the ADA’s statutory definition; and societal cost of accommodating individual’s with peanut allergy under the ADA.

IV. ANALYSIS OF THE APPLICATION OF THE ADA TO PEANUT ALLERGY

A. Exhausting All Remedies Under the Individuals with Disabilities Education Act Before Bringing a Claim Under Title II of the ADA

The Individuals with Disabilities Education Act, “IDEA,” ensures that students with disabilities receive a free appropriate public education.⁶⁹ This section discusses under what circumstances an individual wanting to bring a Title II ADA claim for disability discrimination against a public school will first have to exhaust all of his or her administrative procedures under the IDEA before bringing a ADA claim in federal court. A discussion on the IDEA is included in this article because it is important to realize and understand that ADA is not the only statutory protection afforded to individual’s with disabilities and that in some instances an individual will have to pursue other statutory avenues before bringing his or her claim of disability discrimination under the ADA.

In enacting the IDEA, Congress found that there are more than eight million children with disabilities within the United States and that “more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity.”⁷⁰ As its

⁶⁶42 U.S.C. § 12182(b)(2) (1994).

⁶⁷28 C.F.R. § 36.104 (1994).

⁶⁸*Id.*

⁶⁹20 U.S.C. § 1401 et seq. (1994). In 1990 Congress changed the name of the Education of Handicapped Act, Pub. Law No. 101-476, 104 Stat. 1141 (1990) to the IDEA.

⁷⁰20 U.S.C. § 1400(B) (1994).

purpose in enacting the IDEA, Congress stated that it wanted assure that all children with disabilities have available to them:

free appropriate public education, which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.⁷¹

Under the interpretive regulations of the IDEA promulgated by the Department of Justice, ‘children with disabilities’ means

those children evaluated in accordance with §§ 300.530-300.534 as having mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities, and who because of those impairments need special education and related services.⁷²

Under the regulations “other health impairments” have been defined as “having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes that adversely affects a child’s educational performance.”⁷³ Under this definition, which is similar to that of the definition under Title II and Title III of the ADA, it is feasible that an individual’s allergy to peanuts which affects an individual’s ability to breathe in some cases similarly to asthma, may fall under the IDEA.

The IDEA requires states that receive federal education funds to design an individualized education program for each disabled child.⁷⁴ Section 1415(f) of the IDEA states:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973, or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subsection.⁷⁵

⁷¹20 U.S.C. § 1400(c) (1994).

⁷²34 C.F.R. § 300.7(a)(1) (1998).

⁷³34 C.F.R. § 300.7(b)(8) (1998).

⁷⁴*See, Honig v. Doe*, 484 U.S. 305, 310 (1988).

⁷⁵20 U.S.C. § 1415(f) (1994).

Courts have read this to mean that § 1415(f) contains two components, the first conditioned on the second, that must be met in order for an individual to exhaust his or her claims under the IDEA and thus be able to file a claim in federal court for an ADA violation.⁷⁶ While under § 1415(f), the IDEA is not the exclusive avenue to evoke the rights of a disabled child, the second component of § 1415(f) requires the exhaustion of the administrative procedures of the IDEA prior to the commencement of a lawsuit under another federal statute, if the relief sought is also available under the IDEA.⁷⁷ The failure to exhaust the administrative procedures of the IDEA deprives the federal court of subject matter jurisdiction.⁷⁸

A question arises as to whether the exhaustion procedures of the IDEA apply to a disabled individual's ADA claim, since the ADA did not exist at the time the IDEA was enacted by Congress. A question of applicability also arises because the Department of Justice regulations implementing Title II of the ADA provide that a potential plaintiff may file a private lawsuit "at any time," without first exhausting the ADA's administrative procedures which seems to contradict the procedures of the IDEA.⁷⁹ Courts have concluded, by looking at the plain language of the IDEA, that the exhaustion requirement was intended to apply to all federal statutes under which a potential plaintiff may have a right to bring a claim and that, since Congress, in enacting the ADA, did not expressly exempt the ADA from §1415(f) Congress did not intend ADA claims to bypass the IDEA exhaustion requirement.⁸⁰ Courts have read the Department of Justice regulations stating that a potential plaintiff may bring a claim at any time without exhausting all of the ADA procedures to pertain only to ADA procedures and not the IDEA exhaustion procedures: thus, the two are not contradictory and a plaintiff cannot circumvent the IDEA exhaustion procedures by asserting an ADA claim.

There are exceptions to the IDEA exhaustion requirements. The Plaintiff will not be required to exhaust all remedies if, "(1) it would be futile to use the due process procedures;...(2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; [and] (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g.,the hearing officer lacks the authority to grant the relief sought.)"⁸¹ It seems that the exceptions to the IDEA exhaustion requirement are very case specific and are also very difficult to achieve.

Many argue that the IDEA speaks about available relief and, since IDEA does not permit compensatory damages, the exhaustion requirements should not pertain, since the relief sought is not available under the IDEA. Courts have been reluctant to accept this argument. Courts have stated that available relief does not equate to the relief which the plaintiff demands, but is rather what the plaintiff is entitled to as

⁷⁶*See*, *Hope v. Cortines*, 872 F. Supp. 14, 17 (E.D.N.Y. 1995) (affirmed by *Hope v. Cortines*, 69 F. 3d 687 (2d Cir. 1995)).

⁷⁷*Id.*

⁷⁸*Hoefl v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1302 (9th Cir. 1992).

⁷⁹28 C.F.R. § 35.172 (1998).

⁸⁰*Hope*, 872 F. Supp. at 21.

⁸¹*Id.* at 22 (citing H.R. Rep. No. 296, 99th Cong., 1st Sess. 7 (1995)).

a matter of law.⁸² Thus, a potential plaintiff may not assert a claim for monetary damages just to opt out of the exhaustion requirement of §1415(f) of the IDEA.

Individuals with an allergy to peanuts may try to argue that they do not need to meet the requisite exhaustion requirement to § 1415(f) of the IDEA, because they do not require “special education and related services” but rather only require “related services.”⁸³ Courts have also not found this to be a very good argument stating that this seems to be another way that plaintiffs try to subvert the IDEA exhaustion requirement in order to achieve their goal of compensatory damages.⁸⁴

Thus, when determining whether an individual must exhaust all his or her administrative procedures under the IDEA before bringing an ADA claim in federal court one must decide 1) whether the relief the plaintiff seeks is available under the IDEA, and 2) if the relief is available, whether any exceptions to the exhaustion requirement apply. In many instances when an individual suffering from an allergy to peanuts attempts to assert a disability claim under Title II of the ADA, the relief he or she is seeking is also available under the IDEA. Therefore, in order to assert a proper Title II claim without first exhausting all administrative procedures under the IDEA, an individual will in all likelihood need to show how the relief sought is not available under the IDEA (i.e. compensatory damages are indeed warranted; make a successful argument that they do not meet the requirement of “special education and related services”; or show how one of the exclusions are applicable, all three of which will be a hard argument to win.)

B. Peanut Allergy and the ADA: Who is Disabled?

This section combines the analysis of both Title II and Title III claims. Although in some instances the language of each Title and the interpretive case law thereunder differ slightly, a comprehensive analysis can be made which discusses the two simultaneously.

To establish a prima facie case of discrimination under Title II, a plaintiff must show

- 1) that she is a qualified individual with a disability; (2) that she was either excluded from participation in or denied the benefits of some public entities services, programs or activities, or was otherwise discriminated against by the public entity; and (3) that such exclusion, denial of benefits, or discrimination was by reason of the plaintiff’s disability.⁸⁵

If the plaintiff proves each element, a public entity discriminates against a disabled individual when it fails to make reasonable modifications for the disabled individual, which would not fundamentally alter the nature of the institution.⁸⁶

In considering a Title III case, the Supreme Court developed a three part test to determine whether an individual is disabled under the ADA.⁸⁷ Under this test, a court

⁸²Charlie F. v. Board of Educ. of Skokie Sch. Dist. 68, 98 F. 3d 989 (7th Cir. 1996).

⁸³20 U.S.C. § 1401(a)(1)(ii) (1994).

⁸⁴Babicz v. School Brd. of Broward County., 135 F.3d 1420, 1422 (11th Cir. 1998).

⁸⁵Darian v. University of Mass. Boston, 980 F. Supp. 77, 84 (D. Mass. 1997).

⁸⁶*Id.*

must first consider whether the individual's infliction is a physical impairment.⁸⁸ Second, the court must identify the life activity upon which the plaintiff relies and determine whether it constitutes a major life activity.⁸⁹ Third, the court must consider whether the impairment substantially limits the identified major life activity.⁹⁰ Further, in order to prevail on a Title III claim of discrimination, courts have stated that a plaintiff must prove 1) that he is disabled; 2) that his requests for accommodation are reasonable; and 3) that those requests for accommodation have been denied.⁹¹

As previously stated, the Eighth Circuit recently decided a Title III case in which a mother of a child who suffers from peanut allergy filed suit against a day care center for not accommodating her child's allergy.⁹² In this case, the mother alleged that her daughter suffered a physical impairment that substantially limited her daughter's major life activities of eating and breathing.⁹³ The court determined that the child's peanut allergy was in fact a physical impairment as defined under the ADA and that eating and breathing both constitute major life activities; however, the majority found that the child's physical impairment did not substantially limit her ability to eat or breathe. Thus, she was not disabled under the ADA.⁹⁴

In reaching its conclusion, the court stated that the child's allergy had only minimal impact on her life and that, although she could not eat foods containing peanuts or peanut derivatives, nothing in the record showed that the child suffered an allergic reaction when she consumed any other kind of food, or that her physical ability to eat had been restricted in any other manner.⁹⁵ The court also found that the child only had two documented allergic reactions and that her ability to breathe was generally unrestricted in times when no attack was present.⁹⁶

⁸⁷*Bragdon v. Abbot*, 1185 S. Ct. 2196, 2202 (1998). This case deals with an HIV positive plaintiff bringing a lawsuit against a dentist who refused to treat her in his office.

⁸⁸*Id.*

⁸⁹*Id.*

⁹⁰*Id.*

⁹¹*Dubois v. Albertson-Broadelus College, Inc.*, 950 F. Supp. 754, 757 (N.D.W.Va. 1997). A learning disabled college student sues a college and college administrators alleging failure to reasonably accommodate his learning disability. The court found that the student was not entitled to reasonable accommodation from the college under the ADA.

⁹²*Land v. Baptist Med. Ctr.*, 164 F.3d 423 (8th Cir. 1999). The child first broke out in splotches and hives at the day care center. Her doctor diagnoses her as being allergic to peanuts and peanut derivatives and was to avoid foods containing peanuts and their derivatives and if exposed to such products she must receive medication to combat any resulting limitation on her ability to breathe. After the child suffered another attack at the day care center, the day care center refused to provide services for her.

⁹³*Id.* at 424.

⁹⁴*Id.*

⁹⁵*Id.* at 425.

⁹⁶*Id.*

In the alternative, the child's mother argued that her child's two documented allergic reactions constituted a record of substantial physical impairment.⁹⁷ The court disagreed with this argument stating that "evidence of a history of impairment [is] not evidence of a history of disability."⁹⁸

Finally the child's mother asserted that her child was disabled because the day care center regarded her child as substantially limited in her ability to attend day care.⁹⁹ The court found that day care attendance is not a major life activity as defined under the ADA and, even if it assumed that it was, there was no evidence in the record that supported the contention that the day care center viewed the child's allergy to peanuts as substantially limiting her ability to attend day care.¹⁰⁰

While the majority held that in the child's allergy to peanuts did not constitute a disability under the ADA, the dissent believed that there was an issue of fact as to whether the child's food allergy to peanuts substantially limited her ability to function and, therefore, acted as a disability. The dissent stated that the child's doctor testified that the child's reaction to peanuts could range from hives to death and that the doctor recommended strict avoidance of peanuts and peanut products.¹⁰¹ From this, the dissent concluded that the child was substantially limited in her ability to eat.¹⁰²

In support of its position, the dissent cited an interpretive rule issued by the Department of Agriculture entitled "Meal Substitutions for Medical or Other Special Dietary Reasons," which states:

Generally participants with food allergies or intolerance's, or obese participants are not 'handicapped persons' as defined by 7 C.F.R. 15b.3(i), and school food authorities are not required to make substitutions for them . . .; however when in the physician's assessment of food allergies may result in severe, life-threatening reactions (anaphylactic reactions) or obesity is severe enough to substantially limit a major life activity, the participant then meets the definition of 'handicapped person', and the food service personnel must make the substitutions prescribed by the physician.¹⁰³

The dissent concluded that the doctor's testimony regarding the child's allergy together with the Department of Agriculture's interpretive rule raised a genuine issue of material fact as to whether the child's allergy to peanuts substantially limited her major life activity of eating and that this issue should be decided by a jury.¹⁰⁴

⁹⁷*Land*, 164 F.3d at 425.

⁹⁸*Id.*

⁹⁹*Id.*

¹⁰⁰*Id.*

¹⁰¹*Id.* at 426.

¹⁰²*Land*, 164 F.3d at 426.

¹⁰³*Id.*

¹⁰⁴*Id.*

It should be cautioned that the majority did not conclude that an allergy to peanuts could never be a disability under either Title II or III of the ADA. All that the court held was that in this particular case this child's allergy to peanuts did not substantially limit her major life activities of eating and breathing. In fact the question of whether a major life activity is substantially limited is an "individualized and fact specific inquiry."¹⁰⁵ Courts have stated that the determination of whether an individual has a disability "is not necessarily based on the name or diagnosis of the impairment the person has, but rather on the effect of the impairment [which] may be disabling for a particular individual but not others."¹⁰⁶

The question then becomes whether an individual's allergy to peanuts can rise to a high enough level of severity to be deemed a disability under the ADA. It is not unreasonable to believe that an individual could be so severely allergic to peanuts that it substantially limits his or her ability to eat or breathe, thus making him or her disabled under the ADA. Some individuals are so allergic to peanuts that the mere smell of them inflicts an anaphylactic attack. It is imaginable that the mere presence of peanuts in the school or daycare environment could so substantially limit a child's ability to eat or breathe that he or she would be deemed disabled under Title II or Title III of the ADA.

Such an individual would have to show through medical testimony his or her extreme sensitivity to peanuts and peanut by-products and how exposure to such products within the school or day care center is substantially limits his or her ability to eat or breathe. Such an individual would need to show that the contact was daily and so pervasive and overwhelming as to trigger attacks on a regular basis. One or two attacks, in general, would not be enough to prove a disability under the Act.

It has thus been shown that it is possible that an individual's allergy to peanuts could rise to the level of severity to constitute a disability. This being said, it must now be determined under what circumstances accommodation of such a disability will be required as well as the consequences of accommodation.

V. THE COST OF ACCOMMODATION ON SCHOOLS AND DAY CARE CENTERS: WHEN WILL ACCOMMODATION BE REQUIRED & HOW MUCH WILL BE ENOUGH?

This section will combine the analysis of Title II and Title III claims to assess the accommodation of individual's with peanut allergies in schools and day care centers. Once again, the language and interpretative case law pertaining to Title II and Title III differ slightly; however, analyzing the two Titles together is beneficial. In doing so, it can be seen that the analysis of these cases must truly be done on a case-by-case basis. This analysis will also show how some schools and day care centers may be required to accommodate individuals with peanut allergies, while others may not.

That an individual is deemed disabled under Title II or Title III of the ADA, does not mean that the disabled individual will be afforded protection under the Act. If the requested accommodation "calls for 'substantial modification' of a defendant's program, the accommodations are not reasonable and will not be required."¹⁰⁷

¹⁰⁵*Id.* (citing *Cowell v. Suffolk County Police Dep't.*, 158 F.3d 635, 643 (2d Cir. 1998)).

¹⁰⁶*Darian*, 980 F. Supp. at 85.

¹⁰⁷*Bercovitch v. Baldwin Sch., Inc.* 133 F.3d 141, 152 (1st Cir. 1998). A child suffering from attention deficit disorder, hyperactivity disorder, oppositional defiant disorder, and childhood depression that was suspended from a private school brought an ADA claim

Courts have stated that, in Title II cases, regulations require a public entity to make “reasonable modifications in policies . . . when modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrated that making the modifications would fundamentally alter the nature of the service.”¹⁰⁸ This goes to the core of whether modification of a program will essentially change the program to such an extreme as to make the accommodation impossible.

The test for determining the reasonableness of a modification under Title III is to determine whether the modification “alters the essential nature of the program or imposes an undue burden or hardship in light of the overall program.”¹⁰⁹ While Title III discusses “undue burden,” Title II does not make this distinction. To determine whether a modification will be an “undue burden,” one must look to:

- (1) The nature and cost of the action; (2) the financial resources of the site involved, the number of persons employed at the site, the effect on the expenses and resources, legitimate safety requirements that are necessary for safe operation, or impact otherwise of the action upon the operation of the site; (3) the geographic separateness, and the administrative and financial relationship of the site to the corporation; (4) if applicable, the overall financial resources of the parent corporation and the number of facilities; and (5) if applicable, the type of operation of the parent corporation.¹¹⁰

This list emphasizes the economic hardships that often occur when a facility must modify itself to accommodate a disabled individual.

Some Courts have held that one-on-one caregiving at a day care center would place an undue burden on the center because of the extra staffing necessary and would in turn cause the center financial hardship.¹¹¹ However, Courts have further stated that the determination of whether a modification is reasonable is very fact-specific, and therefore should be done on a case-by-case basis, considering the

alleging discrimination based on his disabilities. The court concluded that the parents request that their child be exempt from normal operation of the school’s disciplinary code was not a reasonable accommodation.

¹⁰⁸DeBord v. Board of Educ. of the Ferguson-Florissant Sch. Dist., 126 F.3d 1102, 1104 (8th Cir. 1997) (citing 28 C.F.R. § 35.130(b)(9) (1996)). Parents of a child who suffers from attention deficit disorder brought a Title II ADA claim against a school district for refusal to administer prescription drugs to the child. The court held that the school district’s refusal to administer prescription drugs to a student in a dose that exceed what the Physicians Desk Reference recommended did not violate the ADA and that the district fulfilled its duty to reasonably accommodate the student.

¹⁰⁹Powers v. MJB Acquisition Corp., 993 F. Supp. 861, 868 (D. Wyo. 1998) (citing Easley v. Snider, 36 F.3d 297, 305 (3rd Cir. 1994)). A student sued a vocational school for discrimination under the ADA and the court held that the school was not excused from compliance with accessibility requirements of the ADA because of the age of the facility.

¹¹⁰Roberts v. Kindercare Learning Ctr., Inc. 86 F.3d 844, 846 (8th Cir. 1996) (citing 28 C.F.R. § 36.104). Parents of a developmentally delayed child brought an Title II ADA claim against a day care center for refusing to provide services to the child.

¹¹¹*Id.*

“effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it.”¹¹² This being said, attention can now be turned to whether, through modification of existing programs, peanut allergies can ever be reasonably accommodated in schools and day care centers.

To decide whether peanut allergies can be reasonably accommodated through modification, one must look at what accommodations would be required to remedy the situation. Some parents of peanut-allergic children are advocating total bans of peanuts and peanut by-products in schools and day care centers.¹¹³ This extreme modification does not seem to be reasonable no matter whether one is discussing the modification for a public school or private school or day care center. Such a ban would not only put an undue burden on the schools or day care centers by requiring more policing of students and meal changes, but it would also place a burden on the other children and parents who feel that peanut butter is a healthy and inexpensive source of protein.

Many organizations such as The Food Allergy Network caution against banning peanuts in schools.¹¹⁴ This is because organizations feel that a school would need to require employees to read all ingredient labels and call manufacturers to determine whether or not a product contained the banned substance, which is an unrealistic goal to achieve.¹¹⁵

The American Academy of Allergy, Asthma and Immunology recommends that school districts can reduce allergic children’s exposure to by taking the following precautions:¹¹⁶

1. All school staff who may be giving allergic students any food or supervising activities involving food should know technical and scientific words for common food ingredients. Ingredient statements should be carefully read before giving any child food.
2. Strict “no food or eating-utensil trading” rules should be implemented throughout the school to avoid peer pressure.
3. Surfaces such as tables and toys should be washed clean of contaminated foods.

¹¹²*Powers*, 993 F. Supp. at 868.

¹¹³*Rossie*, *supra* note 7.

¹¹⁴*School Board News-Policy and Employee Relations: The Peanut Predicament* (visited Feb. 20, 1998) <<http://www.nyssba.org/adnews/employee121498.1.html>>. The Food Allergy Network is a non-profit organization in Fairfax, Va. Established to increase public awareness about food allergies. *Id.* This is cited from the home page of the New York State School Board Association and an advisory opinion to school districts. It gives the Boards opinion as to what should be done as a result of the recent controversy over peanut allergies in schools. The School Board Association argues that a ban on peanut products would only subject the district to criticism and potential legal liability because such a ban would afford more rights to one group of children over another group of children. *Id.*

¹¹⁵*Id.*

¹¹⁶*Supra* note 114. The American Academy of Allergy, Asthma, and Immunology recommends that all school personnel develop a system of identifying children with life-threatening food allergies and be aware of the first-aid protocols for each child. *Id.*

4. Food used in lesson plans for math or science, crafts and cooking classes may need to be substituted, depending upon the allergies of the students.
5. Preschoolers and elementary school students should be encouraged to wash their hands after handling food.
6. If a student with a food allergy plans to eat from the school cafeteria menu, the child's parents should inform the cafeteria staff in writing about foods to be avoided and suggest "safe" substitutes.
7. Food service personnel should be instructed about measures necessary to prevent cross contact during the handling, preparation, and serving of food.
8. Food brought in for special events should be purchased in stores and contain ingredient lists.

Even though it may seem that numbers one, two, and five require policing that may overburden a school, in fact these are precautions that should be taken to protect any child not just allergic children, and as such, it would seem that none of the above mentioned precautions are truly unreasonable.

It seems that the best way to accommodate a child with an allergy to peanuts would be have separately designated tables within the cafeteria where no peanuts or peanut by-products will be consumed. The child's friends could eat lunch at the table with him or her provided that he or she is not eating anything that contains peanuts. This type of voluntary action by other children helps protect the allergic child without taking away any rights from the non-allergic children. Asking parents of non-allergic children to participate in such a plan is more likely to gain support since it is non-confrontational and respects the rights of all children.

If cafeterias serve peanuts or peanut by-products, the staff should be informed of procedures to prevent contamination of the foods or equipment. If peanut butter sandwiches are served, the sandwiches should be prepared away from all other food to prevent contamination, and special utensils should be kept for just this purpose. Furthermore, sandwiches should be individually wrapped and stored away from all other food and put in the food line in a place where cross contamination will not occur.

Teachers and other school and day care personnel should substitute peanuts and peanut by-products from lesson plans when at all possible, and, when not possible, the allergic children should be given adequate notice and be excused from such an assignment. While parents of allergic children may feel that this is not the equivalent of an equal education for their children, this is a reasonable accommodation that balances the rights of all involved; because, it both protects the allergic children from a potentially hazardous condition while attempting to provide a uniform education, and at the same time it does not overburden the school or daycare center.

All school personnel must be made fully aware of the medical conditions of all peanut-allergic children and all of the first-aid protocols. This means that if a child is so allergic as to require a shot of epinephrine if exposed to peanuts, every staff member who has contact with that child should know the proper procedures to administer the required medication.

Each case is going to require an analysis of the available reasonable accommodations. Not every situation is the same; therefore the above-mentioned accommodations are only illustrative of the possible reasonable accommodations. In considering what accommodations are best, one will need to look at the age of the allergic child, the resources available to the school or day care center, both economic and physical (i.e. the number of available staff and classroom space). Thus, there are

methods of reasonable modifications to schools and day care centers to allow for the accommodation of children allergic to peanuts.

VI. CONCLUSION

Given the wide range of allergic reactions that individuals suffering from peanut allergies can have, it is likely that a court could indeed find a child so severely allergic to peanuts as to deem him or her disabled under Title II or Title III of the ADA. It also seems that reasonable modifications of school and day care centers in many instances can be made to afford a child allergic to peanuts protection under the ADA. As with any other claim under the ADA, peanut allergy claims are very fact-specific and will require a case-by-case analysis.

There are precautions that schools and day care centers can take to protect the rights of allergic children without taking away any rights of non-allergic children. If schools and day care centers along with students and parents work together to form a policy, much of the confusion about peanut allergies and allergic reaction can be dispelled early on and a modification program can be more easily generated.

Many schools and day care centers are not waiting for lawsuits to be brought against them, rather they are taking the initiative to try to accommodate allergic children and still balance the needs and rights of all involved. This seems to be the best way to alleviate many of the problems involved.

MARIE PLICKA