I. INTRODUCTION

An increasing number of children report having food allergies. Parents are becoming more demanding in their “requests” for accommodations for food allergies. It is no longer uncommon for parents to demand that life threatening allergens be banned from the entire school or that one-to-one aide be assigned to a student with a life threatening food allergy. Given the prevalence of severe allergies among children, it is likely that most school board will face issue related to allergies at some point. This presentation addresses the legal issues surrounding the accommodation of allergies and focuses on the question: Just how far must a school go to accommodate a student’s allergies?

II. STATISTICS REGARDING STUDENTS WITH SEVERE ALLERGIES

A. Allergic Reactions can Kill. Last year, the death of a 13-year-old made national news after she suffered an allergic reaction from eating a rice crispy bar containing peanuts. In the United States, food allergy reactions send someone to
the emergency room every 3 minutes. It is estimated that food allergies cause an average of 317,000 ambulatory-care visits per year.

B. **Food Allergies are a Growing Concern.** An estimated 15 million Americans suffer from food allergies. [Source: Food Allergy Research & Education (FARE)]. According to the U.S. Centers for Disease Control and Prevention (CDC), approximately 3 million U.S. children suffer from food or digestive allergies. According to a study released this year by the CDC, food allergies among children increased by approximately 50% between 1997 and 2011.

C. **Schools Need to be Prepared to Deal with Allergic Reactions.** Children spend a significant amount of time in the school setting. Studies show that about 16-18% of children with food allergies have had a reaction at school. Given the potentially deadly consequences of an allergic reaction, practices and policies that eliminate, reduce, or mitigate allergic reactions are essential.

III. ALLERGIC REACTIONS GENERALLY

A. **Common Allergens.** Eight types of food are responsible for more than 90% of allergic reactions: 1) milk; 2) eggs; 3) peanuts; 4) tree nuts; 5) fish; 6) shellfish; 7) soy; and 8) wheat. Non-food items, including some school supplies, may also carry trace amounts of these foods. Other severe allergic reactions are known to occur from insect venom (bee stings), medications, latex, and other environmental factors such as artificial scents.

B. **Anaphylaxis.** Anaphylaxis is a life-threatening allergic reaction. Allergies are the most common cause of anaphylaxis. During anaphylaxis, allergic reactions may affect multiple body systems, and may impact blood circulation and breathing. If left untreated, anaphylaxis can kill in a matter of minutes.

C. **There is No Cure for Food Allergies.** Unfortunately, food allergies cannot be cured. The only way to prevent an allergic reaction is strict avoidance.

D. **Epinephrine (adrenaline).** Epinephrine is a medication that can reverse the severe symptoms of anaphylaxis if administered promptly.

IV. APPLICABLE STATE AND FEDERAL LAW

A. **Section 504 of the Rehabilitation Act of 1973 ("Section 504")**

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) is a federal civil rights law. Section 504 is implemented through federal regulations. See 34 C.F.R. Part 104. There is no state law counterpart to Section 504. The purpose
of Section 504 is to eliminate discrimination against individuals with disabilities in all programs or activities receiving federal financial assistance. Section 504’s requirements apply in the areas of employment, education, and “other services” offered by a recipient of federal funds. As recipients of federal funds, school districts have Section 504 obligations in all three of the above areas. As it pertains to disabled students, Section 504 requires school districts to provide a level playing field through reasonable accommodations. The cost of compliance is born solely by the recipient of federal funds, i.e. the school district.

B. The Americans with Disabilities Act (“ADA”)

The Americans with Disabilities Act (“ADA”) is also a federal law prohibiting discrimination against individuals with disabilities. The ADA is set forth in 42 U.S.C. Sections 12101 through 12213. The ADA and Section 504 are similar with regard to the manner in which they relate to education and employment. Effective January 1, 2009, the ADA was amended to include a broader range of individuals as disabled. See ADA Amendments Act of 2008, Pub. L. 110-325, 122 Stat. 3553 (2008).

The ADA Amendments Act of 2008 (or “ADAAA”) redefined (and expanded) what constitutes a disability under the Act. The ADAAA expressly contains provisions which modify the definition of “disability” in Section 504 so that Section 504 is reliant upon and mirrors the definition found in the ADAAA. Id. at Sec. 7. Section 504 was also amended to refer back to the new definition of disability under the ADAAA. As a result, the ADAAA has had a direct impact on Section 504. In light of the ADAAA, even more students and employees will be considered disabled individuals under Section 504 than previously was the case. This number far exceeds the number of eligible students under the Individuals with Disabilities Education Act (“IDEA”).

C. The Minnesota Human Rights Act (“MHRA”)

The Minnesota Human Rights Act (“MHRA”) prohibits, among other forms of discrimination, disability-based discrimination. Like the ADA and Section 504, the MHRA also requires reasonable accommodations for students with disabilities. The MHRA’s definition of disability is very similar to the ADA.

D. Life-threatening severe Allergies may qualify as a “disability.”

As stated above, the ADAAA modified and expanded the definition of “disability.” The amendments increased the number of activities that are considered to be “major life activities” and changed the law to provide that a person with an “episodic” condition, or a condition that is in remission, must be
considered disabled if the condition substantially limits a major life activity during an episode or when the condition is not in remission. As a result, a greater number of individuals with severe allergies will be covered under Section 504 and the ADA.

V. ILLUSTRATIVE CASES


1. Facts. T.F. was an eight-year-old student with a history of anaphylaxis due to a severe tree nut allergy. T.F.’s parents requested a meeting to establish a “504 Plan.” One of the primary areas of disagreement concerned the location where the student was to eat in the cafeteria. The district proposed that the student sit at a “tree nut free” table, which in reality was a student desk. T.F.’s parents disagreed with this option, claiming that it had prevented their son from effectively communicating with his peers and that other students had bullied T.F. because he was separated from the other students. T.F.’s doctor suggested that T.F. be seated at the end of a rectangular table, with a two-foot buffer from other students, with no tree nuts at the table. The district rejected this option because the lunch tables are round, whereas the rectangle tables are used for school activities. T.F.’s parents eventually withdrew T.F. from school and filed a lawsuit under Section 504.

2. Holding. The court held that the district did not violate Section 504. The court found that the district had attempted to work with T.F. and his parents for several months and had proposed four (4) separate 504 Plans. Citing a recent Third Circuit case, the court held that “to offer an ‘appropriate education’ under the Rehabilitation Act, a school district must reasonable accommodate the needs of the handicapped child so as to ensure meaningful participation in educational activities and meaningful access to education benefits.” The district took “reasonable steps to accommodate T.F.’s disabilities and include him in all class activities; it was not required to grant the specific accommodations requested by Parents or otherwise make substantial modifications to the programs that were used for all other students.”

B. Student v. School Dist. of Hudson (Sept. 2010).

1. Facts. The parents of a kindergarten student withdrew their child from school and requested a Section 504 hearing after the school district refused to implement an “allergen-free” classroom. Prior to the beginning of the school year, the parents e-mailed the school stating that the student...
had “severe allergies to peanuts and eggs” and should not be in contact with certain foods. Specifically, the parents stated that the student was allergic to basil, carrots, chocolate, coconut, grapefruit, green beans, oranges, peaches, prunes, raisins, raspberries, red grapes, purple grape juice, sesame seeds, shellfish, sunflower seeds, tree nuts, and cats. The parents assured the school district they would have medical documentation in writing shortly. However, during the development of the student’s individual health plan (“IHP”) and Section 504 Plan, the parents only provided the district with limited medical documentation of the student’s allergies. The documentation the district received did not support the parents’ assertion that the student would suffer an allergic reaction by touching peanuts or egg products and by touching items that previously had been in contact with peanuts or eggs. The parents refused to provide the district with a medical release permitting the school to contact the student’s allergist in order to fully understand and accommodate the student’s allergies.

2. **Issue.** After the district drafted a Section 504 Plan for the parents’ review, the parents requested that the district make seventy-four changes to the Plan. One of the parents’ requests was that the district restrict food allergens in the student’s classroom and other common use instructional areas as well. When the district refused to implement all of the parents’ requests, the parents requested a Section 504 hearing. Although the parents stated 34 issues for hearing, the main issue was whether the District was required to ban all allergens from the classroom.

3. **Holding.** Following a lengthy hearing, the hearing officer held that the district appropriately fulfilled its obligation to make accommodation decisions for the student based on the information it had when the original and revised Section 504 Plans were developed. Specifically, the hearing officer held that the parents’ request for a classroom ban was unreasonable and that the district’s Section 504 Plan would be more effective than a ban. In particular, the hearing officer found that the district cannot effectively enforce a ban on food products containing allergies and that such a ban would create a false sense of security. Further, the hearing officer held that a ban would not ensure the student’s safety as students could consume allergens before school and carry their remnants on their hands or clothes into the classroom. Finally, the hearing officer held that a ban would infringe on the rights of others and be unfair to students who are allergic to a different substance in food products and to students who are not allergic to any substance.
C. **In re Gloucester County (VA) Public Sch.,** 49 IDELR 21 (OCR 2007).

1. **Facts.** Parents of a child with a peanut and tree nut allergy filed a complaint with the OCR alleging the school district discriminated against their daughter by failing to develop and implement a Section 504 Plan ensuring a safe educational environment. The school district argued that it was not required to provide the student with a Section 504 Plan because the student is not an individual with a disability.

2. **Holding.** Usually, the OCR will only focus its review on whether a district complied with Section 504’s procedural safeguards. In this case, the OCR determined there were “extraordinary circumstances” that supported a substantive review of a school district’s determination that a student was ineligible for Section 504 services as the student suffered from a life threatening peanut and tree nut allergy. The OCR found that “extraordinary circumstances” were present as the district received a letter from the student’s doctor stating that the student had experienced several life threatening reactions after coming into contact with items that had once held tree nuts. The student had suffered reactions after she was kissed by someone on the cheek who ate peanut butter and after eating cheese from a salad bowl that previously contained a dressing with walnuts in it. The OCR concluded that it had “concerns” regarding the district’s determination that the student was ineligible for Section 504 services and informed the district it could resolve the matter by reevaluating the student.


1. **Facts:** The parent of a student with life-threatening asthma that is aggravated by the student’s allergy to scents claimed that a parochial school violated Section 504 when it failed to implement a mandatory scent-free policy. After receiving information from the student’s doctor, the school district implemented a voluntary scent-free room where the student’s teachers and classmates voluntarily refrained from wearing scents. Subsequently, the parent, with the support of her doctor, requested a mandatory scent-free environment. The district determined that it was not possible to enforce a mandatory scent-free environment and such policy would conflict with the rights of other students and teachers. The school informed the parent that it would no longer be able to provide educational services for the student and the parent filed suit.

2. **Holding:** The court concluded that the district appropriately accommodated the student under Section 504 by implementing a
voluntary scent-free classroom, and that it would be impossible to enforce a mandatory scent-free policy. Additionally, the court noted that “there is nothing in the Act to suggest that Congress intended the nondisabled population at St. Peter to stop wearing scented products so that one child could avoid the possibility of an allergic reaction.”

E.  *Board of Educ. of the Onteora Central Sch. Dist.*, 27 IDELR 400 (SEA N.Y. 1997).

1. **Facts:** The parents of a tenth-grade student classified as hard of hearing and diagnosed with chronic rhinosinusitus, bronchial asthma, and recurrent respiratory infections filed a request for a due process hearing challenging the district’s placement recommendations. After obtaining information from the student’s doctors and conducting an assessment of the allergens and environmental safety of the school building, the district recommended the student receive some special education instruction and participate in regular education classes. The parent contended that the district should provide services to the student in her home to prevent her exposure to environmental allergens.

2. **Holding:** The hearing officer found in favor of the district with regard to her educational placement at the school as most of the student’s allergies were allergies to substances which occur in the inside and outside air. Thus, instruction at school did not pose any greater threat than the student’s instruction at home. However, the hearing officer directed the district to take steps such as requiring that students not wear makeup or perfume in school to minimize the student’s exposure to contaminants in the air. Unlike the school district in *Hunt*, this school district did not argue that it would be impossible to implement a policy prohibiting makeup or perfume in school. *See Hunt*, 26 IDELR 6 (D. Mo. 1997).

VI. **WHAT SHOULD A DISTRICT DO?**

A. **Remember that a health plan does not satisfy Section 504.** An individual health plan (“IHP”) generally does not meet the requirements of Section 504. The Office of Civil Rights (“OCR”) recently opined that school districts may not rely merely on an IHP for students with peanut allergies. Instead, the OCR held, severe peanut allergies require an evaluation under Section 504 and development of a Section 504 Plan. *See In re North Royalton (OH) City Sch. Dist.*, 52 IDELR 203 (OCR 2009).

1. In *North Royalton City Sch. Dist.*, 52 IDELR 203 (2009), the school provided the student with an Individual Health Plan and evaluated the
student for Section 504 services, but found him ineligible as he was performing well academically. The OCR ruled that the school district violated Section 504 and the ADAAA when it based its evaluation only on whether the impairment affected the student’s learning. The OCR stated that learning is only one of several major life activities to be considered under the ADAAA, and noted that the ADAAA expanded the major life activities to include major bodily functions, concentrating, communicating, and thinking. The OCR also instructed the district to notify all parents/guardians of students with Individual Health Plans or Emergency Allergy Plans of the district’s Section 504 procedures and of their right to request an evaluation under Section 504 if they believe their child’s medical impairment substantially limits one or more major life activities.

2. In *In re Bryan County (GA) Sch. Dist.*, 53 IDELR 131 (OCR 2009), the parent of a first-grade student with asthma and a severe peanut allergy notified school officials that the student would require medication while at school. The parent requested a Section 504 Plan, but the district did not complete an evaluation. Instead, the district developed a safety plan to accommodate the student’s medical conditions. The plan included the creation of a safety sheet detailing the steps to take if the student suffers an allergic reaction, a peanut-free lunch table in the cafeteria, and sanitation of the lunch table every day, classroom training on peanut allergies and hand washing techniques, and school staff were trained on how to administer an EpiPen.

The OCR stated that upon receiving notice that a student has a disability triggering Section 504 protection, the district should determine whether there is reason to believe the child, because of a disability, may need special education or related services and thus would need to be evaluated. If a school district (or charter school) does not believe that the child needs special education or related services, and refuses to evaluate the child, the district must notify parents of their due process rights. When the school district declined to perform an evaluation, it failed to notify the parents of their due process rights in violation of Section 504. Additionally, the OCR found that the district’s Section 504 procedures, only referencing accommodations as a means of providing an appropriate education, did not include an explanation that under Section 504 an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual needs of disabled students as adequately as the needs of nondisabled students are met.
B. **Adopt and implement appropriate policies.** MSBA Model Policy 516, Student Medication addresses the procedures for administrating medications to students generally. While the general rule is that all medications must not be retained by the student, the policy contains exceptions that are applicable in the context of severe allergies. Specifically, the policy excepts “medications administered as noted in a written agreement between the school district and the parent or as specified in an IEP (individualized education program), Section 504 Plan, or IHP (individual health plan).

C. **Follow Epinephrine Requirements.** Minnesota law requires school districts to develop and implement written health plans for all students who are prescribed nonsyringe injectors or epinephrine. See Minn. Stat. § 122A.2205, subd. 2. The written plan must either enable the student to possess the epinephrine or have immediate access to the epinephrine device at all times during the instructional day. This statute is incorporated into MSBA Model Policy No. 516.

D. **Be particularly wary of competing interests.** What should a school district do if the accommodations requested by one student are incompatible with the needs of another student?

a. Example 1: A student seeking to enroll in your district informs you that he has a service dog. Another enrolled student is severely allergic to dogs.

b. Example 2: A student with a severe peanut allergy requests a school-wide ban on peanut products. Another student has been diagnosed with OCD and will only eat peanut butter and jelly sandwiches (on white bread, with the crust removed, cut into quarters diagonally).

These can present the most difficult scenarios, as a school district is obligated to provide reasonable accommodations for the disabilities of all students. These situations are very fact intensive and should be evaluated on a case-by-case basis upon advice of counsel.

E. **Recommendations Concerning the Section 504 Accommodation Process**

a. Never say no to a request for an accommodation until all facts are obtained and considered.

b. When an accommodation request is received, staff should respond by immediately requesting more information from the parents regarding the student’s medical condition. The district should request that parents
provide them with consent for medical records and provide them any other relevant information.

c. In situations where the parents refuse to provide the district with sufficient information, but have indicated that a student’s allergic response is severe, the district may wish to hire its own medical consultant to review the student’s educational and medical records, to recommend accommodations, and to provide a response plan in the event the student has an allergic reaction.

d. If, based on all available information, it appears that the student has an impairment which substantially limits a major life activity, Section 504 then requires that an individual evaluation be conducted before any action is taken with respect to accommodations. The team needs to be made up of individuals knowledgeable about the student, the meaning of any evaluation data, and the placement options. The parents should be notified and invited to this meeting at which both eligibility and placement decisions are made.

e. It is important that the individuals on the student’s Section 504 team remember that there are no absolutes. However, in determining reasonable accommodations, there is a direct relationship between the severity of a student’s allergic response, the district’s ability to effectively control or mitigate that response, and the degree of the accommodation required.

f. The district should give the parents written notice of the placement decision and of their right to a hearing. Parents have the right to request a hearing, and to later sue in federal court, to contest the accommodations provided to their child. Parents can also file a complaint with the OCR and the MDHR if the parents disagree with the accommodations provided.

VII. CONCLUSION