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2.2 MILLION CHILDREN LEFT BEHIND: FOOD ALLERGIES IN AMERICAN SCHOOLS—A STUDY OF THE FOOD ALLERGY AND ANAPHYLAXIS MANAGEMENT ACT

*Heather Martone**

I. INTRODUCTION¹

* J.D. Candidate, Brooklyn Law School, 2011; B.A., English, College of the Holy Cross, 2008. I would like to thank my family and friends for their unconditional love and support, especially my mother and my grandparents. I would also like to thank the editors and staff of the *Journal of Law and Policy* and the professors at Brooklyn Law School who have assisted me throughout editing this Note. This Note is dedicated to my mother; words cannot express how much I appreciate your love, dedication, and encouragement. I also wish to recognize all those who suffer from food allergies and those who care for them. Here's to finding a cure so that someday we will no longer have to worry about reading food labels, eating at restaurants, and being exposed to cross contamination.

¹ In the interest of exposing bias, I have anaphylactic food allergies to nuts and shellfish. I was first diagnosed with a nut allergy when I was sixteen. I discovered that I was allergic to nuts after experiencing an anaphylactic reaction while eating biscotti. Three years later, while eating at a restaurant, I had another allergic reaction. I later found out I was also allergic to shellfish. That second reaction was due to cross contamination because I did not directly ingest any nuts or shellfish while at the restaurant. During the third week of my first year in law school I experienced another anaphylactic allergic reaction, which resulted in another ambulance trip to the emergency room and the first time I had to use my EpiPen. I had this reaction after eating a croissant that was processed in a bakery that used nuts, but the bakery did not list such a warning on the croissant's label. Through experiencing these allergic reactions I have learned that food allergy sufferers constantly have to remain vigilant while eating; I was inspired to write this Note about the Food Allergy and Anaphylaxis Management Act because such

Nine year old Nathan Walters, who had a severe peanut allergy, went on a school field trip with his class in 2001.² The school's cafeteria staff only prepared lunches containing peanut butter sandwiches, trail mix, and peanut butter cookies.³ Even though the school district's cafeteria staff, Nathan's teacher, and the field trip coordinators knew Nathan had a severe peanut allergy, the school did not provide any peanut-free lunches.⁴ Nathan saw the peanut butter in the sandwich and the peanuts in the trail mix, so he did not eat them.⁵ However, he did not realize the cookie contained peanut butter.⁶ After taking one bite of the cookie, Nathan felt ill.⁷ The chaperones did not want to end the trip for the other children, so they told Nathan to wait in the bus.⁸ Nathan's condition soon became life-threatening.⁹ He was administered epinephrine too late and died from a food allergy reaction.¹⁰

Food allergies are becoming more prevalent in Americans, especially in children.¹¹ To protect children from food allergy reactions that can be fatal,¹² there is a paramount need for

legislation will be a positive development in protecting those with food allergies.

² Allergy Moms, Food Allergy Initiative: Nathan Walters Leadership Award, <http://www.allergymoms.com/modules/wordpress/index.php?p=526> (last visited Mar. 3, 2010).

³ *Id.*

⁴ Center for Health and Health Care in Schools, A Look Back at an Allergic Child's Death, <http://www.healthinschools.org/News-Room/EJournals/Volume-7/Number-2/A-Look-Back-at-an-Allergic-Childs-Death.aspx> (last visited Mar. 3, 2010).

⁵ Allergy Moms, *supra* note 2.

⁶ *Id.*

⁷ Center for Health and Health Care in Schools, *supra* note 4.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Serena Gordon, *Child Food Allergies on the Rise in U.S.*, U.S. NEWS & WORLD REP., Nov. 16, 2009, available at <http://health.usnews.com/articles/health/healthday/2009/11/16/child-food-allergies-on-the-rise-in-us.html>.

¹² *See infra* Part III.A.

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Congress to pass uniform federal guidelines regarding food allergies in American public schools.¹³ There is currently no federal law establishing guidelines for food allergies in American schools.¹⁴ The Food Allergy and Anaphylaxis Management Act (“the Act”), which is a proposal that provides voluntary food allergy management guidelines in schools,¹⁵ is thus welcome legislation for the millions of children who are food allergy sufferers.¹⁶

This Note will argue that the Act should be ratified, but it should be altered so that every public elementary school that has at least one student with anaphylactic food allergies is mandated to follow the Act’s guidelines.¹⁷ For such schools, receiving a

¹³ 155 CONG. REC. S2369 (daily ed. Feb. 23, 2009) (statement of Sen. Dodd).

¹⁴ *Id.* at S2368.

¹⁵ Food Allergy and Anaphylaxis Management Act of 2009, S. 456, 111th Cong. (2009).

¹⁶ Food Allergy & Anaphylaxis Network, Food Allergy Q&A for Reporters, <http://www.foodallergy.org/downloads/MediaQA.pdf> (last visited Mar. 5, 2010) [hereinafter FAAN, Allergy Q&A].

¹⁷ The author suggests that public elementary schools that have at least one student with anaphylactic food allergies should be mandated to follow the Act’s guidelines. However, such a school could only be “mandated” to follow the Act if part of its federal education funds could be conditioned on ratifying the Act, since public education is controlled by the states. U.S. Department of Education, 10 Facts about K–12 Education Funding, <http://www2.ed.gov/about/overview/fed/10facts/10facts.pdf> (last visited Mar. 5, 2010) [hereinafter DOE, 10 Facts]. In *South Dakota v. Dole*, the Supreme Court held that Congress can use its spending power to condition the states’ receipt of federal funds on their adoption of certain legislation. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987). However, Congress must use its spending power in “pursuit of the general welfare,” and the conditions to receive federal funds must be clear and unambiguous, related to a federal interest, and cannot encourage the states to engage in unconstitutional acts. *Id.* at 207–08, 210. Assuming the Act’s purpose and conditions meet the requirements of *Dole*, Congress could “mandate” public elementary schools that have at least one student with anaphylactic food allergies to follow the Act by conditioning part of their federal education funds on adopting the Act. A school that is “mandated” to follow the Act would retain all of its federal education funding and would also gain the grants that accompany the Food Allergy and Anaphylaxis Management Act by ratifying the Act. However, if

grant under the Act should also be compulsory. Part II gives an overview of the Act, noting its various provisions. Part III explains that the Act is needed to protect children with food allergies because there is a medical necessity for the Act and no federal law currently protects food allergy sufferers. Part IV suggests that the Act can be made more effective by mandating public elementary schools to follow the Act if they enroll at least one student with anaphylactic food allergies.

II. AN OVERVIEW OF THE FOOD ALLERGY AND ANAPHYLAXIS MANAGEMENT ACT

On February 23, 2009, Senator Christopher Dodd of Connecticut introduced the Food Allergy and Anaphylaxis Management Act of 2009 into the Senate as S. 456.¹⁸ The Act authorizes the Secretary of Health and Human Services (“the Secretary”) and the Secretary of Education to establish voluntary guidelines in creating plans “to manage the risk of food allergy and anaphylaxis in schools and early childhood education programs”¹⁹ and to initiate “school-based food allergy management grants.”²⁰

S. 456 is the latest effort²¹ in the Senate to pass a version of the Act, dating back to 2005.²² In fact, both the House of Representatives and the Senate have attempted to pass a form of the Act over the past three years.²³ Only the House of Representatives has passed a version of the Act, but the Act did

a school that is “mandated” to follow the Act chooses not to follow it, it will lose a portion of its federal education funding, and it will also not be able to receive the Act’s grants. *See* DOE, 10 Facts, *supra*. For purposes of this Note, the author assumes that this funding scheme would be constitutionally sound.

¹⁸ S. 456.

¹⁹ *Id.*

²⁰ *Id.*

²¹ This is as of February 19, 2010.

²² *See* S. 1232, 110th Cong. (2007); H.R. 2063, 110th Cong. (2007); H.R. 6290, 109th Cong. (2006); S. 3980, 109th Cong. (2006); H.R. 4063, 109th Cong. (2005).

²³ *Id.*

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not become law because the Senate did not ratify that version of the Act.²⁴ However, all the bills proposed by both Houses have been substantially the same, with a few differences.²⁵

As embodied in S. 456,²⁶ the Act proposes that voluntary food allergy and anaphylaxis management guidelines should be established.²⁷ The Secretary, in conjunction with the Secretary of Education, is to establish voluntary guidelines for schools²⁸ and early childhood programs²⁹ (collectively, “educational

²⁴ H.R. 2063.

²⁵ With the exception of the 111th Congress’ versions of the Act, each version has contained a “findings” section about food allergies, anaphylactic reactions, and the lack of federal food allergy guidelines in schools. *See* S. 1232 § 2; H.R. 2063 § 2; H.R. 6290 § 2; S. 3980 § 2; H.R. 4063 § 2. The other key difference between the bills concerns whether they provide grants to local educational agencies that ratify the Act and for how long they will provide these grants. Two previous versions of the bill did not include the grants. *See* H.R. 2063; H.R. 4063. H.R. 6290 and S. 3980 provided for grants that would last for less than one year or for a maximum of two years. H.R. 6290 § 5(h); S. 3980 § 5(h). S. 1232 has the same grant scheme as the bills from the 111th Congress; these bills provide for grants for a maximum of two years. *Compare* S. 1232 § 5(d) and Food Allergy and Anaphylaxis Management Act of 2009, H.R. 1378, 111th Cong. § 4(d) (2009); S. 456 § 4(d). Notably, the only version to pass either house of Congress—H.R. 2063, which passed the House—did not provide for grants. H.R. 2063. The bills in the 111th Congress, H.R. 1378 and S. 456, are identical. *Compare* H.R. 1378 and S. 456.

²⁶ This Note will refer specifically to S. 456 because the Senate has yet to pass a version of the Act in any of its sessions. *See* S. 1232. Additionally, S. 456 provides grants for following the Act. S. 456 § 4. The grants are vital to ensuring that the Act accomplishes its purpose of providing food allergy and anaphylaxis management plans in schools since these grants provide financial support to realistically implement the Act’s guidelines. *See infra* Parts IV.A.1, IV.D.

²⁷ S. 456 § 3(a)(i)(A).

²⁸ The Act defines “school” as a public kindergarten, elementary, or secondary school. *Id.* § 2(3).

²⁹ The Act defines an “early childhood education program” as a Head Start or Early Head Start program (as defined by the Head Start Act in 42 U.S.C. § 9831 et seq.), a child care program or school that is licensed or regulated by the State, or a prekindergarten program that is licensed by the State and accommodates children from birth through kindergarten age. *Id.* § 2(1).

institutions”) to use in managing food allergies and anaphylaxis.³⁰ The Act directs the Secretary to establish these voluntary guidelines no later than one year after the legislation’s enactment and to distribute the guidelines to schools and early childhood programs.³¹

The Secretary’s guidelines must address certain topics, which the Secretary may supplement.³² The first category that the guidelines must focus on is parental obligations.³³ A parent must provide her child’s educational institution with documents from her child’s doctor before the start of every school year.³⁴ The documents should: explain that the child has a food allergy and is anaphylactic (if applicable);³⁵ identify the foods to which the child is allergic;³⁶ describe the child’s history of anaphylaxis (if applicable);³⁷ list which medication(s) the child should be given in the event of an anaphylactic reaction (if applicable);³⁸ provide emergency instructions in case the child experiences an adverse reaction to food;³⁹ detail symptoms the child experiences when she has a food allergy reaction;⁴⁰ and note whether the child can administer her own medication in the event that she has a negative reaction to food.⁴¹ Before the start of every school year, the parent of a child with food allergies must also provide the educational institution with a list of meals that the educational institution may serve the child.⁴²

The guidelines also require the Secretary to create individual food allergy management plans for each child who has

³⁰ *Id.* § 3(a)(1)(A).

³¹ *Id.* § 3(a)(1).

³² *Id.* § 3(b).

³³ *Id.* § 3(b)(1).

³⁴ *Id.* § 3(b)(1)(A).

³⁵ *Id.* § 3(b)(1)(A)(i).

³⁶ *Id.* § 3(b)(1)(A)(ii).

³⁷ *Id.* § 3(b)(1)(A)(iii).

³⁸ *Id.* § 3(b)(1)(A)(iv).

³⁹ *Id.* § 3(b)(1)(A)(v).

⁴⁰ *Id.* § 3(b)(1)(A)(vi).

⁴¹ *Id.* § 3(b)(1)(A)(vii).

⁴² *Id.* § 3(b)(1)(B).

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anaphylactic food allergies.⁴³ For each child who experiences anaphylaxis when she is exposed to a trigger food, a food allergy management plan should be created by discussing the child's medical needs with her parent and by then customizing a plan according to the child's needs.⁴⁴ This plan should include how the child will administer her own medication in response to an anaphylactic reaction, if the child is capable of administering her own medication⁴⁵ and if State law does not prohibit the child from dispensing her medication.⁴⁶

The Secretary's guidelines must focus as well on: communication procedures between educational institutions and emergency medical services;⁴⁷ shared plans of educational institutions and emergency medical services for a response to a food allergy reaction;⁴⁸ plans to prevent exposure to trigger foods in common areas in educational institutions, such as classrooms and cafeterias;⁴⁹ distribution of information about life-threatening food allergies to educational institutions' staff, children, and parents;⁵⁰ "food allergy management training" for educational institution staff who often interact with children who have life-threatening food allergies;⁵¹ and approval and training of educational institution staff to dispense epinephrine if the school nurse is unavailable.⁵²

Additionally, the Act calls for guidelines to address: how educational institution staff can quickly obtain epinephrine when the nurse is unavailable;⁵³ food allergy management plans that focus on how to respond to an anaphylactic reaction that occurs

⁴³ *Id.* § 3(b)(2).

⁴⁴ *Id.* The author uses the phrase "trigger food" to refer to the food that causes an allergic reaction in a person that has food allergies.

⁴⁵ *Id.* § 3(b)(2)(A).

⁴⁶ *Id.* § 3(b)(2)(B).

⁴⁷ *Id.* § 3(b)(3).

⁴⁸ *Id.*

⁴⁹ *Id.* § 3(b)(4).

⁵⁰ *Id.* § 3(b)(5).

⁵¹ *Id.* § 3(b)(6).

⁵² *Id.* § 3(b)(7).

⁵³ *Id.* § 3(b)(8).

outside the normal educational setting, such as a reaction that occurs during an extracurricular activity, before or after school, on a field trip, or during weekend school programs;⁵⁴ and procedures for notating when a child is given epinephrine and for notifying the child's parents of an epinephrine administration.⁵⁵ The guidelines should also address any other topic the Secretary deems necessary for managing food allergies and the risk of anaphylaxis in educational institutions.⁵⁶

Section Four of the Act discusses food allergy management grants.⁵⁷ The Secretary is authorized to award grants to educational agencies that implement the voluntary food allergy management guidelines.⁵⁸ Before an educational agency can receive a grant, it must be approved through an application process.⁵⁹

⁵⁴ *Id.* § 3(b)(9).

⁵⁵ *Id.* § 3(b)(10).

⁵⁶ *Id.* § 3(b)(11). Section three of the Act also states that nothing in the Act or in the Secretary's guidelines will preempt state law. *Id.* § 3(c). The legislation's drafters stated that this provision also applies to state laws regarding student self-administration of medication in response to anaphylaxis. *Id.* Thus, if a state law prohibits students from administering medication to themselves to counteract anaphylaxis, students will not be allowed to administer such medication to themselves, *see id.*, regardless of the Act's provision allowing medication to be self-administered. *See id.* § 3(b)(2).

⁵⁷ *Id.* § 4.

⁵⁸ *Id.* § 4(a).

⁵⁹ *Id.* § 4(b)(1). The application process requires the educational agency to submit an application to the Secretary describing that the agency has developed a food allergy and anaphylaxis management plan that conforms with the legislation's guidelines. *Id.* § 4(b)(2)(A). The agency must also explain how it will use the grant money, *id.* § 4(b)(2)(B), including how the agency's individual schools will follow the Act's guidelines, *id.* § 4(b)(2)(B)(i), how the agency will notify students and their parents of the guidelines, *id.* § 4(b)(2)(B)(ii), how educational institution staff will be notified of and trained in accordance with the guidelines, *id.* § 4(b)(2)(B)(iii), and other actions that the Secretary implements. *Id.* § 4(b)(2)(B)(iv). The agency's application must detail as well how the grant will be spent, *id.* § 4(b)(2)(C), how the food allergy and anaphylaxis management plan and grant will be supervised, *id.* § 4(b)(2)(D), and how the agency will provide required information to the Secretary for periodic evaluations. *Id.*

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The Act also defines how its grants may be used.⁶⁰ The educational agency receiving a grant may use it: to purchase supplies for carrying out the Act's guidelines, such as epinephrine and disposable wet wipes;⁶¹ to train educational personnel in food allergy management;⁶² to institute programs that educate students about food allergies and their management;⁶³ to involve parents;⁶⁴ and to fund other activities that the guidelines allow.⁶⁵

There are several limitations on obtaining one of the Act's grants. A grant may be awarded to an educational agency ("agency") for no longer than two years.⁶⁶ An agency may only receive a grant for a second year if the Secretary determines that the agency's program was successful in its first year.⁶⁷ After receiving a grant for two years, an educational agency is not eligible for further grant funds.⁶⁸ The legislation also states that the maximum grant an agency can receive is \$50,000 per year.⁶⁹ Grant funds are awarded by giving priority to agencies that have the most children, as counted under the Elementary and Secondary Education Act of 1965.⁷⁰ The Act's grants are also subject to matching funds.⁷¹ An agency is not eligible to receive a grant unless the agency contributes funds equal to at least

§ 4(b)(2)(E).

⁶⁰ *Id.* § 4(c).

⁶¹ *Id.* § 4(c)(1).

⁶² *Id.* § 4(c)(2).

⁶³ *Id.* § 4(c)(3).

⁶⁴ *Id.* § 4(c)(4).

⁶⁵ *Id.* § 4(c)(5).

⁶⁶ *Id.* § 4(d).

⁶⁷ *Id.*

⁶⁸ *Id.* § 4(e).

⁶⁹ *Id.* § 4(f).

⁷⁰ *Id.* § 4(g). The children counted under the Elementary and Secondary Education Act of 1965 include the total from adding together children aged five to seventeen, inclusive, in an agency's school district who come from families below the poverty level, institutions for neglected and delinquent children, and families above the poverty level. Elementary and Secondary Education Act of 1965, 20 U.S.C.A. § 6333(c) (West 2002).

⁷¹ S. 456 § 4(h).

twenty-five percent of the grant amount to carry out the Act's guidelines.⁷² These funds cannot be Federal funds, and they should come from the agency directly or from public or private donations.⁷³ The non-Federal funds "may be cash or in kind, including plant, equipment, or services."⁷⁴

The grants come with several conditions as well. No more than two percent of a grant received under the Act can be used for administrative costs to implement the Secretary's guidelines.⁷⁵ At the end of the grant period, the agency must inform the Secretary how it used the grant and how it put the food allergy and anaphylaxis management guidelines into practice.⁷⁶ The Act notes that the grant monies shall "supplement, and not supplant, non-Federal funds and any other Federal funds available to carry out the activities . . ."⁷⁷ The amount of money appropriated to support the legislation is \$30,000,000 for the 2010 fiscal year.⁷⁸ The amount for the following four fiscal years will be an amount that is deemed to be necessary.⁷⁹

The Act's last section states that the legislation is voluntary.⁸⁰ This means that an agency is not required to adopt the Act's guidelines.⁸¹ However, the Secretary may require an agency to adopt the guidelines to receive a grant under the Act.⁸²

III. WHY THE ACT IS NECESSARY

A food allergy is a serious medical condition⁸³ that requires

⁷² *Id.* § 4(h)(1).

⁷³ *Id.*

⁷⁴ *Id.* § 4(h)(2).

⁷⁵ *Id.* § 4(i).

⁷⁶ *Id.* § 4(j).

⁷⁷ *Id.* § 4(k).

⁷⁸ *Id.* § 4(l).

⁷⁹ *Id.*

⁸⁰ *Id.* § 5(a).

⁸¹ *Id.*

⁸² *Id.* § 5(b).

⁸³ *See infra* Part III.A.

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accommodations.⁸⁴ Yet, there currently are no uniform federal food allergy guidelines in American schools.⁸⁵ Because the Americans with Disabilities Act does not protect food allergy sufferers, a separate law is needed to protect those with food allergies.⁸⁶ Therefore, the Act is necessary to ensure that students with food allergies are safe while at school.

A. There Is a Medical Necessity for the Act

Because a food allergy is a serious immune system reaction,⁸⁷ school children with such allergies need safeguards to protect their well-being while at school. An allergic reaction to food occurs because a person's immune system mistakenly believes that food is harmful to the person's body.⁸⁸ Normally, the human body produces antibodies to combat things that are harmful, such as disease.⁸⁹ When a person has a food allergy, her body produces immunoglobulin E ("IgE") antibodies in response to a food because the person's body believes the food is a diseased invader.⁹⁰ When the IgE molecules bind to the trigger food, the body releases chemical messengers.⁹¹ The immune system normally responds to a diseased invader by

⁸⁴ To avoid a potentially serious reaction, a person with food allergies cannot eat the food to which she is allergic. *See infra* notes 95–111 and accompanying text. A person with food allergies also may not be able to eat foods that come into contact with an allergen. *See infra* notes 116–18 and accompanying text.

⁸⁵ 155 CONG. REC. S2368 (daily ed. Feb. 23, 2009) (statement of Sen. Dodd).

⁸⁶ *See Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999).

⁸⁷ *See infra* notes 88–109 and accompanying text.

⁸⁸ ELAINE LANDAU, ALLERGIES: UNDERSTANDING ILLNESS 14 (1994).

⁸⁹ *Id.* Antibodies normally attach to antigens, or diseases, within the body. JONATHAN BROSTOFF & LINDA GAMLIN, FOOD ALLERGIES AND FOOD INTOLERANCE: THE COMPLETE GUIDE TO THEIR IDENTIFICATION AND TREATMENT 8 (Healing Arts Press 2000) (1989). This stimulates the immune system to attack the invader—the disease. *Id.*

⁹⁰ STUART H. YOUNG ET AL., ALLERGIES: THE COMPLETE GUIDE TO DIAGNOSIS, TREATMENT, AND DAILY MANAGEMENT 3 (Plume 1999) (1992).

⁹¹ BROSTOFF & GAMLIN, *supra* note 89, at 9.

releasing such chemicals; however, the body releases chemicals here in response to ingesting a certain food, and an allergic reaction occurs.⁹² The trigger food that causes this reaction is called an allergen.⁹³ This reaction can occur even if the person only consumes a very small portion of the food to which she is allergic.⁹⁴

After a person eats a trigger food, the type of allergic reaction she may experience will vary.⁹⁵ A reaction can occur within minutes or up to about two hours after consuming the trigger food.⁹⁶ A typical food allergy reaction may consist of skin, gastrointestinal, or respiratory symptoms.⁹⁷ Skin symptoms may include hives, itching, rash, or swelling.⁹⁸ Swelling may occur not only of the face but also of the lips, tongue, throat, or other body parts.⁹⁹ Gastrointestinal symptoms consist of abdominal pain, vomiting, diarrhea, or nausea.¹⁰⁰ Respiratory symptoms include trouble breathing, wheezing, or nasal congestion.¹⁰¹ Additionally, a person who is experiencing an allergic reaction to food may become dizzy, feel light-headed, or may faint.¹⁰²

⁹² *Id.* at 8.

⁹³ YOUNG ET AL., *supra* note 90, at 5.

⁹⁴ American Academy of Allergy Asthma & Immunology, Tips to Remember: Food Allergy, <http://www.aaaai.org/patients/publicedmat/tips/foodallergy.stm> (last visited Mar. 6, 2010) [hereinafter AAAAI, Food Allergy Tips].

⁹⁵ *See id.*

⁹⁶ Food Allergy & Anaphylaxis Network, About Food Allergy, <http://www.foodallergy.org/section/about-food-allergy> (last visited Mar. 6, 2010) [hereinafter FAAN, About Food Allergy].

⁹⁷ AAAAI, Food Allergy Tips, *supra* note 94.

⁹⁸ *Id.*

⁹⁹ U.S. Food & Drug Administration, *Food Allergies: Reducing the Risks*, CONSUMER HEALTH INFO. (U.S. Food & Drug Admin., Wash. D.C.), Jan. 22, 2009, at 1, <http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM143375.pdf> [hereinafter FDA, *Reducing the Risks*].

¹⁰⁰ JUNE ENGEL, THE COMPLETE ALLERGY BOOK: EVERYTHING YOU NEED TO KNOW 36 (1997).

¹⁰¹ FDA, *Reducing the Risks*, *supra* note 99, at 1.

¹⁰² *Id.*

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A person with food allergies can also experience a severe reaction referred to as anaphylaxis.¹⁰³ After eating a trigger food, a person with anaphylactic food allergies may have difficulty breathing, feel dizzy, lose consciousness, or die.¹⁰⁴ The Food and Drug Administration (“FDA”) describes the specific symptoms of anaphylaxis as “constricted airways in the lungs[,] severe lowering of blood pressure and shock (‘anaphylactic shock’) [, and] suffocation by swelling of the throat.”¹⁰⁵ An anaphylactic reaction occurs rapidly and is treated with an epinephrine injection, which is a shot of adrenalin.¹⁰⁶ A person who has anaphylactic food allergies typically carries an EpiPen, which is an auto-injector of epinephrine that a person can administer to herself when she is having a reaction.¹⁰⁷ Upon administering an EpiPen, the affected person should immediately seek emergency medical treatment because an EpiPen only temporarily reverses an allergic reaction.¹⁰⁸ According to the FDA, anaphylactic reactions to foods result in approximately 30,000 emergency room visits, 2,000 hospitalizations, and 150 deaths per year in the United States.¹⁰⁹

The best way to prevent such reactions is to avoid the trigger food¹¹⁰ because there currently is no cure for food allergies.¹¹¹

¹⁰³ JANICE VICKERSTAFF JONEJA, DEALING WITH FOOD ALLERGIES IN BABIES AND CHILDREN 277 (2007).

¹⁰⁴ AAAAI, Food Allergy Tips, *supra* note 94.

¹⁰⁵ U.S. Food & Drug Administration, *Food Allergies: What You Need to Know*, FOOD FACTS (U.S. Food & Drug Admin., Wash. D.C.), Feb. 2007, at 2, <http://www.fda.gov/downloads/Food/ResourcesForYou/Consumers/UCM079428.pdf> [hereinafter FDA, *What You Need to Know*].

¹⁰⁶ AAAAI, Food Allergy Tips, *supra* note 94.

¹⁰⁷ See EpiPen, About EpiPen Auto-Injector, <http://www.epipen.com/page/about-epipen-auto-injector-index> (last visited Mar. 6, 2010).

¹⁰⁸ *Id.* Following an anaphylactic reaction, a doctor will usually prescribe steroids for the patient to take for a short period of time. See U.S. News & World Rep., Steroids, http://health.usnews.com/usnews/health/allergy/food_allergies/food.treat.drugs.steroids.htm (last visited Mar. 6, 2010). Steroids are an anti-inflammatory medication that can reduce the inflammation that results after an anaphylactic food allergy reaction. *Id.*

¹⁰⁹ FDA, *What You Need to Know*, *supra* note 105, at 2.

¹¹⁰ AAAAI, Food Allergy Tips, *supra* note 94.

The Food Allergen Labeling and Consumer Protection Act of 2004 (“FALCPA”) has made it easier for food allergy sufferers to avoid allergens.¹¹² FALCPA, which applies to all food labeled on or after January 1, 2006, requires manufacturers to “clearly identify the source of all ingredients that are—or are derived from—the eight most common food allergens.”¹¹³ The eight common food allergens are milk, eggs, fish, crustacean shellfish, tree nuts, peanuts, wheat, and soybeans.¹¹⁴

However, FALCPA does not mandate manufacturers to include on their labels common allergens that may be present in their foods as a result of cross contamination.¹¹⁵ “Cross contamination refers to a food being inadvertently contaminated with food proteins other than those listed on the food label during the course of its being prepared, stored or served. These traces of allergenic proteins can cause reactions in individuals having food allergies to those proteins.”¹¹⁶ For example, cross contamination occurs when a factory produces food that contains nuts on the same equipment that it uses to produce food that does not contain nuts.¹¹⁷ Thus, the possibility of experiencing an allergic reaction from consuming a trigger food is still present even with complete avoidance of the allergen due to the possibility of cross contamination¹¹⁸ and other accidental ingestion of the trigger food.¹¹⁹

FALCPA also does not address the meaning and format of precautionary statements such as, “may contain [allergen X],”

¹¹¹ FAAN, About Food Allergy, *supra* note 96.

¹¹² FDA, *What You Need to Know*, *supra* note 105, at 1.

¹¹³ *Id.*; *see also* Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 343(w) (West 2010).

¹¹⁴ Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 321(qq)(1) (West 2010).

¹¹⁵ Kids with Food Allergies, Cross contamination of Foods with Allergenic Ingredients, <http://www.kidswithfoodallergies.org/resourcespre.php?id=7> (last visited Mar. 6, 2010).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ FDA, *Reducing the Risks*, *supra* note 99, at 2.

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or “processed in a facility that also processes [allergen X].”¹²⁰ Therefore, the current food allergy labeling laws may be insufficient to aid food allergy patients in avoiding their trigger foods.

Because food allergies in the United States are increasing,¹²¹ there is an even greater need for the Act. One in twenty-five Americans, or 4% of the American population, has food allergies.¹²² In total, more than 12 million Americans are affected by food allergies.¹²³ It is particularly troubling that food allergies are more common in young children;¹²⁴ in fact, children are developing food allergies at a rate about three or four times greater than adults.¹²⁵ Of the more than 12 million Americans who have food allergies, about 2.2 million are school-aged children.¹²⁶ Moreover, about 6% of children under the age of

¹²⁰ Laura E. Derr, *When Food is Poison: The History, Consequences, and Limitations of the Food Allergen Labeling and Consumer Protection Act of 2004*, 61 FOOD & DRUG L.J. 65, 151 (2006).

¹²¹ Kelly Brewington, *Food Allergies Among Children on the Rise*, BALTIMORE SUN, Nov. 16, 2009, available at http://weblogs.baltimoresun.com/health/2009/11/food_allergies_children_pediat.html. Scientists currently do not know what is causing the increase in food allergies. FAAN, Allergy Q&A, *supra* note 16. However, “[o]ne theory holds that because children in our culture are exposed to fewer germs than our bodies are used to dealing with, the immune system, deprived of its customary full-time germ-fighting job, misidentifies certain foods as harmful.” *Id.*

¹²² Rosemary Black, *Killer in Aisle 4*, N.Y. DAILY NEWS, Oct. 21, 2008, available at http://www.nydailynews.com/lifestyle/health/2008/10/21/2008-10-1_killer_in_aisle_4_deadly_food_allergies_.html.

¹²³ Allergy and Asthma Foundation of America, Greater Kansas City Chapter, Statistics, <http://www.aafakc.org/statistics.html> (last visited Mar. 6, 2010). The only reliable statistics for particular food allergies are for seafood and peanuts or tree nuts. *See* FAAN, Allergy Q&A, *supra* note 16. In the United States, about 6.5 million people have seafood allergies and more than 3 million people have peanut allergies, tree nut allergies, or both. American Academy of Allergy Asthma & Immunology, Allergy Statistics, <http://www.aaaai.org/media/statistics/allergy-statistics.asp> (last visited Mar. 6, 2010) [hereinafter AAAAI, Statistics].

¹²⁴ FAAN, Allergy Q&A, *supra* note 16.

¹²⁵ YOUNG ET AL., *supra* note 90, at 92.

¹²⁶ FAAN, Allergy Q&A, *supra* note 16.

three have food allergies.¹²⁷

A food allergy is a serious medical condition¹²⁸ that affects millions of Americans.¹²⁹ Food allergy sufferers can only prevent experiencing an allergic reaction by avoiding their trigger food,¹³⁰ but this is not always possible because of cross contamination,¹³¹ insufficient food labeling,¹³² and accidental ingestion of allergens.¹³³ Therefore, the Act is necessary to keep children with food allergies safe while they are at school.

B. Food Allergies Are Currently Not a Disability Under the Americans with Disabilities Act

Because of the severity of food allergy reactions and the increased prevalence of food allergies among school-aged children, legal remedies should be implemented to protect such children.¹³⁴ However, there are no federal guidelines that address food allergies and their reactions in schools.¹³⁵ Although the Americans with Disabilities Act (“ADA”) could potentially require accommodations for food allergy sufferers, the Eighth Circuit has questioned whether the ADA applies to people with food allergies.¹³⁶ Thus, the Act is needed to protect children with food allergies while they are at school.

1. Americans with Disabilities Act

The ADA provides civil rights protection to people who are

¹²⁷ AAAAI, Statistics, *supra* note 123.

¹²⁸ See *supra* Part III.A.

¹²⁹ AAAAI, Statistics, *supra* note 123.

¹³⁰ AAAAI, Food Allergy Tips, *supra* note 94.

¹³¹ See *supra* notes 116–18 and accompanying text.

¹³² See Derr, *supra* note 120, at 151.

¹³³ See FDA, *Reducing the Risks*, *supra* note 99.

¹³⁴ 155 CONG. REC. S2369 (daily ed. Feb. 23, 2009) (statement of Sen. Dodd).

¹³⁵ *Id.* at S2368.

¹³⁶ See *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999).

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disabled¹³⁷ by securing them equal opportunities in “public accommodations, employment, transportation, State and local government services, and telecommunications.”¹³⁸ The Office of Civil Rights within the Department of Education ensures Title II of the ADA is followed in schools.¹³⁹ Public schools are subject to the ADA because they are public entities within Title II of the ADA.¹⁴⁰ Under Title II, state and local governments must provide people with disabilities equal access to their programs, such as public education.¹⁴¹ According to the ADA, public accommodations cannot discriminate against individuals.¹⁴² The general rule is that, “[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”¹⁴³ To comply with the ADA, a public accommodation may not deny a person a good or accommodations because of her disability.¹⁴⁴ A public entity may also not provide a good or accommodation to a disabled person

¹³⁷ A “disability” under the ADA is “a physical or mental impairment that substantially limits one or more major life activities of such individual,” Americans with Disabilities Act, 42 U.S.C.A. § 12102(1)(A) (West 2009), “a record of such an impairment,” *id.* § 12102(1)(B), or “being regarded as having such an impairment,” *id.* § 12102(1)(C).

¹³⁸ U.S. Department of Justice Civil Rights Division, Americans with Disabilities Act Questions and Answers, <http://www.ada.gov/q%26aeng02.htm> (last visited Mar. 6, 2010).

¹³⁹ U.S. Department of Education, OCR Functional Statements, http://www.ed.gov/about/offices/list/om/fs_po/ocr/intro.html (last visited Mar. 6, 2010).

¹⁴⁰ Press Release, Deborah Leuchovius, Pacer Center, ADA Q&A: Back to School (2003), *available at* <http://www.pacer.org/parent/php/PHP-c51c.pdf> (last visited Mar. 6, 2010).

¹⁴¹ U.S. Department of Justice Civil Rights Division, A Guide to Disability Rights Laws, <http://www.ada.gov/cguide.htm> (last visited Mar. 6, 2010).

¹⁴² Americans with Disabilities Act, 42 U.S.C.A. § 12182(a) (West 2009).

¹⁴³ *Id.*

¹⁴⁴ *Id.* § 12182(b)(1)(A)(i).

if that good or accommodation is not provided to a person without a disability,¹⁴⁵ unless providing such a benefit is essential to ensuring that the disabled person receives equal access to a benefit that those who are not disabled receive.¹⁴⁶ A disabled person is entitled as well to receive services in an integrated setting with non-disabled people.¹⁴⁷ Under the ADA, it is considered discrimination to exclude a person who has a disability, unless inclusion would alter the “good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden.”¹⁴⁸

2. Food Allergies Under the Americans with Disabilities Act

The sole case that has proceeded to trial and addressed whether a food allergy is a disability under the ADA¹⁴⁹ is *Land*

¹⁴⁵ *Id.* § 12182(b)(1)(A)(ii).

¹⁴⁶ *Id.* § 12182(b)(1)(A)(iii).

¹⁴⁷ *Id.* § 12182(b)(1)(B).

¹⁴⁸ *Id.* § 12182(b)(2)(A)(iii).

¹⁴⁹ Other cases have been initiated that allege ADA violations for failing to make accommodations for people with food allergies; however, these cases have not directly addressed whether a food allergy is a disability under the ADA. *See* *Reed v. Paetec Commc'ns*, No. 08-CV-14034, 2009 U.S. Dist. LEXIS 68250 (E.D. Mich. Aug. 5, 2009); *Vartinelli v. Stapleton*, No. 07-CV-12388, 2009 U.S. Dist. LEXIS 88553 (E.D. Mich. Aug. 3, 2009); *Kiskaden v. Haas*, No. 06-CV-P141, 2007 U.S. Dist. LEXIS 56963 (W.D. Ky. Aug. 2, 2007); *Kropp v. Me. Sch. Admin. Union # 44*, No. 06-CV-81, 2007 U.S. Dist. LEXIS 11648 (D. Me. Feb. 16, 2007); *Patten v. Town of York*, No. 06-CV-203, 2006 U.S. Dist. LEXIS 94984 (D. Me. Dec. 12, 2006); *Crowe v. Williams*, No. 06-CV-1380, 2006 U.S. Dist. LEXIS 90472 (D. Or. Dec. 12, 2006); *Galenbeck v. Newman & Newman, Inc.*, No. 02-CV-6278, 2004 U.S. Dist. LEXIS 9249 (D. Or. May 14, 2004). Additionally, there has been a settlement regarding food allergies under the ADA with a private school, La Petite Academy. U.S. Dep't of Justice, Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and La Petite Academy, Inc. (1997). In the settlement, the parties acknowledged that the children involved were “persons with disabilities within the meaning of 42 U.S.C. § 12102(2) and 28 C.F.R. § 36.104” (the ADA). *Id.* For further analysis of the La Petite settlement, see

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*v. Baptist Med. Ctr.*¹⁵⁰ *Land* is an Eighth Circuit case about a day care center that refused attendance to a child with a peanut allergy.¹⁵¹ The plaintiff, who was the allergic child's mother, argued that her daughter's food allergy fit within the ADA's disability definitions.¹⁵² A disability under the ADA is "a physical or mental impairment that substantially limits one or more major life activities of such individual,"¹⁵³ "a record of such an impairment,"¹⁵⁴ or "being regarded as having such an impairment."¹⁵⁵ If a person has an impairment that fits within any of these disability categories, she is considered disabled under the ADA.¹⁵⁶ The plaintiff argued that her daughter was disabled under all three of the ADA's disability definitions.¹⁵⁷

Under the ADA's first definition of a "disability,"¹⁵⁸ the plaintiff argued that her daughter's allergy "is a physical impairment that substantially limits her major life activities of eating and breathing."¹⁵⁹ Although agreeing that the child's allergy fit within the ADA's definition of "a physiological disorder affecting body systems such as digestion and respiration,"¹⁶⁰ and that "eating and breathing are major life activities within the contemplation of the ADA,"¹⁶¹ the Court

Jonathan Bridges, Note, *Suing for Peanuts*, 75 NOTRE DAME L. REV. 1269, 1286 (2000).

¹⁵⁰ *Land v. Baptist Med. Ctr.*, 164 F.3d 423 (8th Cir. 1999). For a further study of *Land v. Baptist Med. Ctr.* under the ADA, see Bridges, *supra* note 149.

¹⁵¹ *Land*, 164 F.3d at 424.

¹⁵² *Id.*

¹⁵³ Americans with Disabilities Act, 42 U.S.C.A. § 12102(1)(A) (West 2009).

¹⁵⁴ *Id.* § 12102(1)(B).

¹⁵⁵ *Id.* § 12102(1)(C).

¹⁵⁶ *See id.* § 12102(1).

¹⁵⁷ *Land*, 164 F.3d at 424.

¹⁵⁸ The ADA's first definition of a "disability" is "a physical or mental impairment that substantially limits one or more major life activities of such individual." 42 U.S.C. § 12102(1)(A).

¹⁵⁹ *Land*, 164 F.3d at 424.

¹⁶⁰ *Id.* (citing 28 C.F.R. § 36.104(1)(i)).

¹⁶¹ *Id.* (citing 28 C.F.R. § 36.104(2)).

concluded that the child's allergy did not "substantially limit[] her ability to eat or breathe."¹⁶² Therefore, the Court ruled that the child's food allergy was not a disability under the ADA's first definition of a disability.¹⁶³ The Court came to this conclusion because although the child could not eat peanuts, she was able to consume other foods without suffering an allergic reaction.¹⁶⁴ In support of its reasoning, the Court cited *Zirpel v. Toshiba*,¹⁶⁵ in which a person who suffered from panic attacks was not considered disabled under the ADA.¹⁶⁶ In *Zirpel*, the plaintiff was not considered disabled because her panic attacks were sporadic and controllable; therefore, her panic attacks did not "substantially limit" her "major life activities."¹⁶⁷ The Court in *Land* also noted that "[w]hether a major life activity is substantially limited is an individualized and fact-specific inquiry."¹⁶⁸

The plaintiff argued that her daughter's food allergy fit under the ADA's second disability definition¹⁶⁹ because her daughter had a record of impairment due to experiencing two food-related allergic reactions while at day care.¹⁷⁰ The Court disagreed, concluding that the child's food allergies were "a history of an impairment" but not "history of a disability."¹⁷¹

Finally, the plaintiff contended that her daughter's food allergy corresponded to the ADA's third disability definition¹⁷²

¹⁶² *Id.* at 424. However, when the child ate peanuts, she experienced an anaphylactic reaction. *Id.* at 426. Thus, if she experienced such a reaction, her breathing would be limited. *See supra* notes 103–09 and accompanying text.

¹⁶³ *Land*, 164 F.3d at 425.

¹⁶⁴ *Id.*

¹⁶⁵ *Zirpel v. Toshiba Am. Info. Sys., Inc.*, 111 F.3d 80 (8th Cir. 1997).

¹⁶⁶ *Id.* at 81.

¹⁶⁷ *Id.*

¹⁶⁸ *Land*, 164 F.3d at 425.

¹⁶⁹ The ADA's second definition of "disability" is "a record of such an impairment." Americans with Disabilities Act, 42 U.S.C.A. § 12102(1)(B) (West 2009).

¹⁷⁰ *Land*, 164 F.3d at 425.

¹⁷¹ *Id.* (internal citations omitted).

¹⁷² *Id.* The ADA's third definition of "disability" is "being regarded as

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because the day care center considered her daughter to be “substantially limited in her ability to attend day care.”¹⁷³ The Court also rejected that the child was disabled under this ADA disability definition because it concluded that day care is not a major life activity under the ADA,¹⁷⁴ and the day care facility did not believe the child’s allergy “substantially limit[ed] her ability to attend day care.”¹⁷⁵ The particular day care facility denied the plaintiff’s child attendance because it did not have a sufficiently large staff to ensure that the child did not come into contact with peanut products.¹⁷⁶

Thus, because the Court found that the plaintiff’s daughter did not meet any of the ADA’s definitions of “disability,” it determined that her food allergy did not make her disabled under the ADA.¹⁷⁷ Even though the Court did not declare *this* child to be disabled under the ADA, it left open the possibility that another child with food allergies could be deemed disabled under the ADA. The Court explained that deciding whether a person has a major life activity “substantially limited” by a disability “is an individualized and fact-specific inquiry.”¹⁷⁸ Therefore, a child with presumably more severe food allergies,¹⁷⁹ which limit her major life activities,¹⁸⁰ might be considered

having such an impairment.” 42 U.S.C. § 12102(1)(C).

¹⁷³ *Land*, 164 F.3d at 425.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 424–25.

¹⁷⁸ *Id.* at 425 (internal citation omitted).

¹⁷⁹ Perhaps a child would be deemed disabled for having food allergies under the ADA if she was allergic to multiple types of foods. The Court in *Land* held that the plaintiff’s daughter was not disabled because she was only allergic to peanuts and thus could eat many other foods without having an allergic reaction. *Id.* This begs the question just how many foods a person would have to be allergic to before a court would consider her disabled under the ADA.

¹⁸⁰ To be considered disabled, the disability must “substantially limit” that person from performing major life activities. Americans with Disabilities Act, 42 U.S.C.A § 12102(1)(A) (West 2009). The Court in *Land* declared that day care was not a major life activity, so a child would not be considered

disabled under the ADA.

Given the medical evidence about the severity of food allergy reactions,¹⁸¹ the majority's opinion that a food allergy is not necessarily a disability under the ADA is flawed. First, the majority's finding that a food allergy does not substantially limit a person's ability to eat is shortsighted. It is true that a person with food allergies can eat foods she is not allergic to without suffering a reaction, but someone with food allergies can never eat in the normal way that an "average" person without food allergies is able to eat.¹⁸² As the dissent illustrates, a person with food allergies can only eat as an average person does as long as she does not ingest an allergen.¹⁸³ Commentator Jonathan Bridges underscores this notion in discussing *Land*:

The proposition that life-threatening food allergies do not substantially limit an individual's ability to eat seems preposterous. Certainly Megan [the plaintiff's child] can continue to eat, but she cannot do so in the same way in which most people can—or in the way an "average person" can . . . [one] must be painstakingly cautious in reading every ingredient on every food label, in quizzing every waiter at every restaurant, in educating every caregiver and every babysitter. They must remain prepared, at any meal or snack, to head for the nearest hospital emergency room for treatment. The next exposure and corresponding reaction are, after all,

disabled if her impairment prevented her from attending day care. *Land*, 164 F.3d at 425. The Court in *Land* also noted that "gardening, golfing, and shopping are insufficiently fundamental to be major life activities." *Id.* (citing *Colwell v. Suffolk County Police Dep't*, 158 F.3d 635, 642-43 (2d Cir. 1998)).

¹⁸¹ An allergic reaction to food can result in "anaphylaxis[, which is] . . . an acute life-threatening condition." JONEJA, *supra* note 103, at 277. "Anaphylaxis is an immediate, severe reaction, characterized by breathing difficulty (dyspnea); swelling, especially of the face (angioedema); and a drop in blood pressure (hypertension)." *Id.*

¹⁸² See *supra* notes 95-120 and accompanying text.

¹⁸³ *Land*, 164 F.3d at 426 (Arnold, J., dissenting).

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practically inevitable.¹⁸⁴

People without food allergies do not have to take similar precautions when eating; thus, a person with food allergies is substantially limited in her ability to engage in the major life activity of eating, as an average person participates in that activity.

Second, the majority incorrectly concluded that a food allergy does not fit the ADA's first definition of a disability because a food allergy does not "substantially limit" a person's ability to breathe.¹⁸⁵ The majority found that the child's breathing was not substantially limited by her food allergies because she could breathe normally, unless she was having an allergic reaction.¹⁸⁶ However, this reasoning does not comport with the prevailing medical evidence about food allergies. When a person has anaphylactic food allergies, she cannot breathe during an allergic reaction because her throat closes.¹⁸⁷ If she does not receive emergency medical treatment in time, such a reaction can become fatal.¹⁸⁸ It is absurd to claim that experiencing such an anaphylactic reaction is akin to how the average person breathes. In fairness to the majority's position, the majority took a holistic approach when analyzing if a person with food allergies is substantially limited in her ability to breathe.¹⁸⁹ The majority reasoned that a person with food allergies does not experience difficulty breathing when she does not have an allergic reaction, which should be the majority of the time.¹⁹⁰ However, the average person who does not have anaphylactic

¹⁸⁴ Bridges, *supra* note 149, at 1285 (citing 29 C.F.R. 1630.2(j)(1) (1998)).

¹⁸⁵ *Land*, 164 F.3d at 425.

¹⁸⁶ *Id.*

¹⁸⁷ SCOTT H. SICHERER, UNDERSTANDING AND MANAGING YOUR CHILD'S FOOD ALLERGIES 15 (2006).

¹⁸⁸ See *supra* notes 103-09 and accompanying text.

¹⁸⁹ *Land*, 164 F.3d at 424-25; see also *Robinson v. Morgan Stanley & Co.*, 269 F. App'x 603, 608 (7th Cir. 2008) (citing *Land*, 164 F.3d at 424-25); *Walker v. Town of Greeneville*, 347 F. Supp. 2d 566, 571-72 (E.D. Tenn. 2004) (citing *Land*, 164 F.3d at 425).

¹⁹⁰ *Land*, 164 F.3d at 425.

food allergies does not have to constantly be on guard that her normal breathing may become obstructed. A person who has anaphylactic food allergies is therefore substantially limited in her ability to participate in the major life activity of breathing in the same way that an average person breathes.

Based on the medical evidence about food allergies, it seems clear that a food allergy substantially limits a person's ability to eat and breathe,¹⁹¹ as compared to the way an average person partakes in those major life activities.¹⁹² Therefore, contrary to the Court's decision in *Land*, the plaintiff's child, and all people with food allergies, should be considered disabled under the ADA.¹⁹³ However, until the Supreme Court interprets the ADA disability definitions to include food allergy sufferers, the Food Allergy and Anaphylaxis Management Act is the best option left to protect children with food allergies while they are in school.

IV. THE FOOD ALLERGY AND ANAPHYLAXIS MANAGEMENT ACT SHOULD BE MANDATORY IN PUBLIC ELEMENTARY SCHOOLS THAT HAVE STUDENT(S) WITH A DOCUMENTED HISTORY OF ANAPHYLAXIS

The Food Allergy and Anaphylaxis Management Act is a step in the right direction to protecting food allergy patients since no federal law, including the ADA, safeguards people with food allergies.¹⁹⁴ However, the Act does not go far enough in

¹⁹¹ A food allergy would substantially limit a person's ability to breathe if a person suffers from *anaphylactic* food allergies. *See supra* notes 103–09 and accompanying text.

¹⁹² *See supra* notes 181–89 and accompanying text.

¹⁹³ All people who have food allergies are substantially limited in their ability to eat, *see supra* notes 182–84 and accompanying text, so it is the author's contention that all food allergy sufferers could possibly be considered disabled under the ADA. If a court will not find all food allergy sufferers to be disabled under the ADA, at least those with anaphylactic food allergies should be deemed disabled because they are limited both in their ability to eat and to breathe due to their food allergies. *See supra* notes 103–09 and accompanying text.

¹⁹⁴ *See Land*, 164 F.3d at 424–25; 155 CONG. REC. S2368 (daily ed. Feb. 23, 2009) (statement of Sen. Dodd).

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creating effective changes for students with food allergies. The Act's food allergy guidelines are voluntary.¹⁹⁵ For the Act to truly create a safe environment for children in public schools, its guidelines should be mandatory for any public elementary school that has a student with anaphylactic food allergies. If it is mandatory for a school to comply with the Act, the two year grant under the Act should also be compulsory. Schools that do not have anaphylactic student(s) should still be able to voluntarily follow the Act and apply for one of the Act's discretionary grants.

A. It Is Cost Prohibitive to Make the Act Mandatory for All Schools

If making every possible accommodation would be affordable, it would be preferable to make the Act mandatory in every school. Implementing the Act's guidelines in every school would ensure that allergy policies are in place even before a student with food allergies enrolls in a school; thus, a school would not have to scramble to enact policies once such a student enrolls. However, making accommodations necessitates funds, so it is impractical to require every school in the nation to develop allergy policies.

1. Cost Estimates of Implementing the Act

Implementing the Act's guidelines is expensive; therefore, it is not realistic to mandate that every school abide by the Act. Following the Act could become costly because the Act's grants are not compulsory for complying with the Act.¹⁹⁶ Thus, an agency's grant application may be denied or may not result in the maximum allowable grant amount. Additionally, the grant may not cover the full cost of putting the Act into practice,¹⁹⁷

¹⁹⁵ Food Allergy and Anaphylaxis Management Act of 2009, S. 456, 111th Cong. § 3(a)(1)(A) (2009).

¹⁹⁶ *See id.* § 4(b).

¹⁹⁷ The Act states that the Secretary can provide grants to educational agencies to "assist" them with implementing the Act. *Id.* § 4(a) (emphasis

agencies can only receive grants for a maximum of two years,¹⁹⁸ and an agency has to contribute non-Federal funds to the cost of implementing the Act even if it receives a grant.¹⁹⁹ Regardless of its grant amount, an agency must expend non-Federal funds in order to receive a grant under the Act.²⁰⁰

Under the Act, a local educational agency²⁰¹ can apply to receive a grant to aid it in putting the Act's guidelines into practice; however, the agency must *apply* for such a grant.²⁰² The Act does not state that an educational agency will automatically receive a grant for implementing the Act's guidelines.²⁰³

Inherent in the application process for a grant is the possibility that an agency's application may be denied²⁰⁴ or the amount granted may be less than the amount requested.²⁰⁵ Not every agency can receive the maximum grant amount because the Act only appropriates \$30,000,000 to be used in implementing the Act for the 2010 fiscal year.²⁰⁶ If every agency that applied for a grant received the maximum grant of \$50,000

added).

¹⁹⁸ *Id.* § 4(e).

¹⁹⁹ *Id.* § 4(h).

²⁰⁰ *See id.*

²⁰¹ A "local educational agency" is defined in the Act as having the same definition as the phrase has in the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7801). The Elementary and Secondary Education Act of 1965 defines "local educational agency" as the public education board in a State that administers the "public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or of or for a combination of school districts or counties that is recognized in a State as an administrative agency for its public elementary schools or secondary schools" Elementary and Secondary Education Act of 1965, 20 U.S.C.A. § 7801(26)(A) (West 2002).

²⁰² S. 456 § 4(b).

²⁰³ *See id.* § 4.

²⁰⁴ The Act states that "[t]he Secretary *may* award grants to local educational agencies to assist such agencies with implementing voluntary food allergy and anaphylaxis management guidelines." *Id.* § 4(a) (emphasis added).

²⁰⁵ *See id.* § 4(f).

²⁰⁶ *Id.* § 4(l).

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for the year, only 600 local educational agencies could receive a grant under the Act for the 2010 fiscal year.²⁰⁷ Thus, if more than 600 agencies ratify the Act's guidelines, every agency cannot receive the maximum grant amount. To accommodate grants for more than 600 agencies, the Secretary would have to deny some applications or reduce the amount of funds provided to each agency.

Furthermore, implementing the Act will cost more than any grant amount received. The Act highlights that the grant's purpose is "to *assist* such agencies with implementing voluntary food allergy and anaphylaxis management guidelines"²⁰⁸ Using the word "assist" connotes that the grant should only aid agencies in putting the guidelines into practice; therefore, the grant cannot be the guidelines' sole funding source. Moreover, the Act states that its grants should supplement, not take the place of, other non-Federal and Federal funds used in implementing food allergy and anaphylaxis management guidelines.²⁰⁹ The Act's "Matching Funds" provision describes that an agency receiving a grant must match at least 25% of the grant through its own non-Federal funds.²¹⁰ For example, if an agency receives the maximum grant of \$50,000, it would still have to match 25% of that grant amount.²¹¹ The agency would then have to spend at least an additional \$12,500, if it receives the maximum grant of \$50,000. Therefore, even if an agency receives a grant, and even if the grant amount is the maximum \$50,000, the agency will still have to expend its own additional funds to carry out the Act.²¹²

Additionally, if an agency receives a grant, the *maximum* allowable period for the grant is two years.²¹³ Thus, an agency may receive a grant for an even shorter time period. The guidelines also state that if an agency receives a grant for two

²⁰⁷ \$30,000,000 divided by \$50,000 is 600.

²⁰⁸ S. 456 § 4(a) (emphasis added).

²⁰⁹ *Id.* § 4(k).

²¹⁰ *Id.* § 4(h)(1).

²¹¹ *See id.*

²¹² *See id.* § 4(h).

²¹³ *Id.* § 4(d) (emphasis added).

years, its second year grant is contingent on successfully implementing the Act's guidelines during the first grant year.²¹⁴ Consequently, even an agency that receives a grant for the maximum allowable time period must eventually fund the entire cost of implementing the Act on its own. Agencies that are granted less than two years of funding, or those that lose their second year of funding due to unsuccessful evaluations from the Secretary after their first year, must fund the Act on their own even sooner than after receiving grants for two years.

If an agency is denied a grant or if its requested grant amount is reduced, then the agency must bear the cost of implementing the Act either wholly or partially on its own. If the Act proposes to grant a maximum of \$50,000 annually to an agency,²¹⁵ with the agency required to match 25% of the grant amount,²¹⁶ the estimate to implement the Act's guidelines is \$62,500²¹⁷ per local educational institution per year. An agency that wants to put the Act's guidelines into practice must fund the Act entirely on its own, if it receives no grant, or fund it partly on its own, if it receives only some grant money. Even if an agency receives the maximum grant amount for the two year limit, it will have to raise the necessary funds to continue to carry out the Act in future years.²¹⁸

*2. It Is Cost Prohibitive to Make the Act
Mandatory for Schools That Do Not
Have Allergic Students*

Mandatory food allergy policies in every school would respond to Congress' concern that different schools throughout the country currently have different food allergy policies, if they

²¹⁴ *Id.* § 4(d).

²¹⁵ *Id.* § 4(f).

²¹⁶ *Id.* § 4(h)(1).

²¹⁷ This amount is obtained by adding the \$50,000 maximum grant to the 25% of the grant (25% of \$50,000 is \$12,500) that the agency must contribute.

²¹⁸ *See* S. 456 § 4(e).

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have any policy at all.²¹⁹ Differing school allergy policies make it difficult for a student who changes schools because the student's new school may have a different allergy policy or may not have an allergy policy at all.²²⁰ If the Act was mandatory in all schools, it would help prevent divergent food allergy policies across the country.²²¹

However, given the high costs of implementing the Act,²²² it is cost prohibitive to make the Act mandatory for schools that do not have any students with food allergies. The funds expended to implement the Act in such schools would be enormous given the amount of public schools in the United States.

According to the United States Census, there are 98,793 public schools in the United States.²²³ Public schools, from kindergarten through twelfth grade, are projected to enroll approximately 50 million students for the 2009–2010 school year.²²⁴ If the Act's guidelines must be implemented at every school in the United States, that would result in high costs for schools that already have difficulty operating on their fixed budgets.²²⁵ Unfortunately, it is not economically feasible to

²¹⁹ See 155 CONG. REC. S2369 (daily ed. Feb. 23, 2009) (statement of Sen. Dodd).

²²⁰ *Id.*

²²¹ *Id.*

²²² See *supra* Part IV.A.1.

²²³ As part of its 2009–2010 back to school report, the U.S. Census reported that there were 98,793 public schools in the United States as of 2006–2007. U.S. Census Bureau, Back to School: 2009–2010 (June 15, 2009), available at http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/013847.html [hereinafter Census, School Facts].

²²⁴ The U.S. Census reports that 56 million students will be enrolled in kindergarten through twelfth grade during 2009–2010. *Id.* When the 11% of students in private school are subtracted from the 56 million students, *id.*, that leaves approximately 49.84 million students in public school for kindergarten through twelfth grade during 2009–2010.

²²⁵ Public schools across the country have faced financial difficulties. See Giana Magnoli, *Budget Issues at Forefront as District Prepares for New School Year*, NOOZHAWK, Aug. 11, 2009, available at http://www.noozhawk.com/local_news/article/081109_budget_issues_at_forefront_as_district_prepares_for_new_school_year/ (describing financial problems in

implement the Act in schools that do not have students with food allergies.

*3. It Is Cost Prohibitive to Make the Act Mandatory
for All Schools That Have Student(s) with
Non-Anaphylactic Food Allergies*

Because the effects of food allergies can be severe,²²⁶ it seems natural to suggest that the Act should be mandatory for any school that has student(s) with food allergies. Such a mandate would help protect allergic students, especially if any such student later develops anaphylaxis. However, given the amount of school-aged children with food allergies²²⁷ and the cost of enacting individual food management plans,²²⁸ the Act should not be mandatory for schools that have students with non-anaphylactic food allergies.

Currently, 2.2 million school-aged students in the United States have food allergies.²²⁹ While 2.2 million seems like a large amount of children, it is really only 4.4% of the public school population.²³⁰ If the Act was mandatory for all schools that enroll at least one student with food allergies, then such schools' local educational agencies may have to spend more than

California public schools); Loren Moreno, *Lingle Won't Use \$35M Stimulus to Ease Hawaii School Furloughs*, HONOLULU ADVERTISER, Nov. 14, 2009, available at <http://the.honoluluadvertiser.com/article/2009/Nov/14/ln/hawaii/911140329.html> (describing financial problems in Hawaii public schools); John O'Connor, *Schools Face Huge Budget Problems Despite \$1 Billion Stimulus Boost*, HUFFINGTON POST, Apr. 5, 2009, available at http://www.huffingtonpost.com/2009/04/05/schools-face-huge-budget_n_183309.html (describing financial problems in Illinois public schools).

²²⁶ See *supra* notes 103–09 and accompanying text.

²²⁷ FAAN, Allergy Q&A, *supra* note 16.

²²⁸ See Food Allergy and Anaphylaxis Management Act of 2009, S. 456, 111th Cong. § 3(b)(2) (2009).

²²⁹ FAAN, Allergy Q&A, *supra* note 16.

²³⁰ 2.2 million children reflects 4.4% of the 50 million children in United States public schools, based on U.S. Census data. See Census, School Facts, *supra* note 223.

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\$62,500²³¹ to implement guidelines to protect perhaps only one child who does not have life-threatening food allergies.²³² Of course the safest option is to mandate the Act if a school has even one child with non-anaphylactic food allergies, but such a requirement seems cost prohibitive.²³³

B. The Act Should Be Mandatory for Public Elementary Schools with Anaphylactic Student(s)

The Act should be mandatory for every public elementary school that enrolls at least one student with anaphylactic food allergies. This limited mandate will protect such students from experiencing a potentially fatal anaphylactic reaction while at school.²³⁴ Additionally, requiring schools that enroll anaphylactic students to follow the Act responds to the fact that strict avoidance of allergens may not be possible²³⁵ and students with severe food allergies may not be able to attend school without accommodations for their allergies.²³⁶

1. Anaphylaxis Is a Severe, Potentially Fatal, Medical Condition

As mentioned, food allergy reactions can be mild and not life-threatening when they affect only limited areas of the body.²³⁷ Symptoms of food allergy reactions that are not life-threatening when exhibited alone include nasal congestion, runny nose, occasional cough, nausea, vomiting, diarrhea, itchy

²³¹ See *supra* Part IV.A.1.

²³² The author does not mean to suggest that the symptoms of food allergies that do not include anaphylaxis, see *supra* notes 97–102 and accompanying text, are not severe. The point is that the other symptoms of food allergies, besides anaphylaxis, are seemingly not potentially fatal. See *supra* notes 97–109 and accompanying text.

²³³ See *supra* Part IV.A.3.

²³⁴ See *infra* notes 239–42 and accompanying text.

²³⁵ See *infra* notes 245–49 and accompanying text.

²³⁶ See *infra* Part IV.B.3.

²³⁷ SICHERER, *supra* note 187, at 14.

mouth, lip swelling, hives, skin swelling, itch, and others.²³⁸ Anaphylaxis,²³⁹ however, is a severe allergic reaction that is life-threatening.²⁴⁰ Symptoms that by themselves may indicate a potentially life-threatening reaction can be respiratory, gastrointestinal, or cardiovascular.²⁴¹ An anaphylactic food allergy reaction can turn fatal if the patient is not treated promptly or if those attending to the patient do not realize she is experiencing a food allergy reaction.²⁴²

If a young student has a documented history of anaphylaxis, it should be mandatory that her public elementary school implement the Act's guidelines²⁴³ because anaphylaxis is potentially fatal.²⁴⁴ Due to the severity of anaphylaxis, children with the condition should be protected at school. A documented history of anaphylaxis would mean that the child can provide supporting paperwork to show that she has been treated for an anaphylactic reaction before (such as providing paperwork from a hospital's emergency room) or that her doctor indicates that she is anaphylactic, due to the severity of her food allergy. Making the Act mandatory for schools with anaphylactic students would ensure that students with the most severe food allergies are protected by the Act's guidelines.

2. *Strict Avoidance of Allergens May Not Be Possible*

Because anaphylaxis is a severe medical condition that can lead to death,²⁴⁵ patients who suffer from anaphylaxis should avoid the foods that trigger an anaphylactic reaction for them. Strict avoidance of the trigger food is not always possible or

²³⁸ *Id.* at 14–15.

²³⁹ For a further description of anaphylaxis, see *supra* notes 103–09 and accompanying text.

²⁴⁰ STEVE PARKER, JUST THE FACTS: ALLERGIES 14 (2004).

²⁴¹ SICHERER, *supra* note 187, at 15.

²⁴² *Id.* at 16.

²⁴³ See *infra* Part IV.C.

²⁴⁴ PARKER, *supra* note 240, at 14.

²⁴⁵ JONEJA, *supra* note 103, at 277.

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practical in every setting, but avoidance can be especially unfeasible in the elementary school environment. Avoidance of a trigger food is not always possible because of incorrect or insufficient food labeling.²⁴⁶ For example, foods have been recalled because they incorrectly omitted allergens from their ingredient labels.²⁴⁷

Moreover, avoiding allergens may also not be feasible. Eating in unfamiliar places always poses a food allergy threat. The father of a boy with a soy allergy related the frustration of eating outside one's home, stating that, "restaurants, hotels, airlines . . . are not at all interested in accommodating and supporting the special diet."²⁴⁸ A young child in a school setting also faces difficulties in staying allergy free, especially when she is young and does not understand the severity of her food allergies or how to safeguard herself from allergens. The school cafeteria is known as a place where children share snacks, but a child with food allergies has to be vigilant to not trade food with someone whose meal contains allergens.²⁴⁹ Therefore, because strict avoidance of allergens is not always possible, standards must be put in place to safeguard those who have anaphylactic food allergies.

3. *Student(s) with Severe Food Allergies May Not Be Able to Attend School Without Accommodations for Their Allergies*

There are several rare forms of food allergies that require

²⁴⁶ For a discussion of insufficient food labeling, see *supra* notes 115–20 and accompanying text.

²⁴⁷ See, e.g., Jelly Belly, Jelly Belly News, http://www.jellybelly.com/news_and_events/news_clip_3.aspx (last visited Mar. 6, 2010) (noting that Jelly Belly jellybeans had to be recalled because peanut butter and peanut flour, which are present in the jellybeans, were omitted from their ingredient list).

²⁴⁸ Derr, *supra* note 120, at 74–75.

²⁴⁹ For a story about food allergies directed towards children, which also discusses sharing snacks at school, see ELLEN WEINER, *TAKING FOOD ALLERGIES TO SCHOOL* (1999).

even greater vigilance. The majority of those with food allergies do not suffer a reaction if they do not ingest an allergen.²⁵⁰ In fact, *severe* food allergy reactions usually only occur when a food allergy patient eats an allergen.²⁵¹ However, some people with food allergies can experience a reaction from inhalation of, or skin contact with, an allergen, and in rare cases, such a reaction may be anaphylactic.²⁵² To respond to such severe food allergies, some schools have placed stringent limits on allowing common allergens in schools,²⁵³ and some parents have homeschooled their children who have food allergies.²⁵⁴ The Act's guidelines may be able to help protect children who have such severe food allergies by affording these children the opportunity to attend a school that has food allergy safety procedures in place.

i. Non-Ingestion Allergic Reactions

Some people can experience an allergic reaction from airborne allergens, meaning the allergic person inhales an allergen.²⁵⁵ An airborne allergic reaction usually occurs due to high concentrations of allergen proteins in the air.²⁵⁶ Proteins can enter the air in high doses from cooking.²⁵⁷ For example, a person with an airborne allergy may experience a reaction from boiling milk, frying eggs, or steaming fish.²⁵⁸ Peanut flour may also induce a reaction from inhalation.²⁵⁹ A reaction in response

²⁵⁰ SICHERER, *supra* note 187, at 21.

²⁵¹ *Id.*

²⁵² Daniel A. Ramirez, Jr. & Sami L. Bahna, *Food Hypersensitivity by Inhalation*, 7 CLINICAL & MOLECULAR ALLERGY 1, 1-2 (2009), available at <http://www.clinicalmolecularallergy.com/content/pdf/1476-7961-7-4.pdf>.

²⁵³ ENGEL, *supra* note 100, at 208.

²⁵⁴ See, e.g., Mike Celizic, *Allergic Girl's Dog Protects Her Life from Peanuts*, MSNBC, Mar. 26, 2009, <http://today.msnbc.msn.com/id/29895153>.

²⁵⁵ Ramirez & Bahna, *supra* note 252, at 1.

²⁵⁶ SICHERER, *supra* note 187, at 21.

²⁵⁷ *Id.*; see also Ramirez & Bahna, *supra* note 252, at 1.

²⁵⁸ Ramirez & Bahna, *supra* note 252, at 1.

²⁵⁹ SICHERER, *supra* note 187, at 22.

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to inhaling an allergen is usually not severe;²⁶⁰ the symptoms are typically sneezing, nasal congestion, red eyes, coughing, or wheezing.²⁶¹ However, in unusual cases, a person may have an anaphylactic reaction in response to inhaling an allergen.²⁶²

Patients with severe food allergies may also react when an allergen touches their skin.²⁶³ If such an event occurs, the reaction is usually contained to the portion of skin that the allergen touched.²⁶⁴ For example, Dr. Scott H. Sicherer and his colleagues performed a study on children with severe peanut allergies.²⁶⁵ In the study, the doctors placed a small amount of peanut butter on each child's skin for one minute.²⁶⁶ The resulting reaction was redness where the peanut butter was placed.²⁶⁷ No further reaction resulted, and the reaction did not spread beyond the area on the skin where the peanut butter was placed.²⁶⁸

Airborne or skin exposure allergic reactions to food may²⁶⁹ or may not be severe.²⁷⁰ Without food allergy policies in place, like those suggested in the Act, children with such allergies may not be able to attend school.

ii. "Allergen-Free" Tables and Classrooms in Schools

Schools have responded to the recent increased prevalence of food allergies by developing "peanut-free" tables in the cafeteria²⁷¹ and "peanut-safe classrooms."²⁷² Some schools have

²⁶⁰ Ramirez & Bahna, *supra* note 252, at 1–2.

²⁶¹ *Id.* at 1.

²⁶² *Id.* at 2.

²⁶³ Food Allergy Initiative, About Food Allergies, <http://www.faiusa.org/?page=aboutFoodAllergies> (last visited Mar. 6, 2010).

²⁶⁴ *Id.*

²⁶⁵ SICHERER, *supra* note 187, at 21.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ See *supra* note 262 and accompanying text.

²⁷⁰ See *supra* notes 260–61 and accompanying text.

²⁷¹ See Marie Plicka, *Mr. Peanut Goes to Court: Accommodating an*

also considered limiting or banning peanuts from classrooms.²⁷³ Those who advocate banning allergens from the school environment believe the prohibition can protect susceptible children from accidentally coming into contact with allergens.²⁷⁴ However, an outright ban on peanuts has been criticized as preventing students without allergies from eating an inexpensive source of protein.²⁷⁵ Food allergy awareness advocates also question the effectiveness of peanut-free classrooms by noting that they give food allergy patients a false sense of security that they will not encounter a peanut in the classroom;²⁷⁶ therefore, the patients are less cautious in protecting themselves from allergens.²⁷⁷ Consequently, if a peanut is accidentally brought into a “peanut-free classroom,” a reaction may be more likely; the patient may not have taken the precautions she would normally take when eating because she had a false sense of security that the classroom was “peanut-free.”²⁷⁸ Children with food allergies may also feel ostracized by being relegated to isolated allergen-free classrooms.²⁷⁹

iii. Inability to Attend School Due to Food Allergies

A parent may not feel comfortable having her young child with severe food allergies attend a school that has no allergy policy in place to safeguard her child from allergens.²⁸⁰ The Act

Individuals [sic] *Peanut Allergy in Schools and Day Care Centers Under the Americans with Disabilities Act*, 14 J.L. & HEALTH 87, 88 (2000).

²⁷² ENGEL, *supra* note 100, at 208.

²⁷³ Plicka, *supra* note 271, at 88.

²⁷⁴ JONEJA, *supra* note 103, at 204.

²⁷⁵ Plicka, *supra* note 271, at 88.

²⁷⁶ ENGEL, *supra* note 100, at 208.

²⁷⁷ JONEJA, *supra* note 103, at 204–05.

²⁷⁸ *Id.*

²⁷⁹ ENGEL, *supra* note 100, at 208.

²⁸⁰ An extreme example of a child with severe food allergies is Riley Mers. Celizic, *supra* note 254. Riley is an eight-year-old with a severe peanut allergy. *Id.* If Riley inhales any peanut dust or if peanuts touch her skin, she can experience a life-threatening allergic reaction. *Id.* Food allergies like Riley’s are admittedly the most extreme form, and not the norm.

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is a way for schools to make some relatively uncomplicated accommodations for those with food allergies, rather than banning allergens outright from schools.²⁸¹ The Act proposes guidelines, such as educating school staff, parents, and students about food allergies;²⁸² authorizing school staff to administer epinephrine to a student experiencing a food allergy reaction;²⁸³ and planning how school personnel and emergency medical services will communicate in response to a reaction.²⁸⁴ These simple guidelines may provide an allergic student and her parent(s) with a sense of security they may not otherwise have without such guidelines. A parent who has previously opted not to send her child to school, because the school had no policy about how to handle food allergies and their reactions, may now allow her child to attend school since the school has emergency food allergy procedures in place.

However, the Department of Education seeks to ensure equal access to education in the United States. U.S. Department of Education, The Federal Role in Education, <http://www.ed.gov/about/overview/fed/role.html?src=ln> (last visited Mar. 6, 2010). If a child has a food allergy, the answer is not to ostracize her from her peers by relegating her to home schooling instead of providing accommodations for her in the public classroom. Such a response would not be tolerated for people with ailments that are considered disabilities under the ADA. *See* 42 U.S.C.A. § 12182(a) (West 2009) (“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”). However, a person with food allergies has not yet been deemed disabled under the ADA. *See* Land v. Baptist Med. Ctr., 164 F.3d 423, 424–25 (8th Cir. 1999). While the guidelines suggested in the Food Allergy and Anaphylaxis Management Act may not be stringent enough to allow Riley to attend a public school without other accommodations, the Act’s guidelines are a step in the right direction for children with food allergies.

²⁸¹ *See* ENGEL, *supra* note 100, at 208.

²⁸² Food Allergy and Anaphylaxis Management Act of 2009, S. 456, 111th Cong. § 3(b)(5) (2009).

²⁸³ *Id.* § 3(b)(7).

²⁸⁴ *Id.* § 3(b)(3).

C. Why the Act Should Only Be Mandatory for Public Elementary Schools

In the interest of balancing the need for the Act and the Act's high costs, the Act should only be mandatory for public elementary schools. Children in elementary schools (kindergarten through fifth grade) are the most vulnerable to having a food allergy reaction²⁸⁵ because they may not yet understand how to care for their food allergy.²⁸⁶ To safeguard such children, the Act should be mandatory in public elementary schools that have at least one anaphylactic student.²⁸⁷

A young child may experience a food allergy reaction while she is at school and not know how to respond because she is too young to understand how to care for her allergy. While a child is young, parents have the most control over what their child eats; therefore, parents work to ensure that their allergic child avoids her trigger food(s).²⁸⁸ However, there comes a point when a child will have to learn to care for her own food allergies,²⁸⁹ such as when a child enters the school setting without her parents. A child who has food allergies must learn: to which foods she is allergic,²⁹⁰ her food allergies' severity,²⁹¹ a food allergy reaction's symptoms, to ask how food is prepared,²⁹² to ask what ingredients are in a prepared meal,²⁹³ how to read food

²⁸⁵ SICHERER, *supra* note 187, at 188.

²⁸⁶ Daryl L. Minch, Ask Before You Eat, <http://www.foodallergy.rutgers.edu/ectmtfa.htm> (last visited Mar. 6, 2010).

²⁸⁷ Schools may be concerned about what their obligations will be under the Act's mandatory provision if an anaphylactic student enrolls in their school midway through a school year or if a previously enrolled student develops anaphylactic food allergies during a school year. Such schools should be given a reasonable period of time, as determined by the Secretary, to implement the Act's guidelines. The Secretary should also enact a provision for making a compulsory grant available to such schools.

²⁸⁸ Minch, *supra* note 286.

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ University of California San Francisco, Managing Food Allergies,

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labels,²⁹⁴ not to try others' food,²⁹⁵ how to get help if a reaction occurs,²⁹⁶ and how to administer her own medication.²⁹⁷ Until a child grows old enough to understand how to take these actions, she is vulnerable to a food allergy reaction when she is not under her parents' care.²⁹⁸ Younger children are at a greater risk of experiencing a food allergy reaction;²⁹⁹ therefore, the Act should be mandatory in public elementary schools with at least one anaphylactic student.

D. The Act's Grant Should Be Compulsory if a School Must Follow the Act's Guidelines

If a school must follow the Act's guidelines—because it is a public elementary school with at least one anaphylactic student—then the Act's grant should be compulsory. As explained, implementing the Act's guidelines can be expensive, and a school that receives a grant under the Act will still have to contribute some of its own funds to follow the Act.³⁰⁰ Because certain schools would be mandated to follow the Act under the author's proposal, those schools should receive a grant. It may not be necessary that every school receive the maximum grant of \$50,000 under the Act.³⁰¹ Yet, if a school must follow the Act, it should receive some grant amount to aid it in implementing the Act's guidelines.

http://www.ucsfchildrenshospital.org/education/managing_food_allergies/index.html (last visited Nov. 25, 2009).

²⁹⁴ Minch, *supra* note 286; University of California San Francisco, *supra* note 293.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ Minch, *supra* note 286.

²⁹⁸ *Id.*

²⁹⁹ SICHERER, *supra* note 187, at 188.

³⁰⁰ *See supra* Part IV.A.1.

³⁰¹ *See* Food Allergy and Anaphylaxis Management Act of 2009, S. 456, 111th Cong. § 4(f) (2009).

E. The Act Should Be Ratified but Should Be Voluntary if a School Does Not Have an Anaphylactic Student

The Act should be ratified;³⁰² however, it should be adapted so that public elementary schools with at least one anaphylactic student are required to follow the Act, and such schools should receive compulsory grants to aid them in following the Act's guidelines. If a school does not have an anaphylactic student, the Act should still be voluntary for such a school. This will allow schools to realize Congress' goal of having uniform food allergy policies throughout the nation³⁰³ without mandating that all schools bear the high costs of implementing the Act.³⁰⁴ Schools that voluntarily implement the Act's guidelines should still be allowed to apply for voluntary grants, as the current Act provides.³⁰⁵ The incentive of the grants may induce more local educational agencies to work towards making their schools safer for students with food allergies.

V. CONCLUSION

For food allergy sufferers, one wrong bite can be fatal.³⁰⁶ As a parent of a child with a fish and peanut allergy described, "[f]rench fries are fine, but not if they're cooked in the same fryer as fish. Ice cream is usually safe, but not if someone accidentally dropped chopped peanuts on it."³⁰⁷ The parent explained that she reads package labels at the supermarket, even if her child has eaten the product before.³⁰⁸ "Just because you

³⁰² See S. 456 for a description of the Act in its current form.

³⁰³ See 155 CONG. REC. S2369 (daily ed. Feb. 23, 2009) (statement of Sen. Dodd).

³⁰⁴ See *supra* Part IV.A.1.

³⁰⁵ See S. 456 § 4.

³⁰⁶ See *supra* notes 103–09, 239–42 and accompanying text.

³⁰⁷ Lisa Zwiirn, *A Family that Takes Food Allergies Seriously Urges Congress to OK Guidelines*, BOSTON GLOBE, Oct. 21, 2009, available at http://www.boston.com/lifestyle/food/articles/2009/10/21/a_family_that_takes_its_food_allergies_seriously/.

³⁰⁸ *Id.*

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can eat Cocoa Puffs yesterday doesn't mean you can eat them today" because "companies constantly change recipes and the underlying ingredients."³⁰⁹

The Food Allergy and Anaphylaxis Management Act is needed to protect students with food allergies because there currently is no federal legislation to uniformly protect the 2.2 million school-aged American children with food allergies³¹⁰ while they are in school.³¹¹ Until food allergies are considered a disability under the ADA,³¹² the Act is a positive preliminary step in safeguarding children with food allergies; however, the Act does not go far enough.

To ensure that students with life-threatening food allergies are protected while at school, the Act's guidelines should be mandatory for any public elementary school that enrolls at least one student with anaphylactic food allergies. Such schools should automatically receive a grant under the Act if they are mandated to follow the Act. For all other schools, following the Act should be voluntary. The discretionary grants under the Act should be an added incentive for schools that are not mandated to follow the Act to still implement the Act's guidelines. Hopefully, the Act will induce change so that someday all American schools will have food allergy policies to thwart tragic, preventable deaths like Nathan Walters'.³¹³

³⁰⁹ *Id.*

³¹⁰ FAAN, Allergy Q&A, *supra* note 16.

³¹¹ *See* 155 CONG. REC. S2369 (daily ed. Feb. 23, 2009) (statement of Sen. Dodd).

³¹² Food allergies are currently not considered a disability under the ADA. *See* Land v. Baptist Med. Ctr., 164 F.3d 424–25 (8th Cir. 1999).

³¹³ *See supra* notes 2–10 and accompanying text.