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TOPIC:

FOOD FOR THOUGHT: APPLYING THE ADA TO STUDENTS WITH FOOD ALLERGIES

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INTRODUCTION:

Approximately fifteen million Americans have food allergies, and that number is increasing.[1] As awareness of food allergies grows, so does the demand for colleges and universities to accommodate students with these allergies. The demand is coming not just from students and parents; Congress and government agencies have broadened legal protections under the Americans with Disabilities Act ("ADA") to include food allergies and other dietary issues. Indeed, a 2012 settlement agreement between the Department of Justice ("DOJ") and Lesley University suggests that institutions must adapt their approach to food allergy management by implementing procedures to help keep students with food allergies safe at campus dining establishments and to ensure that students with food allergies have a dining experience comparable to that of their peers.

This NACUANOTE will first address the applicability of the ADA to food allergies. It will then discuss the ADA's application to food on campus, providing an overview of Lesley University's settlement with the DOJ. Finally, it will analyze the effect of that agreement on colleges and universities and provide recommendations.

DISCUSSION:

The Americans with Disabilities Act and the Effect of the 2008 Amendments

Title III of the ADA states:

> 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 . . . .[2]

Colleges and universities are considered places of public accommodation under the ADA,[3] and therefore must make reasonable accommodations to provide full and equal access to the services or programs they offer.

A person has a "disability" within the meaning of the ADA if that person (1) demonstrates "a physical or mental impairment that substantially limits one or more of the major life activities of the individual"; (2) has "a record of such an impairment"; or (3) is "regarded as having such an impairment."[4] In response to a

series of Supreme Court decisions that were widely seen as limiting the scope of coverage under these three prongs of the ADA, President George W. Bush in 2008 signed into law the ADA Amendments Act ("ADAAA"), which overturned those cases and greatly expanded the protections afforded by the ADA.[5]

Among other changes, the ADAAA broadened the definition of "substantially limits" to mean whether a person's ability to perform a major life activity or bodily function is limited when compared to that of "most people in the general population."[6] Under the definition of "major life activities," which already included eating and learning, the ADAAA also added major bodily functions such as those of the digestive, bowel, bladder, neurological, and respiratory systems.[7] Furthermore, the ADAAA specified that "[a]n impairment that is episodic or in remission is a disability [under the ADA] if it would substantially limit a major life activity when active."[8]

Federal courts have yet to address whether the ADAAA calls into question the 1999 Eighth Circuit decision in *Land v. Baptist Medical Center*, which has stood for many years as the seminal case regarding whether people with food allergies are protected under the ADA. In *Land*, the Eighth Circuit held that a child with a peanut allergy was not "substantially limited" in her ability to eat and breathe and was thus not disabled under the ADA. [9] Since *Land*, the Ninth Circuit commented on the possibility of whether the ADA may be expanded to cover food allergies, but only in dicta. In *Fraser v. Goodale*, the Ninth Circuit postulated that while someone who cannot eat chocolate cake is not limited in a major life activity because the act of eating chocolate cake is not a major life activity, a more severe allergy, such as a peanut allergy, could be treated differently because many foods besides peanuts have trace amounts of peanuts and can cause an adverse reaction. [10]

Land remains good law, but, according to DOJ guidance, some food allergies may be protected under the ADAAA depending on the severity of the allergy. Students "with more significant or severe responses to certain foods"—such as difficulty swallowing and breathing, asthma, or anaphylactic shock—may be recognized as having a disability as defined by the ADA because certain food allergies may substantially limit major life activities like eating, and may affect the major bodily functions of the immune, digestive, bowel, and neurological systems.[11] Determinations as to whether a student's food allergies constitute a disability are to be made on a case-by-case basis;[12] however, given the 2008 amendments, courts and other administrative agencies would seem more likely to consider serious food allergies a disability under the ADA.

Application to Food on Campus: Lesley University Settlement Agreement[13]

In light of the ADA's expansion, what will be expected of colleges and universities that provide meals to students? As courts have not yet addressed whether food allergies are covered under the ADAAA, the recent Lesley University settlement is instructive. The DOJ initiated the investigation after receiving a complaint that the school's mandatory meal plan did not provide sufficient gluten-free alternatives and that the school did not reasonably accommodate the needs of students with gluten-free diets by excusing them from the meal plan or providing them with a reasonable alternative. The complaint alleged that all students living on campus had to purchase a meal plan even though some students with allergies or celiac disease could not eat the food provided through the meal plan without suffering adverse health consequences.[14]

The DOJ stated that celiac disease[15] and severe allergic reactions—which may result in difficulty swallowing, breathing, and anaphylaxis—may be covered disabilities under the ADA because they affect the major life activity of eating and the major bodily functions of the immune, digestive, bowel, respiratory and neurological systems.[16] The DOJ considered Lesley University's initial implementation of its accommodation procedures to be deficient,[17] but because the University agreed to improve its procedures and provide accommodations to students with food allergies and similar disorders, the DOJ entered a voluntary settlement agreement ("Agreement").[18]

Under the Agreement, Lesley University agreed to continue to take several actions, including:

- Provide "nutritionally comparable" hot and cold gluten- and allergen-free meals to students with celiac disease and food allergies;
- Take reasonable steps to avoid cross-contamination of the allergen-free food, including preparing such meals in a dedicated space in its main dining hall;
- Allow students with celiac disease or other food allergies to pre-order meals made without gluten or specific allergens and serve them at one of the dining halls or campus food eateries;
- Provide students with food allergies a separate area to store and heat up food; and
- Exempt certain students from the mandatory meal plan as a form of reasonable accommodation.[19]

As illustrated by the terms above, excusing students from a mandatory meal plan may be a reasonable accommodation, but the ADA encourages public entities to not "unjustifiably" segregate individuals with disabilities from those without disabilities.[20] Therefore, universities should make an effort to ensure that students with food allergies are able to participate in the social experience of congregating in the dining hall to the extent that reasonable accommodations can make that possible.

Effect of Lesley University Settlement Agreement on Colleges and Universities

The Lesley Agreement only represents a settlement between the DOJ and one institution. It does not constitute binding legal authority as applied to other colleges and universities, but it can serve as an instructive document for explaining what the DOJ is concerned about and what other institutions might consider when reviewing their own policies. A smaller campus, such as Lesley University, may be more limited in providing modifications if doing so would fundamentally alter the nature of its facilities. Larger campuses may have more physical space and resources but face other difficulties in accommodating a larger student body with food allergies. While the Agreement is instructive, each institution needs to carefully evaluate its own policies, procedures, limitations, and capabilities.

Importantly, the Agreement identified *all* severe food allergies as *possible* disabilities, creating a broad new set of potential accommodation obligations for institutions.[21] Especially as food allergies become more prevalent, accommodation of each type of allergy to the extent set forth in the Agreement may be difficult to achieve in a campus community dining environment. According to the Agreement and food allergy experts, gluten-free and allergen-free dining requires not only providing students with appropriate foods, but also preventing cross-contamination.[22] Therefore, in addition to the cost of providing allergen-free food alternatives, many institutions may have trouble finding the physical space needed to separately store and prepare foods.

Notably, however, the DOJ's Q&A guidance document that accompanies the Agreement clarifies that not all places of public accommodation that serve food have to provide gluten-free or allergen-free food. It is at least partly because Lesley University's meal plan was *mandatory* for all students living on campus that the ADA required reasonable modifications to the plan.[23] Furthermore, institutions may be exempt from these requirements if compliance with the ADA would not be "readily achievable"[24] or if it would "fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations."[25] However, it might be challenging for an institution serving food to persuade the DOJ or the courts that accommodating individuals with food allergies would fundamentally alter the nature of their services or would be prohibitively expensive.

Practical Steps Colleges and Universities Can Take

Based upon the above, institutions that offer food–especially those with mandatory dining programs–should:

1. Enable enrolling students to identify and document food allergies for which they want to seek accommodations after admission but before they arrive on campus.

2. Identify a core team of staff in health services, dining services (including outside food vendors if dining services are contracted out), residence life, and campus disability services to work with students to establish a food allergy management plan.
3. Evaluate the feasibility of providing allergen-free food options, including pre-order or delivery options, as well as storing and preparing such food in a separate physical space to avoid cross-contamination.
4. Educate dining staff about food allergies and train them to handle requests for food alternatives, respond to questions about food ingredients, and refer students to disability services, when appropriate.[26]
5. Evaluate the wording of posted warnings for students about the use of allergens in dining halls and campus food eateries and provide information on websites about who to contact to request accommodations.
6. Review contracts and leases with food service providers to ensure compliance with acceptable disability-related practices, such as the accommodations listed in the Lesley University settlement agreement.
7. Train residence hall advisors and staff on ADA requirements and ensure they are able to refer students to appropriate services on campus if issues regarding food allergies arise. As part of general training, residence hall staff should be aware of when and how to contact emergency services.
8. Stay informed of regulatory changes, including changes that could affect the standards for classifying and labeling foods.

Other Issues:

Can a University Charge a Student for Food Allergy Accommodations?

The regulations implementing the ADA prohibit a public entity from imposing a surcharge on an individual with a disability to cover the costs of accommodations required by the ADA.[27] In 2011, the Department of Education's Office for Civil Rights ("OCR") investigated the State University of New York at Potsdam after it received a complaint from a disabled student who had to pay a higher rate for her dormitory room because she was allowed to live in a double room without a roommate as an accommodation for her disability.[28] OCR found that charging the student more for her dormitory room was a violation of the ADA because it was a necessary accommodation for her, rather than a mere student preference.[29] Even though this decision involved housing accommodations, the reasoning would appear to apply equally to accommodations for food allergies. Therefore, if an accommodation for a food allergy is seen as "necessary" instead of merely an agreement to do something extra for a student, any additional charge imposed by the institution could run afoul of the ADA.

Is a University Required to Train Staff to Administer EpiPens or Other Emergency Medical Treatment?

The ADA and its regulations do not address the issue of EpiPens in the university setting, nor is there any case law on point. In 1997, the Department of Justice entered a settlement agreement with the La Petite Academy, a large chain of daycare centers, which required La Petite to train its staff in the use of and to administer EpiPens as needed.[30] While this agreement did not address post-secondary settings, the ADA's requirements do distinguish significantly between primary and secondary schools as compared to post-secondary schools. Under Title II of the ADA, for example, elementary and secondary schools are "required to provide many services and aids of a personal nature to students with disabilities," but postsecondary schools "are no longer required to provide aids, devices, or services of a personal nature."[31] Postsecondary schools are not required to provide personal attendants to students with disabilities.[32] Training university staff and requiring them to administer EpiPens would arguably be similar to providing a student with personal services or a personal care attendant to stay safe, which is not required under the ADA.

Moreover, there is a risk of having non-medical staff incorrectly administer, or fail to administer, an EpiPen or other emergency treatment, exposing the campus to tragedy and legal claims. Lacking any case authority or persuasive guidance to the contrary, it is reasonable for an institution to expect that

students with food allergies will assume responsibility for self-care and come to campus with adequate training to know what foods to avoid, how to identify symptoms, and how to administer shots or other treatment at appropriate times.

Can a Student Living in an "Allergy and Pet Free Dormitory" Insist on Introducing a Peanut-Sniffing Dog or a Coma-Sensing Dog as a Life-Saving Accommodation?

A student's right to have a peanut-sniffing dog or a coma-sensing dog will depend on (1) whether the student's food allergy is considered a disability under the ADA; and (2) whether such a dog would be considered to be a service animal. A disabled individual's right to a service animal depends on the type of animal, the function that the animal performs, and the setting in which the right is asserted. Under the Rehabilitation Act, the ADA, and the Fair Housing Amendments Act (FHAA), students have the right to a service animal.[33] Under the 2010 ADA regulations, a "service animal" is defined as "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability."[34] A service animal must be "trained to respond to the individual's needs"; it must be able to both recognize and respond to episodes.[35]

Under the FHAA, the obligation to make reasonable accommodations may include making an exception to a "no-pets" policy for people with disabilities to use and live with a service animal.[36] However, a housing provider must make such an exception only if (1) the person seeking to use and live with the animal has a disability under the ADA; and (2) the person has a disability-related need for an assistance animal.[37] Accordingly, the student would first need to establish that his food allergy was a disability under the ADA. The request could be denied, though, if (1) the specific assistance animal poses a direct threat to the health or safety of others that cannot be reduced or eliminated by another reasonable accommodation, or (2) the specific assistance animal would cause substantial physical damage to the property of others that cannot be reduced or eliminated by another reasonable accommodation.[38]

Institutions that are able to accommodate such requests are well advised to do so, but bringing a service animal into an allergy and pet-free dormitory (where such students often reside already) can pose a direct threat to the health or safety of others with pet allergies who have requested to live in such a dormitory. Balancing rights and responsibilities in this situation can be challenging. Institutions are well advised to establish reasonable guidelines outlining how such requests will be handled. For example, a student with a food allergy living in an allergy and pet-free dormitory could not insist on having a peanut-sniffing or coma-sensing dog in the dormitory because, even if the student's allergy were considered a disability under the ADA, the animal would likely pose a serious health risk to the other students living in the dorm. However, if the institution were able to place the student in a pet-viable dorm, such an option could be made available, and the student requesting a new and additional accommodation could be the one expected to move.

CONCLUSION:

In the wake of the Lesley University settlement agreement, and as requests from the number of people with food allergies grows, colleges and universities should expect to be confronted with these issues more frequently. Campus counsel and disability service administrators should review applicable laws and campus policies to establish a solid infrastructure for dealing with food allergy accommodation requests. The key will be evaluating what is feasible for your campus now and adapting your campus efficiently and economically in the future.

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ADDITIONAL RESOURCES:

Government Agency Resources

Final Rule on Nondiscrimination on the Basis of Disability in State and Local Government Services, 75 Fed. Reg. 56164 (Sept. 15, 2010)

Final Rule on Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16978 (Mar. 25, 2011)

Notice of Proposed Rulemaking to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839 (Jan. 30, 2014)

U.S. Department of Justice's ADA Website

U.S. Dep't of Housing and Urban Development, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs* (Apr. 25, 2013)

Cases & Enforcement Actions

U.S. Department of Justice, Civil Rights Division, Disability Rights Section, *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies* (January 2013)

Settlement Agreement Between the United States of America and Lesley University, DJ 202-36-231 (Dec. 20, 2012)

Department of Education Office for Civil Rights Resolution Letter to State University of New York at Potsdam, Case No. 02-11-2062 (Aug. 9, 2011)

Department of Justice, Settlement Agreement Between the U.S. and La Petite Academy (1997)

Other Resources

NACUA Virtual Seminar: Animals, Allergies, Autism, and Accessibility: Recent Developments in Student Disability Accommodations (Nov. 21, 2013)

Food Allergy Research & Education College Food Allergy Program

Food Allergy Training Guide for College and University Food Services (2005)

College & University Guidelines for Managing Students with Food Allergies

ENDNOTES:

[1]*See*, *e.g.*, *Facts and Statistics*, Food Allergy Research & Education, http://www.foodallergy.org/facts-and-stats (citing a 2013 study by the Centers for Disease Control and Prevention, which found that from 1997 to 2001, food allergies among children increased by about fifty percent).

[2] 42 U.S.C. § 12182(a) (2012). Title II places similar prohibitions on public institutions, including state-run colleges and universities. *See id.* §12132 (2012) ("[N]o qualified individual with a disability shall . . . be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

[3]*See* 42 U.S.C. § 12181(7)(J) (stating that "a nursery, elementary, secondary, undergraduate, or postgraduate private school, or other place of education" is a place of public accommodation under Title III).

[4] *Id*. § 12102(2)(A)–(C).

[5] *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b)(1)–(5), 122 Stat. 3553, 3553 (2008) (codified at 42 U.S.C. § 12101) (declaring that the purpose of the ADAAA is "to carry out the ADA's objectives of providing a 'clear and comprehensive national mandate for the elimination of discrimination' . . . by reinstating a broad scope of protection to be available under the ADA" and to "reject" the requirements and reasoning of the four Supreme Court cases inhibiting these objectives (quoting 42 U.S.C. § 12102(b)(1)); *id.* § 4(a) (stating that elements of the definition of a disability "shall be construed in favor of broad coverage . . . to the maximum extent [that they permit]."). The ADAAA overturned *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482 (1999) (holding that courts must consider "mitigating measures" used to manage impairments in deciding whether an individual has a disability under the ADA) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (making it more difficult for ADA plaintiffs to prove that they are "substantially limited" in a "major life activity"). *Id.* § 2(b)(2)–(5).

[6] 29 C.F.R. § 1630.2(j)(1)(ii) (2011), *available at* http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1630.xml. Note that while the EEOC's regulations apply only to the employment context, the Department of Justice has issued a Notice for Proposed Rulemaking indicating that it intends to issue regulations implementing the ADAAA's new definitions of "disability," and that the Department proposes, "wherever possible, to adopt regulatory language that is identical to the revisions to the Equal Employment Opportunity Commission's (EEOC) title I regulations implementing the ADA Amendments Act." Office of the Attorney General; Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 4839-01, 4840 (Jan. 30, 2014).

[7] ADA Amendments Act of 2008 § 4(a).

[8] *Id.*

[9] 164 F.3d 423, 425 (8th Cir. 1999) (reasoning that the child's history of two allergic reactions at day care was merely evidence of an impairment and not evidence of a history of a disability).

[10] 342 F.3d 1032, 1040 (9th Cir. 2003).

[11] Disability Rights Section, Civil Rights Division, U.S. Dep't of Justice, *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies* (2013), *available at* http://www.ada.gov/q&a_lesley_university.htm.

[12] There are a wide variety of food allergies that could substantially limit a major life activity; some individuals may have a mild allergic reaction that may not give rise to a recognizable disability, while others may have very severe reactions.

[13] Settlement Agreement Between the United States of America and Lesley University, DJ 202-36-231, 1 (Dec. 20, 2012), *available at* http://www.justice.gov/iso/opa/resources/759201212201614325038 26.pdf [hereinafter Lesley Settlement Agreement].

[14] Harter Secrest & Emery LLP, *Unprecedented Federal Civil Rights Action Mandates that University Modify Its Meal Plan for Students with Food Allergies and Celiac Disease*, Legal Currents 1 (Mar. 2013), *available at* http://www.hselaw.com/files/ADA_Food_Allergies_Ruling_March_2013.pdf.

[15] Celiac disease is not an allergy but an autoimmune disorder in which the consumption of gluten causes permanent damage to the surface of the small intestines. This condition prevents the body from absorbing nutrients, which could deprive essential organs of vital nourishment. Lesley Settlement

Agreement (citing *Celiac Disease Definition*, U.S. Nat'l Library of Medicine, Nat'l Inst. of Health, A.D.A.M. Medical Encyclopedia (Jan. 20, 2010), *available at* http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0001280/).

[16] *Id.*

[17] *Id.* at 1.

[18] *Id*.

[19] *Id.* at 3–6.

[20] *See* 42 U.S.C. § 12101(a)(2) (indicating that congressional findings motivating the law have shown that society has historically tended to segregate disabled individuals from others and that such discrimination continues to be a "serious and pervasive social problem"); 28 C.F.R. § 35.130(d) (2014) (mandating that public entities administer services "in the most integrated setting appropriate to the needs" of disabled individuals); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 597 (1999) ("Unjustified isolation, we hold, is properly regarded as discrimination based on disability.").

[21] Because no court has yet ruled on whether certain food allergies are covered under the ADA or how severe an allergy would have to be to be covered under the ADA, this expansion of universities' obligations under the Agreement could be revised if the courts are asked to interpret this issue.

[22] Paul King, *An Education on Celiac Disease*, Food Service Director (Apr. 4, 2013), http://www.foodservicedirector.com/industry-news-opinion/stories-from-road/articles/education-celiac-disease (explaining that the gluten molecule in particular is very sticky and can remain on bowls used to prepare food if not cleaned properly).

[23] Disability Rights Section, Civil Rights Division, U.S. Dep't of Justice, *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies* (Jan. 2013), http://www.ada.gov/q&a_lesley_university.htm.

[24] 42 U.S.C. §§ 12182(b)(2)(A)(iv)–(v).

[25] 42 U.S.C. §§ 12182(b)(2)(A)(ii),(iii).

[26] Periodic trainings are recommended, at least once per semester, or once before each semester begins.

[27] 28 C.F.R. § 35.130(f) (2014), *available at* http://www.ecfr.gov/cgi-bin/text-idx?SID=aadacdfbfa080d16cd8fe7d1e8d0dd81&node=28:1.0.1.1.36.2.32.1&rgn=div8 ("A public entity may not place a surcharge on a particular individual with a disability or any group of individuals with disabilities to cover the costs of measures, such as the provision of auxiliary aids or program accessibility, that are required to provide that individual or group with the nondiscriminatory treatment required by the Act or this part.").

[28] Resolution Agreement with State University of New York at Potsdam, OCR Complaint No. 02-11-2062, 1–2 (Aug. 9, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/investigations/02112062-a.pdf (explaining that the student suffered from Reflex Sympathetic Dystrophy).

[29] *Id*. at 3.

[30] Settlement Agreement Under the Americans with Disabilities Act Between the United States of America and La Petite Academy, Inc. (1997), *available at* http://www.ada.gov/lapetite.htm.

[31] Office for Civil Rights, U.S. Dep't of Education, *Auxiliary Aids and Services for Postsecondary Students with Disabilities: Higher Education's Obligations Under Section 504 and Title II of the ADA*, U.S. Dep't of Education (Sept. 1998), http://www2.ed.gov/about/offices/list/ocr/docs/auxaids.html.

[32] *Id.* (noting that students are responsible for personal attendants and prescribed devices).

[33] *See* 28 C.F.R. §§ 35.104, 36.104 (2014) (defining a "service animal" under the ADA); 24 C.F.R. § 100.204 (2014) (using the example of allowing a blind potential tenant to own a seeing eye dog in an apartment that otherwise prohibits pets as a reasonable accommodation under the FHAA); 45 C.F.R. § 84.4 (2014).

[34] 28 C.F.R. § 36.104 (implementing Title III); id. § 35.104 (implementing Title II).

[35] 28 C.F.R. pt. 36 app. A (2014); see also, Josh Dermott, NACUANOTE: Update on Accommodating Service and Assistance Animals on Campus: Making Heads or Tails of Federal Disability Laws, Vol. 10, No. 6 (2012).

[36] U.S. Dep't of Housing and Urban Development, *Service Animals and Assistance Animals for People with Disabilities in Housing and HUD-Funded Programs* 3 (Apr. 25, 2013), *available at* http://portal.hud.gov/hudportal/documents/huddoc?id=servanimals_ntcfheo2013-01.pdf.

[37] *Id.* at 2–3.

[38] *Id.* at 3.

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