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FOOD ALLERGY BULLYING AS DISABILITY HARASSMENT: HOLDING SCHOOLS ACCOUNTABLE

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"Despite anti-bullying laws and policies across the country, principals, teachers and other adult leaders often turn a blind eye to bullying. Litigation can motivate them to insist that bullying is confronted, rather than ignored . . . ."[1]

ABSTRACT

Millions of American school children suffer from food allergies, and increasingly, these children are bullied because of their allergies. Any bullying can devastate, but food allergy bullying can sicken or kill within minutes. A food allergy bully may expose the victim to a potentially fatal allergen, such as by hiding the allergen in the allergic child's food or forcing the allergic child to eat it. Food allergy bullying is already responsible for many hospitalizations and at least one death.

Most food allergy bullying happens at school, and schools play a crucial part in preventing bullying and addressing it when it occurs. All too often, though, schools fail to take appropriate action in response to bullying. Even worse, sometimes the bullies are teachers, coaches, or other school personnel. Sovereign immunity insulates schools from most liability, but federal disability law may provide a solution.

This article forges a new path through disability law for schools to be held liable for food allergy bullying under federal disability discrimination laws. The article explains first that a cause of action exists for disability-based harassment; if food allergy is a disability under these statutes, schools could be subject to liability for food allergy bullying under a harassment theory. This statutory claim avoids the sovereign immunity hurdle and holds schools accountable for their role in facilitating or refusing to respond appropriately to food allergy bullying. If bullying breeds and flourishes in schools, then creating a school environment inhospitable to that growth is a top priority.

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[1] Adele Kimmel, Public Justice, *Litigating Bullying Cases: Holding School Districts and Officials Accountable*, Fall 2017, at 28, https://www.publicjustice.net/wp-content/uploads/2016/02/Bullying-Litigation-Primer-Fall-2017-Update-FINAL.pdf.

Facing more certain liability for food allergy bullying can motivate schools to act.

This work builds on the author's previous work, which makes the case for parental liability when parents negligently contribute to their child's food allergy bullying. With food allergies and related bullying on the rise, the law must protect all children's right to learn safely and in peace.

I. INTRODUCTION

School should be a safe and welcoming place where children can learn and grow. But for the 5.6 million American children with food allergies,[2] school can be a danger zone. Managing food allergies at schools is challenging in the best of circumstances. Every meal and snack must be scrutinized because even a trace of the allergen can cause serious health consequences, including a system-wide shock that can kill within minutes.[3] With food at school in the lunchroom and the classroom—for celebrations,

[2] Food Allergy Research & Educ., *Facts & Statistics*, https://www.foodallergy.org/life-with-food-allergies/food-allergy-101/facts-and-statistics (hereinafter *FARE Facts & Statistics*).

[3] *See infra* Part II.A.

snacks, science experiments, and crafts—peril lurks around every corner.[4]

One third of these allergic children confront yet another risk—being bullied because of their allergy.[5] They may be teased and taunted, excluded from activities, and ridiculed. Such stereotypical bullying tactics harm these children, as all bullying does, but perhaps even more so because this bullying taps into deep-seated fears regarding their allergies that these children live with on a daily basis. Even worse, over half of the time, bullies directly threaten them with the very food they are allergic to.[6] This form of bullying poses unique risks because exposure to their allergen puts these children in direct, serious physical danger. For example, a boy in London died recently after a bully touched him with cheese, and other victims have had allergic reactions or been hospitalized from bullying incidents.[7] Some bullies are doubtless unaware of the degree of danger, but others are, such as those who say things like "I'm going to kill you with this peanut butter cracker."[8]

Schools are ground zero for childhood bullying. Most food allergy bullies

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[4] *See infra* Part II.C.

[5] *See* Jay A. Lieberman et al., *Bullying Among Pediatric Patients with Food Allergy*, ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY, Oct. 2010, at 283; Eyal Shemesh et al., *Child and Parental Reports of Bullying in a Consecutive Sample of Children with Food Allergy*, PEDIATRICS, Jan. 2013, at e10. For a more detailed discussion of these studies, see D'Andra Millsap Shu, *When Food is a Weapon: Parental Liability for Food Allergy Bullying*, 103 MARQUETTE L. REV. __, __ (forthcoming summer 2020).

[6] *See* Lieberman et al., *supra* note 5, at 282 (stating that 57% of study participants reported physical bullying "such as being touched by an allergen and having an allergen thrown or waved at them").

[7] *See infra* note 77-89 and accompanying text.

[8] Nicole Smith, *Food Allergy Bullying—What's the Solution?*, ALLERGIC CHILD, June 25, 2013, https://home.allergicchild.com/food-allergy-bullying-whats-the-solution/ (describing food allergy bullying incident among first graders); *see also* Sally Kuzemchak, *Food Allergy Bullying is Heartbreaking and Real*, PARENTS, https://www.parents.com/recipes/scoop-on-food/food-allergy-bullying-is-heartbreaking-and-real/ ("One day at lunchtime, a boy in Will's group began to taunt him, coming at him with a peanut butter sandwich in a threatening way and saying something along the lines of 'I could kill you with this sandwich.'"); Suzanne Allard Levingston, *Bullies Use a Small But Powerful Weapon to Torment Allergic Kids: Peanuts*, WASH. POST, May 28, 2017, https://www.washingtonpost.com/national/health-science/bullies-use-a-small-but-powerful-weapon-to-torment-allergic-kids-peanuts/2017/05/26/a296a878-292f-11e7-be51-b3fc6ff7faee_story.html?noredirect=on&utm_term=_.cb18697ac3a2 (describing how bully wiped peanut butter on an allergic child and said "I dare you to die today"); Roni Caryn Rabin, *In Allergy Bullying, Food Can Hurt*, N.Y. TIMES, Feb. 15, 2018, https://www.nytimes.com/2018/02/15/well/family/in-allergy-bullying-food-can-hurt.html (recounting father's story of allergic son being taunted with a peanut butter sandwich by child saying "let's see if he dies").

operate at school and target classmates.[9] But an astounding 20% of food allergy bullying comes from teachers and other school personnel.[10] Like the teacher who forced an allergic student to use peanut butter in a science experiment. Or the coach who threatened an athlete with peanut butter for poor performance.[11] Much less egregious actions still contribute to food allergy bullying, such as when a teacher questions whether a child's allergy is real or tells the class that they cannot have birthday cupcakes because of Billy's allergy.[12] Even when teachers or other school officials are not involved in the actual bullying, frequently they fail to take bullying seriously. They may ignore bullying they see or downplay reports. They may conduct little if any investigation of alleged bullying and mete out minimal punishment at most.[13] Such a lackluster response serves only to encourage bullying—indeed, 86% of allergic children report being bullied repeatedly.[14]

Food allergy bullying litigation is in its infancy. Parents have increasingly sued schools over bullying in general, but these claims typically fail for a variety of reasons.[15] One significant reason is sovereign immunity, which shelters governmental entities such as school districts from many types of lawsuits.[16] Insulated from the threat of civil liability, in some schools, bullying thrives. That must change.

This article advances the theory that schools should be subject to liability for food allergy bullying under two federal disability discrimination statutes—the Americans with Disabilities Act and the Rehabilitation Act of 1973. Part II explains how food allergies work and some of the issues people with allergies face, such as the skeptics who claim food allergies are exaggerated, nonexistent, or otherwise not a serious health issue. The article also explores the intersection of food allergies and school and how that impacts the allergic children, the rest of the children, and the overall school environment. Part III details how food allergy bullying has arisen as a serious concern in schools and how uniquely dangerous food allergy bullying can be.

With this framework in mind, Part IV sets forth the case for school liability under the ADA and the Rehabilitation Act. It begins by illuminating the critical role schools play in either fostering or squelching an environment

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[9] *See* Lieberman et al., *supra* note 5, at 283.
[10] *See id.* at 285.
[11] *See infra* notes 91-95 and accompanying text.
[12] *See infra* notes 113-117 and accompanying text.
[13] *See infra* notes 106-112 and accompanying text.
[14] *See* Lieberman et al., *supra* note 5, at 285.
[15] *See infra* notes 119-122 and accompanying text.
[16] *See infra* notes 122-125 and accompanying text.

conducive to bullying. This, in combination with the vast majority of bullying originating in school, justifies focusing a litigation strategy on schools. The article then describes how these disability laws generally operate in the primary and secondary education context and how they bypass the sovereign immunity hurdle that has long protected schools from liability for bullying.

But a prerequisite to pursuing a claim under these laws is proving that a particular child's food allergy is a disability. The article analyzes how food allergies can qualify as a disability under several theories, particularly in light of statutory amendments expanding the scope of coverage. When courts accurately apply the statutes and litigants properly plead and prove their cases, food allergies should almost always constitute a disability.

Finally, Part IV lays out the existing cause of action for disability-based harassment. If a food allergy is a disability, then disability harassment is on the table as a potential claim. The article next demonstrates how this claim would work in the food allergy bullying context. It is not an easy claim to prove, often succeeding in only the most serious of cases. But food allergy bullying is serious business. It poses a direct risk of death in a way more traditional bullying does not. Courts should expressly consider this unique circumstance when evaluating disability harassment claims based on food allergy bullying. A million children are bullied with their allergen, filling them with fear that impedes their education and putting their lives at risk. A real threat of liability for serious disability harassment—without the immunity shield—can motivate schools to take effective actions to stamp out food allergy bullying.

II. NAVIGATING THE WORLD WITH FOOD ALLERGIES

To fully comprehend the problem of food allergy bullying, it is first necessary to understand basic information about food allergies and how society in general—and schools in particular—respond to food allergies and those who suffer from them.

A. Food Allergy Basics

Food allergies in America today pose a significant health concern.[17]

[17] Joshua A. Boyce et al., *Guidelines for the Diagnosis and Management of Food Allergy in the United States: Report of the NIAID-Sponsored Expert Panel*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Dec. 2010, at S4, https://www.jacionline.org/article/S0091-

Approximately 32 million people in the United States are allergic to one or more foods.[18] Up to eight percent of children have food allergies.[19] That is 5.6 million children, or one in every thirteen.[20] What is more, food allergy rates among children are skyrocketing, with the Centers for Disease Control reporting a 50% increase between 1997 and 2011.[21] The reasons are unclear, but the numbers are unmistakable and alarming.[22]

A food allergy is an immune system malfunction that occurs when the immune system mistakenly responds to a certain food as if it were harmful.[23] Allergic reactions can affect the cutaneous (skin), gastrointestinal, respiratory, and circulatory organs and systems.[24] Specific responses can include rash, hives, vomiting, abdominal pain, dizziness, wheezing, shortness of breath, throat tightening, tongue swelling, fainting, circulatory collapse, and weak pulse.[25] Allergic responses are unpredictable—they vary from person to person, and one person can experience different reactions from one exposure to the next. [26]

6749(10)01566-6/pdf; U.S. Ctrs. for Disease Control & Prevention, *Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Programs*, 2013, at 9, https://www.cdc.gov/healthyschools/foodallergies/pdf/13_243135_A_Food_Allergy_Web_508.pdf (hereinafter *CDC Voluntary Guidelines*).

[18] *See FARE Facts & Statistics*, *supra* note 2.

[19] *See CDC Voluntary Guidelines*, *supra* note 17, at 9 ("an estimated 4%-6% of children"); David M. Fleischer et al., *Allergic Reactions to Foods in Pre-School Aged Children in a Prospective Observation Food Allergy Study*, PEDIATRICS, July 2012, at e26 ("up to 8% of children").

[20] *FARE Facts & Statistics*, *supra* note 2.

[21] *See* Kristen D. Jackson et al., U.S. Ctrs. for Disease Control & Prevention, *Trends in Allergic Conditions Among Children: United States, 1997-2011*, NCHA Data Brief No. 121, May 2013, https://www.cdc.gov/nchs/data/databriefs/db121.pdf; *see also FARE Facts & Statistics*, *supra* note 2 ("The [CDC] reports that the prevalence of food allergy in children increased by 50 percent between 1997 and 2011.").

[22] *See* Hugh S. Sampson, *Peanut Allergy*, 346 NEW ENG. J. MED. 1294, 1297 (2002).

[23] *See* Am. Coll. of Allergy, Asthma & Immunology, *Food Allergy*, https://acaai.org/allergies/types/food-allergy (hereinafter *ACAAI Food Allergy*); Boyce et al., *supra* note 17, at S4, S8; U.S. Ctrs. for Disease Control & Prevention, *Food Allergies in Schools*, https://www.cdc.gov/healthyschools/foodallergies/ (hereinafter *CDC Food Allergies*).

[24] *See ACAAI Food Allergy*, *supra* note 23; Boyce et al., *supra* note 17, at S19.

[25] *See ACAAI Food Allergy*, *supra* note 23; Boyce et al., *supra* note 17, at S19.

[26] *See ACAAI Food Allergy*, *supra* note 23 ("Symptoms of a food allergy can range from mild to severe. Just because an initial reaction causes few problems doesn't mean that all reactions will be similar; a food that triggered only mild symptoms on one occasion may cause more severe symptoms at another time."); *CDC Food Allergies*, *supra* note 23 ("The symptoms and severity of allergic reactions to food can be different between individuals, and can also be different for one person over time.").

The most acute allergic reaction is anaphylaxis, a severe condition that can lead to respiratory distress, a drastic drop in blood pressure, unconsciousness, and even death.[27] Anaphylaxis can kill within minutes.[28] Epinephrine is the first-line treatment for anaphylaxis,[29] and so doctors usually prescribe patients with food allergies epinephrine autoinjectors such as the EpiPen.[30] Though epinephrine is the best treatment for anaphylaxis, epinephrine cannot always prevent anaphylactic death, particularly if not administered quickly at the onset of symptoms.[31] Because the risk of anaphylaxis is ever present—what once caused a skin rash could result in anaphylaxis the next time—allergic individuals should have access to epinephrine at all times.[32]

Food allergy reactions are not hypothetical or speculative. Forty percent of allergic children have had a severe or life-threatening reaction.[33] A food allergy reaction sends someone to the emergency room every three minutes.[34] Each year, anaphylaxis from food allergies results in 30,000 emergency room visits, 2,000 hospitalizations, and 150 deaths.[35]

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[27] *See ACAAI Food Allergy*, *supra* note 23; Boyce et al., *supra* note 17, at S4, S9-10; U.S. Food & Drug Admin., *Food Allergies: What You Need to Know*, https://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAllergens/ucm079311.htm (hereinafter *FDA Food Allergies*); Laurent L. Reber et al., *The Pathophysiology of Anaphylaxis*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Aug. 2017, at 335.

[28] *See ACAAI Food Allergy*, *supra* note 23 ("Anaphylaxis can occur within seconds or minutes of exposure to the allergen, can worsen quickly and can be fatal."); Boyce et al., *supra* note 17, at S38 ("Failure to respond promptly [to anaphylaxis] can result in rapid decline and death within 30-60 minutes."); *CDC Voluntary Guidelines*, *supra* note 17, at 20 ("Death due to food-induced anaphylaxis may occur within 30 minutes to 2 hours of exposure.").

[29] *ACAAI Food Allergy*, *supra* note 23; Boyce et al., *supra* note 17, at S38; *see also FARE Facts & Statistics*, *supra* note 2 (stating that once anaphylaxis starts, "epinephrine is the only effective treatment").

[30] *See ACAAI Food Allergy*, *supra* note 23; Perri Klass, *Life-Threatening Allergic Reactions Rising in Children*, N.Y. TIMES, Apr. 4, 2018, https://www.nytimes.com/2018/04/09/well/family/life-threatening-allergic-reactions-rising-in-children.html.

[31] *See* Boyce et al., *supra* note 17, at S38; *FARE Facts & Statistics*, *supra* note 2.

[32] *See ACAAI Food Allergy*, *supra* note 23; Boyce et al., *supra* note 17, at S38.

[33] *See FARE Facts & Statistics*, *supra* note 2.

[34] *See* Sunday Clark et al., *Frequency of US Emergency Department Visits for Food-Related Acute Allergic Reactions*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Mar. 2011, at 682; *FARE Facts & Statistics*, *supra* note 2; *see also* Klass, *supra* note 30 (describing Blue Cross Blue Shield report showing emergency room visits among its subscribers for anaphylaxis in children doubled between 2010 and 2016).

[35] U.S. Food & Drug Admin., *Frequently Asked Questions About Food Allergies*, https://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAllergens/ucm530854.htm;

No cure currently exists for food allergies, so allergic individuals must strictly avoid their allergen.[36] But it is not simply a matter of passing on the peanut butter sandwich. Individuals with food allergies must exercise constant vigilance about their food.[37] Ingesting even a minute amount of the allergen can cause a reaction, including anaphylaxis.[38] Food that is manufactured on the same equipment or in the same facility or prepared in the same kitchen as an allergen might be contaminated with it, even though the allergen is not an intended ingredient.[39] Accidental ingestion is common

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see also FARE Facts & Statistics, *supra* note 2.

[36] *CDC Food Allergies*, *supra* note 23; *FDA Food Allergies*, *supra* note 27; Fleischer et al., *supra* note 19, at e26. Food allergy treatments are being developed that promise to help desensitize some people to certain allergens. Rather than "curing" the allergy, these treatments increase the individual's tolerance so that a greater amount of the allergen is required to cause a reaction. Though helpful for some patients, these treatments require lifelong maintenance, are unavailable to patients with the highest risk of anaphylaxis, and simply do not work for many people. *See* Elizabeth Feuille & Anna Nowak-Wegrzyn, *Allergen-Specific Immunotherapies for Food Allergy*, ALLERGY ASTHMA IMMUNOL. RES., May 2018, at 189, 204; Roni Caryn Rabin, *For Children With Peanut Allergies, F.D.A. Experts Recommend New Treatment*, N.Y. TIMES, Sept. 1, 2019, https://www.nytimes.com/2019/09/13/health/peanut-allergy-children.html; Robert A. Wood, *Food Allergen Immunotherapy: Current Status and Prospects for the Future*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Apr. 2016, at 974, 979-80.

[37] *See ACAAI Food Allergy*, *supra* note 23 ("Avoiding an allergen is easier said than done. While labeling has helped make this process a bit easier, some foods are so common that avoiding them is daunting."); Claire Gagné, *Food Allergy Backlash Boards the Bus*, ALLERGIC LIVING, July 2, 2010, https://www.allergicliving.com/2010/07/02/food-allergy-backlash-grows-1/ ("'Spend a week trying to live as if you have a food allergy and a reaction could land you in the hospital. See how it does get to you – spending hours at the grocery store reading every single ingredient label, or going to a restaurant and trying to see if the wait staff really believes you.' Living with food allergies means constant vigilance."); Lieberman et al., *supra* note 5, at 285 ("Patients . . . have to be extremely diligent in monitoring what foods they eat . . . .").

[38] *See* Reber et al., *supra* note 27, at 335 (explaining that "minute amounts" of a food allergen can trigger anaphylaxis); Belen M. Tan et al., *Severe Food Allergies by Skin Contact*, 86 ANNALS OF ALLERGY, ASTHMA & IMMUNOLOGY 583, 586 (2001) ("Severe food allergic reactions can occur through noningestant exposure (skin contact or inhalation), to even minute quantities of the offending allergen."); *see also* James E. Gern et al., *Allergic Reactions to Milk-Contaminated 'Nondairy' Products*, 324 NEW ENG. J. MED. 976, 976 (1991) (reporting allergic reactions to trace amount of milk); Jonathan O'B. Hourihane et al., *An Evaluation of the Sensitivity of Subjects with Peanut Allergy to Very Low Doses of Peanut Protein: A Randomized, Double-Blind, Placebo-Controlled Food Challenge Study*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Nov. 1997, at 596 (discussing allergic response to very low doses of peanut protein).

[39] *See* Sampson, *supra* note 22, at 1296 (stating that the average person with peanut allergy has an allergic reaction every three to five years from inadvertent exposure through sources such as contamination of manufacturing equipment); The Threshold Working Grp., U.S Food & Drug Admin. & U.S Dep't of Health & Human Servs., *Approaches to Establish*

and is responsible for a substantial number of allergic reactions, even deaths.[40] Though ingesting allergens causes most reactions, mere skin contact or inhalation can trigger a reaction in rare instances.[41] Labels must be studied, waiters and restaurant managers must be interrogated, and questionable food must be avoided. Every bite must be scrutinized. A misstep can be deadly.

B. Skepticism and Hostility about Food Allergies

When someone has a life-threatening affliction, society typically responds with sympathy and compassion. But for food allergy sufferers, often that is not the case. A vocal contingent of skeptics disbelieve that food allergies even exist.[42] Then there is the "no one was allergic to peanut butter

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Thresholds for Major Food Allergens and for Gluten in Food, at 21 (2006) https://www.fda.gov/downloads/Food/IngredientsPackagingLabeling/UCM192048.pdf (noting that cross-contact from sources such as shared production machinery has caused numerous allergic reactions).

[40] *See CDC Voluntary Guidelines*, *supra* note 17, at 9 (explaining that "16%-18% of children with food allergies have had a reaction from accidentally eating food allergens while at school"); Fleischer et al., *supra* note 19, at e25 (demonstrating high frequency of food allergy reactions caused by accidental exposure to allergens); *see also* Mary Lynn Smith, *Allergic Reaction to Peanut Residue Kills 22-Year-Old Twin Cities Man*, STAR TRIBUNE (Jan. 22, 2016), http://www.startribune.com/peanut-allergy-kills-22-year-old-twin-cities-man/366152021/ (reporting on death caused by peanut residue on chocolate).

[41] *See* Tan et al., *supra* note 38, at 583 (stating that although ingestion triggers most allergic reactions, skin contact and inhalation can also trigger some and describing five instances of severe food allergy reactions from skin contact or inhalation); *see also* Greg Bradbury, *Banana Prank Sends Teacher to Hospital, Students to Court*, ABC NEWS, July 31, 2019, https://abcnews.go.com/US/banana-prank-sends-teacher-hospital/story?id=64691960 (reporting incident where banana-allergic teacher went into anaphylactic shock after students intentionally caused her to touch banana); G. Liccardi et al., *Severe Allergic Reaction Induced by Accidental Skin Contact with Cow Milk in a 16-Year-Old Boy. A Case Report*, 14 J. INVESTIGATIVE ALLERGOLOGY & CLINICAL IMMUNOLOGY 168, 168 (2004) (describing instance where boy had severe allergic reaction to a drop of milk splashed onto his shoulder).

[42] *See* Gagné, supra note 37 (discussing those who "dismiss food allergy as a made-up phenomenon"); Lavanya Ramanathan, *It's Bad Enough to Have a Food Allergy. But Then You Have to Deal with the Skepticism*, WASH. POST., Sept. 25, 2018, https://www.washingtonpost.com/lifestyle/magazine/its-bad-enough-to-have-a-food-allergy-but-then-you-have-to-deal-with-the-skepticism/2018/09/21/80d2e1f8-89d6-11e8-8aea-86e88ae760d8_story.html ("[T]ell someone that you have a food allergy, and there's a good chance they'll roll their eyes in disbelief."); Beth Teitell, *Skeptics Add to Food Allergy Burden for Parents*, BOSTON GLOBE, Feb. 11, 2014, https://www.bostonglobe.com/lifestyle/2014/02/11/with-one-child-food-allergy-restricting-another-allergy-moms-say-they-face-skepticism/Hi9h2AGwDyCzAB0NsCRX9O/story.html (describing parents facing "disbelief that their children's allergies exist at all").

when I was a kid" crowd, who thinks the numbers are inflated and who believe that parents in particular either overprotect their children, self-diagnose nonexistent allergies, or exaggerate their severity to garner attention.[43] Some skeptics simply do not believe that a small amount of any food can be harmful.[44] Still others resist accommodating food allergies, stressing their purported right to eat freely and appearing unconcerned for the safety of those with food allergies.[45] Television shows and movies joke about food allergies, reinforcing the idea that they are a trivial concern.[46] Food

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[43] *See* Gagné, *supra* note 37 (describing backlash against food allergy parents as portraying them "as hysterical, anxiety-ridden and even needing to 'feel special'"); Ishani Nath, *Parents Sue School Board, Principal in Shocking Allergy Rights Case*, ALLERGIC LIVING, Dec. 9, 2014, https://www.allergicliving.com/2014/12/09/parents-sue-school-board-and-principal-in-shocking-allergy-rights-case/ (explaining that school officials reported parents of young child with peanut allergy to child services for insisting school accommodate her allergy); Joel Stein, *A Nut Allergy Skeptic Learns the Hard Way*, TIME, Aug. 14, 2010, http://content.time.com/time/magazine/article/0,9171,2007417,00.html (recounting author's prior belief that children did not have food allergies but instead had "a parent who needs to feel special"); Teitell, *supra* note 42 ("[P]eople think we're all misdiagnosed, that we're hypochondriacs," says food allergy mom who runs a local parent support group. "[S]ome parents of allergic children say they are sometimes branded hypochondriacs or labeled as overprotective by neighbors, late-night comics, and even grandparents.").

[44] *See* Food Allergy Research & Educ., *Food Allergy Research & Education Urges Public to Understand Severity of Food Allergy with New Awareness Campaign*, May 19, 2017, https://www.foodallergy.org/about/media-press-room/food-allergy-research-education-urges-public-to-understand-severity-of-food ("What many people don't understand is that these life-threatening reactions sometimes can be caused by the tiniest exposure to an allergen."); Teitell, *supra* note 42 ("[S]ome parents of kids with allergies say they're challenged by people who don't understand that even trace amounts of a food can trigger a potentially fatal allergic reaction, or anaphylaxis.").

[45] *See* Julie Weingarden Dubin, *Allergy Backlash: Skeptic Moms Flout No-Peanut Rules*, TODAY, June 21, 2011, https://www.today.com/parents/allergy-backlash-skeptic-moms-flout-no-peanut-rules-1C7398269 (quoting a comment from a food allergy skeptic: "It's not fair to turn a whole school upside down for ONE student….Peanut butter sandwiches are just about the only thing my kid will eat. Multiple kids have to suffer so one kid can 'enjoy' a normal childhood…yeah, screw that."); Lisa Rutledge, *Cambridge Mom Calls for End to Nut Bans in Schools*, CAMBRIDGE TIMES, Oct. 27, 2018, https://www.cambridgetimes.ca/news-story/8989124-cambridge-mom-calls-for-end-to-nut-bans-in-schools/ (reporting on Canadian mother who protested school's nut-free policy because it restricted her non-allergic daughter's food choices).

[46] *See* Food Allergy Research & Educ., *Statement by Food Allergy Research & Education and Members of Clinical Advisory Board on Depiction of Food Allergies in Entertainment Media*, Feb. 13, 2018, https://www.foodallergy.org/about/media-press-room/statement-by-food-allergy-research-education-and-members-of-clinical (reporting that 59% of the 115 television and movie references to food allergies studied joked about or trivialized the seriousness of the allergies, which has been shown to decrease support for food allergy accommodation in schools); *see also* CBC Radio, *Allergy Bullying: It's Real, and It's Dangerous*, Aug. 31, 2018, https://www.cbc.ca/radio/whitecoat/allergy-bullying-it-

allergies are fake, funny, or a fuss—not a potentially life-threatening condition for millions of American adults and children.

C. School Children with Food Allergies

Children, of course, go to school, and because millions of school children are allergic to some type of food, food allergies raise serious concerns in the school setting.[47] The average American classroom has two food-allergic children.[48] At school, food is everywhere, from the lunchroom to the classroom. Children eat the food—up to three meals a day at school—plus snacks and at parties. Children play games, conduct science experiments, and make crafts with food. Children celebrate birthdays, holidays, answering a question correctly, and the end of a big test, all with food.[49]

With so much food and so many allergic children, schools face challenges in keeping allergic children safe. Peanuts are one of the most prevalent and dangerous food allergies,[50] so many schools regulate peanuts or all nuts

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s-real-and-it-s-dangerous-1.4627456 ("Some illnesses we elevate and say the people who are dealing with them are very heroic, and others we make the butt of jokes and we dehumanize them.").

[47] *See* Elizbeth Landau, *Allergy Bullying: When Food is a Weapon*, CNN, Jan. 7, 2013, https://www.cnn.com/2013/01/05/health/bullying-food-allergies/index.html; C. Lynne McIntyre et al., *Administration of Epinephrine for Life-Threatening Allergic Reactions in School Settings*, PEDIATRICS, Nov. 2005, at 1134.

[48] *FARE Facts & Statistics*, *supra* note 2; Ramanathan, *supra* note 42.

[49] *See* U.S. Dep't of Agric., Food & Nutrition Service, *School Meals*, https://www.fns.usda.gov/school-meals/child-nutrition-programs (describing school meal program); Food Allergy Research & Educ., *Managing Food Allergies in the Classroom*, https://www.foodallergy.org/education-awareness/community-resources/your-back-to-school-headquarters/managing-food-allergies-in (hereinafter *FARE Classroom Food Allergies*) (referring to food-related classroom activities, including celebrations, craft and science projects, and rewards); Levingston, *supra* note 8 (reporting on classroom experiment involving exploding peanuts); Jeanne M. Lomas & Kirsi M. Järvinen, *Managing Nut-Induced Anaphylaxis: Challenges and Solutions*, J. OF ASTHMA & ALLERGY, Oct. 29, 2015, at 118, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4631427/ ("Most peanut and tree nut reactions at school occur in the classroom and are due to utilization of nuts in craft projects or nut exposure during celebrations such as for a birthday."); C. Lynne McIntyre et al., *Administration of Epinephrine for Life-Threatening Allergic Reactions in School Settings*, PEDIATRICS, Nov. 2005, at 1139 (documenting allergic reactions in school from parties and special events, cooking classes, and a class project involving peanut butter); U.S. Ctrs. for Disease Control & Prevention, *Managing Food Allergies in Schools*, https://www.cdc.gov/healthyschools/foodallergies/pdf/teachers_508_tagged.pdf (hereinafter *CDC School Food Allergies*) (recommending that schools "[a]void using allergens in classroom activities, includes arts and crafts, counting, science projects, parties, holiday and celebration treats, or cooking").

[50] *See* Lisa M. Bartnikas et al., *Impact of School Peanut-Free Policies on Epinephrine*

through policies such as banning nuts from certain cafeteria tables, classrooms, or the entire school.[51] Not only does this cover the ever-popular peanut butter sandwich, but because candy such as chocolate and baked goods such as cookies often share preparation or manufacturing equipment with nuts,[52] nut-free policies might exclude these items too.

Not surprisingly, such policies often do not go over well with the other children, or their parents.[53] The negativity and skepticism about food allergies in society at large works its way into schools too. Some parents resist efforts to accommodate allergic children, claiming these practices infringe on their children's rights.[54] Such parents may, for example, violate

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Administration, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Aug. 2017, at 465, https://www.jacionline.org/article/S0091-6749(17)30472-4/pdf ("Peanut allergy is the third leading food allergy in US children and rates are rising."); *CDC Voluntary Guidelines*, *supra* note 17, at 19 (noting that peanuts account for 50-62% of fatal or near-fatal food allergy reactions); Sampson, *supra* note 22, at 1294 ("Allergies to peanuts and tree nuts account for the majority of fatal and near-fatal anaphylactic reactions.").

[51] *See* Bartnikas et al., *supra* note 50, at 465; Grace Chen, *Why Peanuts are Being Banned at Public Schools*, PUBLIC SCH. REV., Apr. 6, 2018, https://www.publicschoolreview.com/blog/why-peanuts-are-being-banned-at-public-schools; Elizabeth McQuaid & Barbara Jandasek, *Children's Food Allergies: Another Target for Bullying?*, LIFESPAN, Sept. 2013, https://www.lifespan.org/centers-services/bradley-hasbro-childrens-research-center/school-issues/childrens-food-allergies; David R. Stukus, *Peanut-Free Schools: What Does It Really Mean, and Are They Necessary?*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Aug. 2017, at 391, https://www.jacionline.org/article/S0091-6749(17)30666-8/pdf.

[52] *See* Terence J. Furlong et al., *Peanut and Tree Nut Allergic Reactions in Restaurants and Other Food Establishments*, J. OF ALLERGY & CLINICAL IMMUNOLOGY, Nov. 2001, at 1294 (reporting frequent allergic reactions to foods from bakeries and ice cream shops); KidsHealth, *Nut and Peanut Allergy*, https://kidshealth.org/en/parents/nut-peanut-allergy.html (stating that cookies, baked goods, and candy are "[s]ome of the highest-risk food for people with peanut or tree nut allergy" because of the risk of cross-contamination or hidden nuts); Lomas & Järvinen, *supra* note 49, at 118-19, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4631427/ (stating that children's parties and bakeries are among high-risk situations for cross-contamination and accidental nut exposure).

[53] *See* Carina Hoskisson, *Why Do Your Kid's Allergies Mean My Kid Can't Have a Birthday?*, HUFFINGTON POST, Apr. 22, 2014, https://www.huffpost.com/entry/why-do-your-kids-allergies-mean-my-kid-cant-have-a-birthday_n_4767686; *see also* Bartnikas et al., *supra* note 50, at 472 (stating that nut-free policies may frustrate non-allergic families by restricting food choices).

[54] Mary Quinn O'Connor, *Amid Protest, Florida School Stands Behind Tough New Peanut Allergy Regulations*, FOX NEWS, Mar. 15, 2011, https://www.foxnews.com/us/amid-protest-florida-school-stands-behind-tough-new-peanut-allergy-regulations; *see also* Kim Shiffman, *Pickets for Peanuts?*, ALLERGIC LIVING, Mar. 25, 2011, https://www.allergicliving.com/2011/03/25/pickets-for-peanuts/ ("'You can't take peanut butter and jelly–or any right–away from my child,' yelled one angry protester to the mother

food restrictions by deliberately sending banned food to school or protest to have food regulations removed.[55] They see a simple solution—teach your kid not to eat my kid's food.[56]

But staying safe when allergens are present is easier said than done. When dangerous food is close, the risk of accidental ingestion is significant, especially with younger children,[57] who are notoriously messy eaters. Peanut butter does not stay put on the bread—it can easily get on hands, doorknobs, and tables.[58] An allergic child might then touch a contaminated surface,

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of another peanut-allergic child at the school. 'Keep your child at home!'"); Teitell, *supra* note 42 (discussing lawyer who has been approached to represent families unhappy with nut ban).

[55] *See* Dubin, *supra* note 45 ("Though more schools take measures to protect kids with food allergies, and most parents are sensitive to the dangers, a small but vocal group of parents think such allergies are exaggerated, even invented. Some even send junior off to his nut-free class with a peanut-butter-and jelly sandwich."); Rutlege, *supra* note 45 (describing mother's protest of school's nut-free policy after her daughter came home hungry because she was not allowed to eat the peanut butter her mother packed in her lunch); Nicole Smith, *Parents Who Bully About Food Allergies*, ALLERGIC CHILD, Oct. 13, 2012, https://home.allergicchild.com/parents-who-bully-about-food-allergies/ ("One Mom announced at a PTO meeting that she was done following 'all the no peanuts rules' and was bringing peanut butter cookies to Field Day for all the students."); Margaret Hartmann, *Parents Protest to Remove 6-Year-Old with Peanut Allergy from Class*, JEZEBEL, Mar. 22, 2011, https://jezebel.com/parents-protest-to-remove-6-year-old-with-peanut-allerg-5784267 (reporting on parental protests to have peanut-allergic girl home-schooled and school's nut-free policies rescinded); Landau, *supra* note 47 (quoting comment on food allergy bullying article: "[H]ow about you keep your sickly kid home? That is what homeschooling is for.").

[56] *See* Kennedy, *supra* note 43 (opining that parents with allergic children should not "force an entire group of otherwise healthy kids to alter their lunch and snack selections based on their deficits"); Landau, *supra* note 47 (recounting comment posted regarding food allergy accommodations in school: "It is completely unfair and ridiculous to expect 4500 other families to change their eating habits because you can't teach your kid not to touch someone else's food."); Jill Pond, *Leave Your Stupid Peanut Butter at Home*, BLUNT MOMS, Aug. 22, 2016, https://bluntmoms.com/leave-stupid-peanut-butter-home/ (describing negative comments relating to nut-free policies, including "The whole class has to change for one or two kids? Why can't those kids just stay away from nuts?").

[57] *See* Fleischer et al., *supra* note 19, at e25 (discussing high frequency of food allergy reactions among young children caused by accidental exposure); Teitell, *supra* note 42 (describing allergic reaction when dairy-allergic toddler ate a milk-soaked Cheerio she found in a chair crevice); *see also supra* note 40 and accompanying text.

[58] *See* Wade TA Watson, *Persistence of Peanut Allergen on a Table Surface*, ALLERGY, ASTHMA & CLINICAL IMMUNOLOGY, Feb. 2013, at 2 (remarking that "[p]eanut allergen is very robust" and demonstrating that table smeared with peanut butter and not cleaned for 110 days still contained the allergen); *see also* Michael Borella, Student Note, *Food Allergies in Public Schools: Toward a Model Code*, 85 CHI.-KENT L. REV. 761, 764-65 (2010) ("It is no secret that some children are messy eaters and often fail to wash their hands thoroughly with soap and water after eating. The residue from one child's peanut butter sandwich can

which means the allergen can find its way into that child's mouth. On top of that, some children react to skin contact or inhaling the allergen,[59] and so mere proximity to the allergen puts these children at risk from even the tidiest eaters.

III. FOOD ALLERGY BULLYING EMERGES AS A SIGNIFICANT PROBLEM

The rise of food allergies has given bullies a new target. Whether rooted in ignorance or maliciousness, food allergy bullying has become a serious concern for children with food allergies.[60] The statistics are alarming. Studies indicate that about one third of school-aged children with food allergies are bullied specifically because of their allergies[61] and that allergic children are twice as likely as their peers to be bullied.[62]

Food allergy bullying is not an isolated occurrence. Studies show that 86% of bullied children were bullied repeatedly, 34% were mistreated more than twice per month, and 69% were bullied for at least a year.[63] Though the phenomenon has been studied for only about a decade,[64] food allergy bullying is increasing as more and more children are developing food allergies.[65]

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easily find its way onto the desk or clothes of a child with a peanut allergy.").

[59] *See supra* note 41 and accompanying text.

[60] *See* Lieberman et al., *supra* note 5, at 282 ("Bullying, teasing, and harassment of children with food allergy seems to be common, frequent, and repetitive. These actions pose emotional and physical risks that should be addressed in food allergy management."); U.S. Dep't of Health & Human Servs., StopBullying.gov, *Bullying and Youth with Disabilities and Special Needs*, https://www.stopbullying.gov/at-risk/groups/special-needs/index.html ("Kids with special health needs, such as epilepsy or food allergies, also may be at a higher risk of being bullied. Bullying can include making fun of kids because of their allergies or exposing them to the things are allergic to. In these cases, bullying is not just serious, it can mean life or death.").

[61] *See supra* note 5 and accompanying text; *see also* Rabin, *supra* note 8 ("[S]tudies have shown that close to one in three children with food allergies have been bullied specifically because of their allergy.").

[62] *See* Lieberman et al., *supra* note 5, at 286; Linda L. Quach and Rita M. John, *Psychosocial Impact of Growing Up with Food Allergies*, J. FOR NURSE PRACTITIONERS, June 2018, at 479.

[63] *See* Rachel A. Annunziato et al., *Longitudinal Evaluation of Food Allergy-Related Bullying*, J. OF ALLERGY & CLINICAL IMMUNOLOGY: IN PRACTICE, Sept./Oct. 2014, at 639; Lieberman et al., *supra* note 5, at 285.

[64] *See* Lieberman et al., *supra* note 5, at 282; *see also Bullying Rampant Among Allergic Children*, ALLERGIC LIVING, Sept. 29, 2010, https://www.allergicliving.com/2010/09/29/allergic-children-being-bullied/ (characterizing the Lieberman et al. study as "the first-ever study to assess the social impact of food allergies in children").

[65] *See* Janice Chang, *Parents, Schools Step Up Efforts to Combat Food-Allergy Bullying*, NPR, June 5, 2018, https://www.npr.org/sections/thesalt/2018/06/05/613933607/parents-

Allergic kids are particularly vulnerable to bullying.[66] Though the condition itself is invisible, guarding against allergic reactions requires disclosure.[67] Allergic children often stand out for reasons such as sitting at designated cafeteria tables, carrying epinephrine injectors, studying food labels, or bringing special snacks to class.[68] Soon, everyone knows which kids have food allergies—and thus which kids are to blame for unpopular food restrictions or are otherwise vulnerable because of their difference.[69]

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schools-step-up-efforts-to-combat-food-allergy-bullying; Marwa Eltagouri, *Three Teens Charged with Knowingly Exposing Allergic Classmate to Pineapple. She was Hospitalized*, WASH. POST., Jan. 27, 2018, https://www.washingtonpost.com/news/education/wp/2018/01/26/3-teens-charged-with-knowingly-exposing-allergic-classmate-to-pineapple-she-was-hospitalized/; Chloe Mullarkey, *Food Allergy and Bullying: The Implications for Parents of Children with Food Allergies*, NYU Steinhardt Dep't of Applied Psychology, Fall 2012, https://steinhardt.nyu.edu/appsych/opus/issues/2012/fall/food.

[66] *See* Eve Becker, *Food Allergy Bullying*, LIVING WITHOUT MAG., Jan. 2013, at 41 https://www.foodallergyawareness.org/media/education/Bullying-Food%20Allergy%20Bullying_DecJan2013_Living%20Without%20Magazine.pdf ("A food allergy can be a stigmatizing factor that marks a child as different and exposes him or her to bullying."); Shemesh et al., *supra* note 5, at e14 (stating that food allergic children "have vulnerability that can be easily exploited (ie, by a threat to throw the offending food item at the child)").

[67] *See* McQuaid & Jandasek, *supra* note 51 (commenting that allergic children "cannot 'fly under the radar'"); Mullarkey, *supra* note 65 (stating that food allergic children have "a daily visible struggle," which leads to targeting by bullies). Indeed, federal health information privacy laws generally do not apply in elementary and secondary schools. *See* U.S. Dep't of Health & Human Servs., HHS.gov, Health Information Privacy, *Does the HIPAA Privacy Rule Apply to and Elementary or Secondary School?*, https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html.

[68] *See* Caroline Connell, *Food Allergy Bullying on the Rise*, ALLERGIC LIVING, Fall 2011, https://www.allergicliving.com/2012/09/17/food-allergy-bullying-on-the-rise/ ("A food allergy certainly makes a child different, and the difference is emphasized by the necessary routine precautions, like carrying an auto-injector and reading food labels, which are part of these kids' lives."); McQuaid & Jandasek, *supra* note 51 (commenting that "their food allergy is usually apparent to others" due to, for example, "the different food choices children with food allergies have to make or by designated lunchtime seating arrangements"); Mullarkey, *supra* note 65 (describing the stigma allergic children face, in part because of measures such as designated cafeteria tables and carrying emergency medicine); Catherine Saint Louis, *In Bullies' Hands, Nuts or Milk May Be a Weapon*, N.Y. TIMES, June 17, 2013, https://well.blogs.nytimes.com/2013/06/17/in-bullies-hands-nuts-or-milk-may-be-a-weapon/ ("[A] severe food allergy is a unique vulnerability. It takes only one lunch or cupcake birthday party for other children to know which classmates cannot eat nuts, eggs, milk or even a trace of wheat.").

[69] *See* Levingston, *supra* note 8 (teachers may invite bullying by singling a child out as the reason a food or activity will be missed); McQuaid & Jandasek, *supra* note 51 ("Given the prevalence of food allergies and higher levels of awareness of which children are affected

Allergic children suffer typical bullying tactics, such as name-calling, exclusion, teasing, and taunting.[70] But what makes food allergy bullying even worse is the physical aspect—allergic children are often bullied with the food they are allergic to. One study reported that 57% of food allergy bullying incidents involved the actual dangerous food.[71] Sometimes the bully uses the food to contaminate an allergic child's locker, desk, or school supplies.[72] Bullies threaten with the allergen, for example, by thrusting the food in the other child's face.[73] Some bullies go further, physically touching the child with the allergen,[74] hiding it in their otherwise safe food,[75] or trying

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through implementation of special accommodations, children with food allergies may be at risk for negative peer interactions and bullying.").

[70] *See* Lieberman et al., *supra* note 5, at 283 (stating that 64.7% of those bullied based on food allergies were teased or taunted); Quach & John, *supra* note 62, at 479 ("They may be intentionally excluded from their peers, endure teasing and name-calling, and are targets of rumors."); Saint Louis, *supra* note 68 ("[A] classmate held a Kit Kat candy wrapper near his face and kept chanting, 'You can't eat this!'"); Shemesh et al., *supra* note 5, at e14 (collecting data regarding bullying by being teased, criticized, and excluded, rumors being spread, and belongings being damaged).

[71] Lieberman et al., *supra* note 5, at 282; *see also* Shemesh et al., *supra* note 5, at e10 (reporting that allergic children are frequently threatened with food).

[72] *See* Connell, *supra* note 68 (bully licked allergic child's pencils and erasers after eating allergen); Erika Dacunha, *A Teen's Story of Allergy Bullying—and Bravery*, ALLERGIC LIVING, July 16, 2013, https://www.allergicliving.com/2013/07/16/a-teens-story-of-allergy-bullying-and-bravery/ (desked filled with pistachios and nuts hidden in classroom); Wendy Mondello, *Food Allergy Bullying*, GLUTEN FREE AND MORE, Apr. 23, 2018, https://www.glutenfreeandmore.com/issues/food-allergy-bullying-2/ (peanut butter rubbed on locker).

[73] *See* Chang, *supra* note 49 (teammate "shoved the mayonnaise-laden sandwich" in the face of egg-allergic boy); Lieberman et al., *supra* note 5, at 283 (43.5% of bullied children had allergen waved in their face); Rabin, *supra* note 8 (peanuts and other food waved in allergic children's faces); *see also* Connell, *supra* note 68 (relaying story of students running up to allergic classmate and saying, "'We ate peanuts! We ate peanut M&M's. And we're going to breathe on you!'"); Dacunha, *supra* note 72 (recounting experience where "[s]ome kids would chase me around with their hands up chanting, 'I ate peanut butter!'"); Ishani Nath, *Food Allergy Bullying: What You Can Do*, ALLERGIC LIVING, Nov. 21, 2014, https://www.allergicliving.com/2014/11/21/food-allergy-bullying-what-you-can-do/ (telling story of children in an argument when one "pulled out a peanut butter sandwich and waved it around taunting us and saying, 'What are you gonna do about it now?'").

[74] *See* Becker, *supra* note 66, at 40 (bully wiped peanut butter on allergic child's neck); Eltagouri, *supra* note 65 (girls intentionally exposed allergic classmate to pineapple); Landau, *supra* note 47 (boy touched allergic girl's face with peanut butter); Lieberman et al., *supra* note 5, at 282 (discussing reports of children being smeared or sprayed with their allergen); Levingston, *supra* note 8 (boys threw peanuts at allergic child); Rabin, *supra* note 8 (nacho cheese rubbed on boy's face, milk poured on children, and cake thrown); Saint Louis, *supra* note 68 (child's face touched with peanut butter); *see also* Bradbury, *supra* note 41 (bullies threw bananas at allergic teacher).

[75] *See* Lieberman et al., *supra* note 5, at 285 (discussing incidents of food intentionally

to force-feed their targets.[76]

Several recent cases demonstrate these extreme tactics. In 2018, a middle school girl sent a classmate with a severe pineapple allergy to the hospital after rubbing pineapple on her own hand then high-fiving the allergic girl.[77] Even worse, in 2017, a London boy died after a bully, who knew of his dairy allergy, touched the boy with cheese.[78]

Bullying of all types harms children, and food allergy bullying is no exception. Children who are bullied based on their food allergy, like other bullying victims, may experience absenteeism, declining academic performance, anxiety, depression, violence, and substance abuse.[79] Some may contemplate suicide or even follow through with it.[80] Food allergic children may drastically change their eating habits, including refusing to eat at school.[81] An eight-year-old Virginia boy was bullied because of his food allergies, and he became angry and combative, his grades plummeted, and he repeatedly said he wanted to hurt himself or die.[82]

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being contaminated with allergen); Rabin, *supra* note 8 ("The most dangerous incidents occur when bullies surreptitiously contaminate the child's own food with a food allergen . . . ."); Saint Louis, *supra* note 68 (classmates may plot to switch a peer's lunch to see if he gets sick); Charlotte Jude Schwartz, *Food Allergy Bullying: The Stakes Are High*, ALLERGIC LIVING, Jan. 9, 2014, https://www.allergicliving.com/2014/01/09/food-allergy-bullying-the-stakes-are-high/ (peanut butter cookie crumbled into peanut-allergic child's lunchbox).

[76] *See* Saint Louis, *supra* note 68 (food allergy program director stated that "[e]very few months, a child recounts being force-fed an allergen"); *see also* Landau, *supra* note 47 (kindergarten child came home crying because a boy told him he was going to force him to eat a peanut).

[77] *See* Eltagouri, *supra* note 65; Rabin, *supra* note 8; *see also* Bradbury, *supra* note 41 (three seventh-grade students rubbed banana on the doorknob of teacher they knew had severe banana allergy and threw bananas at her, sending her to the hospital for anaphylactic shock).

[78] *See* Gwen Smith, *Allergic Teen's Eczema May Have Played a Role in Allergic Teen's Cheese-Related Tragedy*, ALLERGIC LIVING, May 3, 2019, https://www.allergicliving.com/2019/05/03/eczema-may-have-had-role-in-allergic-teens-cheese-related-tragedy/.

[79] *See* Connell, *supra* note 68 (sadness, depression, humiliation, embarrassment, low self-esteem, societal withdrawal, fear of school); U.S. Dep't of Health & Human Servs., StopBullying.gov, *Effects of Bullying*, https://www.stopbullying.gov/at-risk/effects/index.html (hereinafter *StopBullying Effects of Bullying*) (substance abuse, violence, depression, anxiety, sadness, loneliness, health problems, and declining academic performance).

[80] *See StopBullying Effects of Bullying*, *supra* note 79.

[81] *See* Becker, *supra* note 66, at 42.

[82] *See* Becker, *supra* note 66, at 40-41; *see also* Children's Ctr. for Psychiatry, Psychology, & Related Servs., *Bullying Kids with Food Allergies*, Aug. 20, 2018, https://childrenstreatmentcenter.com/bullying-kids-food-allergies/ (hereinafter Children's

As if this were not enough, food allergy bullying poses unique additional dangers. To reduce the risk of becoming a target, allergic teens may try to blend in by, for example, gambling that unlabeled food is safe or not carrying their epinephrine, which dramatically increases the risk of having an allergic reaction and dying from it.[83] And when bullies weaponize the allergen by physically bullying with it, they directly place the allergic child's life in danger.[84]

Bullying causes food allergic children to fear for their safety or their very lives.[85] Because of factors such as the ease of accidentally eating an allergen

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Center) ("This harassment and stress can cause allergic children to fear school, leading to school refusal, and can make them depressed or cause them to isolate themselves socially."); Connell, *supra* note 68 (boy who suffered food allergy bullying was afraid to go to school); Rabin, *supra* note 8 ("Even when children aren't physically harmed, the [food allergy bullying] incidents can take a psychological toll, causing distress and anxiety and affecting their quality of life. Children may refuse to go to school, or become socially isolated, depressed or even suicidal, experts say.").

[83] *See* Connell, *supra* note 68 (discussing not carrying emergency medicine as a tactic to hide allergies); Food Allergy & Anaphylaxis Connection Team, *Bullying*, https://www.foodallergyawareness.org/education/bullying/ (hereinafter *FAACT Bullying*) (stating that "[b]ullying has been shown to increase risky behavior among children with food allergies," including not carrying emergency medicine and purposefully eating potentially unsafe foods, and that "[f]atalities among adolescents with food allergies are more common due to risk-taking behaviors"); Lianne Mandelbaum, *Risk Taking and Allergic Teens—What I've Learned*, ALLERGIC LIVING, Sept. 19, 2019 ("When it comes to food-allergic teens, research shows a propensity to become too relaxed about allergen avoidance and carrying epinephrine."); *see also* Janet French, *Food Allergy Bullying: How to Spot if Your Child is a Target and Actions to Take*, ALLERGIC LIVING, May 15, 2018, https://www.allergicliving.com/2018/05/15/food-allergy-bullying-how-to-spot-if-your-child-is-a-target-and-actions-to-take/ ("Surveys also have revealed that children receiving unwanted attention about their allergies had more trouble managing the allergy, and were less likely to wear medical identification.").

[84] *See* Connell, *supra* note 68 ("All bullying is serious, but when an anaphylactic child is targeted, of course, the results can be life-threatening."); Eltagouri, *supra* note 65 (quoting allergy doctor, "putting a little bit of peanut butter on the keyboard to hurt somebody is a potentially deadly thing"); Lieberman et al., *supra* note 5, at 286 ("These actions pose a risk of psychological harm in all people, but unique to this population is that bullying, teasing, or harassment can also pose a direct physical threat when the allergen is involved."); Rabin, *supra* note 8 (quoting mother of food-allergic child that bullying with the allergen "is like assault with a deadly weapon").

[85] *See* Becker, *supra* note 66, at 46 (quoting a psychologist: "When people are threatened with something that they fear—whether it's a fist in their face or peanut butter smeared on their head or a fish thrown into their locker—they're going to be frightened. And justifiably so. Bullying is intimidating and it causes tremendous psychological problems for the kids."); Children's Center, *supra* note 82 (explaining that allergic children who are bullied may come to fear school); Connell, *supra* note 68 (reporting that food allergic boy

and the severe potential consequences of doing so, allergic children tend to experience anxiety regarding their condition.[86] And that is just normal daily living. Being threatened with the source of this daily anxiety amplifies their fears.[87] Food allergy bullying can be terrifying. Though some bullies might not really intend to terrorize or physically endanger their victims,[88] some do. These are the ones who say things like: "I could kill you with this sandwich."[89]

The overwhelming majority of food allergy bullies are school classmates.[90] But shockingly, one study reported that teachers or other school staff bullied allergic children 20% of the time.[91] For example, a fifth grade teacher forced a peanut-allergic boy to participate in a science experiment involving rubbing peanut butter on his hands, responding to his protests with a threat to give him a zero if he did not obey.[92] He had an anaphylactic

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was afraid to go to school the day after he was threatened); *see also CDC Voluntary Guidelines*, *supra* note 17, at 39 ("Bullying, teasing, and harassment can lead to psychological distress for children with food allergies which could lead to a more severe reaction when the allergen is present."); Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1092-93 (2002) (explaining that disabled children who are bullied by peers or teachers may fear going to school).

[86] *See* Quach & John, *supra* note 62, at 479.

[87] *See* Claire Gagné, *Bullying Case Grabs Attention*, ALLERGIC LIVING, July 2, 2010, https://www.allergicliving.com/2010/07/02/food-allergy-bullying-case/ (quoting leader of anaphylaxis support group: "To an allergic child, being threatened with the thing that they're most afraid of, whether it's peanut or milk, to them the perception is a very serious threat."); Suzanne Monaghan, *More Than a Third of Kids with Food Allergies Say They've Been Bullied Because of It*, KNY News Radio, Sept. 23, 2019, https://kywnewsradio.radio.com/articles/news/many-kids-food-allergies-say-they-get-bullied-it ("'What people don't understand is that this is a food that can actually kill them. It can kill them either by touch, in some cases, or by accidental ingestion. And so that level of bullying really heightens up to a fear level that is incomprehensible,' said FARE CEO Lisa Gable.").

[88] *See* Levingston, *supra* note 8.

[89] Kuzemchak, *supra* note 8 ("One day at lunchtime, a boy in Will's group began to taunt him, coming at him with a peanut butter sandwich in a threatening way and saying something along the lines of 'I could kill you with this sandwich.'"); *see also supra* note 8 and accompanying text.

[90] *See* Lieberman et al., *supra* note 5, at 283 (79.8% of food allergy bullies were classmates).

[91] *See id.* at 285; *see also* French, *supra* note 83 (noting that studies show food allergy bullying "was mostly likely to happen at school, with classmates as the perpetrators—although, school staff were sometimes at fault"); Saint Louis, *supra* note 68 (quoting nurse from a food allergy center: "'Food allergy-related bullying does not always stem from peers, but from adults, such as teachers.'").

[92] *See* Kimberly Holland, *The Furor over the Peter Rabbit 'Food Allergy Scene,'* HEALTHLINE, Feb. 16, 2018, https://www.healthline.com/health-news/furor-over-peter-rabbit-food-allergy-scene#1; Mondello, *supra* note 72; *see also* Levingston, *supra* note 8

reaction.[93] When a boy's mother asked his teacher to stop giving candy as a reward for correct answers in class because her son was allergic to it, the teacher refused and openly questioned the legitimacy of his allergy to the entire class.[94] A coach threatened to smear peanut butter on an allergic athlete if she did not perform to his standards.[95]

Schools must do better.

IV. THE CASE FOR SCHOOL LIABILITY FOR FOOD ALLERGY BULLYING UNDER FEDERAL DISABILITY STATUTES

It is a given that teachers themselves should never bully. To the contrary, schools and all school personnel should be the first line of defense against bullying, and schools should establish policies that prevent bullying in the first place. That requires accountability, and the threat of a disability harassment claim under federal law is a move in the right direction.[96]

A. Schools Play a Key Role in the Bullying Epidemic

Bullying is widely recognized as "an urgent social, health, and education

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(teacher excluded student from experiment involving exploding peanuts rather than modifying the experiment).

[93] Mondello, *supra* note 72.

[94] *See* ALLERGIC LIVING, *When the Teacher is a Food Allergy Bully,* Dec. 7, 2010, https://www.allergicliving.com/2010/12/07/the-teacher-is-a-food-allergy-bully-2/; *see also Charlie F. v. Bd. of Educ. of Skokie Sch. Dist. 68*, 98 F.3d 989, 990 (7th Cir. 1996) (discussing allegations that the teacher of a boy with attention deficit disorder and panic attacks repeatedly invited the class to express their complaints about the boy, leading to humiliation and ridicule); *Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ.*, No 1:11-cv-850, 2012 WL 5268964, at *7-8 (S.D. Ohio Oct. 23, 2012) (recounting allegations that a teacher repeatedly questioned a boy about the validity of his seizure disorder in front of the class and allowed his peers to call him "seizure boy").

[95] *See* Levingston, *supra* note 8; *see also Smith v. Tangipahoa Parish Sch. Bd.*, Civil Action No. 05-6648, 2006 WL 3395938, at *1-3 (E.D. La. Nov. 22, 2006) (discussing school employee who made and distributed a flyer to parents, encouraging them to contact the school board regarding a potential decision to modify a school event involving horses in response to a girl's severe horse allergy, which could have caused anaphylaxis).

[96] State disability laws may offer additional protections, sometimes providing standards more favorable to plaintiffs. *See* Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147, 161-62 (2009); *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 915 A.2d 535, 549 (N.J. 2007); *see also* Letter from U.S Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter Regarding Disability Harassment* (July 25, 2000), https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html (hereinafter *Dear Colleague Letter regarding Disability Harassment*) ("Harassing conduct also may violate state and local civil rights, child abuse, and criminal laws.").

concern,"[97] with one fifth to one third of all school children reporting being bullied.[98] One third of children will food allergies are bullied because of their allergies.[99] As with all bullying, most food allergy bullying originates from school and school relationships.[100]

Because schools are the epicenter for this problem, schools are best positioned to respond to bullying and take steps to prevent it.[101] Indeed, the school's overall environment and culture is the most determinative factor in

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[97] U.S. Dep't of Educ., *Analysis of State Bullying Laws and Policies*, 2011, at 1, https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf (hereinafter *DOE State Bullying Law Analysis*); *see also* Douglas A. Abrams, *School Bullying Victimization as an Educational Disability*, 22 TEMPLE POL. & CIV. RIGHTS L. REV. 273, 289 (2013) (noting that the American Medical Association, the National Institutes of Health, and the World Health Organization echo the Department of Education's assessment regarding the bullying crisis); U.S. Gov't Accountability Office, *School Bullying: Extent of Legal Protections for Vulnerable Groups Needs to be More Fully Assessed*, May 2012, at 5, https://www.gao.gov/assets/600/591202.pdf (hereinafter *GAO School Bullying*) ("Bullying is a serious problem, as evidenced by four federally sponsored nationally representative surveys conducted from 2005 to 2009."); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 642 (2004) ("Nearly two decades of educational research has repeatedly demonstrated that one of the most damaging and pervasive problems in our schools today is bullying.").

[98] *See GAO School Bullying*, *supra* note 97, at 5 (discussing survey results showing "approximately 20 to 28 percent of youth reporting they had been bullied"); U.S. Dep't of Educ., *Student Reports of Bullying: Results from the 2017 School Crime Supplement to the National Crime Victimization Survey*, July 2019, at T-6, https://nces.ed.gov/pubs2019/2019054.pdf (reporting that 20.2% of students reported being bullied); U.S. Dep't of Health & Human Servs., StopBullying.gov, *Facts About Bullying*, https://www.stopbullying.gov/media/facts/index.html (hereinafter *StopBullying Facts About Bullying*) ("Between 1 in 4 and 1 in 3 U.S. students say they have been bullied at school.").

[99] *See supra* note 61 and accompanying text.

[100] *See* Lieberman et al., *supra* note 5, at 283 (79.8% of food allergy bullies were classmates); *see also* Abrams, *supra* note 97, at 281 (observing that "[m]ost bullies know their victims largely or entirely from school"); Sheri Bauman & Adrienne Del Rio, *Preservice Teachers' Responses to Bullying Scenarios: Comparing Physical, Verbal, and Relational Bullying*, 98 J. EDUC. PSYCH. 219, 220 (2006) ("Most bullying occurs in schools."); Weddle, *supra* note 97, at 651 (explaining that "it is in school that the majority of bullying occurs, under the supervision of school personnel").

[101] *See* Abrams, *supra* note 97, at 280 ("The schools stand as the central, and potentially most effective, public entities in the pediatric safety system's response to bullying by elementary and secondary students."); Letter from U.S Dep't of Educ., Office for Civil Rights, *Harassment and Bullying* 1 (Oct. 26, 2010) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (hereinafter *Dear Colleague Letter regarding Harassment and Bullying*) (stating that educated school personnel "are in the best position to prevent [harassment and bullying] from occurring and to respond appropriately when it does").

whether kids are likely to bully.[102] Bullying flourishes when adults fail to intercede and to model positive behavior.[103] Some schools have implemented policies and procedures that have drastically reduced bullying.[104] But even a model anti-bullying policy is worthless if not followed.[105]

All too often, schools fail to take bullying seriously.[106] They may downplay bullying, viewing the victims with skepticism or refusing to punish the perpetrators at all or only in the most serious cases such as those involving physical violence.[107] Approximately 75% of the time, no adult intervenes

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[102] *See* JAMES A. RAPP, EDUCATION LAW § 9.05[3][e] (2019) ("Although a number of factors contributes to whether children are likely to bully, a key factor is the school's climate and attitude toward bullying."); Weddle, *supra* note 97, at 652 ("What students appreciate intuitively is what research has demonstrated empirically: bullying is more a function of school climate—which is controlled by the faculty and staff—than it is a function of the student population or the external community from which that population springs.").

[103] *See* Bauman & Del Rio, *supra* note 100, at 220 ("When school personnel ignore or dismiss such behaviors, students perceive that they cannot count on adults for protection and/or that the behavior is acceptable or at least tolerated."); Ryan M. McCabe & Lori J. Parker, *Cause of Action Against School District for Injuries to Student Resulting from Bullying by Another Student*, 59 CAUSES OF ACTION 2D 307, § 18 (July 2019) ("[S]chool personnel must commit themselves to more than just lip service on the issue of eliminating bullying. Rather, they must serve as leaders and guides for students in modeling positive and inclusive behaviors."); RAPP, *supra* note 102, § 9.02[5] (emphasizing importance of principals and teachers modeling safe and welcoming behavior); Sacks & Salem, *supra* note 96, at 189 ("[B]ullying escalates when adult personnel fail to take responsibility by intervening."); Weddle, *supra* note 97, at 656-57 ("Perhaps the greatest deterrent to bullying behavior is the presence of adults who are watching and willing to intervene.").

[104] *See* Weddle, *supra* note 97, at 643 ("[I]t has been proven that school officials can dramatically reduce the prevalence of bullying if they implement proven bullying prevention strategies.").

[105] *See* Weddle, *supra* note 97, at 676 (explaining that "written policies are only as effective as the efforts to enforce them, and those efforts generally turn on whether the school culture has embraced the policies"); *see also* Kimmel, *supra* note 1, at 1, https://www.publicjustice.net/wp-content/uploads/2016/02/Bullying-Litigation-Primer-Fall-2017-Update-FINAL.pdf ("Far too often, however, schools are not doing what the law or their own anti-bullying policies require.").

[106] *See DOE State Bullying Law Analysis*, *supra* note 97, at 1 (characterizing bullying as "an extremely serious and often neglected issue facing youths and local school systems"); Weddle, *supra* note 97, at 643 (observing that "in most schools today, bullying goes on unabated and virtually unchallenged by school officials").

[107] *See* Bauman & Del Rio, *supra* note 100, at 220 (discussing research finding "that school personnel do not respond effectively to incidents of bullying and that most recognized only physical bullying as needing intervention"); Weddle, *supra* note 97, at 650 (stating that many teachers and other school personnel "believe that bullying is nothing more than a normal part of growing up that should be ignored" unless theft or assault is involved); *see also StopBullying Facts About Bullying*, *supra* note 98 ("There is often a disconnect between young people's experience of bullying and what the adults see. Also, adults often don't know how to respond when they do recognize bullying.").

when a child is bullied.[108] For example, according to a suit by an Ohio boy on the autism spectrum and with a seizure disorder, school officials refused to remove him from a group working with boys who regularly bullied him and prevented him from completing his assignments.[109] His classmates often referred to him as "seizure boy"—in front of a teacher who had openly and repeatedly questioned him about whether he truly had seizures.[110] In another case, a boy alleged he suffered severe acts of bullying, including being called names, being "regularly slapped in the face," and having his pants pulled down, all in the classroom and in the presence of school employees.[111] The principal responded by stating that violence was likely to continue because of the school environment, and he offered no plan to address the problem or keep the boy safe.[112]

Like bullying generally, food allergy bullying can arise from a toxic school environment. Sometimes teachers and other school officials share the same negativity and skepticism about food allergies as society at large. Twenty percent of food allergy bullying comes from teachers or other school personnel.[113] But the school environment can foster food allergy bullying short of this direct bullying. So, for instance, a teacher who fails to reengineer an activity involving food to include an allergic child signals that it is socially acceptable to exclude and isolate allergic children.[114] A teacher who comments about not being able to have birthday cake because of Susie's allergies singles out Susie and sets her and others like her up to be bullied.[115]

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[108] Kimmel, *supra* note 1, at 1.

[109] *See Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ.*, No 1:11-cv-850, 2012 WL 5268964, at *7-8 (S.D. Ohio Oct. 23, 2012).

[110] *See id.*

[111] *See J.R. v. N.Y. City Dep't of Educ.*, No. 14 Civ. 0392 (ILG) (RML), 2015 WL 5007918, at *1 (E.D.N.Y. Aug. 20, 2015).

[112] *See id.* at *2; *see also D.A. v. Meridian Joint Sch. Dist.*, 289 F.R.D. 614, 628-30 (D. Idaho 2013) (discussing allegations that school failed to respond to complaints that disabled boy was bullied during PE class, with name calling, his clothes being stolen, the weight bar he was using being pushed down so he could not lift it, all while the PE teacher was present); *see also* Weber, *supra* note 85, at 1085-90 (collecting cases showing mistreatment of disabled children by teachers and other school personnel, teacher conduct that treats them unfairly or encourages other children to ridicule them, or failure to protect them from known risks of harm).

[113] *See supra* note 91 and accompanying text.

[114] *See FAACT Bullying*, *supra* note 83 ("[C]hildren model adult behaviors. In a classroom setting, for example, if a teacher does not include a food-allergic student in a class activity, then it appears to be socially acceptable to exclude the child in all social activities.").

[115] *See* Becker, *supra* note 66, at 41 ("[A] child might be singled out when the teacher says, 'We're going to have a birthday party today but we're not going to have any cake because Johnny has food allergies.'"); Children's Center, *supra* note 82 ("[T]eachers often make insensitive remarks or single-out and exclude children with food allergies from certain

Rather than accommodating a child with a severe peanut allergy, her Tennessee school reported her parents to child protective services, accusing them of Munchausen by Proxy, a disorder in which a parent seeks attention by faking or exaggerating a child's medical condition.[116] A school trustee in Michigan resigned amidst an outcry after she said "you should just shoot them" in response to a complaint about accommodating so many kids with food allergies.[117] Of course, not all schools treat food allergies or related bullying with such hostility,[118] but it should come as no surprise if food allergy bullying thrives in places that do.

Increasingly, parents of bullied children are suing schools.[119] But these efforts are overwhelmingly unsuccessful.[120] One analysis of 600 disability-

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activities or school functions, further contributing to the child's feelings of isolation and anxiety."); Connell, *supra* note 68 (discussing "the occasional insensitive (and sometimes intentional) remark by a teacher or other adult who singles out an allergic child for spoiling the fun"); *When the Teacher is a Food Allergy Bully*, *supra* note 94 (citing example of teacher mistreatment as including "comments like, 'For John's birthday party we are having raisins as snacks instead of cake because Jane is allergic.'").

[116] *See* Nath, *supra* note 43. CPS investigated the parents and found the report to be unsubstantiated. *Id.*

[117] *See* Ishani Nath, *School Trustee Resigns after "Joke" About Shooting Allergic Students*, ALLERGIC LIVING, Nov. 30, 2014, https://www.allergicliving.com/2014/11/30/school-board-member-jokes-about-shooting-allergic-students/.

[118] *See* Connell, *supra* note 68 (explaining that principal's response to food allergy bullying scared the bullies, who apologized and never repeated the behavior); Tove Danovich, *Parents, Schools Step Up Efforts to Combat Food-Allergy Bullying*, NPR, June 5, 2018, https://www.npr.org/sections/thesalt/2018/06/05/613933607/parents-schools-step-up-efforts-to-combat-food-allergy-bullying (reporting that allergic boy and his mother agree that his school responds well to food allergy bullying incidents he has experienced as long as he reports them); Saint Louis, *supra* note 68 (discussing effective teacher response to food allergy bullying episode that "nipped the problem in the bud").

[119] *See* Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of Court Claim Rulings*, 361 EDUC. L. REP. 498, 498 (2019) (hereinafter Holben & Zirkel, *Bullying of Students with Disabilities*); Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299, 323 (2014) (hereinafter Holben & Zirkel, *School Bullying Litigation*); *see also* Letter from U.S Dep't of Educ., Office for Civil Rights, *Responding to Bullying of Students with Disabilities* 1 (Oct. 21, 2014) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf (hereinafter *Dear Colleague Letter regarding Disability Bullying*) (noting that the Department of Education's Office of Civil Rights "has received an ever-increasing number of complaints concerning the bullying of students with disabilities").

[120] *See* Sacks & Salem, *supra* note 96, at 149 ("[C]ourts have set a high bar for recovery, with plaintiffs often prevailing only in the most horrific cases."); Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 U. ILL. L. REV. 175, 175 (2015) (noting the "remarkable lack of case success in even the most severe instances of special education student bullying").

related bullying claims from 125 state and federal bullying cases brought from 1998 to 2017 showed that students achieved a conclusively favorable outcome only about 1% of the time.[121] Many factors contribute to this poor success rate, but various forms of immunity protect both public school boards and school officials from many tort and statutory claims.[122] This immunity "often serve[s] as a substantial shield against school liability for injuries that occur as a result of questionable supervision decisions by officials."[123] Because about 90% of kids go to public school,[124] immunity presents a significant barrier to liability for most instances of bullying. And when school boards face little to no risk of financial liability for failing to address bullying, they have little to no incentive to do so.[125]

How can that dynamic be changed? If schools are motivated to act only when facing the risk of serious repercussions, then it is worth exploring new avenues for recovery. That is where federal disability statutes come into play.

B. How Federal Disability Statutes Apply to Schools

The Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), passed in 1990, are the two most comprehensive federal disability laws and provide the most hope for protecting school children from food allergy bullying.[126] Section 504 of the Rehabilitation Act prohibits disability

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[121] *See* Holben & Zirkel, *Bullying of Students with Disabilities*, *supra* note 119, at 502.

[122] *See* Scott D. Camassar, *Cyberbullying and the Law: An Overview of Civil Remedies*, 22 ALB. L. J. SCI. & TECH. 567, 577 (2012) ("In general, however, it is difficult to bring claims against school systems for failing to intervene or prevent bullying. The main hurdle is governmental immunity."); Weddle, *supra* note 97, at 674 ("Tort actions for negligent supervision face a variety of obstacles: immunity for school officials, flawed and unrealistic definitions of negligent supervision, and theoretical problems with foreseeability and causation.").

[123] Weddle, *supra* note 97, at 683; *see also* Holben & Zirkel, *School Bullying Litigation*, *supra* note 119, at 304 (discussing immunity "barrier"); Kimmel, *supra* note 1, at 26 (immunity is a "significant obstacle[]"); McCabe & Parker, *supra* note 103, § 19 (immunity is "a powerful defense").

[124] *See* Julie Halpert, *What if America Didn't Have Public Schools?*, THE ATLANTIC, Mar. 4, 2018, https://www.theatlantic.com/education/archive/2018/03/what-if-america-didnt-have-public-schools/552308/ ("The private-school enrollment rate has remained relatively stagnant at around 10 percent for decades.").

[125] *See* Weddle, *supra* note 97, at 683 ("[I]mmunity severely weakens incentives that might otherwise exist in tort theories to inspire care among school officials who fail to take seriously enough their role in protecting students from violence or harassment by others.").

[126] The Individuals with Disabilities in Education Act (IDEA) protects disabled children in need of special education and related services. *See* 20 U.S.C. § 1401(3)(A)(ii). Because a food allergy is unlikely to impair a student's ability to learn or otherwise give rise to the need for special education, the IDEA would not likely apply to a student with no impairment

discrimination by any state program accepting federal financial assistance.[127] Because virtually all public schools and many private schools accept federal financial assistance,[128] section 504 covers the vast majority of school children. Congress passed the ADA to extend the Rehabilitation Act's protections and "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"[129] including specifically in the educational context.[130] Title II of the ADA prohibits state and local governmental agencies, such as public school systems, from discriminating based on disability,[131] and Title III extends those same protections to privately operated public accommodations, including educational programs.[132]

Congress modeled the ADA on the Rehabilitation Act and specifically provided that it should not "be construed to apply a lesser standard than the standards applied" under the Rehabilitation Act.[133] Although remedies and

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other than a food allergy. *See* Tess O'Brien-Heizen, *A Complex Recipe: Food Allergies and the Law*, WISC. LAWYER, May 2010, 8, 8 n.4 (stating that "food allergies alone, however, do not appear to be enough to trigger the protections under the IDEA"); LAURA ROTHSTEIN & JULIA IRZYK, DISABILITIES AND THE LAW § 2:53, at 264 (4th ed. 2019) (stating that a student with a peanut allergy might not require special education under the IDEA but could be covered by the Rehabilitation Act); *see also* Paul Harpur & Richard Bales, *The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience*, 37 N. KY. L. REV. 363, 383 (2010) (noting that the IDEA covers only disabled students who require specialized education); *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 991 (5th Cir. 2014) (explaining how some students may qualify for protection under the Rehabilitation Act but not the IDEA).

[127] *See* 29 U.S.C. § 794(a); ROTHSTEIN & IRZYK, *supra* note 126, § 1:20, at 61.

[128] *See Dear Colleague Letter regarding Disability Bullying*, *supra* note 119, at 2 (stating that "all public schools and school districts as well as all public charter schools and magnet schools" receive federal financial assistance and are thus subject to section 504) ; ROTHSTEIN & IRZYK, *supra* note 126, § 2:20, at 104 ("Because all states presently receive federal funding for public educational programming, all are subject to the mandates of Section 504. Because Section 504 applies to entities that receive funds indirectly through another recipient, local school districts are also subject to its mandates."); *see also* U.S Dep't of Agric., Food & Nutrition Serv., *National School Lunch Program (NSLP) Fact Sheet*, https://www.fns.usda.gov/nslp/nslp-fact-sheet (stating that the NSLP serves tens of millions of children in public and nonprofit private schools); *Russo v. Diocese of Greensburg*, Civil Action No. 09-1169, 2010 WL 3656579, at *1 (W.D. Pa. Sept. 15, 2010) (concluding defendant was federal financial assistance recipient subject to the Rehabilitation Act by its participation in the NSLP).

[129] 42 U.S.C. § 12101(b)(1).

[130] *See id.* § 12101(a)(3), (6).

[131] *See id.* §§ 12131(1)(A), 12132; ROTHSTEIN & IRZYK, *supra* note 126, § 2:6, at 110.

[132] *See* 42 U.S.C. §§ 12181(7)(J), 12182(a); ROTHSTEIN & IRZYK, *supra* note 126, § 2:6, at 110-11.

[133] 42 U.S.C. § 12201(a); *see also* 42 U.S.C. § 12133 (stating that the rights and remedies

enforcement vary to some extent, courts read the substantive requirements consistently and use cases construing the two statutes interchangeably.[134] Because neither section 504 nor Title II of the ADA applies to individuals, and Title III applies to individuals only if they own the public accommodation,[135] this article focuses on suits against educational entities themselves, primarily local school boards and private schools.[136]

If section 504 and the ADA apply to food allergy bullying, victims can sue schools without facing an immunity barrier. The Eleventh Amendment to the United States Constitution bars actions (other than constitutional claims) against states and state agencies.[137] States, however, can waive their immunity, and Congress can abrogate (take away) state immunity as necessary to enforce the Fourteenth Amendment.[138] It is now well settled that a state's decision to accept federal financial assistance for educational programs constitutes a waiver of immunity for section 504 suits.[139] Because all states accept federal educational dollars and trickle that money down to the local level,[140] all public schools are subject to suits under section 504 with no immunity defense. As to the ADA, Congress expressly intended to abrogate sovereign immunity.[141] The abrogation provision has been challenged, and all circuit courts addressing the issue have found that Congress's abrogation was valid,[142] though a few district courts have

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under Title II are the same as for section 504); *Bragdon v. Abbott*, 524 U.S 624, 631 (1998) (commenting that Congress has required that the ADA be construed "to grant as least as much protection as provided by the regulations implementing the Rehabilitation Act").

[134] *See* RAPP, *supra* note 102, §§ 10C.01[5][b][ii], 10C.02[1]; Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 OHIO STATE L.J. 1263, 1270 (2014).

[135] *See* RAPP, *supra* note 102, § 10C.02[3].

[136] Private schools controlled by religious organizations are exempt from Title III. 42 U.S.C. § 12187.

[137] U.S. CONST. amend. XI; ROTHSTEIN & IRZYK, *supra* note 126, § 2:52, at 257.

[138] *See* ROTHSTEIN & IRZYK, *supra* note 126, § 2:52, at 257.

[139] *See* RAPP, *supra* note 102, § 10C.02[3][b]; *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 379 (5th Cir. 2016) (holding that school waived sovereign immunity from section 504 claim by accepting federal funding); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 546 (3d Cir. 2007) (same); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 491, 496 (4th Cir. 2005) (same); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 112 (1st Cir. 2003) (same); *see also* 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act . . . .").

[140] *See supra* note 128 and accompanying text.

[141] *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter.").

[142] *See Bowers*, 475 F.3d at 556; *Toledo v. Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006);

disagreed.[143] Thus, although it is uncertain if a court in any given case would find immunity abrogated for an ADA suit, immunity is waived for section 504 claims. Since both the ADA and section 504 provide the same substantive rights, either path provides hope for students seeking relief from food allergy bullying, assuming that their food allergy constitutes a disability.

C. Food Allergy as a Disability

For federal disability law to provide relief to food allergy bullying victims, the threshold inquiry is the existence of a statutorily protected disability. The ADA and the Rehabilitation Act define "disability" essentially the same in all relevant respects.[144] Congress specifically intended that the scope of coverage in this regard be coextensive,[145] and courts have interpreted the statutes consistently.[146] For convenience, the remainder of this discussion will focus on the ADA's provisions. Congress amended the ADA in 2008, but to assess how the ADA might cover food allergies and other potential impairments relating to allergies and eating, it is important to understand the ADA, both as originally enacted and as amended. With that established, it becomes clear that in most, if not all, cases, food allergies should qualify for disability status.

1. Initial Resistance to Statutory Coverage

The ADA has always defined "disability" as "a physical or mental impairment that substantially limits one or more major life activities" of an individual.[147] The original ADA did not define the key terms of

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Constantine, 411 F.3d at 490; *Ass'n for Disabled Ams., Inc. v. Fla. Int'l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005); *accord Bearden v. Okla. ex rel. Bd. of Regents*, 234 F. Supp. 3d 1148, 1153 (W.D. Okla. 2017); *Goonewardena v. New York*, 475 F. Supp. 2d 310, 324 (S.D.N.Y. 2007).

[143] *See Doe v. Bd. of Trustees*, 429 F. Supp. 2d 930, 939 (N.D. Ill. 2006); *Press v. State Univ. of N.Y.*, 388 F. Supp. 2d 127, 135 (E.D.N.Y. 2005).

[144] *See* 29 U.S.C. §§ 705(20), 794(a); *see also* ROTHSTEIN & IRZYK, *supra* note 126, § 2:53, at 262 (stating that in the ADA and the Rehabilitation Act, "[t]he definition of who is protected is virtually the same").

[145] *See* RAPP, *supra* note 102, § 10C.01[5][b][ii] ("The genesis of the ADA rests with Section 504 of the Rehabilitation Act. Both statutes are nearly identical and the interpretation of each is to be coordinated to prevent imposition of inconsistent or conflicting standards for the same requirements under the respective statutes." (footnotes and quotation marks omitted)).

[146] *See supra* note 134 and accompanying text.

[147] 42 U.S.C. § 12102(1)(A); *see also* Curtis D. Edmonds, *Lowering the Threshold: How Far has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?*, 26 J. LAW & POL'Y 1, 9 (2018) (stating that the 2008 ADA

"substantially limits" or "major life activities."[148] This lead to frequent litigation on these topics,[149] culminating in a series of four United States Supreme Court decisions that severely restricted the ADA's scope of coverage.[150] The Court held that "substantially limits" and "major life activities" should be "interpreted strictly to create a demanding standard."[151] To this end, the Court concluded that a substantial limitation was one that was "considerable" or "to a large degree."[152] In applying that demanding standard, an individual's degree of limitation must be assessed only after considering the impact of corrective or mitigating measures.[153] So, for example, using a hearing aid would mean that a hearing-impaired individual is not substantially limited,[154] as would taking medication that controls the symptoms of high blood pressure.[155] Many lower courts further restricted the "substantially limits" definition by requiring that an episodic or intermittent condition be assessed not when the condition is active but based on the frequency of the symptoms, so that a condition such as epilepsy would not be substantially limiting to someone who did not regularly experience seizures.[156] As to the major life activity prong, the Supreme Court held that

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amendments did not change the actual disability definition). The definition also includes having a record of or being regarded as having such impairment. 42 U.S.C. § 12102(1)(B), (C).

[148] *See Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196-97 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999); Edmonds*, supra* note 147, at 9, 11.

[149] *See* Edmonds*, supra* note 147, at 11.

[150] *See Williams*, 534 U.S. at 187; *Albertson's, Inc. v. Kirkinburg*, 527 U.S. 555, 565-66 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 518-19 (1999); *Sutton*, 527 U.S. at 475; *see also* Edmonds, *supra* note 147, at 8 ("Four ADA employment cases involving the definition of disability were decided by the Supreme Court, all of them resulting in a substantial narrowing of the protected class of individuals with disabilities."); Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 260 GEO. J. ON POVERTY L. & POL'Y 383, 388 (2019) (explaining that because of these four cases, "the protected class shrunk substantially").

[151] *Williams*, 534 U.S. at 197.

[152] *Id.* at 196; *Sutton*, 527 U.S. at 491.

[153] *See Sutton*, 527 U.S. at 475; *Kirkinburg*, 527 U.S. at 518; *Murphy*, 527 U.S. at 565-66.

[154] *See Sutton*, 527 U.S. at 487.

[155] *See Murphy*, 527 U.S. at 518-19.

[156] *See Landry v. United Scaffolding, Inc.*, 337 F. Supp. 2d 808, 821 (M.D. La. 2004); *see also* Stephen F. Befort, *An Empirical Examination of Case Outcomes under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2039 (2013) ("[M]ost courts prior to the ADAAA found chronic illnesses that are episodic in nature are not disabling."); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 507 F.3d 1306, 1315 (11th Cir. 2007) (concluding that cancer was not a disability because most severe limitations periods were short term and temporary).

an activity must be "of central importance to most people's daily lives,"[157] leading to logic gymnastics as litigants attempted to connect their limitations to a small pool of narrowly interpreted major life activities.[158] Under these restrictive interpretations, courts held that the ADA did not cover many conditions that most people would easily consider disabling, such as cancer, mental retardation, and multiple sclerosis.[159]

The few food allergy cases involving the original ADA language suffered the same fate. The courts focused primarily on the major life activities of eating and breathing and held that food allergies did not substantially limit those activities.[160] As to eating, courts reasoned that because allergic individuals were not limited in their physical ability to eat food and only reacted when eating a specific food, as opposed to food generally, their allergy was not substantially limiting.[161] In other words, merely having to watch what you eat is not a substantial limitation on eating.[162] As to breathing, the plaintiffs' otherwise normal breathing was compromised only

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[157] *Williams*, 534 U.S. at 187.

[158] *See, e.g.*, *Blanks v. Sw. Bell Commc'ns, Inc.*, 310 F.3d 398, 401 (5th Cir. 2002) (concluding that an HIV-positive person did not have a disability because HIV did not substantially limit reproduction); *Muller v. Costello*, 187 F.3d 298, 298, 314 (2d Cir. 1999) (finding breathing impairment was not a disability because plaintiff did not show how his breathing problems impacted other major life activities); *Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191 (5th Cir. 1996) (holding breast cancer was not a disability because it did not substantially limit plaintiff's ability to work).

[159] *See* Edmonds, *supra* note 147, at 8; Porter, *supra* note 150, at 384, 388.

[160] *See Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999) (peanut allergy not covered); *Slade v. Hershey Co.*, No. 1:09CV00451, 2011 WL 3159164, at *4 (M.D. Pa. July 26, 2011) (nut allergy not a covered); *Bohacek v. City of Stockton*, No. CIV S-04-0939, 2005 WL 2810536, at *5 (E.D. Cal. Oct. 26, 2005) (peanut allergy not covered).

[161] *See Land*, 164 F.3d at 425 ("[T]he record does not suggest that [the plaintiff] suffers an allergic reaction when she consumes any other kind of food or that her physical ability to eat is in any way restricted."); *Bohacek*, 2005 WL 2810536, at *4 ("[The plaintiff] can eat as much as he wants, when he wants and what he wants—as long as peanuts or food with peanut derivatives are not involved. He is not tasked, for example, with having foods ingested through a tube, or having to eat at very frequent intervals.").

[162] *See Bohacek*, 2005 WL 2810536, at *4 ("[T]o say that the ADA may be invoked because one cannot enjoy the full panoply of foods trivializes the Act."); *see also Fraser v. Goodale*, 342 F.3d 1032, 1041 (9th Cir. 2003) ("Not every impediment to the copious and tasty diets our waistlines and hearts cannot endure is a substantial limitation on the major life activity of eating. We must carefully separate those who have simple dietary restrictions from those who are truly disabled."); *Walker v. City of Vicksburg*, Civil Action No. 5:06cv60-DCB-JMR, 2007 WL 3245169, at *8 (S.D. Miss. Nov. 1, 2007) (concluding diabetic plaintiff not covered, stating: "Merely because [the plaintiff] must watch and limit what he eats more closely than a member of the general population does not mean that he is disabled under the ADA. To so hold would be to recognize all persons with diabetes, lactose intolerance, food allergies, and various other eating-related impairments as disabled.").

when exposed to their allergen, so their breathing was not substantially limited.[163] Put differently, a potential breathing issue is not an actual, substantial limitation.[164] According to these courts, the plaintiffs can prevent adverse reactions through the "simple measures" of avoiding the allergen and taking emergency medicine to treat symptoms, and these mitigating measures must be taken into account in assessing the plaintiffs' limitations.[165] Because the plaintiffs had been largely successful in avoiding allergen exposure and thus could mostly go about their normal lives, they were not disabled on the basis of their food allergy.[166]

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[163] *See Land*, 164 F.3d at 425 (noting that plaintiff's "ability to breathe is generally unrestricted except for the limitations she experienced during her two allergic reactions"); *Bohacek*, 2005 WL 2810536, at *4 ("Unless [the plaintiff] ingested or otherwise contacted a peanut substance, the facts show that his breathing was not limited at all.").

[164] *See Bohacek*, 2005 WL 2810536, at *4 (explaining that breathing "is only *potentially* affected by the peanut allergy" and that the ADA does not cover "an impairment that 'potentially' limits a major life activity" (emphasis in original)); *see also Smith v. Tangipahoa Parish Sch. Bd.*, Civil Action No. 05-6648, 2006 WL 3395938, at *8 (E.D. La. Nov. 22, 2006) (concluding that girl's horse allergy, which could have caused anaphylaxis and required her to carry an EpiPen at all times, did not substantially limit her ability to breath because she had never actually experienced anaphylaxis and "a potential reaction does not 'presently' limit her ability to breathe").

[165] *See Slade*, 2011 WL 3159164, at *5 ("[The plaintiff] can cure her breathing problem through simple measures such as avoiding exposure to nuts and keeping medication on her person."); *Bohacek*, 2005 WL 2810536, at *4 (noting that plaintiff can avoid breathing problems by avoiding peanuts); *see also Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999) (evaluating plaintiff's breathing impairment in light of his inhalers and other medication) *Kropp v. Me. Sch. Admin. Union #44*, Civil No. 06-81-P-S, 2007 WL 551516, at *1, 17 (D. Me. Feb. 16, 2007) (concluding that environmental allergies and asthma requiring frequent breathing treatments were not disabilities because plaintiff did not show "that any functional limitation remains" post-medicine); *Gallagher v. Sunrise Assisted Living of Haverford*, 268 F. Supp. 2d 436, 441 (E.D. Pa. 2003) (holding that plaintiff's allergy to cat and dogs was not a disability because she could minimize the impact on her breathing by using an inhaler and taking allergy injections).

[166] *See Land*, 164 F.3d at 425 (noting that plaintiff is not disabled, in part based on her doctor's testimony that her "allergy impacts her life only 'a little bit'"); *Bohacek*, 2005 WL 2810536, at *3 (commenting that plaintiff had been able to avoid ingesting peanuts except one time); *see also Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 519-20 (1999) (discussing testimony from plaintiff's doctor that he functions normally when taking his blood pressure medication); *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 642-43 (N.D. Tex. 1995) (plaintiff with smoke allergy and asthma not disabled based on her doctor's testimony that she "leads a normal life"); Jason Mustard, Comment, *Nothing to Sneeze At: Severe Food Allergy as a Disability under the ADA Amendments Act of 2008*, 45 GOLDEN GATE U. L. REV. 173, 180-81 (2015) ("Food allergies are episodic in nature, and although always present, an allergy limits an individual's ability to breathe, eat, or participate in any other major life activity only when triggered by certain foods. These factors have proved to be a formidable obstacle to obtaining a court ruling that a food allergy is a disability under the ADA.").

The most well-known and influential of these cases is *Land v. Baptist Medical Center*.[167] That suit arose out of a day care center's refusal to care for a girl with a peanut allergy.[168] The Eighth Circuit concluded she was not disabled because her allergy only impacted her life "a little bit."[169] Her allergy, the court reasoned, did not substantially limit her eating because she did not react when she ate other food and had no restrictions on her physical ability to eat.[170] Likewise, her breathing was not substantially limited because her "ability to breathe is generally unrestricted" except for during her two prior allergic reactions.[171] Thus, although her allergy affected her eating and breathing, it did not substantially limit either as a matter of law.[172]

These sentiments from *Land* and other food allergy cases were echoed in many cases involving diabetes, which is somewhat analogous to food allergies because diabetics, like those with food allergies, must manage their condition through dietary restrictions and medication. Though some courts found severe cases of diabetes to be covered conditions,[173] many concluded that the ADA did not protect diabetics who were able to control their symptoms through reasonable dietary restrictions and medication.[174] Cases

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[167] 164 F.3d 423 (8th Cir. 1999).

[168] *Id.* at 424.

[169] *Id.* at 425.

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *See, e.g.*, *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 855, 859-60 (9th Cir. 2009) (finding fact issue as to whether insulin-dependent diabetic was covered under the ADA because despite rigorous dietary restrictions and daily insulin injections and blood tests, his diabetes was not controlled, and even minor variations from his daily regimen could have serious medical consequences); *Fraser v. Goodale*, 342 F.3d 1032, 1041, 1045 (9th Cir. 2003) (concluding that "brittle" diabetic whose blood sugar levels are very difficult to control raised a fact issue as to whether she was disabled because her diabetes regimen "is perpetual, severely restrictive, and highly demanding . . . and even this is no guarantee of success"); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924-25 (7th Cir. 2001) (holding that because diabetic plaintiff's extensive dietary restrictions and demanding treatment regimen did not control his blood sugar, he raised a fact issue as to whether he was disabled); *see also Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) ("Although [the plaintiff]'s treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating.").

[174] *See, e.g.*, *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 224 (5th Cir. 2011) ("As [the plaintiff]'s diabetes treatment regimen requires only modest dietary and lifestyle changes, no genuine issue exists as to whether his impairment substantially limits his eating."); *Carreras v. Sajo, García & Partners*, 596 F.3d 25, 35 (1st Cir. 2010) (concluding that plaintiff's twice daily insulin injections prevented his diabetes from substantially limiting any major life activity); *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1156-57 (11th Cir. 2005) (finding no disability where diabetic plaintiff admitted that he can eat and digest food normally when taking insulin and that "his diabetes has not affected his

involving non-food allergies, such as allergies to smoke, animals, and chemicals, were often dismissed as well.[175]

2. The ADA Amendments Act Provides Hope

Congress responded to courts' narrow interpretation of the ADA by passing the ADA Amendments Act of 2008 (ADAAA).[176] Congress intended these amendments to restore its original purpose of providing broad coverage for individuals with disabilities.[177] In doing so, Congress did not alter the actual definition of disability but instead made several key changes in how the disability definition is to be interpreted and applied,[178] both in the ADA and in section 504 of the Rehabilitation Act.[179]

Four amendments in particular are significant for analyzing food allergies as disabilities. First, Congress specifically rejected the Supreme Court's strict, narrow interpretation of the ADA's substantial limitation requirement and mandated that the disability definition "shall be construed in favor of broad coverage . . . , to the maximum extent permitted by the terms of this chapter."[180] Second, in another direct repudiation of the Supreme Court, Congress eliminated the mitigating measures rule, stating that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures" such as medication, medical equipment, and learned behavioral

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lifestyle in any way").

[175] *See, e.g.*, *Muller*, 187 F.3d at 314 (asthma exacerbated by tobacco smoke); *Kropp*, 2007 WL 551516, at *1, 17 (environmental allergies); *Smith v. Tangipahoa Parish Sch. Bd.*, Civil Action No. 05-6648, 2006 WL 3395938, *8 (E.D. La. Nov. 22, 2006) (horse allergy); *Gallagher*, 268 F. Supp. 2d at 441 (cat and dog allergy); *Minor v. Stanford Univ./Stanford Hosp.*, No. C-98-2536 MJJ, 1999 WL 414305, at *1, 3 (N.D. Cal. June 14, 1999) (chemical sensitivities); *Emery*, 879 F. Supp. at 642-43 (smoke allergy).

[176] ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[177] *See* Pub. L. No. 110-325, § 2(a)(4), (5), (7) (declaring that the Supreme Court's ADA decisions narrowed and eliminated protections Congress intended to provide in the original ADA); *id.* § 2(b)(1) (declaring that the ADAAA is intended to "reinstat[e] a broad scope of protection to be available under the ADA"); 28 C.F.R. § 35.101(b) (stating that the ADAAA's "primary purpose" is "to make it easier for people with disabilities to obtain protection under the ADA"); Harpur & Bales, *supra* note 126, at 380 (explaining how judicial interpretation of the ADA did not match original congressional intent, leading to the ADAAA).

[178] *See* Edmonds, *supra* note 147, at 9-10; Porter, *supra* note 150, at 389.

[179] *See* ROTHSTEIN & IRZYK, *supra* note 126, § 1:18, at 58.

[180] 42 U.S.C. § 12102(4)(A), (B); *see* Pub. L. No. 110-325, § 2(a)(5), (7), (b)(4) (ADAAA enacted to reject Supreme Court holding that the ADA is interpreted strictly to create a demanding standard).

adaptations.[181] Third, for episodic impairments or those in remission, substantial limitation must be assessed based on the circumstances present when the impairment is active.[182]

Finally, Congress rejected the Supreme Court's narrow construction that a major life activity must be "of central importance to most people's daily lives."[183] It provided a non-exclusive list covering a variety of tasks such as caring for oneself, seeing, hearing, sleeping, speaking, walking and, most significantly for food allergy sufferers, eating and breathing.[184] Congress also specified that a major life activity "includes the operation of a major bodily system," including the functions of the immune, digestive, respiratory, and circulatory systems, among others.[185]

These changes gutted the rationale of *Land* and the few other cases that had specifically excluded food allergies from coverage. Now, rather than focusing, for example, on the individual's typical breathing ability, a court must examine how an allergic person's body responds when exposed to the allergen. Courts may no longer consider the effects of mitigating measures—such as attempting to avoid the allergen and using emergency medicine—when analyzing whether the food allergy substantially limits an allergic individual's major life activities. And rather than looking narrowly at the mechanical, physical aspects of eating and breathing, courts are to broadly interpret coverage and can consider the allergy's impact on an individual's bodily systems.

Since the ADAAA, many commentators have expressed hope that the ADA will now cover food allergies,[186] and to some extent, the signs have been positive. Several food allergy cases that surely would have been dismissed under the old law have survived.[187] For example, a dairy-allergic

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[181] 42 U.S.C. § 12102(4)(E); *see* Pub. L. No. 110-325, § 2(a)(4), (b)(2) (ADAAA enacted to reject Supreme Court holding that mitigating measures are to be assessed when determining substantial limitation). The only exception to this rule is that courts should constitute ordinary eyeglasses and contact lenses when assessing visual impairments. *See* 42 U.S.C. § 12102(4)(E)(ii).

[182] 42 U.S.C. § 12102(4)(D).

[183] *See* Pub. L. No. 110-325, § 2(a)(5), (b)(4).

[184] 42 U.S.C. § 12102(2)(A).

[185] 42 U.S.C. § 12102(2)(B).

[186] *See, e.g.*, Borella, *supra* note 58, at 773; Carol J. Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does "Substantially Limits" Mean?*, 76 MO. L. REV. 43, 60 (2011); Mustard, *supra* note 166, at 174-75; O'Brien-Heinzen, *supra* note 126, at 56-57; ROTHSTEIN & IRZYK, *supra* note 126, § 2:53, at 264.

[187] *See Mills v. St. Louis Cnty. Gov't*, Case No. 4:17CV0257 PLC, 2017 WL 3128916, at *5 (E.D. Mo. July 24, 2017) (denying motion to dismiss claim based on fish and shellfish

boy sufficiently pleaded an ADA claim based on the allegation that if he ate dairy products, he could suffer anaphylaxis and die, and thus he alleged an impairment that "restricts him from eating the way most people" eat.[188] Government agencies are considering food allergies to be disabilities for many purposes, including air travelers needing accommodations,[189] children participating in school meal programs,[190] and college students required to purchase meal plans.[191]

Equally encouraging results have arisen in cases involving celiac disease. Celiac disease, a digestive disorder triggered by consuming gluten, raises issues similar to a food allergy in that it requires constant vigilance in food choices because ingesting even a small amount of gluten can cause an immune response with serious health consequences.[192] In a closely watched case, the Department of Justice reached a public settlement with Lesley University over its refusal to allow students with celiac disease to opt out of a mandatory dining program, even though they could not eat the food.[193] The

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allergy, which caused plaintiff to be hospitalized, rejecting defendant's argument that she was not substantially limited because her reactions were infrequent and manageable); *Hebert v. CEC Entm't, Inc.*, Civil Action No. 6:16-cv-00385, 2016 WL 5003952, at *3 (W.D. La. July 6, 2016) (refusing to dismiss claim of boy with dairy allergy who alleged that eating dairy could cause anaphylaxis and death); *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at *2-3 (Iowa Ct. App. Jan. 9, 2013) (reversing summary judgment on plaintiff's tree nut allergy claim and remanding for trial court to evaluate substantial limitation based on when the allergy is active).

[188] *Hebert*, 2016 WL 5003952, at *3.

[189] *See* Roni Caryn Rabin, *Boarding Now: Parents of Children with Food Allergies*, N.Y. TIMES, June 19, 2019, https://www.nytimes.com/2019/06/19/health/nut-allergies-airlines.html (reporting that the Department of Transportation has announced that it considers severe food allergies to be disabilities under the Air Carrier Access Act if they substantially impact the ability to breathe or another major life activity).

[190] *See* U.S. Dep't of Agric., *Policy Memorandum on Modifications to Accommodate Disabilities in the School Meal Program*, Sept. 27, 2016, https://fns-prod.azureedge.net/sites/default/files/cn/SP59-2016os.pdf.

[191] *See* U.S. Dep't of Justice, Civil Rights Div., Disability Rights Section, *Questions and Answers about the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, Jan. 25, 2013, https://www.ada.gov/q&a_lesley_university.htm (hereinafter *Lesley Settlement Q&A*).

[192] *See id.*; Beyond Celiac, *What is Celiac Disease?*, https://www.beyondceliac.org/celiac-disease/what-is-celiac-disease/; Claudia Trotch, Recent Development, *It's Not Easy Being G-Free: Why Celiac Disease Should be a Disability Covered under the ADA*, 22 AM. U. J. GENDER, SOC. POL'Y & L. 219, 222-23, 230-31 (2013).

[193] *See Lesley Settlement Q&A*, *supra* note 191; Travis Anderson, *Lesley University Agrees to Gluten-Free Food Choices*, BOSTON GLOBE, Jan. 9, 2013, https://www.bostonglobe.com/metro/2013/01/09/justice-department-agreement-ensures-lesley-university-meal-plan-accommodates-those-with-celiac-disease-food-

DOJ equated celiac disease with food allergies and said that individuals who "have an autoimmune response to certain foods, the symptoms of which may include difficulty swallowing and breathing, asthma, or anaphylactic shock" would have a disability under the ADA.[194] Several disability cases involving celiac disease have now progressed past the motion to dismiss or motion for summary judgment stage.[195]

Cases involving diabetics have also fared well under the new standards,[196] as have other cases involving a similar type of endocrine-system disorder[197] or a condition that requires detailed meal planning.[198] So too with cases involving non-food allergies, such as latex,[199] chemicals,[200] fragrances,[201] and mold.[202]

Not all food allergy and analogous cases, however, have been treated so

allergies/JgVUf1Dx6FpTYYCMr8nKPL/story.html.

[194] *Lesley Settlement Q&A*, *supra* note 191.

[195] *See, e.g.*, *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 671 (4th Cir. 2019); *Peterson v. Kelly Servs., Inc.*, No. 2:15-CV-0074-SMJ, 2016 WL 5858688, at *6 (E.D. Wash. Oct. 5, 2016), *rev'd on other grounds*, 730 F. App'x 471 (9th Cir. 2018); *Phillips v. P.F. Chang's China Bistro, Inc.*, Case No. 5:15-cv-00344-RMW, 2015 WL 7429497, at *3 (N.D. Cal. Nov. 23, 2015).

[196] *See, e.g.*, *Cloutier v. GoJet Airlines, LLC*, 311 F. Supp. 3d 928, 938 (N.D. Ill. 2018); *Powell v. Merrick Acad. Charter Sch.*, 16-CV-5315 (NGG) (RLM), 2018 WL 1135551, at *6 (E.D.N.Y. Feb. 28, 2018); *Hensel v. City of Utica*, 6:15-CV-0374 (LEK/TWD), 2017 WL 25893555, at *4 (N.D.N.Y. June 14, 2017); *Frazier v. Burwell*, Civil Action File No. 1:14-cv-3529-WBH-JKL, 2016 WL 10650814, at *8 (N.D. Ga. July 15, 2016).

[197] *See Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439, 446-47 (6th Cir. 2018) (hyperthyroidism).

[198] *See Kravtsov v. Town of Greenburgh*, No. 10-CV-3142, 2012 WL 2719663, at *11 (S.D.N.Y. July 9, 2012).

[199] *See Farmer v. HCA Health Servs. of Va., Inc.*, Civil Action No. 3:17CV342-HEH, 2017 WL 6347962, at *5 (E.D. Va. Dec. 12, 2017).

[200] *See Bonnen v. Coney Island Hosp.*, 16 CV 4258 (AMD) (CLP), 2017 WL 4325703, at *8-9 (E.D.N.Y. Sept. 6, 2017); *Lopez-Cruz v. Instituto de Gastroenterologia de P.R., S.R.I.*, 960 F. Supp. 2d 367, 370-71 (D.P.R. 2013).

[201] *See Rotkowski v. Ark. Rehab. Servs.*, 180 F. Supp. 3d 618, 623 (W.D. Ark. 2016); *Brady v. United Refrigeration, Inc.*, Civil Action No. 13-6008, 2015 WL 3500125, at *8 (E.D. Pa. June 3, 2015).

[202] *See O'Reilly v. Gov't of the V.I.*, Civil Action No. 11-0081, 2015 WL 4038477, at *6-7 (D.V.I. June 30, 2015).

favorably. Two food allergy[203] and two celiac disease[204] cases were dismissed on thin reasoning or with the courts relying on pre-ADAAA precedents or rationales. Some diabetes cases have suffered a similar fate.[205] Several food allergy[206] and diabetes[207] cases involving inmates have been dismissed based on outdated opinions and reasoning, when any was even given. This could reflect a general hostility toward prisoner litigation, with courts that are eager to clear their dockets giving these cases less attention.[208]

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[203] *See Hustvet v. Allina Health Sys.*, 283 F. Supp. 3d 734, 740 (D. Minn. 2017) (holding that "garden-variety allergies to various foods, grass, pets, trees, etc." were not disabilities because plaintiff did not show they substantially impaired her immune system functioning, relying on *Land*); *Boss v. Dep't of Health & Human Servs.*, No. 337682, 2018 WL 1733930, at *4-5 (Mich. Ct. App. Apr. 10, 2018) (concluding that plaintiff's fish and shellfish allergies were not a disability because she could not show they substantially impaired her ability to work).

[204] *See Kelly v. Kingston City Sch. Dist., Inc.*, 1:16-CV-00764 (MAD/DJS), 2017 WL 976943, at *4 (N.D.N.Y. Mar. 13, 2017) (finding that well-managed celiac disease is not a disability, relying on *Land*); *Nolan v. Vilsack*, Case No. CV 14-08113-AB (FFMx), 2016 WL 3678992, at *5 (C.D. Cal. June 30, 2016) (holding that celiac disease was not a disability because plaintiff admitted that it did not affect his work or daily living).

[205] *See, e.g.*, *Sanders v. Bemis Co.*, Case No. 3:16-cv-00014-GFVT, 2017 WL 405920, at *5 (E.D. Ky. Jan. 30, 2017) (finding diabetes not a disability because plaintiff's doctor stated it caused him no functional limitations); *Dominelli v. N. Country Acad.*, 1:15-cv-0087 (LEK/CFH), 2016 WL 616375, at *5 (N.D.N.Y. Feb. 16, 2016) ("Diabetes is often held not to constitute a disability, particularly if symptoms are sporadic or can be controlled by minor changes in lifestyle.").

[206] *See Kokinda v. Pa. Dep't of Corr.*, Civil Action No. 16-1303, 2016 WL 5122033, at *6 & n.2 (W.D. Pa. Sept. 6, 2016) (suggesting in a single sentence that prisoner's soy allergy is not a disability); *Shirley v. Collier Cnty. Sheriff's Office*, No. 2:13-cv-16-FtM-29UAM, 2013 WL 2477261, at *2 (M.D. Fla. June 10, 2013) (dismissing prisoner's food allergy claim in a single sentence with no citation to authority); *Rodriguez v. Putnam*, No. CV 11-8772-CJC (PJW), 2013 WL 1953687, at *5 (C.D. Cal. May 8, 2013) (rejecting prisoner's peanut allergy, which caused two allergic reactions in prison, as a disability with one sentence of analysis, citing *Land*).

[207] *See, e.g.*, *Banks v. LeBlanc*, Civil Action No. 16-649-JWD-EWD, 2019 WL 4315018, at *8 (M.D. La. Aug. 27, 2019) (dismissing diabetic prisoner's claim because no evidence it limited his walking or seeing); *Bonds v. S. Health Partners, Inc.*, Civil Action No. 2:15-CV-209-WOB, 2016 WL 1394528, at *7 (E.D. Ky. Apr. 6, 2016) (dismissing diabetic inmate's claim because he did not allege how diabetes substantially limited a major life activity); *Dunbar v. Byars*, Civil Action No. 2:11-cv-2243-JFA-BHH, 2013 WL 667930, at *2 (D.S.C. Jan. 30, 2013) (dismissing diabetic inmate's claim, concluding he was not disabled because he was not substantially limited in working, even though the defendant did not dispute plaintiff's disability status).

[208] *But see* Borella, *supra* note 58, at 770 (asserting that prisoners allege they suffer from food allergies without providing adequate factual support, which desensitizes courts "to legitimate claims . . . from food allergy sufferers").

3. If the Law is Properly Interpreted and Used, Food Allergy Should be a Disability

Considering the flaws in the older cases and the impact of faithful application of the ADAAA, food allergy should generally be considered a disability. A disability is an impairment that substantially limits one or more of an individual's major life activities.[209] In most cases, the existence of an impairment will not be an issue. An impairment includes "[a]ny physiological disorder or condition . . . affecting one or more body systems," including specifically the immune system.[210] If an individual has been diagnosed with a food allergy, which is by definition an immune system malfunction,[211] that should easily qualify as an impairment. The real issue, then, is whether a food allergy substantially limits a major life activity.

In assessing substantial limitation of a major life activity, courts should interpret the standard "broadly in favor of expansive coverage," and "the threshold of whether an impairment substantially limits a major life activity should not demand an extensive analysis."[212] A substantial limitation need not prevent or severely restrict the ability to perform a major life activity as long as the individual is substantially limited compared "to most people in the general population."[213] That comparison can include factors such as "the difficulty, effort or time required to perform the activity."[214] Impairments that are episodic should be evaluated based on whether the condition imposes a substantial limitation "when active,"[215] and all limitations should be analyzed "without regard to the ameliorative effects of mitigating measures"

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[209] 42 U.S.C. § 12102(1)(A).

[210] 28 C.F.R. § 35.108(b)(1)(i). This discussion will cite the ADA Title II agency regulations regarding the parameters of the disability definition, but the Title III and section 504 regulations are the same. *See* 28 C.F.R. Pt. 35, App. C; 28 C.F.R. § 36.105.

[211] *See supra* note 23 and accompanying text.

[212] 28 C.F.R. § 35.108(d)(1)(i), (ii); *see also* 42 U.S.C. § 12102(4)(A); Pub. L. No. 110-325, § 2(b)(5); *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 670 (4th Cir. 2019); *Williams v. Tarrant Cnty. Coll. Dist.*, 717 F. App'x 440, 446-47 (5th Cir. 2018).

[213] 28 C.F.R. § 35.108(d)(1)(v); *see also J.D.*, 925 F.3d at 670; *Williams*, 717 F. App'x at 446.

[214] 28 C.F.R. § 35.108(d)(3)(i), (ii); *see also Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) ("Although [the plaintiff]'s treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating."); *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 855, 860 (9th Cir. 2009) (stating as to diabetic plaintiff that "the effort required to control his diet is itself substantially limiting").

[215] 42 U.S.C. § 12102(4)(D); *see also Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at *3 (Iowa Ct. App. Jan. 9, 2013).

such as medication and learned behavioral adaptations.[216]

Applying these principles, food allergies substantially limit the major life activities of eating and breathing.

As to eating, the statute explicitly includes eating as a major life activity.[217] Individuals with a food allergy cannot eat certain food without having an allergic reaction. These reactions can be serious, including death.[218] Strict avoidance of the allergen is the only safe course, which means that all food choices must be carefully scrutinized.[219] Allergic individuals must use extreme care to avoid ingesting any amount of the allergen because even a trace can cause an immediate, acute response.[220] There is no margin for error.[221] Contrary to the rationale in the old food allergy cases, being able to eat other foods does not lessen the limitation on eating the allergy demands.[222] Most people do not have allergic reactions to eating any food and do not have to meticulously analyze every bite they eat to stay safe. This amounts to a substantial limitation on the major life activity of eating.[223]

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[216] 42 U.S.C. § 12102 (4)(E)(i)(I), (IV); *see also J.D.*, 925 F.3d at 670 (stating that impairments must be assessed "in their unmitigated state" (internal quotation marks and emphasis omitted)); *accord Rohr*, 555 F.3d at 862.

[217] 42 U.S.C. § 12102(2)(A).

[218] *See supra* notes 23-28 and accompanying text.

[219] *See supra* note 36 and accompanying text; *see also J.D.*, 925 F.3d at 671.

[220] *See supra* notes 37-41 and accompanying text; *see also J.D.*, 925 F.3d at 671.

[221] *See J.D.*, 925 F.3d at 671 (reversing summary judgment on celiac plaintiff's claim based on allegations that "because the ingestion of even a small amount of gluten may have serious [health] consequences," he "must monitor everything he eats" and does not "enjoy much (if any) margin for error); *Fraser v. Goodale*, 342 F.3d 1032, 1041 (9th Cir. 2003) ("Unlike a person with ordinary dietary restrictions, she does not enjoy a forgiving margin of error. While the typical person on a heart-healthy diet will not find himself in the emergency room if he eats too much at a meal or forgets to take his medication for a few hours, Fraser does not enjoy this luxury.").

[222] The pre-ADAAA food allergy cases holding otherwise are too demanding in analyzing substantial limitation and are therefore invalid. *See Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999); *Bohacek v. City of Stockton*, No. CIV S-04-0939, 2005 WL 2810536, at *4 (E.D. Cal. Oct. 26, 2005).

[223] *See Mills v. St. Louis Cnty. Gov't*, Case No. 4:17CV0257 PLC, 2017 WL 3128916, at *5 (E.D. Mo. July 24, 2017) (implying that pleading that exposure to shellfish caused plaintiff to become ill and be hospitalized for several days sufficiently alleged a substantial limitation on eating); *Hebert v. CEC Entm't, Inc.*, Civil Action No. 6:16-cv-00385, 2016 WL 5003952, at *3 (W.D. La. July 6, 2016) (holding that allegation that plaintiff cannot eat dairy products without risking an anaphylactic reaction sufficiently pleads a physical impairment that "restricts him from eating the way most people in the general population eat"); *see also Fraser*, 342 F.3d at 1042 (concluding that diabetic plaintiff "presented evidence that the major life activity of eating is substantially limited because of her demanding and highly difficult treatment regimen," including severe dietary restrictions). Commentators agree that

Focusing on the mechanical act of eating is too limiting.[224] Indeed, cases involving diabetics recognize that limitations imposed by a treatment regimen can substantially limit eating, even if unrelated to the physical ability to ingest food.[225] Eating is more than chewing and swallowing. It includes selecting and consuming food. Certainly, not every condition that forces certain food choices to avoid discomfort or some health consequence will substantially limit eating, but the lengths that those with food allergies must go to just to eat safely extend well beyond the substantial limitation threshold.[226]

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food allergies substantially limit the major life activity of eating. *See, e.g.*, Borella, *supra* note 58, at 773; Miller, *supra* note 186, at 60; Mustard, *supra* note 166, at 188; O'Brien-Heizen, *supra* note 126, at 569.

[224] *See Land*, 164 F.3d at 425 ("[T]he record does not suggest that [the plaintiff] suffers an allergic reaction when she consumes any other kind of food or that her physical ability to eat is in any way restricted."); *Bohacek*, 2005 WL 2810536, at *4 ("[The plaintiff] can eat as much as he wants, when he wants and what he wants—as long as peanuts or food with peanut derivatives are not involved. He is not tasked, for example, with having foods ingested through a tube, or having to eat at very frequent intervals."); *see also Telemaque v. Marriott Int'l, Inc.*, 14 Civ. 6336 (ER), 2016 WL 406384, at *8 (S.D.N.Y. 2016) ("These dietary restrictions, unaccompanied by any impairment to his ability to eat and ingest food, simply do not rise to a substantial level." (internal quotation marks omitted)).

[225] *See Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924 (7th Cir. 2001) (reversing district court's determination that diabetic plaintiff was substantially limited in eating only if his "actual physical ability to ingest food is restricted" because that failed to consider the restrictions his treatment regimen imposes and the consequences of noncompliance); *see also Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 855, 860 (9th Cir. 2009) (stating diabetic plaintiff's "effort required to control his diet is itself substantially limiting").

[226] *See* 28 C.F.R. § 35.108(d)(3)(ii) (directing that substantial limitation should include factors such as "the difficulty, effort or time required to perform the activity"); *J.D.*, 925 F.3d at 671 ("To be sure, no one can eat whatever he or she desires without experiencing some negative health effects. Nonetheless, we must permit those who are disabled because of severe dietary restrictions to enjoy the protections of the ADA." (internal quotation marks omitted)); *Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) ("Although [the plaintiff]'s treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating."); *Fraser*, 342 F.3d at 1040 ("If a person is impaired only from eating chocolate cake, he is not limited in a major life activity because eating chocolate cake is not a major life activity. On the other hand, peanut allergies might present a unique situation because so many seemingly innocent foods contain trace amounts of peanuts that could cause severely adverse reactions."); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924 (7th Cir. 2001) (reversing summary judgment because plaintiff's "perpetual, multi-faceted treatment regime required constant vigilance" and if not followed, "he could experience debilitating, and potentially life-threatening, symptoms" and thus could support a finding that his eating was substantially limited); *Phillips v. P.F. Chang's China Bistro, Inc.*, Case No. 5:15-cv-00344-RMW, 2015 WL 7429497, *3-4 (N.D. Cal. Nov. 23, 2015) (denying motion to dismiss celiac plaintiff's claim based on allegations that gluten ingestion causes severe health consequences and that she has to carefully monitor her food intake to

Food allergies also substantially limit the major life activity of breathing. As with eating, breathing is an express statutory major life activity.[227] An allergic response to food can impair breathing in many ways, including a swollen throat, asthma, direct respiratory distress, and anaphylaxis.[228] Most people in the general population do not risk severe breathing impediments from eating any food. Not every allergic reaction will involve impaired breathing, but nothing in the statute or regulations requires that a condition's effects be uniform every time. Allergic reactions can vary each time, and so the risk of breathing problems exists with any exposure.[229] That an allergic person's breathing is normal when not eating or when eating other food is irrelevant[230] because episodic impairments must be assessed based on when they are active.[231] When active, an allergic reaction risks severe breathing problems, which means food allergies substantially limit the major life activity of breathing.[232]

Apart from these more typical grounds, food allergies should easily qualify under the new standard focusing on substantial limitation of a major

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avoid gluten); *Kravtsov v. Town of Greenburgh*, No. 10-CV-3142 (CS), 2012 WL 2719663, at *1, 11 (S.D.N.Y. July 9, 2012) (denying summary judgment on claim that plaintiff's ability to eat was substantially limited by the his need to eat 8-10 times per day in specific physical positions and the severe restrictions on the types of food he could eat).

[227] 42 U.S.C. § 12102(2)(A).

[228] *See supra* notes 25-28 and accompanying text; *see also Lesley Settlement Q&A*, *supra* note 191 (stating that celiac disease and food allergies that cause an autoimmune response with potential symptoms of difficulty breathing, asthma, and anaphylactic shock are disabilities).

[229] *See supra* notes 26 and 32 and accompanying text.

[230] *See Farmer v. HCA Health Servs. of Va., Inc.*, Civil Action No. 3:17CV342-HEH, 2017 WL 6347962, at *2 (E.D. Va. Dec. 12, 2017) (concluding that because plaintiff's latex allergy could cause life-threatening breathing problems, that it was currently in remission was irrelevant for summary judgment purposes); *Mills v. St. Louis Cnty. Gov't*, Case No. 4:17CV0257 PLC, 2017 WL 3128916, at *5 (E.D. Mo. July 24, 2017) (rejecting argument that shellfish allergy did not substantially impair breathing because plaintiff's reactions were "infrequent and manageable"); *see also Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439, 446 (6th Cir. 2018) (assessing impact of plaintiff's hyperthyroidism based on "when it flared up"). This is one of many reasons that *Bohacek*, a pre-ADAAA food allergy case, is stale and should no longer be relied on. *See Bohacek v. City of Stockton*, No. CIV S-04-0939, 2005 WL 2810536, at *4 (E.D. Cal. Oct. 26, 2005) (reasoning that because plaintiff's breathing was normal unless he contacted peanuts, his breathing was only potentially, but not actually, limited).

[231] 42 U.S.C. § 12102(4)(D); *see also Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at *3 (Iowa Ct. App. Jan. 9, 2013).

[232] *See Farmer*, 2017 WL 6347962, at *2; *Mills*, 2017 WL 3128916, at *5; O'Brien-Heinzen, *supra* note 126, at 56.

bodily function.[233] A food allergy is an immune system disorder in which the immune system responds inappropriately when a certain food is present, leading to a host of health risks, including death, from even a minute amount of the food.[234] This is not how most people's immune system works. An allergic reaction can also substantially impair many other body systems' functioning, including the skin, respiratory, circulatory, and gastrointestinal systems.[235] Any of these should provide a basis for finding a substantial limitation on a major bodily function.[236]

That allergic reactions are (theoretically) preventable is no defense. Avoiding exposure is no easy task, and even with extreme diligence, accidental ingestion is a significant risk.[237] It is not, as one pre-ADAAA court suggested, a "simple" matter of not eating the allergen.[238] Indeed, the effort

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[233] *See* 42 U.S.C. § 12102(2)(B).

[234] *See supra* notes 23 and 38 and accompanying text.

[235] *See supra* notes 24-25 and accompanying text.

[236] *See Farmer*, 2017 WL 6347962, at *4-5 (jury could find that latex allergy substantially limited immune system); *O'Reilly v. Gov't of the V.I.*, Civil Action No. 11-0081, 2015 WL 4038477, at *6 (D.V.I. June 30, 2015) (plaintiff stated a claim of being disabled in part based on allegations that mold allergy impacted her immune system); *see also Kravtsov v. Town of Greenburgh*, No. 10-CV-3142, 2012 WL 2719663, at *11 (S.D.N.Y. July 9, 2012) (plaintiff stated a claim based on his eating-related condition limiting his digestive and bowel systems). Several post-ADAAA courts have found diabetes to be a disability based on its impact on the plaintiff's endocrine system. *See Cloutier v. GoJet Airlines, LLC*, 311 F. Supp. 3d 928, 938 (N.D. Ill. 2018); *Powell v. Merrick Acad. Charter Sch.*, 16-CV-5315 (NGG) (RLM), 2018 WL 1135551, at *6 (E.D.N.Y. Feb. 28, 2018); *Hensel v. City of Utica*, 6:15-CV-0374 (LEK/TWD), 2017 WL 25893555, at *4 (N.D.N.Y. June 14, 2017); *Frazier v. Burwell*, Civil Action File No. 1:14-cv-3529-WBH-JKL, 2016 WL 10650814, at *8 (N.D. Ga. July 15, 2016); *see also Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439, 446-47 (6th Cir. 2018) (hyperthyroidism limits endocrine system in ways similar to diabetes).

[237] *See supra* notes 36-41 and accompanying text; *see also J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 667 (4th Cir. 2019) (discussing plaintiff's difficulty, despite diligence, in avoiding consuming gluten).

[238] *Slade v. Hershey Co.*, No. 1:09CV00451, 2011 WL 3159164, at *5 (M.D. Pa. July 26, 2011). Other courts misunderstood or downplayed the seriousness of food allergies as well. *See Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999) (focusing on foods plaintiff was not allergic to and minimizing the impact of her two prior allergic reactions); *Bohacek v. City of Stockton*, No. CIV S-04-0939, 2005 WL 2810536, at *3 (E.D. Cal. Oct. 26, 2005) (emphasizing that plaintiff was able to avoid peanut products "his whole six years of life except the one time where his peanut allergy was first discovered at one year of age" and focusing more on plaintiff's socialization than his health risks); *see also Walker v. City of Vicksburg*, Civil Action No. 5:06cv60-DCB-JMR, 2007 WL 3245169, at *8 (S.D. Miss. Nov. 1, 2007) (concluding diabetic plaintiff not covered, stating: "Merely because [the plaintiff] must watch and limit what he eats more closely than a member of the general population does not mean that he is disabled under the ADA. To so hold would be to recognize all persons with diabetes, lactose intolerance, food allergies, and various other

involved in attempting to prevent accidentally eating it demonstrates the degree the allergy impairs major life activities.[239] What is more, steps taken to avoid the allergen constitute learned behavioral adaptations, which are a type of mitigating measure that courts cannot consider in analyzing substantial limitation.[240] The allergy's impact must be evaluated in the unmitigated state, which means when the individual eats the allergen.[241] In other words, the focus should be on what happens when allergic individuals are exposed to their allergen, not on how successful they are in preventing it.[242]

That allergic reactions are (theoretically) treatable with medication is also no defense. Many allergic individuals carry inhalers, epinephrine, and other medications to treat allergic reactions.[243] Even though some courts are continuing to evaluate substantial impairment based on using these medications,[244] medications are mitigating measures and explicitly

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eating-related impairments as disabled.").

[239] *See* 28 C.F.R. § 35.108(d)(3)(i), (ii); *Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) ("Although [the plaintiff]'s treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating."); *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 855, 860 (9th Cir. 2009) (stating as to diabetic plaintiff that "the effort required to control his diet is itself substantially limiting").

[240] *See J.D.*, 925 F.3d at 670-71 (stating that plaintiff's "need to maintain a strict diet is a learned behavioral modification" that courts are prohibited from considering); *Kravtsov*, 2012 WL 2719663, at *11 (reasoning that "planning meals is a mitigating measure the ameliorative effects of which cannot be considered"). All of the pre-ADAAA cases relying on the plaintiff's ability to avoid the allergen flatly conflict with the ADAAA and are thus no longer binding authority. *See Slade*, 2011 WL 3159164, at *5; *Bohacek*, 2005 WL 2810536, at *3.

[241] *See J.D.*, 925 F.3d at 671 ("[T]he district court was required to consider the effects of [the plaintiff]'s impairment when he's not on a strict gluten-free diet."); *Rohr*, 555 F.3d at 861-62 ("Impairments are to be evaluated in their *unmitigated* state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does *not* take insulin injections or medicine and does not require behavioral adaptations such as a strict diet." (emphasis in original)); *Hensel v. City of Utica*, 6:15-CV-0374 (LEK/TWD), 2017 WL 25893555, at *4 (N.D.N.Y. June 14, 2017) (analyzing substantial limitation based on effects of plaintiff's diabetes when untreated).

[242] A plaintiff's ability to lead a normal life in spite of an impairment does not mean the plaintiff does not have a disability. *See Williams v. Tarrant Cnty. Coll. Dist.*, 717 F. App'x 440, 448 (5th Cir. 2018) (rejecting the implication that plaintiff "could not show a disability without showing she is a person who has difficulty leading a normal life" (internal quotation marks omitted)).

[243] *See supra* notes 29-30 and accompanying text.

[244] *See, e.g.*, *Sanders v. Bemis Co.*, Case No. 3:16-cv-00014-GFVT, 2017 WL 405920, at *4-5 (E.D. Ky. Jan. 30, 2017) (finding that diabetic with an insulin pump was not disabled based on its control of his symptoms).

prohibited from consideration.[245] The limitation must be evaluated based on what happens if the allergic individual is not medicated.[246] Besides, epinephrine cannot always stop anaphylaxis.[247] That would be like downplaying the risk of a heart attack because a defibrillator is nearby. The availability of emergency treatment should never be used to minimize the impact of an impairment.[248]

Each case must be evaluated individually.[249] The ADA does not envision per se classes of disabilities.[250] At the same time, most food allergies, if properly pleaded and explained, should qualify as a disability. All food allergies are immune system malfunctions. Reactions can vary and can become life threatening with no prior notice. The extreme efforts involved in reducing the risk of exposure, combined with the grave consequences that exposure can cause, should qualify most if not all food allergies as disabilities.

This all, of course, depends on courts properly applying the statute. Unquestionably, the ADAAA has expanded protections for individuals with disabilities. Many cases—including some specifically involving plaintiffs with food allergies and analogous conditions—that surely would have been doomed under the old law have withstood dismissal attempts.[251] But courts

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[245] 42 U.S.C. § 12102(4)(E). *Slade*, one of the pre-ADAAA food allergy cases, expressly relied on the plaintiff's ability to avoid breathing problems by using an inhaler and is thus invalid under the ADAAA. *See Slade*, 2011 WL 3159164, at *5.

[246] *See Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 855, 861-62 (9th Cir. 2009) (stating that diabetes should be evaluated based on the limitations present when plaintiff does not take insulin or other medications); *Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439, 446 (6th Cir. 2018) (explaining that plaintiff's hyperthyroidism should be assessed based on the absence of medication).

[247] *See supra* note 31 and accompanying text.

[248] *See* Borella, *supra* note 58, at 772.

[249] *See Alston v. Park Pleasant, Inc.*, 679 F. App'x 169, 172 (3d Cir. 2017); *Cloutier v. GoJet Airlines, LLC*, 311 F. Supp. 3d 928, 937 (N.D. Ill. 2018); *see also* 38 C.F.R. § 35.108(d)(2)(ii) (referring to the "individualized assessment of . . . impairments").

[250] *See* 28 C.F.R. Pt. 35, App. C; *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 223 (5th Cir. 2011); Edmonds, *supra* note 147, at 28-29. The regulations refer to a non-exclusive category of impairments called "predictable assessments," where these impairments "will, in virtually all cases, result in a determination of coverage" because "the necessary individualized assessment should be particularly simple and straightforward." 38 C.F.R. § 35.108(d)(2)(i), (ii). Examples include blindness substantially limiting seeing, cancer substantially limiting normal cell growth, and diabetes substantially limiting endocrine function. *Id.* § 35.108(d)(2)(iii). Some commentators worry that the regulations create too much tension with the individualized assessment requirement and thus may have overreached. *See, e.g.*, Edmonds, *supra* note 147, at 28-29.

[251] *See supra* notes 196-202 and accompanying text.

have misapplied the statute as well, to the detriment of some food allergy plaintiffs and others with conditions involving eating.[252] Scholars have methodically analyzed post-ADAAA disability cases and found hundreds of errors, either in courts' rulings or in how litigants have pursued the cases.[253] For example, many courts have continued to blindly rely on *Land* and other old cases, despite the substantial statutory changes.[254] Though Congress expressly intended to overrule Supreme Court precedent requiring that limitations be evaluated considering mitigating measures, some courts have continued to reject claims after viewing the plaintiff's condition as mitigated by medication, behavioral modifications, or other measures.[255] Other courts have continued to consider whether a condition is sporadic or in remission, despite explicit statutory language to the contrary.[256] Courts and litigants both have struggled with the new major life activity category of the operation of a major bodily system. Plaintiffs have often failed to plead limits on bodily system functions or have done so in such a cursory manner as to deprive courts of the ability to conduct an individual assessment.[257] Some courts have not been as receptive to these claims as those based on traditional major life

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[252] *See supra* notes 203-208 and accompanying text.

[253] *See* Edmonds*, supra* note 147, at 4-5; Porter, *supra* note 150, at 385-86.

[254] *See* Porter, *supra* note 150, at 393; *see also, e.g.*, *Hustvet v. Allina Health Sys.*, 283 F. Supp. 3d 734, 740 (D. Minn. 2017); *Kelly v. Kingston City Sch. Dist., Inc.*, 1:16-CV-00764 (MAD/DJS), 2017 WL 976943, at *4 (N.D.N.Y. Mar. 13, 2017); *Sanders v. Bemis Co.*, Case No. 3:16-cv-00014-GFVT, 2017 WL 405920, at *4 (E.D. Ky. Jan. 30, 2017); *Rodriguez v. Putnam*, No. CV 11-8772-CJC (PJW), 2013 WL 1953687, at *5 (C.D. Cal. May 8, 2013). Many courts, however, have disapproved of relying on such outdated cases. *See, e.g.*, *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 671 (4th Cir. 2019); *Cloutier v. GoJet Airlines, LLC*, 311 F. Supp. 3d 928, 938 (N.D. Ill. 2018); *Powell v. Merrick Acad. Charter Sch.*, 16-CV-5315 (NGG) (RLM), 2018 WL 1135551, at *6 (E.D.N.Y. Feb. 28, 2018); *Mills v. St. Louis Cnty. Gov't*, Case No. 4:17CV0257 PLC, 2017 WL 3128916, at *5 (E.D. Mo. July 24, 2017); *Hensel v. City of Utica*, 6:15-CV-0374 (LEK/TWD), 2017 WL 25893555, at *4 & n.3 (N.D.N.Y. June 14, 2017); *Frazier v. Burwell*, Civil Action File No. 1:14-cv-3529-WBH-JKL, 2016 WL 10650814, at *8 & n.17 (N.D. Ga. July 15, 2016); *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at *1-3 (Iowa Ct. App. Jan. 9, 2013).

[255] *See* Porter, *supra* note 150, at 404-05; *see also, e.g.*, *Kelly*, 2017 WL 976943, at *3-4; *Sanders*, 2017 WL 405920, at *4-5; *Amaker v. Annucci*, Case No. 14-CV-9692 (KMK), 2016 WL 5720798, at *7 n.10 (S.D.N.Y. Sept. 30, 2016); *Dominelli v. N. Country Acad.*, 1:15-cv-0087 (LEK/CFH), 2016 WL 616375, at *5 (N.D.N.Y. Feb. 16, 2016).

[256] *See* Porter, *supra* note 150, at 405-06; *see, e.g.*, *Dominelli*, 2016 WL 616375, at *5.

[257] *See* Edmonds*, supra* note 147, at 23-27; Porter, *supra* note 150, at 400-02; *see also, e.g.*, *Alston v. Park Pleasant, Inc.*, 679 F. App'x 169, 172-73 (3d Cir. 2017); *Banks v. LeBlanc*, Civil Action No. 16-649-JWD-EWD, 2019 WL 4315018, at *8 (M.D. La. Aug. 27, 2019); *Bonds v. S. Health Partners, Inc.*, Civil Action No. 2:15-CV-209-WOB, 2016 WL 1394528, at *7 (E.D. Ky. Apr. 6, 2016); *Dominelli*, 2016 WL 616375, at *5; *Quarles v. Md. Dep't of Human Res*, Civil Action No. MJG-13-3553, 2014 WL 6941336, at *4 (D. Md. Dec. 5, 2014).

activities.[258] Whether due to ignorance, incompetence, or hostility towards the changes, the ADAAA has not, so far, always accomplished Congress's goal of expanding protections for individuals with disabilities.[259]

To maximize the likelihood of success in litigating food allergy as a disability, plaintiffs should plead carefully and brief thoroughly, both to take advantage of as much of the statute as possible and to educate the court. Pleadings should include impaired functioning of the immune system and other bodily systems, but they should also cover the traditional major life activities of eating and breathing, particularly because the statute now expressly lists them. Plaintiffs must thoroughly explain how their food allergies impact those systems and activities, the health consequences they have suffered before and are at risk of from any future exposure, including anaphylaxis and death. Further, plaintiffs should detail the measures required to prevent accidental ingestion so that courts understand that avoidance is not a simple matter but rather requires constant vigilance because exposure to even trace amounts of the allergen can be deadly. Finally, plaintiffs must ensure that courts completely understand the change in the law to prevent them from relying on outdated opinions and repudiated rationales.

Establishing food allergy as a disability is the first step in protecting food allergy bullying victims. Clearing that hurdle sets the stage for disability harassment claims against schools based on food allergy bullying.

D. Food Allergy Bullying as Disability Harassment

Rooted in sex and racial discrimination law, courts have recognized a cause of action for harassment based on a student's disability.[260] Though proving these claims can be challenging, the unique circumstances of food allergy bullying increase the odds of success. This threat of liability will motivate some schools to act appropriately in the face of food allergy bullying.

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[258] *See* Edmonds, *supra* note 147, at 22-27; Porter, *supra* note 150, at 405-06; *see also, e.g.*, *Alston*, 679 F. App'x at 172-73; *Hustvet*, 283 F. Supp. 3d at 740.

[259] *See* Porter, *supra* note 150, at 385-86.

[260] Courts have recognized a disability harassment claim in the employment context as well. *See* William Goren, UNDERSTANDING THE ADA, *Hostile Work Environment Issues and Demotion as a Reasonable Accommodation*, Nov. 18, 2019, https://www.williamgoren.com/blog/2019/11/18/hostile-work-environment-ada-demotion-reasonable-accommodation/. For a discussion of how the ADA might apply in the workplace bullying context, see David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L. J. 475, 515-17 (2000).

1. A Cause of Action Exists for Disability Harassment

It is well established that harassment based on a protected characteristic is a form of discrimination.[261] In the education context, the Supreme Court held in *Davis v. Monroe County Board of Education*[262] that a school board can be liable for student-on-student sexual harassment under Title IX of the Education Amendments Act of 1972, which prohibits gender discrimination by federal financial assistance recipients.[263] To establish liability, a plaintiff must show: (1) she was harassed based on her sex, (2) that the harassment was sufficiently severe, pervasive, and objectively offense as to deprive her access to the educational benefits or opportunities the school provides, (3) the defendant had actual knowledge of the harassment, and (4) the defendant was deliberately indifferent to the sexual harassment.[264] When a teacher harasses a student, the elements are the same, except that personnel within the school who must have actual notice might differ.[265] In either case, the school's liability is based not on vicarious liability for the harasser's conduct but on the school's own failure to respond appropriately to known harassment.[266]

Title VI of the Civil Rights Act of 1964 prohibits federal financial assistance recipients from discriminating based on race, color, or national origin.[267] Because Title IX and Title VI are so similar, courts have extended the *Davis* cause of action to cover racial harassment.[268]

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[261] *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 649-50 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 542 U.S. 274, 283 (1998); *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003).

[262] 526 U.S. at 650.

[263] *See* 20 U.S.C. § 1681(a).

[264] *See Davis*, 526 U.S. at 650; *see also* McCabe & Parker, *supra* note 103, § 11.

[265] *See Gebser*, 542 U.S. at 277; *see also Davis*, 526 U.S. at 679-80 (Kennedy, J., dissenting).

[266] *See Davis*, 526 U.S. at 640-41; *Gebser*, 542 U.S. at 288; *see also* Jessica Brookshire, Comment, *Civil Liability for Bullying: How Federal Statutes and State Tort Law Can Protect Our Children*, 45 CUMB. L. REV. 351, 373 (2015); Kimmel, *supra* note 1, at 6. This is analogous to parental negligence liability for children's bullying behavior, which is based not on direct liability for the child's conduct but on the parent's own negligence in failing to exercise appropriate care to protect other children from their child's conduct. *See generally* Shu, *supra* note 5.

[267] *See* 42 U.S.C. § 2000d.

[268] *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 665 & n.10 (2d Cir. 2012); *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003) (same); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 n.5 (3d Cir. 2001) (Alito, J.) (referring to peer sexual harassment cases, "we believe that their reasoning applies equally to harassment on the basis of the personal characteristics enumerated in Title VI and other relevant federal anti-discrimination statutes"); *see also Alexander v. Sandoval*, 532 U.S 275, 280 (2001) (stating

Congress modeled section 504 of the Rehabilitation Act after Title IX and Title VI,[269] which in turn incorporated many of the same protections into the ADA,[270] and so courts have begun to apply the *Davis* framework to recognize a cause of action for disability-based harassment.[271] The elements are the same as in sex and race cases, except that the plaintiffs must also show that they have a disability.[272] Since most if not all food allergies should be disabilities,[273] food allergy bullying should qualify as disability harassment if the plaintiff can prove the other elements of the claim.

2. A Disability Harassment Claim for Food Allergy Bullying is Legally Viable

No cases have analyzed food allergy bullying as disability harassment. Studying how courts have applied the claim's elements in other types of disability cases as well as sex and race cases establishes the framework for using this harassment theory to provide relief for victims of food allergy bullying. "Harassment is a form of discrimination. It reinforces hierarchies of prestige and peer acceptance within the school setting. . . . [D]isability harassment constantly reinforces the message that the child with disabilities does not belong and that nothing he or she does can change that reality."[274] A viable disability harassment claim for food allergy bullying victims, however, is a step toward changing that reality.

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that Title IX was patterned after Title VI and they should be interpreted in light of each other).

[269] *See* 29 U.S.C. § 794a(a)(2); *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); ROTHSTEIN & IRZYK, *supra* note 126, § 2:2, at 103.

[270] *See* 42 U.S.C. § 12133; *see also supra* note 133 and accompanying text.

[271] *See, e.g.*, *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 690 (5th Cir. 2017); *S.B. v. Bd. of Educ. of Hartford Cnty.*, 819 F.3d 69, 75 (4th Cir. 2016); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008); *see also* Kimmel, *supra* note 1, at 15-18 (collecting cases) The Department of Education recognizes that the ADA and section 504 prohibit disability-based harassment. *See Dear Colleague Letter regarding Disability Harassment*, *supra* note 96; *Dear Colleague Letter regarding Harassment and Bullying*, *supra* note 101; *Dear Colleague Letter regarding Disability Bullying*, *supra* note 119; *see also* Letter from U.S Dep't of Educ., Office of Special Educ. & Rehab. Servs., *Dear Colleague Letter Regarding Bullying of Students with Disabilities* (Aug. 20, 2013), https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf.

[272] *See Doe*, 855 F.3d at 690; *S.S.*, 532 F.3d at 454; Kimmel, *supra* note 1, at 16.

[273] *See supra* Part IV.C.3.

[274] Weber, *supra* note 85, at 1091-92.

a. Harassment Because of Disability

Being bullied and having a disability, without more, is insufficient to maintain a disability harassment claim.[275] Rather, the plaintiff must show a nexus between the disability and the mistreatment.[276] The ADA and section 504 "are not general protection statutes for vulnerable people with disabilities."[277] Rather, they are antidiscrimination statutes, which require the disability and the bullying to be linked.[278] "The conduct of jerks, bullies, and persecutors is simply not actionable" unless they are acting because of the victim's disability.[279]

Courts have consistently dismissed claims when plaintiffs fail to show this connection.[280] For example, in cases concerning learning disabilities, bullying allegations—including very serious ones involving threats and violence—did not state a claim because those actions were unrelated to the plaintiff's condition.[281] But, when the bullying involved name calling such as "retard," idiot," "special ed," and "stupid," those cases avoided dismissal because a jury could reasonably conclude those words tied the disability to the bullying.[282]

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[275] *See Eskenazi-McGibney v. Connetquot Cent. Sch. Dist.*, 84 F. Supp. 3d 221, 232 (E.D.N.Y. 2015) (stating that "[s]imply because a disabled person was bullied does not, without more, compel the conclusion that the bullying" was based on the disability).

[276] *See Vargas v. Madison Metro. Sch. Dist.*, No. 18-cv-272-slc, 2019 WL 2173928, at *6 (W.D. Wis. May 20, 2019); *Wormuth v. Lammersville Union Sch. Dist.*, 305 F. Supp. 3d 1108, 1126 (E.D. Cal. 2018); *Eskenazi*, 84 F. Supp. 3d at 233.

[277] *Vargas*, 2019 WL 2173928, at *6; *accord Wormuth*, 305 F. Supp. 3d at 1125; *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179, 196 (D. Conn. 2016); *Eskenazi*, 84 F. Supp. 3d at 233; *see also Hoffman v. Saginaw Pub. Schs.*, No. 12-10354, 2012 WL 2450805, at *7 (E.D. Mich. June 27, 2012) (stating that federal antidiscrimination statutes "do not create a code of federal manners").

[278] *See Vargas*, 2019 WL 2173928, at *6; *Wormuth*, 305 F. Supp. 3d at 1125; *Doe*, 179 F. Supp. 3d at 196; *Eskenazi*, 84 F. Supp. 3d at 233.

[279] *Hoffman*, 2012 WL 2450805, at *1.

[280] *See Vargas*, 2019 WL 2173928, at *6, 8; *Wormuth*, 305 F. Supp. 3d at 1126; *Doe*, 179 F. Supp. 3d at 196-97; *Eskenazi*, 84 F. Supp. 3d at 232-33.

[281] *See Vargas*, 2019 WL 2173928, at *1 (girl with cognitive disabilities sexually assaulted); *Doe*, 179 F. Supp. 3d at 183-88 (boy with learning disabilities assaulted); *Eskenazi*, 84 F. Supp. 3d at 226-27 (boy with ADHD and other learning issues threatened and assaulted); *see also Wormuth*, 305 F. Supp. 3d at 1126 (bully targeted everyone, not just boy with speech impediment).

[282] *See Sutherline v. Indep. Sch. Dist. No. 40*, 960 F. Supp. 2d 1254, 1267 (N.D. Okla. 2013) (child with on autism spectrum called retard, crazy, freaky, creepy); *M.J. v. Marion Indep. Sch. Dist.*, Cv. No. SA-10-CV-00978-DAE, 2013 WL 1882330, at *7 (W.D. Tex. May 3, 2013) (child with bipolar disorder and ADHD called retard, dumb, stupid, idiot, special ed, psycho); *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 238-39, 242 (W.D.N.Y. 2012) (child on autism spectrum called "f*cking retard" and "autistic piece of

This element should not prove difficult to meet in food allergy bullying cases. When allergic children are, for instance, threatened or touched with their allergen or ridiculed because their allergy prevents the class from having cupcakes, the disability connection is obvious.

b. Severe and Pervasive Harassment that Impacts Education

Disability harassment is actionable only when it "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[283] In determining if harassing conduct is severe and pervasive, courts are to consider the "'constellation of surrounding circumstances,'" including that children are immature and still learning social navigation.[284] "Damages are not available for simple acts of teasing and name-calling among school children."[285] Cases finding severe and pervasive conduct generally involve repeated harassing acts, often with a physical component,[286] though a single incident suffice if severe enough.[287]

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sh*t"); *Long v. Murray Cnty. Sch. Dist.*, Civil Action File No. 4:10-CV-00015-HLM, 2012 WL 2277836, at *26 (N.D. Ga. May 21, 2012) (child on autism spectrum called retard, slow, stupid); *see also Dorsey v. Pueblo Sch. Dist. 60*, 215 F. Supp. 3d 1082, 1084-85, 1089 (D. Colo. 2016) (child with muscular and skeletal weakness condition called freak, cripple).

[283] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999).

[284] *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)); *accord Hoffman*, 2012 WL 2450805, at *6-7; *see also Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 159, 166-67 (5th Cir. 2011) (holding that high school girl drama involving boyfriends and the cheerleading squad was not severe and pervasive).

[285] *Davis*, 526 U.S. at 652.

[286] *See, e.g.*, *D.A. v. Meridian Joint Sch. Dist. No. 2*, 289 F.R.D. 614, 627, 629 (D. Idaho 2013) (concluding fact issue existed on severity and pervasiveness based on "relentless bullying," including name calling, stolen clothing, and physical attacks); *Long*, 2012 WL 2277836, at *27 (finding fact issue on pervasiveness based on evidence of "severe, nearly constant bullying," including name calling, pushing, and other physical actions); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 954, 968 (D. Kan. 2005) (denying summary judgment based on evidence of a years-long pattern of harassment including name calling, teasing, and crude gestures). *But see Werth v. Bd. of Dirs. of the Pub. Schs. of the City of Milwaukee*, 472 F. Supp. 2d 1113, 1129 (E.D. Wis. 2007) (summary judgment granted because two assaults were brief, from two different aggressors, and three months apart).

[287] *See Davis*, 526 U.S. at 652-53 (stating that although it is unlikely Congress would have envisioned it, "in theory, a single instance of sufficiently severe one-on-one peer harassment" could "be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity"); *T.Z. v. City of N.Y.*, 634 F. Supp. 2d 263, 270 (E.D.N.Y. 2009) (collecting authority that a single incident can be severe and pervasive and denying summary judgment based on plaintiff being sexually assaulted); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62-63 (D. Me. 1999) (denying summary judgment on claim

The harassing conduct must also "so undermine[] and detract[] from the victims' educational experience" that they "are effectively denied equal access to an institution's resources and opportunities."[288] Courts look for a "concrete" impact on the victim's education,[289] such as dropping grades, absenteeism, a change in demeanor or behavior, or a complete removal from the educational environment, such as by dropping out or committing suicide.[290]

Food allergy bullying victims will likely meet these standards in many instances. One of the "constellation of surrounding circumstances" is the danger dynamic—over half of food allergy bullying physically involves the allergen and puts the child at risk for an allergic reaction, including anaphylaxis.[291] This is just as serious as if a bully used a more traditional deadly weapon, like a knife or gun,[292] which should easily satisfy the severe and pervasive standard, even if only a single incident. But it probably will not just be one incident. Eighty-six percent of bullied allergic children are bullied repeatedly,[293] adding to the severity of the bullying. And for the 20%

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based on single incident of teacher getting student drunk and then having sex with him); *see also* Weber, *supra* note 85, at 1101 (stating that because a single severe incident can support a Title IX sexual harassment claim, that same rule should apply by analogy in disability harassment cases).

[288] *Davis*, 526 U.S. at 651; *accord D.A.*, 289 F.R.D. at 629.

[289] *Davis*, 526 U.S. at 654; *cf. Vargas v. Madison Metro. Sch. Dist.*, No. 18-cv-272-slc, 2019 WL 2173928, at *7 (W.D. Wis. May 20, 2019) (granting summary judgment because no evidence showed the assault had any negative impact on plaintiff's education); *Doe v. Big Walnut Local Sch. Dist. Bd. of Educ.*, 837 F. Supp. 2d 742, 757 (S.D. Ohio 2011) (granting summary judgment because plaintiff had no evidence that bullying made his grades, attendance, or extracurricular activities suffer).

[290] *See Davis*, 526 U.S.at 652 (stating that plaintiff's declining grades "provides necessary evidence of a potential link between her education and [the] misconduct"); *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 49 (2d Cir. 2006) (affirming jury verdict based on evidence of plaintiff being upset by harassment and her increased absenteeism, even though her grades did not fall); *D.A.*, 289 F.R.D. at 629 (stating that "recognized examples" of educational impact "include dropping grades, change in the student's demeanor or classroom participation, becoming homebound or hospitalized due to harassment, or self-destructive and suicidal behavior" and concluding that evidence showing bullying caused plaintiff's destructive behavior and subsequent incarceration met the standard); *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 242 (W.D.N.Y. 2012) (denying motion to dismiss based on allegations that the bullied plaintiff stopped going to school and could not take final exams); *Long v. Murray Cnty. Sch. Dist.*, Civil Action File No. 4:10-CV-00015-HLM, 2012 WL 2277836, at *28 (N.D. Ga. May 21, 2012) ("Plaintiffs provide evidence that the years of harassment ultimately caused Tyler to commit suicide—necessarily barring Tyler from educational opportunities.").

[291] *See supra* notes 71-78, 84 and accompanying text.

[292] *See supra* notes 84 and 88 and accompanying text.

[293] *See supra* note 63 and accompanying text.

of allergic children who are bullied by teachers or other school personnel, the power imbalance further amplifies the bullying's severity and the impact on the child's educational environment.[294]

The fear factor magnifies the severity even more. For children with a food allergy, being threatened with their allergen is terrifying.[295] Bullied students may become fearful of the lunchroom, classroom, or any place where food is present, which impacts their educational environment and ability to learn.[296] Allergic students cannot safely participate in school activities involving certain foods,[297] and excluding them denies them these educational opportunities. Allergic students who miss school because of, for example, an allergic reaction from bullying, trauma from past bullying, or fear of future bullying cannot participate when absent. Teens, in an effort to blend in to avoid bullying, may eat unsafe foods or stop carrying their epinephrine, drastically increasing their risk of dying from anaphylaxis.[298] A dead student cannot go to school.

"Being subjected to abuse either at the hands of school personnel or at the hands of peers with the knowledge of school personnel makes the public school experience decidedly unequal to the experience of others. Harassment excludes students with disabilities from the educational environment provided to students without disabilities . . . ."[299] This applies with equal if not additional force for children with food allergies,[300] whose life can be placed in direct jeopardy by being bullied with their allergen.

c. Actual Notice

Disability harassment claims for money damages lie only for "known acts

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[294] *See Davis*, 526 U.S. at 653 (explaining that teacher-student harassment is more likely to breach the "guarantee of equal access to educational benefits and to have a systemic effect on a program or activity").

[295] *See supra* note 85 to 87 and accompanying text.

[296] *See* Bauman & Del Rio, *supra* note 100, at 219 ("School bullying negatively impacts school climate, as fear, depression, and physical complaints affect students' attendance, concentration, and academic performance."); *Dear Colleague Letter regarding Harassment and Bullying*, *supra* note 101, at 1 ("Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby undermining the ability of students to achieve their full potential."); *Dear Colleague Letter regarding Disability Harassment*, *supra* note 96 ("Students can not learn in an atmosphere of fear, intimidation, or ridicule.").

[297] *See supra* notes 92-94 and accompanying text.

[298] *See supra* note 83 and accompanying text.

[299] Weber, *supra* note 85, at 1095.

[300] *See supra* notes 79-82 and accompanying text.

of harassment."[301] Liability is thus based on actual, not constructive, notice,[302] and what a school should have known—even something open and obvious—is irrelevant.[303] Plaintiffs can establish actual notice by showing they reported the harassment or that specific school officials otherwise had direct knowledge of it.[304] Actual knowledge can also be proven by notice of prior complaints similar enough to the complained-of behavior to put the school on notice that it might occur.[305]

In food allergy bullying cases, actual notice will be easiest to establish when students who are bullied report these incidents to school officials. This will put the school on notice of this particular student's issues and can form the basis of future notice if the same bully—whether student or teacher—repeats the behavior.

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[301] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 649-50 (1999). Though recovering damages in a private suit requires proving actual notice of harassment, the Department of Education can bring enforcement actions seeking injunctive relief against schools that should have known of harassment and failed to respond appropriately. *See Dear Colleague Letter regarding Disability Bullying*, *supra* note 119, at 4 & n.18; RAPP, *supra* note 102, § 10C.02[2][b][ii].

[302] *See Davis*, 526 U.S. at 651; *Gebser v. Lago Vista Indep. Sch. Dist.*, 542 U.S. 274, 285, 287-89 (1998); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 666 (2d Cir. 2012).

[303] *See Davis*, 526 U.S. at 642; *S.B. v. Bd. of Educ. of Hartford Cnty.*, 819 F.3d 69, 76 (4th Cir. 2016); *Moore v. Chilton Cnty. Bd. of Educ.*, 1 F. Supp. 3d 1281, 1300-01 (M.D. Ala. 2014).

[304] *See Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 685, 690 (5th Cir. 2017) (concluding peer harassment claim failed as a matter of law because the assault was never reported); *J.F.K. v. Troup Cnty. Sch. Dist.*, 678 F.3d 1254, 1260 (11th Cir. 2012) (stating that plaintiff can prove actual notice by showing the school knew the teacher was sexually harassing her); *Moore*, 1 F. Supp. 3d at 1301 (rejecting actual notice theory based on allegations that numerous unnamed teachers witnessed the harassment).

[305] *See Gebser*, 542 U.S. at 291 (holding that prior complaints about a teacher making inappropriate comments in class "was plainly insufficient to alert the principal to the possibility that [the teacher] was involved in a sexual relationship with a student"); *J.F.K.*, 678 F.3d at 1256, 1260-61 (stating that "the actual notice must be sufficient to alert the decision-maker to the possibility of sexual harassment by the teacher" and holding that knowledge of complaints about inappropriate and unprofessional conduct was insufficient because the teacher's "known conduct was not of the same type" as her molesting a twelve-year-old boy); *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1258-59 (11th Cir. 2010) (explaining that although "some prior allegations of harassment may be sufficiently minimal and far afield" from the underlying claim that they do not alert the school of the possibility of future harassment, the prior complaints against this teacher were similar enough to provide notice of the risk); *Moore*, 1 F. Supp. 3d at 1300 ("Complaints that are too general are insufficient to provide actual notice." (internal quotation marks omitted)); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 61, 63 (D. Me. 1999) (denying summary judgment, even though incident of teacher having sex with a student after getting him drunk was not reported, based on evidence of prior complaints involving this teacher having sex with students).

d. Deliberate Indifference

School districts can be liable only if they are deliberately indifferent to known harassment, which means their actions are "clearly unreasonable in light of the known circumstances."[306] This is an "exacting" standard.[307] Neither negligence nor unreasonableness is enough—the school must make "an official decision . . . not to remedy the violation."[308] Schools need not actually stop harassment as long as their actions are not clearly unreasonable under the circumstances.[309] "[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators" and instead allow them the flexibility to respond to the conditions in each case.[310]

Most courts interpret the deliberate indifference requirement so rigidly that it can be nearly impossible to meet.[311] If a school takes some action—any action at all—in response to a complaint, these courts will find the school not liable.[312] If the school stops one harasser, many courts will find that

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[306] *Davis*, 526 U.S. at 648.

[307] *Doe*, 604 F.3d at 1259; *see also S.B.*, 819 F.3d at 76 ("high bar"); *Domino v. Tex. Dep't of Crim. Justice*, 239 F.3d 752, 756 (5th Cir. 2001) ("extremely high standard").

[308] *Gebser*, 542 U.S. at 290; *accord Davis*, 526 U.S. at 642; *see also Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 1000 (5th Cir. 2014) (stating that "a school district consciously avoid[ing] confronting harassment" can show deliberate indifference); *Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist.*, 647 F.3d 156, 167 (5th Cir. 2011) ("[Deliberate indifference] is a high bar, and neither negligence nor mere unreasonableness is enough.").

[309] *See Davis*, 526 U.S. at 648 (explaining that schools do not escape liability under the deliberate indifference standard "only by purging their schools of actionable peer harassment"); *accord Estate of Lance*, 743 F.3d at 996; *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000).

[310] *Davis*, 526 U.S. at 648; *see also Estate of Barnwell v. Watson*, 880 F.3d 998, 1007 (8th Cir. 2018) ("The 'clearly unreasonable' standard is intended to afford flexibility to school administrators."); *S.B.*, 819 F.3d at 77 (noting that "school administrators are entitled to substantial deference when they calibrate a disciplinary response to student-on-student bullying or harassment"); *Estate of Lance*, 743 F.3d at 996 ("Judges make poor vice principals . . . .").

[311] *See* Sacks & Salem, *supra* note 96, at 149; Secunda, *supra* note 120, at 181, 183; David Ellis Ferster, Note, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education under the Individuals with Disabilities Education Act*, 43 GA. L. REV. 191, 203 (2008); Weddle, *supra* note 95, at 659.

[312] *See Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179, 196 (D. Conn. 2016) (concluding deliberate indifference claim fails because plaintiffs did not allege a "complete failure to address bullying"); *Long v. Murray Cnty. Sch. Dist.*, Civil Action File No. 4:10-CV-00015-HLM, 2012 WL 2277836, at *35 (N.D. Ga. May 21, 2012) (rejecting deliberate indifference claim because defendants "responded to each incident"); *P.R. v. Metro. Sch. Dist. of Wash. Twp.*, Cause No. 1:08-cv-1562-WTL-DMI, 2010 WL 4457417, at *9 (S.D. Ind. Nov. 1, 2010) (dismissing claim because it was undisputed that the defendant "took

response sufficient, even though others rise up to replace the bully, resulting in a succession of bullying against one child.[313] As one commentator put it, the standard often means in practice "that a school literally has to ignore bullying behavior brought to its attention" to be held liable.[314]

Not all courts have taken quite such a restrictive approach. They hold that just doing "something" in response to harassment is not enough.[315] Rather, the school's actions must be evaluated based on the known circumstances, and one of those circumstances is the effectiveness of past responses.[316] Thus, in the face of repeated harassment, duplicating the same ineffectual tactics is clearly unreasonable.[317] So, for example, when a student is continually harassed by a series of different bullies who receive little if any discipline, stopping one bully does not remedy the overall problem of that student being harassed, and the school should do more to protect that student.[318] The "whack-a-mole" approach is insufficient. These courts also assess circumstances such as the existence and quality of the school's investigation,[319] any time lag between notice of an incident and the school's response,[320] whether the school takes any action beyond a simple investigation,[321] and the school's overall attitude toward the situation.[322]

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some action after every reported incident" (emphasis in original)); *Biggs. v. Bd. of Educ. of Cecil Cnty.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002) (granting summary judgment because "each and every time [the plaintiff] complained, the school took action").

[313] *See Doe v. Bellefonte Area Sch. Dist.*, 106 F. App'x 798, 799-800 (3d Cir. 2004); *see also Patterson v. Hudson Area Schs.*, 551 F.3d 438, 456 (6th Cir. 2009) (Vinson, J., dissenting); Sacks & Salem, *supra* note 96, at 155.

[314] Secunda, *supra* note 120, at 180.

[315] *See S.B.*, 819 F.3d at 77; *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1260, 1263 (11th Cir. 2010); *Patterson*, 551 F.3d at 448; *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000).

[316] *See Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 669 (2d Cir. 2012); *Doe*, 604 F.3d at 1261; *Vance*, 231 F.3d at 261.

[317] *See S.B.*, 819 F.3d at 77; *Zeno*, 702 F.3d at 668-69; *Doe*, 604 F.3d at 1261-62; *Patterson*, 551 F.3d at 446; *Vance*, 231 F.3d at 261-62; *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 806 (M.D. Tenn. 2016).

[318] *See Zeno*, 702 F.3d at 669-70; *Patterson*, 551 F.3d at 448; *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 966, 977 (D. Kan. 2005).

[319] *See Doe v. Boyertown Area Sch. Dist.*, 10 F. Supp. 3d 637, 650, 653 (E.D. Pa. 2014); *D.A. v. Meridian Joint Sch. Dist.*, 289 F.R.D. 614, 631 (D. Idaho 2013); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 64-65 (D. Me. 1999).

[320] *See Zeno*, 702 F.3d at 669-70; *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 49 (2d Cir. 2006); *Dorsey v. Pueblo Sch. Dist. 60*, 215 F. Supp. 3d 1082, 1089 (D. Colo. 2016); *Theno*, 377 F. Supp. 2d at 965-66.

[321] *See Vance*, 231 F.3d at 260; *see also Stewart v. Waco Indep. Sch. Dist.*, 599 F. App'x 534, 521 (5th Cir. 2013).

[322] *See Doe*, 10 F. Supp. 3d at 650, 653.

The deliberate indifference element will present challenges in the food allergy bullying context as in any other. Although courts' overly strict application of this element allows horrible cases to go unremedied,[323] the courts that take a broader view of the "known circumstances" provide some hope.[324] Food allergy bullying presents unique known circumstances that call for strong remedial measures. Bullying can make allergic children fear for their lives, which obviously magnifies the bullying's psychological and educational impacts.[325] Even worse is the direct risk of serious health consequences or even death from being bullied with the allergen.[326] This leaves little room for schools to take a wait and see type approach. And when allergic children are bullied repeatedly—as the statistics show they will be[327]—that signals to schools that they need to adjust and strengthen their response. Failing to do so puts some of these kids' lives on the line, and that is clearly unreasonable based on these known circumstances.

V. CONCLUSION

Schools are a critical component in the fight against food allergy bullying. They have a responsibility to ensure equal educational opportunities for all students, including those with food allergies.[328] The vast majority of food allergy bullying happens at school, sometimes by teachers and coaches. The school's environment contributes substantially to the amount of bullying in a school. Schools ignoring or downplaying bullying—or even worse, school personnel bullying too—emboldens bullies by signifying that the school accepts or even encourages their behavior. As the Tenth Circuit eloquently explained,

> Schools administrators are not simply bystanders in the school. They are the leaders of the educational environment. They set the standard for behavior. They mete out discipline and consequences. They provide the system and rules by which students are expected to

[323] *See, e.g.*, *Estate of Lance v. Kyer*, Civil Action No. 4:11-cv-32, 2012 WL 5384200, at *1 (E.D. Tex. Sept. 11, 2012) (disabled child hung himself in the nurse's bathroom after being bullied from kindergarten through fourth grade and being labeled a "bad child" and "tattletale" for reporting it), *aff'd sub nom. Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982 (5th Cir. 2014); *Long v. Murray Cnty. Sch. Dist.*, Civil Action File No. 4:10-CV-00015-HLM, 2012 WL 2277836, at *1, 39 (N.D. Ga. May 21, 2012) (child on autism spectrum committed suicide after extensive bullying over several years).

[324] *Davis*, 526 U.S. at 648.

[325] *See supra* notes 80-82, 85-87 and accompanying text.

[326] *See supra* notes 71-78, 83-84 and accompanying text.

[327] *See supra* note 63 and accompanying text.

[328] *See Dear Colleague Letter regarding Disability Harassment*, *supra* note 96.

follow.[329]

Though far from an ideal solution, the threat of litigation can force an otherwise reluctant school to step up.[330] Some schools do not need this incentive to prompt anti-bullying measures, but far too many do. The immunity defense takes the teeth out of much potential litigation, but if food allergies are disabilities and can form the foundation of a federal disability harassment claim, that defense disappears. This potential for liability can only help motivate schools to take more proactive measures to address food allergy bullying.[331]

Of course, suing schools for disability harassment is not a cure-all. Bullies' parents are important role models and can substantially influence their children's propensity to bully, either by their own insensitive or negative behavior or in failing to respond appropriately to their child's bullying.[332] And further educating teachers and students about food allergies would hopefully increase understanding and empathy, which should also reduce bullying.[333]

Disability harassment claims are difficult to prove and are most likely to succeed only in severe cases. Food allergy bullying risks serious, potentially life-threatening consequences whenever the bully weaponizes the allergen,

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[329] *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 933 (10th Cir. 2003).

[330] *See* Kimmel, *supra* note 1, at 28 ("We cannot eliminate all bullying among school children, but we can make schools and school districts respond appropriately to it—and help stop and deter a great deal of it—through effective litigation under federal and state laws. Litigation is a critical tool in our arsenal."); Rothstein, *supra* note 134, at 1299 ("It is generally recognized that litigation is an essential component of effectively accomplishing federal disability policy goals."); Secunda, *supra* note 120, at 179 (asserting that "[i]f such prophylactic, in-school steps fail to remedy ongoing bullying of special education students, or if schools turn a blind eye to such behavior, litigation may be the only alternative to provide effective relief"); Weber*, supra* note 85, at 1109 ("If disability harassment is ever to be stopped, the threat of damages will be an important reason for the change.").

[331] *See* Kimmel, *supra* note 1, at 28 ("Litigation can motive [school officials] to insist that bullying is confronted, rather than ignored, put teeth into school policies, require anti-bullying training, and teach tolerance to students."); Weber, *supra* note 85, at 1155 (noting that "the legal system operates as the ultimate tool to ensure equal participation in school without harassment for children with disabilities").

[332] *See* Shu, *supra* note 5, at __.

[333] *See CDC Voluntary Guidelines*, *supra* note 17, at 39 ("Among adolescents, food allergy education and awareness can be an effective strategy to improve social interactions, reduce peer pressure, and decrease risk-taking behaviors that expose them to food allergens."); *FAACT Bullying*, *supra* note 83 (stating the food allergy bullies often act out of ignorance and model insensitive behavior from adults such as teachers); Gagné, *supra* note 87 (discussing positive response to teen's food allergy bullying experience when she and her parents reported the incident and educated the bullies about the seriousness of her allergies).

which happens 57% of the time. With 5.6 million allergic children, and one third of them being bullied because of it, that equates to over one million children being physically bullied with their allergen. Even if disability harassment claims succeed primarily only in these cases, they are worth pursuing to protect a million children.