

DON'T BE HANDICAPPED WHEN DEALING WITH STUDENT DISABILITIES

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You've just received a note from a parent of a new student, stating that your school must become "absolutely peanut-free," as her son has a severe peanut allergy and will go into anaphylactic shock if he is even in the same room with a peanut! What do you do? This article will address the obligations of an independent school as it relates to students with disabilities by focusing on 10 essential questions to ask yourself when receiving such a note from a parent.

QUESTION 1 – DOES THE LAW APPLY TO YOU?

First, while you may choose to address this situation for the well-being of the child, are you legally obligated to follow all of the requirements of the laws related to students with disabilities? Essentially, there are two laws which could apply to this situation – Title III of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973. Your state or city may also have local ordinances that mirror these two laws.

Generally speaking, Title III of the ADA applies to all independent schools, unless the school is a religious organization or an entity "controlled by" a religious organization. It is not enough to have a religious focus or identity. Rather, the school must be "controlled" by a religious organization. Courts will look at several factors including the school's curriculum, instruction, mission, board membership, ownership of property, tax status, and funding; and ownership, control, affiliation, and sponsorship by a religious entity. It is a very fact-specific analysis that is based on a desire to protect the free exercise of religious belief.

Section 504 applies to all schools, whether or not you are controlled by a religious organization, if you accept federal financial assistance. Federal financial assistance is defined very broadly and acceptance of such assistance in one area applies to the whole school and possibly the entire organization, such as a group of schools under separate operation. Examples of federal financial assistance include school lunch programs, anti-drug programs, at-risk student programs, technology grants, government contracts, government loans, etc. If you accept federal assistance, it comes at a price, and you must adhere to Section 504 as well as many other laws.

ANSWER: For the student with a peanut allergy, then, if you are an independent school that is not a religious organization or controlled by a religious organization, or if you accept federal financial assistance, you will need to address this parent's request under the law.

QUESTION 2 – WHO IS PROTECTED?

The laws mentioned above protect a qualified individual with a disability who can perform the essential functions of the school task with or without reasonable accommodations. In 2009, the ADA was amended to extend the protections of the law to substantially more people, many for the first time. In fact, the majority of the people the law protects have impairments which are not visible to the naked eye. To determine who is protected, a school must analyze whether the individual has an impairment, whether the impairment substantially limits a major life activity, and whether the individual, with or without a reasonable accommodation, is otherwise qualified for the program.

ANSWER: For the student with an alleged peanut allergy, such an allergy, depending on its severity, could be considered an impairment which substantially limits several major life activities, and if the student has already met your enrollment standards, he may be otherwise qualified to participate in your program.

QUESTION 3 – DOES THE STUDENT HAVE AN IMPAIRMENT?

A student has an impairment if he or she has a physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, or a mental or psychological disorder. Although all impairments should be evaluated on a case-by-case basis, the following examples will most likely be considered an impairment covered by the law: clinical anxiety, depression, visual or auditory processing disorder, ADHD, dyslexia, deafness, blindness, cancer, bipolar disorder, epilepsy, autism, HIV/AIDS, diabetes, multiple sclerosis, cerebral palsy, and a mobility impairment.

Although medical evidence may not be necessary when an impairment is obvious, we recommend always obtaining medical documentation to confirm a parent's or student's statement that an impairment exists.

ANSWER: A serious peanut allergy could be considered an impairment under the law, if it is supported by appropriate medical documentation.

QUESTION 4 – DOES THE IMPAIRMENT SUBSTANTIALLY LIMIT A MAJOR LIFE ACTIVITY?

A major life activity is defined as any activity that is of central importance to most people's daily lives. Examples include performing manual tasks, thinking, communicating, learning, speaking, breathing, seeing, hearing, eating, sleeping, walking, standing, sitting, lifting, interacting with others, reading, concentrating, and caring for oneself. The assessment does not involve analyzing whether the activity is important to the student – just whether it is important to the general population.

ANSWER: The student's peanut allergy, depending on the severity of the allergy, could substantially impair the child's ability to eat, breathe, or interact with others.

QUESTION 5 – IS THE IMPAIRMENT TEMPORARY?

Temporary, non-chronic impairments do not meet the definition of a protected disability under the law. But there is no bright line rule regarding the amount of time an impairment must last. An impairment that is episodic or in remission is a disability if it substantially limits the student when it is active. For example, many mental impairments such as depression, bipolar disorder, migraine headaches, and post-traumatic stress disorder are episodic in nature and may be completely controlled by medications, but are considered disabilities under the law. In fact, an impairment can be substantially limiting even if it lasts less than six months.

ANSWER: In our case, most allergies, especially severe allergies are not temporary or non-chronic. Sometimes children do grow out of allergies, and therefore the reasonable accommodation may change.

QUESTION 6 – WHO ARE COVERED PERSONS?

Under the law, more than just individuals with current disabilities are covered. In fact, covered persons include not only those students who are actually disabled, but those students who have a history of a disability, and those students who are regarded as disabled.

Having a history of a disability could include those students who have had cancer in the past or other medical conditions, for which they are currently in remission. While

there may not be a need for a reasonable accommodation at this time, schools do need to consider those students as protected under the law.

Being regarded as disabled protects individuals who are discriminated against because of actual or *perceived* physical or mental impairments whether or not the impairment limits or is *perceived* to substantially limit a major life activity. The mere fact that a school makes an accommodation is not evidence that it regarded the student as disabled, but if a student does not have a disability under the law, they are not entitled to a reasonable accommodation.

ANSWER: For our peanut allergy student, he would definitely be covered by the law, after making the determination that he is actually disabled.

QUESTION 7 – WHAT IS A REASONABLE ACCOMMODATION?

Independent schools are obligated to provide reasonable accommodations to students who demonstrate they have a disability covered by the law. However, the reasonable accommodation requirement does not require any modification or accommodation that would fundamentally alter the nature or purpose of the school's program or that would cause an "undue burden" on the school.

A fundamental alteration to a program is one that would require a school to provide an altogether different program than what it typically provides. For example, a school would not be required to change its required curriculum, grading practices, or enrollment standards, if such change would affect the mission or purpose of the school. An undue burden is one that requires significant difficulty or expense. The relevant factors in determining whether an undue burden exists can include the nature and cost of the action required and the overall financial resources of the school.

When a school determines that an accommodation is unreasonable, it must be able to show that institution officials considered alternative means, the feasibility of the alternative means, the cost and effect on the academic program, and a rationally-justifiable conclusion of lowered academic standards or substantial program alteration. Think outside the box! Even if a requested accommodation imposes an undue hardship, a school is still obligated to attempt to provide an alternative that is reasonable under the law.

ANSWER: In the case of the student with a peanut allergy, depending upon the severity of the allergy, while making the entire school peanut-free may be unduly burdensome, the school may have an obligation to provide a peanut-free table in the cafeteria or place the student in a peanut-free classroom.

QUESTION 8 – WOULD THE ACCOMMODATION CAUSE A DIRECT THREAT TO THE STUDENT OR OTHERS?

The law does not require the school to make a reasonable accommodation for a student's disability if it could result in a direct threat to the student or to others. A direct threat is a significant, highly probable risk of serious harm to the health and safety of the student or others, which cannot be eliminated by a modification of policies, practices, and procedures, or by the provision of auxiliary aids or services. This standard is very difficult to meet.

ANSWER: Accommodating a peanut allergy likely will not cause a direct threat to the student or others. However, allowing a seeing-eye dog to attend school may cause a direct threat to another student with a severe dog allergy.

QUESTION 9 – WHAT STEPS SHOULD THE SCHOOL TAKE TO DETERMINE WHAT ACCOMMODATION IS REASONABLE?

The law requires schools to engage in an interactive process, which is usually initiated when the student or parent of the student requests an accommodation. But if the school has evidence or knowledge of the disability prior to a request for accommodation, you have an obligation to inquire whether the parent wishes to disclose a disability and engage in this interactive process. Most importantly, each stage of this process should be clearly documented by the school.

The first step of the process is to document the request and ensure that the request is received by the appropriate personnel. If the request is made to a teacher, the teacher should not respond. Instead, the teacher should document the request in writing to the Head of School. The school should also confirm the request, in writing, to the parents.

The second step is to prepare for and set up a preliminary meeting with the parents. To some extent, the individuals who should attend the meeting may depend on what type of accommodation the student is requesting. Generally, the Head of School, and the disability coordinator, if one exists, should attend. If the disability is not apparent, the school may either assume that the student is disabled or prepare an inquiry to the student's physician to determine whether the student is disabled.

Regardless of the decision made, a medical inquiry should always be made to determine whether the accommodation is necessary, whether other possible accommodations exist, and if they would be effective. Narrowly tailor medical inquiries to obtain only the information necessary to determine whether the student is disabled and needs an accommodation, or whether the student is a direct threat. Thus, the school may not request the student's complete medical records or treatment plans.

The third step is to hold the meeting with the parent and appropriate personnel to discuss the disability and the requested accommodation. The school should have the parent sign a HIPAA-compliant Authorization for Release of Medical Information. A copy of the medical inquiry to the student's physician should be attached so that the parent can see what information the school is seeking.

Since the law does not require the school to provide the student's preferred accommodation, if you do not believe the accommodation is reasonable, explore other possible accommodations that meet the student's need. The other accommodation options may be included in the medical inquiry for comment by the treating physician or psychologist. While the school may certainly receive any documentation from the parent related to the student's disability or accommodation request, we recommend that the school request the authority and opportunity to communicate with the student's doctor directly.

The fourth step is to evaluate the medical documentation and the requested accommodation, and make a decision regarding the appropriate accommodation, if any.

The final step is to communicate your decision to the parent in writing. If the school determines that no accommodation is reasonable, this communication should set out the alternatives considered, the deciding factors, and the rational justifications for the conclusion.

ANSWER: You obtain the medical documentation from the doctor of the student with the peanut allergy. The medical documentation shows that the student does have a peanut allergy, but it is only when the student himself actually ingests a peanut, and it only causes a slight rash to the student, which could affect his ability to concentrate. You find that the student has a disability, but deny the accommodation requested.

Through the interactive process, you offer an alternative accommodation by asking the parent to provide all lunch and snack food for the student. You also inform the student's teachers and other personnel who have direct contact with the student to allow the student to eat only the food provided by the parent, with no exception, unless they obtain written approval from the parent. You have reasonably accommodated this student's disability.

Of course, if the medical documentation had, in fact, supported the parent's initial claim that her child would go into shock by the mere presence of a peanut in the room, your response may be quite different. You may have to ensure that your facility is completely peanut-free, unless you can prove that such measures would cause an undue burden on the school, in that it would require significant difficulty or expense based on the financial resources of the school.

QUESTION 10 – HOW DO WE PREVENT COMPLAINTS REGARDING THE PROCESS?

Dealing with students with disabilities can be a formidable process. But with careful planning and specific procedures, a school can certainly address the needs of the child, while preserving the mission and integrity of the school. Some key points to consider are:

- have a disability services coordinator – one person who is responsible for such accommodations and who is able to keep up to date on changing laws and decisions;
- establish good policies and procedures regarding the accommodations process, including required documentation;
- communicate policies and procedures to students and parents annually;
- train administrators and the coordinator regarding the interactive process;
- document all steps of the process as well as the implementation of the accommodation;
- train staff on their accommodation obligations;
- establish a complaint and resolution process; and
- seek guidance from your school's attorney.

By going through these ten questions, even tricky cases such as our peanut-allergy example, can be handled with a minimum of legal exposure.

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