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## Food Allergy Bullying as Disability Harassment: Holding Schools Accountable

D'Andra Millsap Shu

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**FOOD ALLERGY BULLYING  
AS DISABILITY HARASSMENT:  
HOLDING SCHOOLS ACCOUNTABLE**

D'ANDRA MILLSAP SHU\*

*Millions of American schoolchildren of all ages suffer from food allergies, and increasingly, bullies target these children because of their allergies. If a bully exposes a victim to an allergen, food allergy bullying can sicken or kill within minutes. Food allergy bullying is already responsible for many hospitalizations and at least one death. Most food allergy bullying*

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*happens at school, and schools play a crucial part in addressing and preventing bullying. All too often, though, schools fail to take appropriate action. Sovereign immunity and other obstacles insulate public schools from liability in many instances, but federal disability law may provide a solution.*

*This Article forges a new path in disability law for schools to be held liable for food allergy bullying under existing federal disability discrimination laws. It argues that food allergy can, in most instances, constitute a disability under these laws and thus can provide the basis for school liability based on a theory of disability harassment. This statutory claim avoids the sovereign immunity hurdle and holds schools accountable for their role in facilitating or refusing to respond appropriately, thereby motivating schools to protect children with food allergies from bullying.*

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*“Despite anti-bullying laws and policies across the country, principals, teachers and other adult leaders often turn a blind eye to bullying. Litigation can motivate them to insist that bullying is confronted, rather than ignored . . . .”<sup>1</sup>*

## INTRODUCTION

School should be a safe and welcoming place where children can learn and grow. But for the 5.6 million American children with food allergies,<sup>2</sup> school can be a danger zone. Managing food allergies at school is challenging in the best of circumstances: Every meal and snack must be scrutinized because even a trace of an allergen can cause serious health consequences, including a system-wide shock that can kill within minutes.<sup>3</sup> With food at school in the lunchroom and the classroom—for celebrations, snacks, science experiments, and crafts—peril lurks around every corner.<sup>4</sup>

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1. ADELE KIMMEL, PUBLIC JUSTICE, LITIGATING BULLYING CASES: HOLDING SCHOOL DISTRICTS AND OFFICIALS ACCOUNTABLE 28 (Fall 2017 ed.), <https://www.publicjustice.net/wp-content/uploads/2016/02/Bullying-Litigation-Primer-Fal-1-2017-Update-FINAL.pdf> [<https://perma.cc/TV4T-JHG6>].

2. FOOD ALLERGY RESEARCH & EDUC., FOOD ALLERGY FACTS & STATISTICS FOR THE U.S., 1 [hereinafter FARE FACTS & STATISTICS], <https://www.foodallergy.org/life-with-food-allergies/food-allergy-101/facts-and-statistics> (last visited July 19, 2020) [<https://perma.cc/J5L7-FMWP>].

3. See *infra* Section I.A; see also NAT'L FOOD ALLERGY DEATH REGISTRY, <https://www.nationalfoodallergydeathregistry.org> (last visited July 19, 2020) [<https://perma.cc/6CLN-ZEEX>] (archiving information on U.S. deaths from food allergies).

4. See *infra* Section I.C.

About one-third of these allergic children confront yet another risk: being bullied because of their allergy.<sup>5</sup> They may be

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5. In 2010, a team of researchers at the Jaffe Food Allergy Institute of Mount Sinai School of Medicine, led by Dr. Jay Lieberman, conducted the first known study of food allergy bullying. See Jay A. Lieberman et al., *Bullying Among Pediatric Patients with Food Allergy*, 105 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 282, 283 (2010). Based on 353 responses to a survey developed in part by a doctor specializing in pediatric food allergies and a bullying expert, the study concluded that 35.2% of school-aged children with food allergies were bullied because of their allergies. See *id.* at 282–83. A one-year follow-up study of the same group showed 29% had been bullied in the past year. See Rachel A. Annunziato et al., *Longitudinal Evaluation of Food Allergy-Related Bullying*, 2 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 639, 639 (2014).

Since then, many other researchers have documented comparable, if not higher, rates of food allergy bullying in America and other countries. See M. Ambrose et al., *Bullying of Food-Allergic Youth: Results from a Parent and Child Survey*, 129 J. ALLERGY & CLINICAL IMMUNOLOGY AB31, AB31 (2012) (28.8%); Andrew Timothy Fong et al., *Bullying in Australian Children and Adolescents with Food Allergies*, 29 PEDIATRIC ALLERGY IMMUNOLOGY 740, 741 (2018) [hereinafter Fong et al., *Bullying in Australia*] (22.6% in Australia); Adora Lin & Hemant P. Sharma, *Teasing and Bullying Among Adolescents with Food Allergy*, 133 J. ALLERGY & CLINICAL IMMUNOLOGY AB288, AB288 (2014) (71%); A.E. Morris et al., *Bullying and Teasing in Children with Food Allergy: A Survey of Pediatric Patients in Urban Jackson, Mississippi Outpatient Allergy and Immunology Clinics*, 129 J. ALLERGY & CLINICAL IMMUNOLOGY AB133, AB133 (2012) (33.3%); Antonella Muraro et al., *Comparison of Bullying of Food-Allergic Versus Healthy Schoolchildren in Italy*, 134 J. ALLERGY & CLINICAL IMMUNOLOGY 749, 750 (2014) (letter to the editor) (24.2% in Italy); Eyal Shemesh et al., *Child and Parental Reports of Bullying in a Consecutive Sample of Children with Food Allergy*, 131 PEDIATRICS e10, e10 (2013) (31.5%); see also Andrew T. Fong et al., *Bullying and Quality of Life in Children and Adolescents with Food Allergy*, 53 J. PAEDIATRICS & CHILD HEALTH 630, 630 (2017) [hereinafter Fong et al., *Bullying and Quality of Life*] (“Several studies worldwide have investigated bullying in food allergic individuals, providing evidence for its occurrence in North America, Canada, Italy and Japan.”).

These studies have been widely cited in the medical and social science literature. See, e.g., Lisa M. Bartnikas & Scott H. Sicherer, *Fatal Anaphylaxis: Searching for Lessons from Tragedy*, 8 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 334, 335 (2020); Theresa Bingemann et al., *Deficits and Opportunities in Allergists’ Approaches to Food Allergy-Related Bullying*, 8 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 343, 343 (2020); Melissa A. Faith et al., *Bullying in Medically Fragile Youth: A Review of Risks, Protective Factors, and Recommendations for Medical Providers*, 36 J. DEV. & BEHAV. PEDIATRICS 285, 290 (2015); Charles Feng & Jea-Hyoun Kim, *Beyond Avoidance: The Psychosocial Impact of Food Allergies*, 57 CLINICAL REVIEWS ALLERGY & IMMUNOLOGY 74, 75–76 (2019); Linda Herbert et al., *Clinical Management of Psychosocial Concerns Related to Food Allergy*, 4 J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC. 205, 207 (2016); Michael Pistiner et al., *School Food Allergy & Anaphylaxis Management for the Pediatrician—Extending the Medical Home with Critical Collaborations*, 62 PEDIATRIC CLINICS N. AM. 1425, 1432 (2015); Laura Polloni et al., *Bullying Risk in Students with Food Allergy: Schoolteachers’ Awareness*, 27 PEDIATRIC ALLERGY & IMMUNOLOGY 225, 225 (2016) (letter to the editor); N.L. Ravid et al., *Mental Health and Quality-of-Life Concerns Related to the Burden of Food Allergy*, 32 IMMUNOLOGY ALLERGY CLINICS N. AM. 83, 89–90 (2012); Gregory C. Rocheleau & Brandy Rocheleau, *The*

teased and taunted, excluded from activities, and ridiculed. Such stereotypical bullying tactics are especially pernicious to allergic children because food allergy bullying compounds deep-seated fears regarding their allergies that these children often struggle with daily.<sup>6</sup> Even worse, in over half of food allergy bullying incidents, bullies directly threaten their victims with the very food they are allergic to.<sup>7</sup> This form of bullying poses unique risks because exposure to their allergen puts these children in direct, serious physical danger. For example, a boy in London died in 2017 after a bully touched him with cheese, and other victims have had allergic reactions or have been hospitalized from bullying incidents.<sup>8</sup> Although some bullies are doubtless unaware of the degree of danger from their conduct, others convey their awareness by saying things like “I’m going to kill you with this peanut butter cracker.”<sup>9</sup>

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*Mark of a Food Allergy Label: School Accommodation Policy & Bullying*, 19 J. SCH. VIOLENCE 167, 167 (2020); Scott H. Sicherer & Hugh A. Sampson, *Food Allergy: A Review and Update on Epidemiology, Pathogenesis, Diagnosis, Prevention, and Management*, 141 J. ALLERGY & CLINICAL IMMUNOLOGY 41, 50 (2018).

6. See *infra* notes 107–113 and accompanying text.

7. See Lieberman et al., *supra* note 5, at 282 (stating that 57% of study participants reported physical bullying “such as being touched by an allergen and having an allergen thrown or waved at them”); see also *infra* note 91 and accompanying text.

8. See *infra* notes 97–99 and accompanying text.

9. Nicole Smith, *Food Allergy Bullying—What’s the Solution?*, ALLERGIC CHILD (June 25, 2013), <https://home.allergicchild.com/food-allergy-bullying-whats-the-solution/> [<https://perma.cc/H328-Z654>] (describing food allergy bullying incident among first graders); see also Sally Kuzemchak, *Food Allergy Bullying is Heartbreaking and Real*, PARENTS, <https://www.parents.com/recipes/scoop-on-food/food-allergy-bullying-is-heartbreaking-and-real/> (last visited July 19, 2020) [<https://perma.cc/9T29-HZ27>] (“One day at lunchtime, a boy in Will’s group began to taunt him, coming at him with a peanut butter sandwich in a threatening way and saying something along the lines of ‘I could kill you with this sandwich.’”); Suzanne Allard Levingston, *Bullies Use a Small But Powerful Weapon to Torment Allergic Kids: Peanuts*, WASH. POST (May 28, 2017), [https://www.washingtonpost.com/national/health-science/bullies-use-a-small-but-powerful-weapon-to-torment-allergic-kids-peanuts/2017/05/26/a296a878-292f-11e7-be51-b3fc6ff7faee\\_story.html?noredirect=on&utm\\_term=.cb18697ac3a2](https://www.washingtonpost.com/national/health-science/bullies-use-a-small-but-powerful-weapon-to-torment-allergic-kids-peanuts/2017/05/26/a296a878-292f-11e7-be51-b3fc6ff7faee_story.html?noredirect=on&utm_term=.cb18697ac3a2) [<https://perma.cc/79FK-SH2M>] (describing how bully wiped peanut butter on an allergic child and said “I dare you to die today”); Roni Caryn Rabin, *In Allergy Bullying, Food Can Hurt*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/well/family/in-allergy-bullying-food-can-hurt.html> [<https://perma.cc/NHN6-49NB>] (recounting father’s story of allergic son being taunted with a peanut butter sandwich by a child saying “let’s see if he dies”).

School is ground zero for childhood bullying. Most food allergy bullies operate at school and target classmates.<sup>10</sup> Yet an astounding 20% of food allergy bullying comes from teachers and other school personnel.<sup>11</sup> In one instance, a teacher forced an allergic student to use peanut butter in a science experiment; in another, a coach threatened an athlete with peanut butter for poor performance.<sup>12</sup> Less egregious actions still contribute to food allergy bullying, such as when a teacher questions whether a child's allergy is real or announces that the class cannot have birthday cupcakes because of Billy's allergy.<sup>13</sup> Even when teachers or other school officials are not involved in the actual bullying, they frequently fail to take bullying seriously. They may ignore bullying they see or downplay reports. They may conduct little, if any, investigation of alleged bullying and mete out minimal punishment.<sup>14</sup> Such a lackluster response serves only to encourage bullying—indeed, 86% of bullied allergic children report being bullied repeatedly.<sup>15</sup>

Schools must be motivated to do more to protect these children. The threat of litigation can provide that motivation. Food allergy bullying litigation is in its infancy. Parents have increasingly sued schools over bullying in general, but these claims typically fail for a variety of reasons.<sup>16</sup> One significant reason is sovereign immunity, which shelters governmental entities such as public school districts from many types of lawsuits.<sup>17</sup> Insulated from the threat of civil liability, some schools enable bullies to thrive. This protection from liability, with its concomitant disincentive to properly address bullying, must change.

This Article advances the theory that schools should be subject to liability for food allergy bullying under two federal disability discrimination statutes: the Americans with Disabilities Act (ADA) and the Rehabilitation Act. To use these laws, a particular child's food allergy must be legally cognizable as a

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10. See Lieberman et al., *supra* note 5, at 283; Ambrose et al., *supra* note 5, at AB31.

11. See Lieberman et al., *supra* note 5, at 285; see also *infra* note 117 and accompanying text.

12. See *infra* notes 118–119, 121 and accompanying text.

13. See *infra* notes 139–143 and accompanying text.

14. See *infra* notes 133–137 and accompanying text.

15. See Lieberman et al., *supra* note 5, at 285; see also *infra* note 83 and accompanying text.

16. See *infra* notes 146–151 and accompanying text.

17. See *infra* notes 152–155 and accompanying text.

disability. The Article analyzes how food allergy can potentially qualify as a disability, thus providing access to recovery under a theory of disability harassment.

Part I explains how food allergies work and some of the challenges people with allergies face, such as skeptics who claim that food allergies are exaggerated, nonexistent, or otherwise not a serious health issue. Part I also explores the way food allergies affect allergic children, non-allergic children, and the overall school environment. Part II details how food allergy bullying has arisen as a serious concern in school and how dangerous food allergy bullying in particular can be. Part III explains the critical role schools play in either fostering or inhibiting an environment conducive to bullying. Because schools have so much influence and because the vast majority of bullying originates in school, a litigation strategy focused on schools is justified.

With this framework in mind, Part IV presents the case for school liability under the ADA and the Rehabilitation Act. It begins by describing how these disability laws generally operate in the primary and secondary education context and how they bypass the sovereign immunity hurdle that has long protected public schools—where 90% of children attend school<sup>18</sup>—from liability for bullying.

Part IV then explores how to use these laws on the basis of food allergy qualifying as a disability, particularly in light of statutory amendments in 2008 expanding the scope of coverage. When courts accurately apply the statutes and litigants properly plead and prove their cases, most food allergies should usually qualify as disabilities.

Finally, Part IV also lays out the existing cause of action for disability-based harassment. If food allergy is a disability, then disability harassment is on the table as a potential claim. The Article next demonstrates how this claim would work in the food allergy bullying context. It is not an easy claim to prove, often succeeding in only the most serious of cases. But food allergy bullying is serious business. It poses a direct risk of death in a way more traditional bullying does not. Courts can and should expressly consider this unique circumstance when evaluating disability harassment claims based on food allergy bullying. A

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18. See Julie Halpert, *What if America Didn't Have Public Schools?*, ATLANTIC (Mar. 4, 2018), <https://www.theatlantic.com/education/archive/2018/03/what-if-america-didnt-have-public-schools/552308/> [<https://perma.cc/PS94-WPHX>].



million children are bullied with their allergen,<sup>19</sup> filling them with fear that impedes their education and putting their lives at risk. A real threat of liability for serious disability harassment—without the immunity shield—can motivate schools to take effective actions to stamp out food allergy bullying for all allergic children.

This Article is the first to analyze food allergy bullying as disability harassment. It builds on the author's previous work—the first comprehensive legal analysis of food allergy bullying—which makes the case for parental liability when parents negligently contribute to their child's harmful food allergy bullying.<sup>20</sup> As to whether food allergy should be considered a disability under the federal disability statutes, several scholars have briefly noted that the statutory amendments should provide a stronger basis for food allergy being classified as a disability or have analyzed some legal arguments in favor of expanded coverage.<sup>21</sup> This Article contributes to the scholarship by thoroughly analyzing multiple legal theories in favor of coverage, supported by a comprehensive analysis of current cases, and providing a litigation strategy for advocates. Prior scholarship on disability harassment and bullying has focused on aspects other than food allergies or food allergy bullying<sup>22</sup> and is useful for establishing a framework for this Article.

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19. See *infra* note 26 and accompanying text (5.6 million children have food allergies); *supra* note 5 and accompanying text (at least one-third of allergic children are bullied because of their allergy); *infra* note 91 and accompanying text (57% of food allergy bullying incidents involved using the allergen).

20. See D'Andra Millsap Shu, *When Food Is a Weapon: Parental Liability for Food Allergy Bullying*, 103 MARQUETTE L. REV. 1465 (2020).

21. See, e.g., LAURA ROTHSTEIN & JULIA IRZYK, *DISABILITIES AND THE LAW* § 2:53, at 264 (4th ed. 2019); Marie Boyd, *Serving Up Allergy Labeling: Mitigating Food Allergen Risks in Restaurants*, 97 OR. L. REV. 109, 134–37 (2018); John G. Browning, *Keep Your Hands Off My Nuts—Airlines, Peanut Allergies, and the Law*, 76 J. AIR L. & COM. 3, 27–30 (2012); Tess O'Brien-Heizen, *A Complex Recipe: Food Allergies and the Law*, 83 WISC. LAW. 8, 10–11 (2010); Jonathan B. Roses, *Food Allergen Law and the Food Allergen Labeling and Consumer Protection Act of 2004: Falling Short of True Protection for Food Allergy Sufferers*, 66 FOOD & DRUG L.J. 225, 232, 236–37 (2011); see also Michael Borella, Note, *Food Allergies in Public Schools: Toward a Model Code*, 85 CHI. KENT L. REV. 761, 766–73 (2010); Jason Mustard, Comment, *Nothing to Sneeze At: Severe Food Allergy as a Disability Under the ADA Amendments Act of 2008*, 45 GOLDEN GATE U. L. REV. 173, 177–91 (2015).

22. See, e.g., Kathleen Conn, *Bullying and Harassment: Can IDEA Protect Special Students?*, 239 EDUC. L. REP. 789 (2009); Cynthia A. Dieterich et al., *Bullying Issues Impacting Students with Disabilities Highlights of Section 1983, Title IX, Section 504, ADA, and IDEA Cases*, 2015 B.Y.U. EDUC. & L.J. 107 (2015); Charles

## I. NAVIGATING THE WORLD WITH FOOD ALLERGIES

To fully comprehend the problem of food allergy bullying, it is first necessary to understand basic information about food allergies and how society in general—and schools in particular—respond to food allergies and those who suffer from them. This Part first explores food allergies and their prevalence. Next, it details some of the skepticism and hostility toward food allergies. Finally, it considers the challenges food-allergic children face.

### A. Food Allergy Basics

Food allergies in America today are a significant health concern.<sup>23</sup> Approximately 32 million people in the United States are allergic to one or more foods.<sup>24</sup> Up to 8% of children have food allergies.<sup>25</sup> That is 5.6 million children, or one in every thirteen.<sup>26</sup> Food allergy rates among children are skyrocketing, with the Centers for Disease Control reporting a 50% increase

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J. Russo & Allan G. Osborne, Jr., *Bullying and Students with Disabilities: How Can We Keep Them Safe?*, 316 EDUC. L. REP. 1 (2015); Julie Sacks & Robert S. Salem, *Victims Without Legal Remedies: Why Kids Need Schools to Develop Comprehensive Anti-Bullying Policies*, 72 ALB. L. REV. 147 (2009); Paul M. Secunda, *Overcoming Deliberate Indifference: Reconsidering Effective Legal Protections for Bullied Special Education Students*, 2015 U. ILL. L. REV. 175 (2015); Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079, 1092–93 (2002); see also Jessica Brookshire, Comment, *Civil Liability for Bullying: How Federal Statutes and State Tort Law Can Protect Our Children*, 45 CUMB. L. REV. 351 (2015); David Ellis Ferster, Note, *Deliberately Different: Bullying as a Denial of a Free Appropriate Public Education Under the Individuals with Disabilities Education Act*, 43 GA. L. REV. 191 (2008).

23. U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, VOLUNTARY GUIDELINES FOR MANAGING FOOD ALLERGIES IN SCHOOLS AND EARLY CARE AND EDUCATION PROGRAMS 9 (2013) [hereinafter CDC, VOLUNTARY GUIDELINES], [https://www.cdc.gov/healthyschools/foodallergies/pdf/13\\_243135\\_A\\_Food\\_Allergy\\_Web\\_508.pdf](https://www.cdc.gov/healthyschools/foodallergies/pdf/13_243135_A_Food_Allergy_Web_508.pdf) [<https://perma.cc/TX8Q-JQYQ>]; Joshua A. Boyce et al., *Guidelines for the Diagnosis and Management of Food Allergy in the United States: Report of the NIAID-Sponsored Expert Panel*, 126 J. ALLERGY & CLINICAL IMMUNOLOGY S1, S4 (2010).

24. See FARE FACTS & STATISTICS, *supra* note 2, at 1.

25. See CDC, VOLUNTARY GUIDELINES, *supra* note 23, at 9 (“an estimated 4%–6% of children”); David M. Fleischer et al., *Allergic Reactions to Foods in Pre-School Aged Children in a Prospective Observation Food Allergy Study*, 130 PEDIATRICS e25, e26 (2012) (“up to 8% of children”).

26. FARE FACTS & STATISTICS, *supra* note 2, at 1.

between 1997 and 2011.<sup>27</sup> The reasons for this increase are unclear, but the numbers are unmistakable and distressing.<sup>28</sup>

A food allergy is an immune system malfunction that occurs when the immune system mistakenly responds to a certain food as if it were harmful.<sup>29</sup> Allergic reactions can affect the cutaneous (skin), gastrointestinal, respiratory, and circulatory organs and systems.<sup>30</sup> Specific responses can include rash, hives, vomiting, abdominal pain, dizziness, wheezing, shortness of breath, throat tightening, tongue swelling, fainting, circulatory collapse, and weak pulse.<sup>31</sup> Allergic responses are unpredictable—they vary from person to person, and one person can experience different types and severity of reactions from one exposure to the next.<sup>32</sup>

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27. See KRISTEN D. JACKSON ET AL., U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, TRENDS IN ALLERGIC CONDITIONS AMONG CHILDREN: UNITED STATES, 1997-2011, NCHA DATA BRIEF NO. 121, 2 (2013), <https://www.cdc.gov/nchs/data/databriefs/db121.pdf> [<https://perma.cc/74Q7-29D6>]; see also FARE FACTS & STATISTICS, *supra* note 2, at 1 (“The [CDC] reports that the prevalence of food allergy in children increased by 50 percent between 1997 and 2011.”); Feng & Kim, *supra* note 5, at 74 (“We are in the midst of a food allergy epidemic.”); Sicherer & Sampson, *supra* note 5, at 41 (reporting “extensive data” suggesting that food allergies have increased in the last two to three decades).

28. The cause of food allergy and its increase have been studied extensively, and though scientists have developed many theories, none have been proven. See FAIR Health, *Food Allergy in the United States: Recent Trends and Costs*, FAIR HEALTH WHITE PAPER, Nov. 2017, at 3 (“A number of genetic and environmental factors for food allergy have been identified, but it remains uncertain why food allergy is increasing in prevalence. Greater awareness and detection of food allergies, decreases in exposure to microbes early in life, changes in how food is manufactured and alterations in the human biome may all play a role.”); Divya Seth et al., *Food Allergy: A Review*, 49 PEDIATRIC ANNALS e50, e51 (2020) (discussing multiple factors that influence susceptibility to food allergy, including race/ethnicity, sex, genetics, atopic disease, hygiene, vitamin deficiency, fat intake, antioxidant and anti-acid intake, obesity, and timing and method of exposure to foods).

29. See Boyce et al., *supra* note 23, at S4, S8; *Food Allergy*, AM. COLL. ALLERGY, ASTHMA & IMMUNOLOGY, <https://acaai.org/allergies/types/food-allergy> (last visited July 19, 2020) [hereinafter ACAA, *Food Allergy*] [<https://perma.cc/4BDJ-M6BT>]; *Food Allergies in Schools*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/healthyschools/foodallergies/> (last visited July 19, 2020) [hereinafter CDC, *Food Allergies*] [<https://perma.cc/U5BF-E4K2>]. A food allergy is distinguished from a food insensitivity or intolerance, which may cause discomfort and illness but does not cause an immune reaction and is not life threatening. See Seth, *supra* note 28, at e50; Sicherer & Sampson, *supra* note 5, at 41.

30. See ACAA, *Food Allergy*, *supra* note 29; Boyce et al., *supra* note 23, at S19.

31. See ACAA, *Food Allergy*, *supra* note 29; Boyce et al., *supra* note 23, at S19.

32. See ACAA, *Food Allergy*, *supra* note 29 (“Symptoms of a food allergy can range from mild to severe. Just because an initial reaction causes few problems doesn’t mean that all reactions will be similar; a food that triggered only mild symptoms on one occasion may cause more severe symptoms at another time.”); CDC,

The most acute allergic reaction is anaphylaxis, a severe condition that can lead to respiratory distress, a drastic drop in blood pressure, unconsciousness, and even death.<sup>33</sup> Anaphylaxis can kill within minutes.<sup>34</sup> Epinephrine is the first-line treatment for anaphylaxis,<sup>35</sup> and so doctors usually prescribe patients with food allergies epinephrine autoinjectors such as the EpiPen.<sup>36</sup> Though epinephrine is the best treatment for anaphylaxis, epinephrine cannot always prevent anaphylactic death, particularly if not administered quickly at the onset of symptoms.<sup>37</sup> Because the risk of anaphylaxis is ever present—what once caused a skin rash could result in anaphylaxis the next time—allergic individuals should have access to epinephrine at all times.<sup>38</sup>

Severe food allergy reactions are not hypothetical or speculative. A food allergy reaction sends someone to the emergency room every three minutes.<sup>39</sup> Among allergic children, 40% have had a severe or life-threatening reaction.<sup>40</sup> What is more, the rate of severe reactions is increasing: the CDC reports about 9,500 children with reactions severe enough to warrant

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*Food Allergies*, *supra* note 29 (“The symptoms and severity of allergic reactions to food can be different between individuals, and can also be different for one person over time.”).

33. See Boyce et al., *supra* note 23, at S4, S9–10; Laurent L. Reber et al., *The Pathophysiology of Anaphylaxis*, 140 *J. ALLERGY & CLINICAL IMMUNOLOGY* 335, 335 (2017); ACAAI, *Food Allergy*, *supra* note 29; *Food Allergies: What You Need to Know*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Food/IngredientsPackagingLabeling/FoodAllergens/ucm079311.htm> (last visited Aug. 25, 2020) [hereinafter FDA, *Food Allergies*] [<https://perma.cc/RTV6-9QFA>].

34. See Boyce et al., *supra* note 23, at S38 (“Failure to respond promptly [to anaphylaxis] can result in rapid decline and death within 30-60 minutes.”); ACAAI, *Food Allergy*, *supra* note 29 (“Anaphylaxis can occur within seconds or minutes of exposure to the allergen, can worsen quickly and can be fatal.”).

35. Boyce et al., *supra* note 23, at S38; ACAAI, *Food Allergy*, *supra* note 29; see also FARE FACTS & STATISTICS, *supra* note 2, at 1 (stating that prompt injection of epinephrine “is crucial to successfully treating an anaphylactic reaction”).

36. See Perri Klass, *Life-Threatening Allergic Reactions Rising in Children*, *N.Y. TIMES* (Apr. 4, 2018), <https://www.nytimes.com/2018/04/09/well/family/life-threatening-allergic-reactions-rising-in-children.html> [<https://perma.cc/5QXT-KR7Y>]; ACAAI, *Food Allergy*, *supra* note 29.

37. See Boyce et al., *supra* note 23, at S38; FARE FACTS & STATISTICS, *supra* note 2, at 1.

38. See Boyce et al., *supra* note 23, at S38; ACAAI, *Food Allergy*, *supra* note 29.

39. See Sunday Clark et al., *Frequency of US Emergency Department Visits for Food-Related Acute Allergic Reactions*, 127 *J. ALLERGY & CLINICAL IMMUNOLOGY* 682, 682 (2011); FARE FACTS & STATISTICS, *supra* note 2, at 2; see also Klass, *supra* note 36 (describing Blue Cross Blue Shield report showing emergency room visits among its subscribers for anaphylaxis in children doubled between 2010 and 2016).

40. See FARE FACTS & STATISTICS, *supra* note 2, at 2.

hospitalization between 2004 and 2006, compared to about 2,600 such admissions between 1998 and 2000.<sup>41</sup>

Although medications such as epinephrine can help mitigate allergic reactions as a means of last resort, no cure currently exists to prevent food allergies or their potentially lethal reactions.<sup>42</sup> As such, allergic individuals must strictly avoid their allergen.<sup>43</sup> But it is not simply a matter of passing on the peanut butter sandwich. Individuals with food allergies must exercise constant vigilance about their food.<sup>44</sup> Ingesting even a minute amount of the allergen—like one-fiftieth of a peanut<sup>45</sup>—can

41. AMY M. BRANUM & SUSAN L. LUKACS, FOOD ALLERGY AMONG U.S. CHILDREN: TRENDS IN PREVALENCE AND HOSPITALIZATIONS, NCHS DATA BRIEF NO. 10, 4 (2008), <https://www.cdc.gov/nchs/data/databriefs/db10.pdf> [<https://perma.cc/85SF-TRSQ>]. Between 2009 and 2016, anaphylaxis incidents increased in every state except Massachusetts, with two-thirds showing at least a 100% increase and four rising over 300%. See *State-by-State Data for Food Allergy*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/resources/state-state-data-food-allergy> (last visited July 19, 2020) [<https://perma.cc/MVV2-UUM7>] (Full Chartbook).

42. Food allergy treatments are being developed that promise to help desensitize some people to certain allergens. Rather than “curing” the allergy, these treatments increase the individual’s tolerance so that a greater amount of the allergen is required to cause a reaction. Though helpful for some patients, these treatments require lifelong maintenance, are unavailable to patients with the highest risk of anaphylaxis, and simply do not work for many people. See Elizabeth Feuille & Anna Nowak-Wegrzyn, *Allergen-Specific Immunotherapies for Food Allergy*, 10 ALLERGY ASTHMA IMMUNOLOGY RES. 189, 189, 204 (2018); Carolyn Y. Johnson, *First Peanut Allergy Drug Approved by FDA*, WASH. POST (Jan. 31, 2020), <https://www.washingtonpost.com/health/2020/01/31/first-peanut-allergy-drug-approved-by-fda> [<https://perma.cc/GB5K-JPSY>]; Roni Caryn Rabin, *For Children with Peanut Allergies, F.D.A. Experts Recommend New Treatment*, N.Y. TIMES (Sept. 1, 2019), <https://www.nytimes.com/2019/09/13/health/peanut-allergy-children.html> [<https://perma.cc/3J8S-3JST>]. The FDA approved the first of these treatments in January 2020. See Johnson, *supra*.

43. Fleischer et al., *supra* note 25, at e26; CDC, *Food Allergies*, *supra* note 29; FDA, *Food Allergies*, *supra* note 33.

44. See Mary E. Bollinger et al., *The Impact of Food Allergy on the Daily Activities of Children and Their Families*, 96 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 415, 415 (2006) (“Maintaining a diet that strictly avoids food allergens is a formidable task.”); Anne Muñoz-Furlong, *Daily Coping Strategies for Patients and Their Families*, 111 PEDIATRICS 1654, 1654 (2003) (“The diagnosis of food allergy in a child has an impact on every minute of every day of the child and the child’s family.”); ACAAI, *Food Allergy*, *supra* note 29 (“Avoiding an allergen is easier said than done. While labeling has helped make this process a bit easier, some foods are so common that avoiding them is daunting.”); Claire Gagné, *Food Allergy Backlash Boards the Bus*, ALLERGIC LIVING (July 2, 2010), <https://www.allergicliving.com/2010/07/02/food-allergy-backlash-grows-1/> [<https://perma.cc/A7DU-YP4R>] (“Living with food allergies means constant vigilance.”).

45. See Bollinger et al., *supra* note 44, at 415 (explaining that half of people allergic to peanuts will have a reaction to consuming 1/50th of a peanut).

cause a reaction, including anaphylaxis.<sup>46</sup> To make matters worse, allergens sometimes show up in unexpected and unintended places. For example, allergens such as peanut flour can appear in snack cakes or cheese crackers, which most consumers would not expect.<sup>47</sup> Moreover, food that is manufactured or prepared using the same equipment or in the same facility as an allergen might be contaminated with it, even though the allergen is not an intended ingredient.<sup>48</sup> For these and other reasons,

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46. See Reber et al., *supra* note 33, at 335 (explaining that “minute amounts” of a food allergen can trigger anaphylaxis); Belen M. Tan et al., *Severe Food Allergies by Skin Contact*, 86 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 583, 586 (2001) (“Severe food allergic reactions can occur through noningestant exposure (skin contact or inhalation), to even minute quantities of the offending allergen.”); see also James E. Gern et al., *Allergic Reactions to Milk-Contaminated ‘Nondairy’ Products*, 324 NEW ENG. J. MED. 976, 976 (1991) (reporting allergic reactions to trace amount of milk).

47. For example, in January 2020, Hostess announced that it will begin adding small amounts of peanut flour as an ingredient to its Suzy Q’s snack cakes. See Dave Bloom, *Why Hostess Will Begin Adding Peanut Flour to Suzy Q’s*, SNACK SAFELY (Jan. 7, 2020), <https://snacksafely.com/2020/01/why-hostess-will-begin-adding-peanut-flour-to-suzy-qs/> [hereinafter Bloom, *Why Hostess*] [<https://perma.cc/QFM4-2K6Y>]. Similarly, in March 2016, Kellogg announced that it would add peanut flour to eight varieties of crackers, such as cheese sandwich crackers, that had previously been peanut free. See Dave Bloom, *Media Briefing: Kellogg’s Intentionally Adding Allergens to Products*, SNACK SAFELY (May 3, 2016), <https://snack-safely.com/2016/05/media-briefing-kelloggs-intentionally-adding-allergens-to-products/> [<https://perma.cc/4B78-VTEQ>]; see also Dave Bloom, *Why Allergens Are Being Intentionally Added to Foods*, SNACK SAFELY (June 25, 2020), <https://snack-safely.com/2020/06/why-allergens-are-being-intentionally-added-to-foods/> [<https://perma.cc/H2HM-36YY>] (reporting that candy manufacturer Pearson’s recently began adding peanut and tree nut flour to its chocolate mint patties). Those actions have raised concerns that unsuspecting allergic consumers may eat these once-safe products, particularly because one would not normally expect products like cheese crackers to contain peanut flour. See Bloom, *Why Hostess*, *supra*; Sarah DiGregorio, *Parents Are Upset that Kellogg’s is Adding Peanut Flour to Sandwich Crackers*, COOKING LIGHT (May 12, 2016), <https://www.cookinglight.com/healthy-living/kelloggs-adding-peanut-flour-to-sandwich-crackers> [<https://perma.cc/5J5M-9Z7G>]. At least one advocacy group contends these manufacturers made these changes to avoid the cost of complying with certain regulations under the Food Safety Modernization Act to prevent peanut cross-contamination in the manufacturing process—if peanut flour is an actual ingredient, then potentially costly measures necessary to reduce cross contamination need not be implemented. See Bloom, *Why Hostess*, *supra*; Dave Bloom, *Kellogg’s, Unintended Consequences, and the Death of ‘May Contain,’* SNACK SAFELY (June 21, 2016), <https://snacksafely.com/2016/06/kelloggs-unintended-consequences-and-the-death-of-may-contain/> [<https://perma.cc/UGY5-MFZB>]; see also 21 U.S.C. § 350g (2020); 21 C.F.R. § 117 (2019).

48. See Hugh A. Sampson, *Peanut Allergy*, 346 NEW ENG. J. MED. 1294, 1296 (2002) (stating that the average person with peanut allergy has an allergic reaction every three to five years from inadvertent exposure through sources such as contamination of manufacturing equipment); THRESHOLD WORKING GRP., U.S. FOOD & DRUG ADMIN. & U.S. DEPT’ OF HEALTH & HUM. SERVS., APPROACHES TO

accidental ingestion is common and is responsible for a substantial number of allergic reactions, even deaths.<sup>49</sup> A Minnesota man died in 2016 after eating chocolate containing peanut residue.<sup>50</sup> Although ingesting allergens causes most reactions, mere skin contact or inhalation can trigger a reaction in rare instances,<sup>51</sup> such as when a sixteen-year-old had a severe allergic reaction to a drop of milk splashing on his shoulder.<sup>52</sup> Labels must be studied, waiters and restaurant managers must be interrogated, and questionable food must be avoided. Every bite must be scrutinized. A misstep can be deadly.

### B. General Skepticism and Hostility About Food Allergies

When someone has a life-threatening affliction, we expect society to respond with sympathy and compassion. Yet food allergy sufferers often face a different reality. A vocal contingent of skeptics do not even believe that food allergies exist.<sup>53</sup> Then

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ESTABLISH THRESHOLDS FOR MAJOR FOOD ALLERGENS AND FOR GLUTEN IN FOOD 21 (2006), <https://www.fda.gov/downloads/Food/IngredientsPackagingLabeling/UCM192048.pdf> [<https://perma.cc/5ME8-JYZT>] (noting that cross-contact from sources such as shared production machinery has caused numerous allergic reactions).

49. See Bollinger et al., *supra* note 44, at 415 (stating that unintentional ingestion is inevitable, despite best attempts to avoid the allergen); Fleischer et al., *supra* note 25, at e25 (demonstrating high frequency of food allergy reactions caused by accidental exposure to allergens); CDC, VOLUNTARY GUIDELINES, *supra* note 23, at 9 (explaining that “16%-18% of children with food allergies have had a reaction from accidentally eating food allergens while at school”).

50. Mary Lynn Smith, *Allergic Reaction to Peanut Residue Kills 22-Year-Old Twin Cities Man*, STAR TRIB. (Jan. 22, 2016), <http://www.startribune.com/peanut-allergy-kills-22-year-old-twin-cities-man/366152021/> [<https://perma.cc/R6XW-7YJ9>].

51. See Bartnikas & Sicherer, *supra* note 5, at 335 (describing five reports of anaphylaxis from skin exposure to cow’s milk); Tan et al., *supra* note 46, at 583 (stating that although ingestion triggers most allergic reactions, skin contact and inhalation can also trigger some allergic reactions and describing five instances of severe food allergy reactions from skin contact or inhalation).

52. G. Liccardi et al., *Severe Allergic Reaction Induced by Accidental Skin Contact with Cow Milk in a 16-Year-Old Boy. A Case Report*, 14 J. INVESTIGATIVE ALLERGOLOGY & CLINICAL IMMUNOLOGY 168, 168 (2004).

53. See A.J. Cummings et al., *The Psychosocial Impact of Food Allergy and Food Hypersensitivity in Children, Adolescents and Their Families: A Review*, 65 ALLERGY 933, 939 (2010) (reporting parental frustration that some friends and family members disbelieve the food allergy diagnosis); Muñoz-Furlong, *supra* note 44, at 1654 (“Families may also face other family members who do not believe the food allergy diagnosis and attempt to give the child the restricted food, often causing a reaction when they succeed.”); Gagné, *supra* note 44 (discussing those who “dismiss food allergy as a made-up phenomenon”); Lavanya Ramanathan, *It’s Bad Enough to Have a Food Allergy. But Then You Have to Deal with the Skepticism*, WASH.

there is the “no one was allergic to peanut butter when I was a kid” crowd, who think the numbers are inflated and believe that parents either overprotect their children, self-diagnose nonexistent allergies, or exaggerate the allergy’s severity to garner attention.<sup>54</sup> The relative rarity of death from allergic reactions leads some to mock or trivialize food allergies.<sup>55</sup> Some skeptics simply do not believe that a small amount of any food can be harmful.<sup>56</sup> Still others resist accommodating food allergies, stressing their purported right to eat freely while appearing unconcerned for the safety of those with food allergies.<sup>57</sup>

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POST (Sept. 25, 2018), [https://www.washingtonpost.com/lifestyle/magazine/its-bad-enough-to-have-a-food-allergy-but-then-you-have-to-deal-with-the-skepticism/2018/09/21/80d2e1f8-89d6-11e8-8aea-86e88ae760d8\\_story.html](https://www.washingtonpost.com/lifestyle/magazine/its-bad-enough-to-have-a-food-allergy-but-then-you-have-to-deal-with-the-skepticism/2018/09/21/80d2e1f8-89d6-11e8-8aea-86e88ae760d8_story.html) [<https://perma.cc/U2CJ-U5SF>] (“[T]ell someone that you have a food allergy, and there’s a good chance they’ll roll their eyes in disbelief.”); Beth Teitell, *Skeptics Add to Food Allergy Burden for Parents*, BOS. GLOBE (Feb. 11, 2014), <https://www.bostonglobe.com/lifestyle/2014/02/11/with-one-child-food-allergy-restricting-another-allergy-moms-say-they-face-skepticism/Hi9h2AGwDyCzAB0NsCRX9O/story.html> [<https://perma.cc/AM9H-XNTZ>] (describing parents facing “disbelief that their children’s allergies exist at all”).

54. See Gagné, *supra* note 44 (describing backlash against food allergy parents as portraying them “as hysterical, anxiety-ridden and even needing to ‘feel special’”); Ishani Nath, *Parents Sue School Board, Principal in Shocking Allergy Rights Case*, ALLERGIC LIVING (Dec. 9, 2014), <https://www.allergicliving.com/2014/12/09/parents-sue-school-board-and-principal-in-shocking-allergy-rights-case/> [<https://perma.cc/78GF-N9BS>] (explaining that school officials reported parents of young child with peanut allergy to child services for insisting school accommodate her allergy); Joel Stein, *A Nut Allergy Skeptic Learns the Hard Way*, TIME (Aug. 14, 2010), <http://content.time.com/time/magazine/article/0,9171,2007417,00.html> [<https://perma.cc/VEH4-6K98>] (recounting author’s prior belief that children did not have food allergies but instead had “a parent who needs to feel special”); Teitell, *supra* note 53 (“[P]eople think we’re all misdiagnosed, that we’re hypochondriacs,” says food allergy mom who runs a local parent support group. “[S]ome parents of allergic children say they are sometimes branded hypochondriacs or labeled as overprotective by neighbors, late-night comics, and even grandparents.”).

55. See Bartnikas & Sicherer, *supra* note 5, at 334.

56. See Teitell, *supra* note 53 (“[S]ome parents of kids with allergies say they’re challenged by people who don’t understand that even trace amounts of a food can trigger a potentially fatal allergic reaction, or anaphylaxis.”); see also Ruchi S. Gupta, *Food Allergy Knowledge, Attitudes and Beliefs: Focus Groups of Parents, Physicians and the General Public*, 8 BMC PEDIATRICS 1, 1 (2008) (discussing public misperceptions about the prevalence, definition, and triggers of food allergies).

57. See Julie Weingarden Dubin, *Allergy Backlash: Skeptic Moms Flout No-Peanut Rules*, TODAY (June 21, 2011), <https://www.today.com/parents/allergy-backlash-skeptic-moms-flout-no-peanut-rules-1C7398269> [<https://perma.cc/U7SN-KU>] (quoting a comment from a food allergy skeptic: “It’s not fair to turn a whole school upside down for ONE student . . . Peanut butter sandwiches are just about the only thing my kid will eat. Multiple kids have to suffer so one kid can ‘enjoy’ a normal childhood . . . yeah, screw that.”); Lisa Rutledge, *Cambridge Mom Calls for End to Nut Bans in Schools*, CAMBRIDGE TIMES (Oct. 27, 2018), <https://>



Skepticism about food allergies and lack of compassion for those who suffer from them are reflected in the media. Television shows and movies often joke about food allergies.<sup>58</sup> For example, the 2018 *Peter Rabbit* movie included a “comedic” scene depicting an allergic character being bombarded with blackberries, his allergen.<sup>59</sup> A sitcom featured a joke about how a peanut-allergic child could be “taken out” with “a bag of trail mix.”<sup>60</sup> This is just the tip of the iceberg.<sup>61</sup> Such behavior reinforces the idea that food allergies are a trivial concern.<sup>62</sup> The media exacerbates broader societal concerns that people fake or exaggerate food allergies or other disabilities to gain some sort of advantage.<sup>63</sup>

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[www.cambridgetimes.ca/news-story/8989124-cambridge-mom-calls-for-end-to-nut-bans-in-schools/](http://www.cambridgetimes.ca/news-story/8989124-cambridge-mom-calls-for-end-to-nut-bans-in-schools/) [<https://perma.cc/8P6M-Z5RJ>] (reporting on Canadian mother who protested school’s nut-free policy because it restricted her non-allergic daughter’s food choices); see also Ruchi S. Gupta, *Food Allergy Knowledge, Attitudes, and Beliefs in the United States*, 103 ANNALS ALLERGY, ASTHMA & IMMUNOLOGY 43, 48–49 (2009) (explaining that parents of non-allergic children tend to oppose specific school protection policies, even when generally agreeing that schools should help manage food allergies).

58. *Statement by Food Allergy Research & Education and Members of Clinical Advisory Board on Depiction of Food Allergies in Entertainment Media*, FOOD ALLERGY RES. & EDUC. (Feb. 13, 2018), <https://www.foodallergy.org/media-room/statement-food-allergy-research-education-and-members-clinical-advisory-board-depiction> [hereinafter FARE, *Media Statement*] [<https://perma.cc/MKP5-DWYC>] (discussing analysis of 115 television and movie references to food allergies showing 59% joked about or trivialized the seriousness of the allergy).

59. See *Allergy Bullying: It’s Real, and It’s Dangerous*, CBC RADIO, <https://www.cbc.ca/radio/whitecoat/allergy-bullying-it-s-real-and-it-s-dangerous-1.4627456> (last updated Aug. 31, 2018) [<https://perma.cc/T9QE-TCWV>].

60. *Id.*

61. For example, a January 2020 *Saturday Night Live* skit featured a Mr. Peanut character quipping that he “took out a lot of first graders with peanut allergies.” See Dave Itzkoff, “*Saturday Night Live* Spoofs Trump’s Impeachment Trial,” N.Y. TIMES (Jan. 26, 2020), <https://www.nytimes.com/2020/01/26/arts/television/saturday-night-live.html> [<https://perma.cc/EVT9-ZHJN>]. The Netflix show *Alexa & Katie* featured a joke in December 2019 about an allergic customer blowing off the barista’s mistake in including an allergen in her drink because she had an EpiPen available. See Danielle Mikulak, *How This Joke on Netflix’s “Alexa & Katie” Hurts Those with Food Allergies*, MIGHTY (Jan. 16, 2020), <https://themighty.com/2020/01/netflix-alexa-katie-food-allergy-joke/> [<https://perma.cc/TH5G-VBQ2>]. Comedian Ricky Gervais asked, “[i]f being near a nut can kill you, do we really want that in the gene pool?” CBC RADIO, *supra* note 59.

62. See FARE, *Media Statement*, *supra* note 58 (explaining that media trivializing or joking about food allergies has been shown to decrease support for food allergy accommodation in schools).

63. See Doron Dorfman, *Fear of the Disability Con: Perceptions of Fraud and Special Rights Discourse*, 53 L. & SOC’Y REV. 1051, 1053, 1060 (2019) (discussing the “public suspicion of the ‘disability con,’ that is the cultural anxiety that individuals fake disabilities to take advantage of rights, accommodations, or benefits” and the media’s crucial role in perpetuating this image); Laura Rothstein, *Puppies*,

“Some illnesses we elevate and say the people who are dealing with them are very heroic, and others we make the butt of jokes and we dehumanize them.”<sup>64</sup> Food allergies are viewed as fake, funny, or a fuss—not a potentially life-threatening condition for millions of American adults and children.

### C. Challenges Schoolchildren with Food Allergies Face

Because millions of schoolchildren are allergic to some type of food, food allergies raise serious concerns in the school setting.<sup>65</sup> The average American classroom has one to two food-allergic children.<sup>66</sup> At school, food is everywhere, from the lunchroom to the classroom. Children eat this food at meals—up to three meals a day at school—plus at snack time and during parties. Children play games, conduct science experiments, and make crafts with food. Children celebrate birthdays, holidays, answering a question correctly, and the end of a big test, all with food.<sup>67</sup> Children attend school-related activities such as sporting

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*Ponies, Pigs, and Parrots: Policies, Practices, and Procedures in Pubs, Pads, Planes, and Professions: Where We Live, Work, and Play, and How We Get There: Animal Accommodations in Public Places, Housing, Employment, and Transportation*, 24 ANIMAL L. 13, 14, 16 (2018) (raising the issue of fake support animals and the challenges posed by individuals who falsely claim the need for emotional support animals simply because they want their pets nearby); Neil Swidey, *Why Food Allergy Fakers Need to Stop*, BOS. GLOBE MAG. (Oct. 14, 2015), <https://www.bostonglobe.com/magazine/2015/10/14/why-food-allergy-fakers-need-stop/PB6uN8NF3eLWFjXnKF5A9K/story.html> [<https://perma.cc/63GZ-ZPQT>] (imploping “food allergy fakers” to stop describing their food preferences as allergies because it “erode[s] hard-won progress for people with genuine allergies and disorders”).

64. CBC RADIO, *supra* note 59.

65. See C. Lynne McIntyre et al., *Administration of Epinephrine for Life-Threatening Allergic Reactions in School Settings*, 116 PEDIATRICS 1134, 1134 (2004); Elizabeth Landau, *Allergy Bullying: When Food is a Weapon*, CNN (Jan. 7, 2013), <https://www.cnn.com/2013/01/05/health/bullying-food-allergies/index.html> [<https://perma.cc/24VA-LCWL>].

66. See Bartnikas & Sicherer, *supra* note 5, at 334; FARE FACTS & STATISTICS, *supra* note 2, at 1; Ramanathan, *supra* note 53.

67. See *School Meals*, U.S. DEP’T OF AGRIC., FOOD & NUTRITION SERV., <https://www.fns.usda.gov/school-meals/child-nutrition-programs> (last visited Aug. 25, 2020) [<https://perma.cc/6SR9-J26K>] (describing school meal program); *Managing Food Allergies in the Classroom*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/education-awareness/community-resources/your-back-to-school-headquarters/managing-food-allergies-in> (last visited Aug 25, 2020) [<https://perma.cc/TY9T-XVCB>] (referring to food-related classroom activities, including celebrations, craft and science projects, and rewards); Levingston, *supra* note 9 (reporting on classroom experiment involving exploding peanuts); Jeanne M. Lomas & Kirsi M. Järvinen, *Managing Nut-Induced Anaphylaxis: Challenges and Solutions*, J. ASTHMA & ALLERGY 115, 118 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC46314>

events, debate tournaments, and musical performances where meals and snacks might be necessary.<sup>68</sup>

With so much food and so many allergic children, schools face challenges in keeping allergic children safe. Because peanuts are one of the most prevalent and dangerous food allergies,<sup>69</sup> many schools regulate peanuts, or all nuts, by implementing policies that ban nuts from certain cafeteria tables, classrooms, or even the entire school.<sup>70</sup> Not only do these policies cover the ever-popular peanut butter sandwich, but because candy such as chocolate and baked goods such as cookies often share preparation or manufacturing equipment with nuts,<sup>71</sup> nut-free policies might exclude these items too.

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27/ [<https://perma.cc/M767-URPV>] (“Most peanut and tree nut reactions at school occur in the classroom and are due to utilization of nuts in craft projects or nut exposure during celebrations such as for a birthday.”); McIntyre et al., *supra* note 65, at 1139 (documenting allergic reactions in school from parties and special events, cooking classes, and a class project involving peanut butter); Muñoz-Furlong, *supra* note 44, at 1657 (discussing food allergy risks at school relating to meals, snacks, class projects, celebrations, and awards); *Managing Food Allergies in Schools*, U.S. CTRS. FOR DISEASE CONTROL & PREVENTION, [https://www.cdc.gov/healthyschools/foodallergies/pdf/teachers\\_508\\_tagged.pdf](https://www.cdc.gov/healthyschools/foodallergies/pdf/teachers_508_tagged.pdf) (last visited Aug. 25, 2020) [<https://perma.cc/8BCL-HG96>] (recommending that schools “[a]void using allergens in classroom activities, including arts and crafts, counting, science projects, parties, holiday and celebration treats, or cooking”); see also Pistiner et al., *supra* note 5, at 1427 (noting that most allergic reactions at school start in the classroom).

68. See Muñoz-Furlong, *supra* note 44, at 1657 (discussing food allergy concerns regarding field trips); Pistiner et al., *supra* note 5, at 1425, 1427-28 (same).

69. See Lisa M. Bartnikas et al., *Impact of School Peanut-Free Policies on Epinephrine Administration*, *J. ALLERGY & CLINICAL IMMUNOLOGY* 465, 465 (2017), [https://www.jacionline.org/article/S0091-6749\(17\)30472-4/pdf](https://www.jacionline.org/article/S0091-6749(17)30472-4/pdf) [<https://perma.cc/XE B6-8ASE>] (noting that “[p]eanut allergy is the third leading food allergy in US children and rates are rising”); CDC, *VOLUNTARY GUIDELINES*, *supra* note 23, at 19 (noting that peanuts account for 50-62% of fatal or near-fatal food allergy reactions).

70. See Bartnikas et al., *supra* note 69, at 465; Grace Chen, *Why Peanuts are Being Banned at Public Schools*, *PUB. SCH. REV.* (Apr. 6, 2018), <https://www.publicschoolreview.com/blog/why-peanuts-are-being-banned-at-public-schools> [<https://perma.cc/RQ4K-MRT8>]; Elizabeth McQuaid & Barbara Jandasek, *Children’s Food Allergies: Another Target for Bullying?*, *LIFESPAN* (Sept. 2013), <https://www.lifespan.org/centers-services/bradley-hasbro-childrens-research-center/school-issues/childrens-food-allergies> [<https://perma.cc/KV5Z-CV65>]; David R. Stukus, *Peanut-Free Schools: What Does It Really Mean, and Are They Necessary?*, *J. ALLERGY & CLINICAL IMMUNOLOGY* 391 (2017), [https://www.jacionline.org/article/S0091-6749\(17\)30666-8/pdf](https://www.jacionline.org/article/S0091-6749(17)30666-8/pdf) [<https://perma.cc/GPP4-FYEY>].

71. See Terence J. Furlong et al., *Peanut and Tree Nut Allergic Reactions in Restaurants and Other Food Establishments*, *J. ALLERGY & CLINICAL IMMUNOLOGY* 867, 869 (2001) (reporting frequent allergic reactions to foods from bakeries and ice cream shops); *Nut and Peanut Allergy*, *KIDSHEALTH*, <https://kidshealth.org/en/parents/nut-peanut-allergy.html> (last updated Aug. 2018) [<https://perma.cc/V9NW-VQ5E>] (stating that cookies, baked goods, and candy are “[s]ome of the highest-risk

Unsurprisingly, these types of policies frequently do not go over well with the other children or their parents.<sup>72</sup> The negativity and skepticism about food allergies in society at large work their way into schools too. Some parents resist efforts to accommodate allergic children, claiming these practices infringe on their children's rights.<sup>73</sup> Such parents may, for example, violate food restrictions by deliberately sending banned food to school or protest to have food regulations removed.<sup>74</sup> These parents see a simple solution: teach your kid not to eat my kid's food.<sup>75</sup>

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food for people with peanut or tree nut allergy" because of the risk of cross-contamination or hidden nuts); Lomas & Järvinen, *supra* note 67, at 118–19 (stating that children's parties and bakeries are among high-risk situations for cross-contamination and accidental nut exposure).

72. See Carina Hoskisson, *Why Do Your Kid's Allergies Mean My Kid Can't Have a Birthday?*, HUFFINGTON POST (Apr. 22, 2014), [https://www.huffpost.com/entry/why-do-your-kids-allergies-mean-my-kid-cant-have-a-birthday\\_n\\_4767686](https://www.huffpost.com/entry/why-do-your-kids-allergies-mean-my-kid-cant-have-a-birthday_n_4767686) [https://perma.cc/5CXG-445R]; see also Bartnikas et al., *supra* note 69, at 472 (stating that nut-free policies may frustrate non-allergic families by restricting food choices).

73. Mary Quinn O'Connor, *Amid Protest, Florida School Stands Behind Tough New Peanut Allergy Regulations*, FOX NEWS (Mar. 15, 2011), <https://www.foxnews.com/us/amid-protest-florida-school-stands-behind-tough-new-peanut-allergy-regulations> [https://perma.cc/R2UP-CXWS]; see also Kim Shiffman, *Pickets for Peanuts?*, ALLERGIC LIVING (Mar. 25, 2011), <https://www.allergicliving.com/2011/03/25/pickets-for-peanuts/> [https://perma.cc/B8YJ-LRVH] ("You can't take peanut butter and jelly—or any right-away from my child," yelled one angry protester to the mother of another peanut-allergic child at the school. 'Keep your child at home!'); Teitell, *supra* note 53 (discussing lawyer who has been approached to represent families unhappy with nut ban).

74. See Dubin, *supra* note 57 ("Though more schools take measures to protect kids with food allergies, and most parents are sensitive to the dangers, a small but vocal group of parents think such allergies are exaggerated, even invented. Some even send junior off to his nut-free class with a peanut-butter-and[-]jelly sandwich."); Margaret Hartmann, *Parents Protest to Remove 6-Year-Old with Peanut Allergy from Class*, JEZEBEL (Mar. 22, 2011), <https://jezebel.com/parents-protest-to-remove-6-year-old-with-peanut-allerg-5784267> [https://perma.cc/6LDC-XZ9W] (reporting on parental protests to have peanut-allergic girl home-schooled and school's nut-free policies rescinded); Landau, *supra* note 65 (quoting comment on food allergy bullying article: "[H]ow about you keep your sickly kid home? That is what homeschooling is for."); Rutledge, *supra* note 57 (describing mother's protest of school's nut-free policy after her daughter came home hungry because she was not allowed to eat the peanut butter her mother packed in her lunch); Nicole Smith, *Parents Who Bully About Food Allergies*, ALLERGIC CHILD (Oct. 13, 2012), <https://home.allergicchild.com/parents-who-bully-about-food-allergies/> [https://perma.cc/E378-FYMK] ("One Mom announced at a PTO meeting that she was done following 'all the no peanuts rules' and was bringing peanut butter cookies to Field Day for all the students.").

75. See Kennedy, *Why I Mock "Attachment Parenting" and the Kids It Produces*, REASON (Apr. 29, 2012), <https://reason.com/2012/04/29/why-i-mock-attachment-parenting-and-the> [https://perma.cc/D6ZY-UBXV] (opining that parents with allergic children should not "force an entire group of otherwise healthy kids to alter their

But staying safe when allergens are present is easier said than done. When dangerous food is close, the risk of accidental ingestion is significant, especially with younger children.<sup>76</sup> Nearly 20% of food-allergic children have had an allergic reaction at school.<sup>77</sup> Children are notoriously messy eaters. Peanut butter does not stay put on the bread—it can easily get on hands, doorknobs, and tables.<sup>78</sup> An allergic child might touch a contaminated surface, and the allergen can then end up in that child's mouth. On top of that, some children react to skin contact or inhalation,<sup>79</sup> and so mere proximity to the allergen puts these children at risk from even the tidiest eaters.

Food allergies are ever more prevalent in schools, and the struggles that food-allergic children face are real and life threatening. These challenges set the stage for an equally if not more severe threat—being bullied because of their allergy.

## II. THE PROBLEM OF FOOD ALLERGY BULLYING

The rise of food allergies has given bullies a new target. Whether rooted in ignorance or maliciousness, food allergy bullying has become a serious concern for children with food

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lunch and snack selections based on their deficits"); Landau, *supra* note 65 (recounting comment posted regarding food allergy accommodations in school: "It is completely unfair and ridiculous to expect 4500 other families to change their eating habits because you can't teach your kid not to touch someone else's food."); Jill Pond, *Leave Your Stupid Peanut Butter at Home*, BLUNT MOMS (Aug. 22, 2016), <https://bluntmoms.com/leave-stupid-peanut-butter-home/> [<https://perma.cc/UG2H-SJ2J>] (describing negative comments relating to nut-free policies, including "The whole class has to change for one or two kids? Why can't those kids just stay away from nuts?").

76. See Fleischer et al., *supra* note 25, at e25 (discussing high frequency of food allergy reactions among young children caused by accidental exposure); Teitell, *supra* note 53 (describing allergic reaction when dairy-allergic toddler ate a milk-soaked Cheerio she found in a chair crevice); see also *supra* note 49 and accompanying text.

77. Bartnikas & Sicherer, *supra* note 5, at 334.

78. See Wade TA Watson et al., *Persistence of Peanut Allergen on a Table Surface*, ALLERGY, ASTHMA & CLINICAL IMMUNOLOGY, Feb. 2013, at 2 (remarking that "[p]eanut allergen is very robust" and demonstrating that table smeared with peanut butter and not cleaned for 110 days still contained the allergen); see also Borella, *supra* note 21, at 764–65 ("It is no secret that some children are messy eaters and often fail to wash their hands thoroughly with soap and water after eating. The residue from one child's peanut butter sandwich can easily find its way onto the desk or clothes of a child with a peanut allergy.").

79. See *supra* notes 51–52 and accompanying text.

allergies.<sup>80</sup> The statistics are alarming. Studies indicate that at least one-third of school-aged children with food allergies are bullied specifically because of their allergies<sup>81</sup> and that allergic children are twice as likely as their peers to be bullied.<sup>82</sup>

Food allergy bullying is not an isolated occurrence. Studies show that 86% of bullied children were bullied repeatedly, 34% were bullied more than twice per month, and 69% were bullied for at least a year.<sup>83</sup> Although the phenomenon has been studied for only about a decade,<sup>84</sup> food allergy bullying is increasing as more and more children are developing food allergies.<sup>85</sup>

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80. See Lieberman et al., *supra* note 5, at 282 (“Bullying, teasing, and harassment of children with food allergy seems to be common, frequent, and repetitive. These actions pose emotional and physical risks that should be addressed in food allergy management.”); *Bullying and Youth with Disabilities and Special Needs*, U.S. DEPT OF HEALTH & HUM. SERVS., <https://www.stopbullying.gov/at-risk/groups/special-needs/index.html> (last visited Aug. 4, 2020) [<https://perma.cc/L94C-LHSX>] (“Kids with special health needs, such as epilepsy or food allergies, also may be at higher risk of being bullied. Bullying can include making fun of kids because of their allergies or exposing them to the things they are allergic to. In these cases, bullying is not just serious, it can mean life or death.”).

81. See *supra* note 5 and accompanying text; see also Rabin, *supra* note 9 (“[S]tudies have shown that close to one in three children with food allergies have been bullied specifically because of their allergy.”).

82. See Bartnikas & Sicherer, *supra* note 5, at 335; Lieberman et al., *supra* note 5, at 286; Linda L. Quach and Rita M. John, *Psychosocial Impact of Growing Up with Food Allergies*, J. FOR NURSE PRACS. 477, 479 (2018); see also Muraro et al., *supra* note 5, at 750–51 (reporting Italian study that food-allergic children are twice as likely to be bullied as their non-allergic peers, confirming North American studies and showing that food allergy bullying is a “universal issue”).

83. See Annunziato et al., *supra* note 5, at 639; Lieberman et al., *supra* note 5, at 285.

84. See Lieberman et al., *supra* note 5, at 282; see also *Bullying Rampant Among Allergic Children*, ALLERGIC LIVING (Sept. 29, 2010), <https://www.allergicliving.com/2010/09/29/allergic-children-being-bullied/> [<https://perma.cc/2XB9-M5QC>]; Muraro et al., *supra* note 5, at 749.

85. See Tove Danovich, *Parents, Schools Step Up Efforts to Combat Food-Allergy Bullying*, NPR (June 5, 2018), <https://www.npr.org/sections/thesalt/2018/06/05/613933607/parents-schools-step-up-efforts-to-combat-food-allergy-bullying> [<https://perma.cc/2HMH-XENR>]; Marwa Eltagouri, *Three Teens Charged with Knowingly Exposing Allergic Classmate to Pineapple. She was Hospitalized*, WASH. POST (Jan. 27, 2018), <https://www.washingtonpost.com/news/education/wp/2018/01/26/3-teens-charged-with-knowingly-exposing-allergic-classmate-to-pineapple-she-was-hospitalized/> [<https://perma.cc/8CUE-XADZ>]; Chloe Mullarkey, *Food Allergy and Bullying: The Implications for Parents of Children with Food Allergies*, NYU Steinhardt Dept of Applied Psychology, Spring 2012, [https://wp.nyu.edu/steinhardt-appsych\\_opus/food-allergy-and-bullying-the-implications-for-parents-of-children-with-food-allergies/](https://wp.nyu.edu/steinhardt-appsych_opus/food-allergy-and-bullying-the-implications-for-parents-of-children-with-food-allergies/) [<https://perma.cc/BUN8-GW7L>].

Allergic children are particularly vulnerable to bullying.<sup>86</sup> Though a food allergy itself is invisible, guarding against allergic reactions requires disclosure.<sup>87</sup> Allergic children often stand out for reasons such as sitting at designated cafeteria tables, carrying epinephrine injectors, studying food labels, or bringing special snacks to class.<sup>88</sup> Soon, everyone knows which kids have food allergies—and thus which kids are to blame for unpopular food restrictions or are otherwise vulnerable because of their difference.<sup>89</sup>

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86. See Eve Becker, *Food Allergy Bullying*, LIVING WITHOUT MAG., Dec./Jan. 2013, at 41, [https://www.foodallergyawareness.org/media/education/Bullying-Food%20Allergy%20Bullying\\_DecJan2013\\_Living%20Without%20Magazine.pdf](https://www.foodallergyawareness.org/media/education/Bullying-Food%20Allergy%20Bullying_DecJan2013_Living%20Without%20Magazine.pdf) [<https://perma.cc/5ZE6-FRWJ>] (“A food allergy can be a stigmatizing factor that marks a child as different and exposes him or her to bullying.”); Faith et al., *supra* note 5, at 290 (identifying various factors placing food-allergic children at risk for bullying, including limited participation in social and academic activities because of allergen avoidance); McQuaid & Jandasek, *supra* note 70 (“Given the increased prevalence of food allergies and higher levels of awareness of which children are affected through implementation of special accommodations, children with food allergies may be at risk for negative peer interactions and bullying.”).

87. See McQuaid & Jandasek, *supra* note 70 (commenting that allergic children “cannot ‘fly under the radar’”); Mullarkey, *supra* note 85 (stating that food-allergic children have “a daily visible struggle,” which leads to targeting by bullies). Indeed, federal health information privacy laws generally do not apply in elementary and secondary schools. See *Does the HIPAA Privacy Rule Apply to an Elementary or Secondary School?*, U.S. DEPT OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/faq/513/does-hipaa-apply-to-an-elementary-school/index.html> (last updated July 26, 2013) [<https://perma.cc/4L38-Y2W8>].

88. See Caroline Connell, *Food Allergy Bullying on the Rise*, ALLERGIC LIVING (Fall 2011), <https://www.allergicliving.com/2012/09/17/food-allergy-bullying-on-the-rise/> [<https://perma.cc/6QUE-WZF9>] (“A food allergy certainly makes a child different, and the difference is emphasized by the necessary routine precautions, like carrying an auto-injector and reading food labels . . . .”); Fong et al., *Bullying and Quality of Life*, *supra* note 5, at 2 (pointing to factors such as dietary modifications, food exclusions, and the need for emergency medicine); McQuaid & Jandasek, *supra* note 70 (commenting that “their food allergy is usually apparent to others” due to, for example, “the different food choices children with food allergies have to make or by designated lunchtime seating arrangements”); Ravid et al., *supra* note 5, at 89–90 (explaining that children with food allergies are more susceptible to bullying because of social separation).

89. See Herbert et al., *supra* note 5, at 207 (“[C]hildren whose food allergy results in a perceived intrusion on classmates, such as disallowing certain foods in the classroom, may be at a particular risk of bullying.”); Levingston, *supra* note 9 (commenting that teachers may invite bullying by singling a child out as the reason a food or activity will be missed); Catherine Saint Louis, *In Bullies’ Hands, Nuts or Milk May Be a Weapon*, N.Y. TIMES (June 17, 2013), <https://well.blogs.nytimes.com/2013/06/17/in-bullies-hands-nuts-or-milk-may-be-a-weapon/> [<https://perma.cc/4Y-NZ-XQBW>] (“[A] severe food allergy is a unique vulnerability: It takes only one lunch or cupcake birthday party for other children to know which classmates cannot eat nuts, eggs, milk or even a trace of wheat.”).

Allergic children suffer typical bullying tactics, such as name-calling, exclusion, teasing, and taunting.<sup>90</sup> What makes food allergy bullying even more dangerous, however, is its physical aspect—allergic children are often bullied with the food they are allergic to. One study reported that 57% of food allergy bullying incidents involved the allergen.<sup>91</sup> Some bullies use the food to contaminate an allergic child's locker, desk, or school supplies.<sup>92</sup> Some bullies threaten their victim with the allergen, for example, by thrusting the food in the other child's face.<sup>93</sup> Some

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90. See Lieberman et al., *supra* note 5, at 283 (stating that 64.7% of those bullied based on food allergies were teased or taunted); Quach & John, *supra* note 82, at 479 (“They may be intentionally excluded from their peers, endure teasing and name-calling, and are targets of rumors.”); Saint Louis, *supra* note 89 (“[A] classmate held a Kit Kat candy wrapper near his face and kept chanting, ‘You can’t eat this!’”); Shemesh et al., *supra* note 5, at e14 (collecting data regarding food allergy bullying by being teased, criticized, and excluded, rumors being spread, and belongings being damaged).

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

92. See Connell, *supra* note 88 (bully licked allergic child's pencils and erasers after eating allergen); Erika Dacunha, *A Teen's Story of Allergy Bullying—and Bravery*, ALLERGIC LIVING (July 16, 2013), <https://www.allergicliving.com/2013/07/16/a-teens-story-of-allergy-bullying-and-bravery/> [<https://perma.cc/3ZP8-LW8A>] (desk filled with pistachios and nuts hidden in classroom); Evan Gorman, *Allegations Surface over Prank Causing Allergic Reaction in Hancock Co. Student*, 14 NEWS (Sept. 20, 2018, 7:02 PM), <https://www.14news.com/2018/09/21/allegations-surface-over-prank-causing-allergic-reaction-hancock-co-student/> [<https://perma.cc/9KQW-K8E5>] (peanut butter smeared on child's school supplies, which caused an allergic reaction); Wendy Mondello, *Food Allergy Bullying*, GLUTEN FREE & MORE (Apr. 23, 2018), <https://www.glutenfreeandmore.com/issues/food-allergy-bullying-2/> [<https://perma.cc/NA57-MZJM>] (peanut butter rubbed on locker).

93. See Devin Bates, *Parents Look for Help in Effort to Treat Their Son's Long List of Life-Threatening Allergies*, MY CHAMPLAIN VALLEY, <https://www.mychamplainvalley.com/news/parents-looks-for-help-in-effort-to-treat-their-sons-long-list-of-life-threatening-allergies/> (last updated Jan. 8, 2020, 10:17 AM) [<https://perma.cc/EAR5-R5JB>] (classmates waved egg in boy's face); Danovich, *supra* note 85 (teammate “shoved the mayonnaise-laden sandwich” in the face of egg-allergic boy); Lieberman et al., *supra* note 5, at 283 (stating that 43.5% of bullied children had allergen waved in their face); Morris et al., *supra* note 5, at AB133 (waved in face and chased with allergen); Rabin, *supra* note 9 (peanuts and other food waved in allergic children's faces); see also Connell, *supra* note 88 (relaying story of students running up to allergic classmate and saying, “We ate peanuts! We ate peanut M&M's. And we're going to breathe on you!”); Dacunha, *supra* note 92 (recounting experience where “[s]ome kids would chase me around with their hands up chanting, ‘I ate peanut butter!’”); Ishani Nath, *Food Allergy Bullying: What You Can Do*, ALLERGIC LIVING (Nov. 21, 2014), <https://www.allergicliving.com/2014/11/21/food-allergy-bullying-what-you-can-do/> [<https://perma.cc/YF7L-T2LZ>] (recounting an incident of children in an argument when one “pulled out a peanut butter sandwich and waved it around taunting us and saying, ‘What are you gonna do about it now?’”).



bullies go even further, physically touching the child with the allergen,<sup>94</sup> hiding it in their otherwise safe food,<sup>95</sup> or trying to force-feed their targets.<sup>96</sup>

Several recent incidents demonstrate these extreme tactics. In 2018, a middle-school girl sent a classmate with a severe pineapple allergy to the hospital after rubbing pineapple on her own hand before high-fiving the allergic girl.<sup>97</sup> Even worse, in 2017, a London boy died after a bully who knew of his dairy allergy threw cheese at him.<sup>98</sup> This represents the first known death caused solely by skin exposure to an allergen.<sup>99</sup>

94. See Becker, *supra* note 86, at 40 (bully wiped peanut butter on allergic child's neck); Eltagouri, *supra* note 85 (girls intentionally exposed allergic classmate to pineapple); Landau, *supra* note 65 (boy touched allergic girl's face with peanut butter); Levingston, *supra* note 9 (boys threw peanuts at allergic child); Lieberman et al., *supra* note 5, at 282 (discussing reports of children being smeared or sprayed with their allergen); Muñoz-Furlong, *supra* note 44, at 1654 (child smeared with peanut butter; another child sprayed with milk and had a reaction); Rabin, *supra* note 9 (nacho cheese rubbed on boy's face, milk poured on children, and cake thrown); Saint Louis, *supra* note 89 (child's face touched with peanut butter); see also Greg Bradbury, *Banana Prank Sends Teacher to Hospital, Students to Court*, ABC NEWS (July 31, 2019), <https://abcnews.go.com/US/banana-prank-sends-teacher-hospital/story?id=64691960> [<https://perma.cc/Q4JR-MZ2K>] (bullies threw bananas at allergic teacher).

95. See Lieberman et al., *supra* note 5, at 285 (discussing incidents of food intentionally being contaminated with allergen); Rabin, *supra* note 9 ("The most dangerous incidents occur when bullies surreptitiously contaminate the child's own food with a food allergen . . ."); Saint Louis, *supra* note 89 (classmates may plot to switch a peer's lunch to see if he gets sick); Charlotte Jude Schwartz, *Food Allergy Bullying: The Stakes Are High*, ALLERGIC LIVING (Jan. 9, 2014), <https://www.allergicliving.com/2014/01/09/food-allergy-bullying-the-stakes-are-high/> [<https://perma.cc/33D5-VD67>] (peanut butter cookie crumbled into peanut-allergic child's lunchbox); see also Fong et al., *Bullying in Australia*, *supra* note 5, at 742 (reporting Australian food allergy bullying study where child was tricked into eating an allergen).

96. See Lin & Sharma, *supra* note 5, at AB288 (45% of survey respondents reported that "other children tried to make them eat a food allergen"); Saint Louis, *supra* note 89 (food allergy program director stated that "[e]very few months, a child recounts being force-fed an allergen"); see also Landau, *supra* note 65 (kindergarten child came home crying because a boy told him he was going to force him to eat a peanut).

97. See Eltagouri, *supra* note 85; Rabin, *supra* note 9; see also Bradbury, *supra* note 94 (three seventh-grade students rubbed banana on the doorknob of teacher they knew had severe banana allergy and threw bananas at her, sending her to the hospital for anaphylactic shock); Fong et al., *Bullying in Australia*, *supra* note 5, at 742 (discussing two Australian children who had allergic reactions from food allergy bullying).

98. See Bartnikas & Sicherer, *supra* note 5, at 334; Ru-Xin Foong et al., *Fatal Anaphylaxis Due to Transcutaneous Allergen Exposure: An Exceptional Case*, *J. ALLERGY & CLINICAL IMMUNOLOGY: IN PRAC.* 332, 332 (2020).

99. See Foong et al., *supra* note 98, at 332.

Bullying of all types harms children, and food allergy bullying is no exception. Bullied food-allergic children may drastically change their eating habits, including refusing to eat at school.<sup>100</sup> Like other bullying victims, they may experience absenteeism, declining academic performance, anxiety, depression, violence, substance abuse, and school dropout.<sup>101</sup> Some may contemplate suicide or even follow through with it.<sup>102</sup> After an eight-year-old Virginia boy was bullied because of his food allergies, he became angry and combative, his grades plummeted, and he repeatedly said he wanted to hurt himself or die.<sup>103</sup>

As if this were not enough, food allergy bullying poses unique additional dangers. For instance, allergic children, particularly teens, might attempt to reduce the risk of becoming a bully's target by gambling that unlabeled food is safe or not carrying their epinephrine—practices that dramatically increase the risk of having an allergic reaction and dying from it.<sup>104</sup> And

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100. See Becker, *supra* note 86, at 42.

101. See Laura Baams et al., *Economic Costs of Bias-Based Bullying*, SCH. PSYCH. Q. 422, 422, 423 (2017) (reporting that bias-based bullying, including bullying based on disability, contributes to lower student wellness, poor academic performance, absenteeism, and dropping out more for than non-bias bullying); Connell, *supra* note 88 (sadness, depression, humiliation, embarrassment, low self-esteem, societal withdrawal, fear of school); *Effects of Bullying*, U.S. DEP'T OF HEALTH & HUM. SERVS. <https://www.stopbullying.gov/at-risk/effects/index.html> (last updated July 21, 2020) [hereinafter STOPBULLYING, *Effects of Bullying*] [<https://perma.cc/SU2U-XXR6>] (substance abuse, violence, depression, anxiety, sadness, loneliness, health problems, declining academic performance, and dropout); MARK C. WEBER, DISABILITY HARASSMENT 66 (2007) (headache, abdominal pain, resisting going to school, dropout).

102. See STOPBULLYING, *Effects of Bullying*, *supra* note 101.

103. See Becker, *supra* note 86, at 40–41; see also *Bullying Kids with Food Allergies*, CHILD.'S CTR. FOR PSYCHIATRY, PSYCH. & RELATED SERVS. (Aug. 20, 2018), <https://childrenstreatmentcenter.com/bullying-kids-food-allergies/> [hereinafter CHILDREN'S CENTER] [<https://perma.cc/4B2T-QAZE>] (“This harassment and stress can cause allergic children to fear school, leading to school refusal, and can make them depressed or cause them to isolate themselves socially.”); Connell, *supra* note 88 (boy who suffered food allergy bullying was afraid to go to school); Rabin, *supra* note 9 (“Even when children aren't physically harmed, the [food allergy bullying] incidents can take a psychological toll, causing distress and anxiety and affecting their quality of life. Children may refuse to go to school, or become socially isolated, depressed or even suicidal, experts say.”).

104. See Connell, *supra* note 88 (discussing not carrying emergency medicine as a tactic to hide allergies); *Bullying*, FOOD ALLERGY & ANAPHYLAXIS CONNECTION TEAM [hereinafter FAACT, *Bullying*], <https://www.foodallergyawareness.org/education/bullying/> (last visited Aug. 25, 2020) [<https://perma.cc/4CK5-CLQC>] (stating that “[b]ullying has also been shown to increase risky behavior among children with food allergies,” including not carrying emergency medicine and purposefully eating potentially unsafe foods, and that “[f]atalities among adolescents with food allergies

when bullies weaponize the allergen by using it physically, they directly place the allergic child's life in danger.<sup>105</sup> The death of the London boy from food allergy bullying “highlights the worst possible outcome of the devastating impact of teasing and bullying on patients with food allergies.”<sup>106</sup>

In addition to these physical risks, food allergy bullying can take a severe emotional toll. Bullying causes food-allergic children to fear for their safety or their very lives.<sup>107</sup> Because of factors such as the ease of accidentally eating an allergen and the potentially lethal consequences of doing so, allergic children tend to experience anxiety regarding their condition.<sup>108</sup> They may constantly worry about coming into contact with their allergen at school or elsewhere.<sup>109</sup> One study reported that peanut-

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are more common due to risk-taking behaviors”); see also Janet French, *Food Allergy Bullying: How to Spot if Your Child is a Target and Actions to Take*, ALLERGIC LIVING (May 15, 2018), <https://www.allergicliving.com/2018/05/15/food-allergy-bullying-how-to-spot-if-your-child-is-a-target-and-actions-to-take/> [https://perma.cc/8GLV-UG8W] (“Surveys also have revealed that children receiving unwanted attention about their allergies had more trouble managing the allergy, and were less likely to wear medical identification.”).

105. See Connell, *supra* note 88 (“All bullying is serious, but when an anaphylactic child is targeted, of course, the results can be life-threatening.”); Eltagouri, *supra* note 85 (quoting allergy doctor, “putting a little bit of peanut butter on the keyboard to hurt somebody is a potentially deadly thing”); Fong et al., *Bullying and Quality of Life*, *supra* note 5, at 3 (expressing concern about the possibility of an allergic reaction due to bullying, “particularly so in cases of children being touched with an allergen or their food intentionally being contaminated”); Lieberman et al., *supra* note 5, at 286 (“These actions pose a risk of psychological harm in all people, but unique to this population is that bullying, teasing, or harassment can also pose a direct physical threat when the allergen is involved.”); Rabin, *supra* note 9 (quoting mother of food-allergic child that bullying with the allergen “is like an assault with a deadly weapon”).

106. Bartnikas & Sicherer, *supra* note 5, at 335.

107. See Natalie J. Avery et al., *Assessment of Quality of Life in Children with Peanut Allergy*, PEDIATRIC ALLERGY & IMMUNOLOGY 378, 381–82 (2003) (reporting that allergic children may fear they will die if near their allergen); Becker, *supra* note 86, at 46 (quoting a psychologist: “When people are threatened with something that they fear—whether it’s a fist in their face or peanut butter smeared on their head or a fish thrown into their locker—they’re going to be frightened. And justifiably so. Bullying is intimidating and it causes tremendous psychological problems for the kids.”); CHILDREN’S CENTER, *supra* note 103 (explaining that allergic children who are bullied may come to fear school); Connell, *supra* note 88 (reporting that food-allergic boy was afraid to go to school the day after he was threatened); see also Weber, *supra* note 22, at 1092–93 (explaining that disabled children who are bullied by peers or teachers may fear going to school).

108. See Cummings et al., *supra* note 53, at 933; Feng & Kim, *supra* note 5, at 75; Herbert et al., *supra* note 5, at 206.

109. See Susan J. Elliott et al., “What Are We Waiting For, Another Child to Die?” *A Qualitative Analysis of Regulatory School Environments for Food Allergic*

allergic children had more fear of an adverse event and more anxiety about eating than insulin-dependent diabetic children.<sup>110</sup> And that is just normal day-to-day life.<sup>111</sup> Being threatened with the source of this daily anxiety exponentially magnifies these children's fears.<sup>112</sup> Food allergy bullying can be terrifying. It can make victims afraid that they will die.<sup>113</sup> Even though some bullies might not really intend to terrorize or physically endanger their victims,<sup>114</sup> some do. These are the ones who say things like: "I could kill you with this sandwich."<sup>115</sup>

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*Children*, UNIVERSAL J. PUB. HEALTH 234, 237 (2015) ("Kids are also constantly worried about coming into contact with food allergen(s) from other children and/or the broader school environment. Snacks and lunch times were always associated with higher anxiety, but birthday celebrations were particularly stressful."); Rocheleau & Rocheleau, *supra* note 5, at 168 (describing an "intense fear" of being exposed to food allergens at school).

110. See Avery et al., *supra* note 107, at 378.

111. See *id.* at 381–82 (reporting study results showing peanut-allergic children can be "extremely frighten[ed]" of "simple tasks such as shopping or eating in restaurants" and that two children were afraid of dying when they knew peanuts were nearby, like in a grocery store); Cummings et al., *supra* note 53, at 938 ("Everyday activities such as shopping and eating out are frightening for children with food allergies and even perceived as life threatening."); Herbert et al., *supra* note 5, at 207 (noting that food-allergic children have "fear related to the unpredictability of death" from allergen exposure).

112. See Claire Gagné, *Bullying Case Grabs Attention*, ALLERGIC LIVING (July 2, 2010), <https://www.allergicliving.com/2010/07/02/food-allergy-bullying-case/> [https://perma.cc/GEQ3-Q3DK] (quoting leader of anaphylaxis support group: "To an allergic child, being threatened with the thing that they're most afraid of, whether it's peanut or milk, to them the perception is a very serious threat."); Suzanne Monaghan, *More Than a Third of Kids with Food Allergies Say They've Been Bullied Because of It*, KYW NEWS RADIO (Sept. 23, 2019, 4:00 AM), <https://kywnewsradio.radio.com/articles/news/many-kids-food-allergies-say-they-get-bullied-it> [https://perma.cc/K8JV-FF4E] ("What people don't understand is that this is a food that can actually kill them. It can kill them either by touch, in some cases, or by accidental ingestion. And so that level of bullying really heightens up to a fear level that is incomprehensible," said FARE CEO Lisa Gable.); Rocheleau & Rocheleau, *supra* note 5, at 168 ("Even if not resulting in a severe reaction, this experience [food allergy bullying] can enhance what is often an already intense fear of being exposed to food allergens at school among those with food allergies."); see also Faith et al., *supra* note 5, at 290 (stating that allergic children suffer more stress and anxiety and are thus more susceptible to the psychological effects of bullying); Ravid et al., *supra* note 5, at 89–90 (same).

113. See Rocheleau & Rocheleau, *supra* note 5, at 168 ("[I]n addition to the general consequences of being bullied typical to any youth, food allergy youth may feel that their very life is being threatened if forced to touch or eat an allergen.").

114. See Levingston, *supra* note 9.

115. Kuzemchak, *supra* note 9; see also *supra* note 9 and accompanying text.

Even though the overwhelming majority of food allergy bullies are school classmates,<sup>116</sup> shockingly, one study reported that teachers or other school staff bullied allergic children 20% of the time.<sup>117</sup> For example, a fifth grade teacher forced a peanut-allergic boy to participate in a science experiment involving rubbing peanut butter on his hands, responding to his protests with a choice between obeying or receiving a zero.<sup>118</sup> He had an anaphylactic reaction.<sup>119</sup> In another instance, when a boy's mother asked his teacher to stop giving candy as a reward for correct answers in class because her son was allergic to it, the teacher refused and openly questioned the existence of his allergy to the entire class.<sup>120</sup> A coach threatened to smear peanut butter on an allergic athlete if she did not perform to his standards.<sup>121</sup> A teacher—with the principal's knowledge—force-fed oatmeal mixed with the boy's own vomit as a punishment to a boy with multiple disabilities, even though his mother informed

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

117. See *id.* at 285; see also French, *supra* note 104 (noting that studies show food allergy bullying perpetrators are primarily classmates but sometimes school staff); Morris et al., *supra* note 5, at AB133 (documenting reports of food allergy bullying by teachers); Saint Louis, *supra* note 89 (quoting nurse from a food allergy center: "Food allergy-related bullying does not always stem from peers, but from adults, such as teachers.").

118. See Kimberly Holland, *The Furor over the Peter Rabbit 'Food Allergy Scene,'* HEALTHLINE (Feb. 16, 2018), <https://www.healthline.com/health-news/furor-over-peter-rabbit-food-allergy-scene#1> [<https://perma.cc/CXY3-3YHQ>]; Mondello, *supra* note 92; see also Levingston, *supra* note 9 (teacher excluded student from experiment involving exploding peanuts rather than modifying the experiment).

119. Mondello, *supra* note 92.

120. See *When the Teacher is a Food Allergy Bully*, ALLERGIC LIVING (Dec. 7, 2010), <https://www.allergicliving.com/2010/12/07/the-teacher-is-a-food-allergy-bully-2/> [<https://perma.cc/CUY9-F5UU>]; see also *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.* 68, 98 F.3d 989, 990 (7th Cir. 1996) (discussing allegations that the teacher of a boy with attention deficit disorder and panic attacks repeatedly invited the class to express their complaints about the boy, leading to humiliation and ridicule); *Galloway v. Chesapeake Union Exempted Vill. Schs. Bd. of Educ.*, No 1:11-cv-850, 2012 WL 5268946, at \*7–8 (S.D. Ohio Oct. 23, 2012) (recounting allegations that a teacher repeatedly questioned a boy about the validity of his seizure disorder in front of the class and allowed his peers to call him "seizure boy").

121. See Levingston, *supra* note 9; see also *Smith v. Tangipahoa Parish Sch. Bd.*, No. 05-6648, 2006 WL 3395938, at \*1–3 (E.D. La. Nov. 22, 2006) (discussing school employee who made and distributed a flyer to parents, encouraging them to contact the school board regarding a potential decision to modify a school event involving horses in response to a girl's severe horse allergy, which could have caused anaphylaxis).

the teacher he was allergic to oatmeal.<sup>122</sup> Schools must do better.

### III. SCHOOLS HAVE FAILED TO ADEQUATELY ADDRESS BULLYING

Because most bullying occurs at school, schools should be the first line of defense against bullying. Schools should establish policies that prevent bullying, whether from other students or school personnel. Motivating some schools to do so requires accountability. Such accountability, however, is virtually nonexistent. Indeed, bullying litigation has been mostly unsuccessful for many reasons, not the least of which is schools' use of immunity defenses.

#### A. *Schools Play a Key Role in the Bullying Epidemic*

Bullying is widely recognized as “an urgent social, health, and education concern,”<sup>123</sup> with one-fifth to one-third of all schoolchildren reporting being bullied.<sup>124</sup> Children with

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122. See *Witte v. Clark Cnty. Sch. Dist.*, 197 F.3d 1271, 1273 (9th Cir. 1999).

123. *Analysis of State Bullying Laws and Policies*, U.S. DEPT OF EDUC., 2011, at 1 [hereinafter DOE, *State Bullying Law Analysis*], <https://www2.ed.gov/rschstat/eval/bullying/state-bullying-laws/state-bullying-laws.pdf> [<https://perma.cc/6LBM-NWB2>]; see also Douglas A. Abrams, *School Bullying Victimization as an Educational Disability*, 22 TEMPLE POL. & CIV. RIGHTS L. REV. 273, 289 (2013) (noting that the American Medical Association, the National Institutes of Health, and the World Health Organization echo the Department of Education's assessment regarding the bullying crisis); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-349, SCHOOL BULLYING: EXTENT OF LEGAL PROTECTIONS FOR VULNERABLE GROUPS NEEDS TO BE MORE FULLY ASSESSED 5 (May 2012) [hereinafter GAO, *School Bullying*], <https://www.gao.gov/assets/600/591202.pdf> [<https://perma.cc/T8RH-SNZM>] (“Being bullied is a serious problem, as evidenced by four federally sponsored nationally representative surveys conducted from 2005 to 2009.”); Daniel B. Weddle, *Bullying in Schools: The Disconnect Between Empirical Research and Constitutional, Statutory, and Tort Duties to Supervise*, 77 TEMPLE L. REV. 641, 642 (2004) (“Nearly two decades of educational research has repeatedly demonstrated that one of the most damaging and pervasive problems in our schools today is bullying.”).

124. See GAO, *School Bullying*, *supra* note 123, at 5 (discussing survey results showing “approximately 20 to 28 percent of youth reporting they had been bullied”); U.S. DEPT OF EDUC., STUDENT REPORTS OF BULLYING: RESULTS FROM THE 2017 SCHOOL CRIME SUPPLEMENT TO THE NATIONAL CRIME VICTIMIZATION SURVEY, at T-6 (July 2019), <https://nces.ed.gov/pubs2019/2019054.pdf> [<https://perma.cc/7LR4-ZLQ2>] (reporting that 20.2% of students reported being bullied); *Facts About Bullying*, U.S. DEPT OF HEALTH & HUM. SERVS. <https://www.stopbullying.gov/media/facts/index.html> (last updated Aug. 12, 2020) [hereinafter STOPBULLYING, *Facts*

disabilities are bullied at a higher rate than children generally.<sup>125</sup> Around one-third of children with food allergies are bullied because of their allergies.<sup>126</sup> As with all child bullying, most food allergy bullying originates in school.<sup>127</sup>

Because schools are the epicenter of this problem, schools are best positioned to respond to bullying and to take steps to prevent it.<sup>128</sup> Indeed, a school's overall environment and culture is the most determinative factor in whether children are likely to bully.<sup>129</sup> Bullying flourishes when adults fail to intercede, model positive behavior, and impose consequences for negative behavior.<sup>130</sup> Some schools have implemented policies and

*About Bullying*] [<https://perma.cc/73P4-A8CL>] (“Between 1 in 4 and 1 in 3 U.S. students say they have been bullied at school.”).

125. See Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of the Case Law*, ETHICAL HUM. PSYCH. & PSYCHIATRY, Nov. 3, 2018, at 136; JONATHAN YOUNG ET AL., NAT’L COUNCIL ON DISABILITY, BRIEFING PAPER: BULLYING AND STUDENTS WITH DISABILITIES (2011), <https://ncd.gov/publications/2011/briefing-paper-bullying-and-students-disabilities> [<https://perma.cc/9HAY-X6PD>].

126. See *supra* notes 5, 81 and accompanying text.

127. See Lieberman et al., *supra* note 5, at 283 (noting that 79.8% of food allergy bullies were classmates); see also Sheri Bauman & Adrienne Del Rio, *Preservice Teachers’ Responses to Bullying Scenarios: Comparing Physical, Verbal, and Relational Bullying*, 98 J. EDUC. PSYCH. 219, 220 (2006) (“Most bullying occurs in schools.”); Weddle, *supra* note 123, at 651 (explaining that “it is in the school that the majority of bullying occurs, under the supervision of school personnel”).

128. See Abrams, *supra* note 123, at 280 (“The schools stand as the central, and potentially most effective, public entities in the pediatric safety system’s response to bullying by elementary and secondary students.”); Dear Colleague Letter: Harassment and Bullying, Russlyn Ali, Office for Civil Rights, U.S. Dep’t of Educ. (Oct. 26, 2010) [hereinafter Dear Colleague Letter on Harassment and Bullying], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [<https://perma.cc/74F4-ASVT>] (stating that educated school personnel “are in the best position to prevent [harassment and bullying] from occurring and to respond appropriately when it does”).

129. See JAMES A. RAPP, EDUCATION LAW § 9.05[3][e] (2019); Weddle, *supra* note 123, at 652.

130. See Bauman & Del Rio, *supra* note 127, at 220 (“When school personnel ignore or dismiss such behaviors, students perceive that they cannot count on adults for protection and/or that the behavior is acceptable or at least tolerated.”); Ryan M. McCabe & Lori J. Parker, *Cause of Action Against School District for Injuries to Student Resulting from Bullying by Another Student*, 59 CAUSES OF ACTION 2D 307, § 18 (July 2019) (“[S]chool personnel must commit themselves to more than just lip service on the issue of eliminating bullying. Rather, they must serve as leaders and guides for students in modeling positive and inclusive behaviors.”); RAPP, *supra* note 129, § 9.02[5] (emphasizing importance of principals and teachers modeling safe and welcoming behavior); Sacks & Salem, *supra* note 22, at 189 (“[B]ullying escalates when adult personnel fail to take responsibility by intervening.”); Weddle, *supra* note 123, at 656–57 (“Perhaps the greatest deterrent to bullying behavior is the presence of adults who are watching and willing to

procedures that have drastically reduced bullying.<sup>131</sup> Even so, an anti-bullying policy is worthless if not followed.<sup>132</sup>

All too often, schools fail to take bullying seriously.<sup>133</sup> They may downplay bullying, viewing the victims with skepticism. Or they may refuse to punish the perpetrators at all or only in the most serious cases, such as those involving physical violence.<sup>134</sup> Approximately 75% of the time, no adult intervenes when a child is bullied.<sup>135</sup> For example, one victim alleged he suffered severe acts of bullying, including being called names, being “regularly slapped in the face,” and having his pants pulled down, all in the classroom and in the presence of school employees.<sup>136</sup> The principal responded by stating that violence was likely to continue

intervene.”). President Trump’s behavior demonstrates this modeling principle, as now some school bullies use tactics from Trump’s playbook when harassing their victims. See Hanna Natanson et al., *Trump’s Words, Bullied Kids, Scarred Schools*, WASH. POST (Feb. 13, 2020), <https://www.washingtonpost.com/graphics/2020/local/school-bullying-trump-words/> [<https://perma.cc/6MVN-6RLZ>] (“Since Trump’s rise to the nation’s highest office, his inflammatory language—often condemned as racist and xenophobic—has seeped into schools across America. Many bullies now target other children differently than they used to, with kids as young as 6 mimicking the president’s insults and the cruel way he delivers them.”).

131. See Annunziato et al., *supra* note 5, at 640 (“[S]chool-based programs that reduce tolerance of and increase remediation for bullying appear to be the most effective means to address [food allergy bullying].”); Baams et al., *supra* note 101, at 429 (“[R]ecent research into antibullying policies and their effects suggest that schools play a crucial role in improving school climates.”); Weddle, *supra* note 123, at 643 (“[I]t has [been] proven that school officials can dramatically reduce the prevalence of bullying if they implement proven bullying prevention strategies.”).

132. See Weddle, *supra* note 123, at 676; see also KIMMEL, *supra* note 1, at 1 (“Far too often, however, schools are not doing what the law or their own anti-bullying policies require.”).

133. See DOE, *State Bullying Law Analysis*, *supra* note 123, at 1; Weddle, *supra* note 123, at 643.

134. See Bauman & Del Rio, *supra* note 127, at 220 (discussing research finding “that school personnel do not respond effectively to incidents of bullying and that most recognized only physical bullying as needing intervention”); Weddle, *supra* note 123 at 650 (stating that many teachers and other school personnel “believe that bullying is nothing more than a normal part of growing up that should be ignored” unless theft or assault is involved); see also STOPBULLYING, *Facts About Bullying*, *supra* note 124 (“There is often a disconnect between young people’s experience of bullying and what the adults see. Also, adults often don’t know how to respond when they do recognize bullying.”); Feng & Kim, *supra* note 5, at 76 (reporting study where “99% of teachers underestimated the amount of taunting directed against food-allergic children”).

135. Faith et al., *supra* note 5, at 292; KIMMEL, *supra* note 1, at 1.

136. J.R. v. N.Y. City Dep’t of Educ., No. 14 Civ. 0392 (ILG) (RML), 2015 WL 5007918, at \*1 (E.D.N.Y. Aug. 20, 2015).



because of the school environment, offering no plan to address the problem or keep the boy safe.<sup>137</sup>

Like bullying generally, food allergy bullying can arise from a toxic school environment. Sometimes teachers and other school officials seem to share the same negativity and skepticism about food allergies as society at large. Twenty percent of food allergy bullying comes from teachers or other school personnel.<sup>138</sup> But the school environment can foster food allergy bullying short of these direct actions. Teachers and other school officials set the tone for how students treat others with food allergies.<sup>139</sup> So, for instance, a teacher who fails to reengineer an activity involving food to include an allergic child signals that it is socially acceptable to exclude and isolate allergic children.<sup>140</sup> A teacher who comments about not being able to have birthday cake because of Susie's allergies singles out Susie and, intentionally or not, sets

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137. See *id.* at \*2; see also *D.A. v. Meridian Joint Sch. Dist.*, 289 F.R.D. 614, 628-30 (D. Idaho 2013) (discussing allegations that school failed to respond to complaints that disabled boy was bullied during PE class, with name-calling, his clothes being stolen, and the weight bar he was using being pushed down so he could not lift it, all while the PE teacher was present); *Galloway v. Chesapeake Union Ex-empted Vill. Schs. Bd. of Educ.*, No 1:11-cv-850, 2012 WL 5268964, at \*7-8 (S.D. Ohio Oct. 23, 2012) (alleging that school officials refused to remove boy with a seizure disorder and on the autism spectrum from a group working with boys who regularly bullied him and that his classmates often referred to him as “seizure boy” in front of a teacher who had openly and repeatedly questioned him about whether he truly had seizures); *Weber*, *supra* note 22, at 1085-90 (collecting cases showing mistreatment of disabled children by teachers and other school personnel, teacher conduct that treats them unfairly or encourages other children to ridicule them, or failure to protect them from known risks of harm).

138. See *supra* note 117 and accompanying text.

139. See *Faith et al.*, *supra* note 5, at 290 (stating that negative attitudes about food allergies and food allergy policies in school may increase the risk of food allergy bullying); see also René Veenstra et al., *The Role of Teachers in Bullying: The Relation Between Antibullying Attitudes, Efficacy, and Efforts to Reduce Bullying*, *J. EDUC. PSYCH.* 1135, 1141 (2014) (stating that teacher attitudes signal appropriate behavior to students); Jina S. Yoon & Karen Kerber, *Bullying: Elementary Teachers' Attitudes and Intervention Strategies*, *RES. EDUC.* 27, 32 (2003) (explaining that when a teacher does not discipline socially exclusionary behaviors, it sets the tone that this behavior is tolerated or permitted); *cf.* *Faith et al.*, *supra* note 5, at 292 (“Teachers who use structured classroom instruction and set clear disciplinary rules about bullying have classrooms in which chronic bullying is less likely to occur.”); Yoon & Kerber, *supra*, at 27 (“Given that teachers are the individuals most likely to handle a bullying incident, they play an important role in creating a positive school climate.” (citations omitted)).

140. See *FAACT*, *Bullying*, *supra* note 104 (“[C]hildren model adult behaviors. In a classroom setting, for example, if a teacher does not include a food-allergic student in a class activity, then it appears to be socially acceptable to exclude the child in all social activities.”).

her and others like her up to be bullied.<sup>141</sup> In Tennessee, rather than accommodating a girl with a severe peanut allergy, the school reported her parents to child protective services, accusing them of Munchausen by Proxy, a disorder in which a parent seeks attention by faking or exaggerating a child's medical condition.<sup>142</sup> Another school refused to characterize as bullying an incident in which a student smeared peanut butter on an allergic boy's school supplies, causing an allergic reaction, because it was only the first incident.<sup>143</sup> And a school trustee in Michigan resigned amidst an outcry after she said "you should just shoot them" in response to a complaint about the school accommodating so many children with food allergies.<sup>144</sup>

Of course, not all schools treat food allergies or related bullying with such hostility,<sup>145</sup> but it should come as no surprise that food allergy bullying thrives in places that do. What, then, can be done to ensure schools will protect these children?

### *B. Past Bullying Litigation Against Schools Has Been Unsuccessful*

Increasingly, parents of bullied children, including children with disabilities, are suing schools under state and federal

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141. See Becker, *supra* note 86, at 41 ("[A] child might be singled out when the teacher says, 'We're going to have a birthday party today but we're not going to have any cake because Johnny has food allergies.'"); CHILDREN'S CENTER, *supra* note 103 ("[T]eachers often make insensitive remarks or single-out and exclude children with food allergies from certain activities or school functions, further contributing to the child's feelings of isolation and anxiety."); Connell, *supra* note 88 (discussing "the occasional insensitive (and sometimes intentional) remark by a teacher or other adult who singles out an allergic child for spoiling the fun"); *When the Teacher is a Food Allergy Bully*, *supra* note 120 (citing example of teacher mistreatment as including "comments like, 'For John's birthday party we are having raisins as snacks instead of cake because Jane is allergic'").

142. See Nath, *supra* note 54. CPS investigated the parents and found the report to be unsubstantiated. *Id.*

143. See Gorman, *supra* note 92.

144. Ishani Nath, *School Trustee Resigns After "Joke" About Shooting Allergic Students*, ALLERGIC LIVING (Nov. 30, 2014), <https://www.allergicliving.com/2014/11/30/school-board-member-jokes-about-shooting-allergic-students/> [<https://perma.cc/2XNS-EDH2>].

145. See Connell, *supra* note 88 (explaining that principal's response to food allergy bullying scared the bullies, who apologized and never repeated the behavior); Danovich, *supra* note 85 (reporting that allergic boy and his mother agree that his school responded well to food allergy bullying incidents he has experienced as long as he reported them); Saint Louis, *supra* note 89 (discussing effective teacher response to food allergy bullying episode that "nipped the problem in the bud").

law.<sup>146</sup> In the disability-bullying context, state law claims have mostly been tort-based, primarily alleging negligence, whereas federal claims have been statutory and constitutional.<sup>147</sup>

These efforts, however, are overwhelmingly unsuccessful.<sup>148</sup> One analysis of 600 disability-related bullying claims from 125 state and federal bullying cases involving public schools brought from 1998 to 2017 showed that students achieved a conclusively favorable outcome only about 1% of the time.<sup>149</sup> Of the remaining 99% of cases, the defendants conclusively won 55% while 44% were inconclusive.<sup>150</sup>

Disability bullying claims often struggle for substantive reasons. For example, claims may not meet strict foreseeability and causation standards under state negligence law, or the school may be found to not owe the duty required to support federal constitutional claims.<sup>151</sup>

Moreover, bullying claims across the state and federal law spectrum regularly fail due to governmental immunity defenses, which protect defendants from suits altogether or insulate them from liability in many instances.<sup>152</sup> This immunity “often

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146. See Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of Court Claim Rulings*, 361 EDUC. L. REP. 498, 498 (2019) [hereinafter Holben & Zirkel, *Court Claim Rulings*]; Holben & Zirkel, *supra* note 125, at 746–47; Diane M. Holben & Perry A. Zirkel, *School Bullying Litigation: An Empirical Analysis of the Case Law*, 47 AKRON L. REV. 299, 323 (2014) [hereinafter Holben & Zirkel, *Empirical Analysis of the Case Law*]; see also Dear Colleague Letter: Responding to Bullying of Students with Disabilities, Catherine E. Lhamon, Office for Civil Rights, U.S. Dep’t of Educ. (Oct. 21, 2014) [hereinafter Dear Colleague Letter on Disability Bullying], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf> [<https://perma.cc/SU6K-XND3>] (noting that the Department of Education’s Office of Civil Rights “has received an ever-increasing number of complaints concerning the bullying of students with disabilities”).

147. See Holben & Zirkel, *Court Claim Rulings*, *supra* note 146, at 502.

148. See Sacks & Salem, *supra* note 22, at 149 (“[C]ourts have set a high bar for recovery, with plaintiffs often prevailing only in the most horrific cases.”); Secunda, *supra* note 22, at 175 (noting the “remarkable lack of case success in even the most severe instances of special education student bullying”).

149. See Holben & Zirkel, *Court Claim Rulings*, *supra* note 146, at 502.

150. See *id.* Inconclusive claims consist primarily of dismissals without prejudice and denials of summary judgment. *Id.* at 499 n.11.

151. See *id.* at 503–05; Sacks & Salem, *supra* note 22, at 181–84, 187–89; Secunda, *supra* note 22, at 192; Weddle, *supra* note 123, at 659, 663–64, 674, 683; see also Brookshire, *supra* note 22, at 389.

152. See Scott D. Camassar, *Cyberbullying and the Law: An Overview of Civil Remedies*, 22 ALB. L.J. SCI. & TECH. 567, 577 (2012); Holben & Zirkel, *Court Claim Rulings*, *supra* note 146, at 503 & n.45, 505; Holben & Zirkel, *Empirical Analysis of the Case Law*, *supra* note 146, at 303–04; KIMMEL, *supra* note 1, at 26; Peter J. Maher et al., *Governmental and Official Immunity for School Districts and Their Employees: Alive and Well?*, 19 KAN. J. L. & PUB. POL’Y 234, 235 (2010); McCabe &

serve[s] as a substantial shield against school liability for injuries that occur as a result of questionable supervision decisions by officials.”<sup>153</sup> Governmental immunity obviously does not impact private actors; however, because about 90% of children go to public school,<sup>154</sup> immunity presents a significant barrier to liability for the vast majority of bullying incidents. And when schools face little to no risk of financial liability for failing to address bullying, they may have little to no incentive to do so.<sup>155</sup>

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

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

Federal disability law provides a path to holding schools accountable for failing to respond appropriately to food allergy bullying. A claim under federal disability law is not subject to an immunity defense, and thus using these laws to address food allergy bullying offers real hope. This, of course, depends on construing food allergy as a disability under the statutes. In most cases, food allergy should constitute a disability, which would allow litigants to pursue a disability harassment claim under existing law. The unique dangers of food allergy bullying make this claim more likely than other disability harassment cases to succeed. It is this potential for liability that can motivate reluctant

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Parker, *supra* note 130, § 19; Sacks & Salem, *supra* note 22, at 176–78; Weddle, *supra* note 123, at 674, 683; Perry A. Zirkel & John H. Clark, *School Negligence Case Law Trends*, 32 S. ILL. U. L.J. 345, 361 (2008). State law immunity doctrines vary from state to state, with some states being nominally more protective of immunity than others. See Maher et al., *supra*, at 242–43, 246–47. In practice, however, school defendants are able to invoke immunity in negligence actions frequently, and an empirical study of school litigation showed outcomes overwhelmingly favoring defendants, with immunity defenses being the most frequent basis of success. See *id.* at 236; Zirkel & Clark, *supra*, at 359–60.

153. Weddle, *supra* note 123, at 683.

154. See Halpert, *supra* note 18 (“The private-school enrollment rate has remained relatively stagnant at around 10 percent for decades.”).

155. See Weddle, *supra* note 123, at 683 (“[I]mmunity severely weakens incentives that might otherwise exist in tort theories to inspire care among school officials who fail to take seriously enough their role in protecting students from violence or harassment by other students.”); see also *infra* notes 373–385 and accompanying text (discussing benefits of litigation strategy).

schools to take food allergy bullying seriously and put an end to it.

This Part first overviews federal disability law and how it applies to schools. It then explains in detail several ways that a food allergy can constitute a disability and provides practical advice to advocates seeking to make that showing in court. Finally, this Part concludes by laying out, step by step, how food allergy bullying can be litigated as disability harassment under federal disability laws and demonstrating the benefits of this litigation strategy.

### A. *How Federal Disability Statutes Apply to Schools*

The Rehabilitation Act of 1973 and the Americans with Disabilities Act (ADA), passed in 1990, are the two most comprehensive federal disability laws and provide the most hope for protecting schoolchildren from food allergy bullying.<sup>156</sup> Section 504 of the Rehabilitation Act prohibits disability discrimination by any state program receiving federal financial assistance.<sup>157</sup> Because all public schools and many private schools accept federal financial assistance,<sup>158</sup> section 504 covers the vast majority

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156. The Individuals with Disabilities in Education Act (IDEA) is also a significant federal disability law, and it protects disabled children in need of special education and related services. See 20 U.S.C. § 1401(3)(A)(ii); see also MARK C. WEBER, UNDERSTANDING DISABILITY LAW 17 (3d ed. 2019). However, because a food allergy is unlikely to impair a student's ability to learn or otherwise give rise to the need for special education, the IDEA would not likely apply to a student with no impairment other than a food allergy. See O'Brien-Heizen, *supra* note 21, at 8 n.4 (stating that "food allergies alone, however, do not appear to be enough to trigger the protections under the IDEA"); ROTHSTEIN & IRZYK, *supra* note 21, § 2:53, at 264 (stating that a student with a peanut allergy might not require special education under the IDEA but could be covered by the Rehabilitation Act); see also Paul Harpur & Richard Bales, *The Positive Impact of the Convention on the Rights of Persons with Disabilities: A Case Study on the South Pacific and Lessons from the U.S. Experience*, 37 N. KY. L. REV. 363, 383 (2010) (noting that the IDEA covers only disabled students who require specialized education); Estate of Lance v. Lewisville Indep. Sch. Dist., 743 F.3d 982, 991 (5th Cir. 2014) (explaining how some students may qualify for protection under the Rehabilitation Act but not the IDEA).

157. See 29 U.S.C. § 794(a); ROTHSTEIN & IRZYK, *supra* note 21, § 1:20, at 61.

158. See Dear Colleague Letter on Disability Bullying, *supra* note 146, at 2; ROTHSTEIN & IRZYK, *supra* note 21, § 2:20, at 104; see also *National School Lunch Program (NSLP) Fact Sheet*, FOOD & NUTRITION SERV., U.S. DEPT AGRIC. (Mar. 20, 2019), <https://www.fns.usda.gov/nslp/nslp-fact-sheet> [<https://perma.cc/26UR-8D4N>] (stating that the NSLP serves tens of millions of children in public and nonprofit private schools); Russo v. Diocese of Greensburg, No. 09-1169, 2010 WL 3656579, at \*1 (W.D. Pa. Sept. 15, 2010) (concluding defendant was federal financial assistance recipient subject to the Rehabilitation Act by its participation in the NSLP).

of schoolchildren. Congress passed the ADA to extend the Rehabilitation Act's protections and "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities,"<sup>159</sup> including specifically in the educational context.<sup>160</sup> Title II of the ADA prohibits state and local governmental agencies, such as public school systems, from discriminating based on disability.<sup>161</sup> Title III extends those same protections to privately operated public accommodations, including educational programs.<sup>162</sup>

Congress modeled the ADA on the Rehabilitation Act and specifically provided that it should not "be construed to apply a lesser standard than the standards applied" under the Rehabilitation Act.<sup>163</sup> Although remedies and enforcement vary between the two statutes to some extent, courts generally read the substantive requirements consistently and use cases construing the two statutes interchangeably.<sup>164</sup> Because neither section

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159. 42 U.S.C. § 12101(b)(1).

160. *See id.* § 12101(a)(3), (6).

161. *See id.* §§ 12131(1)(A), 12132; ROTHSTEIN & IRZYK, *supra* note 21, § 2:6, at 110.

162. *See* 42 U.S.C. §§ 12181(7)(J), 12182(a); ROTHSTEIN & IRZYK, *supra* note 21, § 2:6, at 110–11.

163. 42 U.S.C. § 12201(a); *see also id.* § 12133 (stating that the rights and remedies under Title II are the same as for section 504); *Bragdon v. Abbott*, 524 U.S. 624, 631 (1998) (commenting that Congress has required that the ADA be construed "to grant at least as much protection as provided by the regulations implementing the Rehabilitation Act").

164. *See RAPP, supra* note 129, §§ 10C.01[5][b][ii], 10C.02[1]; Laura Rothstein, *Disability Discrimination Statutes or Tort Law: Which Provides the Best Means to Ensure an Accessible Environment?*, 75 OHIO ST. L.J. 1263, 1270 (2014). The major difference between the two statutes is causation: the ADA and the Rehabilitation Act have different statutory causation language. Title II of the ADA provides liability for discrimination "by reason of" disability, and Title III prohibits discrimination "on the basis of disability." 42 U.S.C. §§ 12132, 12182(a). Section 504, on the other hand, prohibits discrimination "solely by reason of" disability. 29 U.S.C. § 794(a). Some courts, focusing only the word "solely" in section 504, have held that the ADA and section 504 causation standards are substantively distinct. *See, e.g., Lewis v. Humboldt Acquisition Corp.*, 681 F.3d 312, 315–16 (6th Cir. 2012); *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005). Three recent Supreme Court opinions involving causation standards under other discrimination statutes have raised significant questions regarding how the disability causation standards will be interpreted in the future. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020) (Title VII of the Civil Rights Act of 1964 as applied to gay and transgender workers); *Babb v. Wilkie*, 140 S. Ct. 1168, 1171 (2020) (federal-sector provision of the Age Discrimination in Employment Act); *Comcast v. Nat'l Ass'n of African Am.-Owned Media*, 140 S. Ct. 1009, 1013 (2020) (42 U.S.C. § 1981); William Goren, *Expect Every ADA Case in Litigation to Litigate Causation*, UNDERSTANDING THE ADA (Apr. 6, 2020), <https://www.williamgoren.com/blog/2020/04/06/babb-wilkie-but-for->

504 nor Title II of the ADA applies to individuals, and because Title III covers individuals only if they own a public accommodation,<sup>165</sup> the analysis in this Article focuses on suits against educational entities themselves, primarily local school boards and private schools.<sup>166</sup>

If section 504 and the ADA were to apply to food allergy bullying, victims could sue schools without facing an immunity barrier. The Eleventh Amendment to the United States Constitution bars actions (other than some constitutional claims) against states and state agencies.<sup>167</sup> States, however, can waive their immunity, and Congress can abrogate immunity as necessary to enforce the Fourteenth Amendment.<sup>168</sup> It is now well settled that a state's decision to accept federal financial assistance for educational programs constitutes a waiver of immunity for section 504 suits.<sup>169</sup> Because all states accept federal educational dollars and funnel that money down to the local level,<sup>170</sup> all public schools (which 90% of schoolchildren attend<sup>171</sup>) are subject to suit under section 504 and cannot assert a successful immunity defense. As to the ADA, Congress expressly intended to abrogate

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mixed-motive/ [<https://perma.cc/A7FB-EM46>] (discussing causation under the ADA and section 504 in light of *Babb* and *Comcast*). Though causation standards might differ between the two statutes, that is likely to make a difference only on the margins. If a plaintiff can prove the elements of a disability harassment claim based on being targeted and injured because of a food allergy disability under the rigorous standards explained below, causation is unlikely to present a significant barrier in most cases.

165. See RAPP, *supra* note 129, § 10C.02[3].

166. Private schools controlled by religious organizations are exempt from Title III. See 42 U.S.C. § 12187.

167. See U.S. CONST. amend. XI; *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020); ROTHSTEIN & IRZYK, *supra* note 21, § 2:52, at 257.

168. See ROTHSTEIN & IRZYK, *supra* note 21, § 2:52, at 257; see *Allen*, 140 S. Ct. at 1003 (“Section 5 of the Fourteenth Amendment . . . can authorize Congress to strip States of immunity.”).

169. See RAPP, *supra* note 129, § 10C.02[3][b]; *Campbell v. Lamar Inst. of Tech.*, 842 F.3d 375, 379 (5th Cir. 2016) (holding that school waived sovereign immunity from section 504 claim by accepting federal funding); *Bowers v. Nat'l Collegiate Athletic Ass'n*, 475 F.3d 524, 546 (3d Cir. 2007) (same); *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 491, 496 (4th Cir. 2005) (same); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 112 (1st Cir. 2003) (same); *Nihiser v. Ohio Env'tl. Prot. Agency*, 269 F.3d 626, 628–29 (6th Cir. 2001) (same); *Jim C. v. United States*, 235 F.3d 1079, 1081–82 (8th Cir. 2000) (same); see also 42 U.S.C. § 2000d-7(a)(1) (“A State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . .”).

170. See *supra* note 158 and accompanying text.

171. See Halpert, *supra* note 18.

sovereign immunity.<sup>172</sup> All circuit courts that have considered the validity of the ADA's abrogation provision have upheld it,<sup>173</sup> though a few district courts have disagreed.<sup>174</sup> Thus, although it is uncertain if a court in any given case would find immunity abrogated for an ADA suit, because immunity is unquestionably waived for section 504 claims—which provide the same scope of coverage as the ADA—immunity is not a valid defense to a disability harassment claim against a public school.

After establishing that immunity—one of the most formidable defenses in existing bullying litigation—is not a viable defense to disability harassment claims, the next step is to assess the substance of a food allergy bullying claim under federal

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

173. See *Bowers*, 475 F.3d at 556; *Toledo v. Sanchez*, 454 F.3d 24, 40 (1st Cir. 2006); *Constantine*, 411 F.3d at 490; *Ass’n for Disabled Ams., Inc. v. Fla. Int’l Univ.*, 405 F.3d 954, 959 (11th Cir. 2005); *accord* *Bearden v. Okla. ex rel. Bd. of Regents*, 234 F. Supp. 3d 1148, 1153 (W.D. Okla. 2017); *Goonewardena v. New York*, 475 F. Supp. 2d 310, 324 (S.D.N.Y. 2007).

174. See *Doe v. Bd. of Trs.*, 429 F. Supp. 2d 930, 939 (N.D. Ill. 2006); *Press v. State Univ. of N.Y.*, 388 F. Supp. 2d 127, 135 (E.D.N.Y. 2005). The debate centers on the interpretation of several U.S. Supreme Court decisions regarding how Congress can abrogate states’ Eleventh Amendment immunity. In *Seminole Tribe of Florida v. Florida*, the Court held that Congress can abrogate immunity only through a valid exercise of its power under section 5 of the Fourteenth Amendment. 517 U.S. 44, 65–66 (1996). The Court applied that rule in an ADA case involving Title I (employment discrimination) and held that Title I was not a valid exercise of Congress’s section 5 power and thus a state university was immune from a Title I suit. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 373–74 (2001). In a Title II case, the Court found that sovereign immunity did not protect Tennessee from a suit by wheelchair users who claimed Tennessee’s lack of elevators in the county courthouse denied them the right to access courts because the right to court access is fundamental, and thus protecting that right is a valid exercise of Congress’s section 5 power in enacting Title II. See *Tennessee v. Lane*, 541 U.S. 509, 513–14, 533–34 (2004). This analysis has led courts and commentators to question whether Congress abrogated sovereign immunity by enacting the ADA only when the conduct at issue impinges a fundamental right and how that framework would apply in the educational context. See cases cited *supra* notes 173–174. See generally Christopher Cowan, Note, *An Unworkable Rule of Law: The ADA, Education, and Sovereign Immunity: An Argument for Overruling Seminole Tribe of Florida v. Florida Consistent with Stare Decisis*, 80 S. CAL. L. REV. 347 (2007); Clayton Kozinski, *Education as a Vital Right*, 43 J. LEGIS. 34 (2016); WILLIAM D. GOREN, UNDERSTANDING THE ADA 96 (4th ed. 2013); Dianne Heckman, *The Impact of the Eleventh Amendment on the Civil Rights of Disabled Educational Employees, Students and Student-Athletes*, 227 EDUC. L. REP. 19 (2008); WEBER, *supra* note 101, at 184–87. That analysis is beyond the scope of this Article and is unnecessary here because section 504 and the ADA cover disability harassment claims equally and because sovereign immunity is waived in all section 504 claims against public schools.



disability law. Since both the ADA and section 504 provide the same substantive rights, either statute provides hope for students seeking relief from food allergy bullying, assuming that their food allergy constitutes a disability.

### *B. Food Allergy as a Disability*

For federal disability law to provide relief to food allergy bullying victims, the threshold inquiry is the existence of a statutorily protected disability.<sup>175</sup> The ADA and the Rehabilitation Act define “disability” essentially the same in all relevant respects.<sup>176</sup> Congress specifically intended that the scope of coverage in this regard be coextensive,<sup>177</sup> and courts have interpreted the statutes consistently.<sup>178</sup> For convenience, the remainder of this discussion will focus on the ADA’s provisions.

To assess how the ADA might cover food allergies and other potential impairments relating to allergies and eating, it is important to understand the ADA, both as originally enacted and as amended in 2008.<sup>179</sup> Judicial interpretations of the statute initially excluded coverage for food allergies and related conditions, but the 2008 amendments changed the landscape significantly. If litigants take advantage of the amendments and courts properly apply the law, in most cases, food allergies should qualify for disability status.

#### 1. Initial Resistance to Statutory Coverage of Food Allergy as a Disability

Since its enactment, the ADA has defined “disability” as “a physical or mental impairment that substantially limits one or more major life activities” of an individual.<sup>180</sup> As originally

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175. *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 222 (5th Cir. 2011).

176. *See* 29 U.S.C. §§ 705(20), 794(a); 42 U.S.C. § 12102(1)(A); *see also* ROTHSTEIN & IRZYK, *supra* note 21, § 2:53, at 262 (stating that in the ADA and the Rehabilitation Act, “[t]he definition of who is protected is virtually the same”).

177. *See* RAPP, *supra* note 129, § 10C.01[5][b][ii].

178. *See supra* note 164 and accompanying text.

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

180. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 329–30 (codified as amended at 42 U.S.C. § 12102(1)(A)); 154 CONG. REC. S8840, S8841 (Sept. 16, 2008) (statement of managers, S. 3406, ADA Amendments Act of 2008) [hereinafter ADAAA Managers Statement]; *see also* Curtis D. Edmonds, *Lowering the Threshold: How Far Has the Americans with Disabilities Act Amendments Act Expanded Access to the Courts in Employment Litigation?*, 26 J.L. & POL’Y 1, 9

enacted, the ADA did not define two key terms: “substantially limits” and “major life activities.”<sup>181</sup> This gap led to frequent litigation on these topics,<sup>182</sup> culminating in a series of four Supreme Court decisions that severely restricted the ADA’s scope of coverage.<sup>183</sup> The Court held that “substantially limits” and “major life activities” should be “interpreted strictly to create a demanding standard.”<sup>184</sup>

To this end, the Court concluded that a substantial limitation is one that is “considerable” or “to a large degree.”<sup>185</sup> In applying that demanding standard, an individual’s degree of limitation must be assessed only after considering the impact of corrective or mitigating measures.<sup>186</sup> So, for example, using a hearing aid would mean that a hearing-impaired individual is not substantially limited,<sup>187</sup> as would taking medication that controls the symptoms of high blood pressure for someone so afflicted.<sup>188</sup> Many lower courts further restricted the “substantially limits” definition by requiring that an episodic or intermittent condition be assessed not when the condition is active but based on the frequency of the symptoms; thus, a condition such as epilepsy would not be substantially limiting to someone who does not regularly experience seizures.<sup>189</sup>

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(2018) (stating that the 2008 ADA amendments did not change the actual disability definition). The definition also includes having a record of or being regarded as having such impairment. 42 U.S.C. § 12102(1)(B), (C).

181. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327, 329–30 (codified as amended at 42 U.S.C. § 12102(1)(A)); see also *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196–97 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999); Edmonds, *supra* note 180, at 9, 11.

182. See Edmonds, *supra* note 180, at 11.

183. See *Williams*, 534 U.S. at 187; *Albertson’s, Inc. v. Kirkinburg*, 527 U.S. 555, 565–66 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 518–19 (1999); *Sutton*, 527 U.S. at 475; see also Edmonds, *supra* note 180, at 8 (“Four ADA employment cases involving the definition of disability were decided by the Supreme Court, all of them resulting in a substantial narrowing of the protected class of individuals with disabilities.”); Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADA: A Story of Ignorance, Incompetence, and Possibly Animus*, 260 GEO. J. ON POVERTY L. & POL’Y 383, 388 (2019) (explaining that because of these four cases, “the protected class shrunk substantially”).

184. *Williams*, 534 U.S. at 197.

185. *Id.* at 196; *Sutton*, 527 U.S. at 491.

186. See *Sutton*, 527 U.S. at 475; *Kirkinburg*, 527 U.S. at 565–66; *Murphy*, 527 U.S. at 518.

187. See *Sutton*, 527 U.S. at 487.

188. See *Murphy*, 527 U.S. at 518–19.

189. See *Landry v. United Scaffolding, Inc.*, 337 F. Supp. 2d 808, 821 (M.D. La. 2004); see also Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2039 (2013) (“[M]ost

As to the major life activity prong, the Supreme Court held that an activity must be “of central importance to most people’s daily lives.”<sup>190</sup> This led to logic gymnastics as litigants attempted to connect their limitations to a small pool of narrowly interpreted major life activities.<sup>191</sup> Under these restrictive interpretations, courts held that the ADA did not cover many conditions that most people would easily consider disabling, such as cancer, intellectual impairments, and multiple sclerosis.<sup>192</sup>

The few food allergy cases considered under the original ADA language suffered the same fate. The courts focused primarily on the major life activities of eating and breathing and held that food allergies did not substantially limit those activities.<sup>193</sup> As to eating, courts reasoned that because allergic individuals were not limited in their physical ability to eat food and only reacted when eating a specific food, as opposed to food generally, their allergy was not substantially limiting.<sup>194</sup> In other

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courts prior to the ADAAA found chronic illnesses that are episodic in nature are not disabling.”); *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 507 F.3d 1306, 1315 (11th Cir. 2007) (concluding that cancer was not a disability because most severe limitations periods were short term and temporary).

190. *Williams*, 534 U.S. at 198.

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

192. *See Ellison*, 85 F.3d at 191 (breast cancer); *Littleton v. Wal-Mart Stores, Inc.*, 231 F. App’x 874, 877–78 (11th Cir. 2007) (intellectual disability); *Sorensen v. Univ. of Utah Hosp.*, 194 F.3d 1084, 1087 (10th Cir. 1999) (multiple sclerosis); *see also* 154 CONG. REC. S8432-01, S8349 (daily ed. Sept. 11, 2008) (statement of Sen. Hatch) (explaining that because of the Supreme Court’s ADA interpretations, “people with conditions that common sense would tell us are disabilities are being told by the courts that they are not in fact disabled,” including cases involving “amputations, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, cancer, and others”).

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

194. *See Land*, 164 F.3d at 425 (“[T]he record does not suggest that [the plaintiff] suffers an allergic reaction when she consumes any other kind of food or that her physical ability to eat is in any way restricted.”); *Bohacek*, 2005 WL 2810536, at \*4 (“[The plaintiff] can eat as much as he wants, when he wants and what he wants—as long as peanuts or food with peanut derivatives are not involved. He is not

words, merely having to watch what you eat is not a substantial limitation on eating.<sup>195</sup> As to breathing, allergic individuals' otherwise normal breathing was compromised only when exposed to their allergen, so their breathing was not substantially limited.<sup>196</sup> Put differently, a potential breathing issue is not an actual, substantial limitation.<sup>197</sup> According to these courts, the plaintiffs can prevent adverse reactions through the "simple measures" of avoiding the allergen and taking emergency medicine to treat symptoms, and these mitigating measures must be taken into account in assessing the plaintiffs' limitations.<sup>198</sup>

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tasked, for example, with having foods ingested through a tube, or having to eat at very frequent intervals.").

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

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

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

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

Because the plaintiffs had been largely successful in avoiding allergen exposure and thus could mostly go about their normal lives, they were not disabled on the basis of their food allergy.<sup>199</sup>

The most well-known and influential of these early food allergy cases is *Land v. Baptist Medical Center*.<sup>200</sup> That suit arose out of a day care center's refusal to care for a girl with a peanut allergy.<sup>201</sup> The Eighth Circuit concluded she was not disabled because her allergy only impacted her life "a little bit."<sup>202</sup> Her allergy, the court reasoned, did not substantially limit her eating because she did not react when she ate other food and was not restricted in her physical ability to eat.<sup>203</sup> Likewise, her breathing was not substantially limited because her "ability to breathe [was] generally unrestricted" except for during her two prior allergic reactions.<sup>204</sup> Thus, although her allergy affected her eating and breathing, it did not substantially limit either as a matter of law.<sup>205</sup>

These sentiments from *Land* and other food allergy cases were echoed in many cases involving diabetes, since diabetics, like those with food allergies, must manage their condition through dietary restrictions and medication.<sup>206</sup> Though some

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disability because she could minimize the impact on her breathing by using an inhaler and taking allergy injections).

199. See *Land*, 164 F.3d at 425 (noting that plaintiff is not disabled, in part based on her doctor's testimony that her "allergy impacts her life only 'a little bit'"); *Bohacek*, 2005 WL 2810536, at \*3 (commenting that plaintiff had been able to avoid ingesting peanuts except one time); see also *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 519–20 (1999) (discussing testimony from plaintiff's doctor that he functions normally when taking his blood pressure medication); *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 642–43 (N.D. Tex. 1995) (plaintiff with smoke allergy and asthma not disabled based on her doctor's testimony that she "leads a normal life").

200. 164 F.3d 423 (8th Cir. 1999).

201. *Id.* at 424.

202. *Id.* at 425.

203. *Id.*

204. *Id.*

205. *Id.*

206. See *Diabetes Management: How Lifestyle, Daily Routine Affect Blood Sugar*, MAYO CLINIC (May 6, 2017), <https://www.mayoclinic.org/diseases-conditions/diabetes/in-depth/diabetes-management/art-20047963> [<https://perma.cc/DM3D-E8EJ>] (discussing diet and medication as means of managing diabetes); *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 223 (5th Cir. 2011) (describing diabetic plaintiff's medication and food choices to control his diabetes); see also *Borella*, *supra* note 21, at 770 ("To the extent that diabetes sufferers must carefully monitor their diets, their challenges are analogous to food allergy sufferers.").

courts found severe cases of diabetes to be covered conditions,<sup>207</sup> many concluded that the ADA did not protect diabetics who were able to control their symptoms through reasonable dietary restrictions and medication.<sup>208</sup> Cases involving non-food allergies, such as allergies to smoke, animals, and chemicals, were often dismissed as well.<sup>209</sup> Thus, even though only a few food allergy cases were on the books, those cases, in combination with these cases in analogous areas, made it clear that food allergy would not be a disability under the law as it then existed.

## 2. The ADA Amendments Act Provides Hope

Congress responded to courts' narrow interpretation of the ADA by passing the ADA Amendments Act of 2008 (ADAAA).<sup>210</sup>

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207. See, e.g., *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 855, 859–60 (9th Cir. 2009) (finding fact issue as to whether insulin-dependent diabetic was covered under the ADA because despite rigorous dietary restrictions and daily insulin injections and blood tests, his diabetes was not controlled, and even minor variations from his daily regimen could have serious medical consequences); *Fraser v. Goodale*, 342 F.3d 1032, 1045 (9th Cir. 2003) (concluding that “brittle” diabetic whose blood sugar levels are very difficult to control raised a fact issue as to whether she was disabled because her diabetes regimen “is perpetual, severely restrictive, and highly demanding . . . and even this is no guarantee of success”); *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924–25 (7th Cir. 2001) (holding that because diabetic plaintiff’s extensive dietary restrictions and demanding treatment regimen did not control his blood sugar, he raised a fact issue as to whether he was disabled); see also *Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) (“Although [the plaintiff]’s treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating.”).

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

209. See, e.g., *Muller v. Costello*, 187 F.3d 298, 314 (2d Cir. 1999) (asthma exacerbated by tobacco smoke); *Kropp v. Me. Sch. Admin. Union #44*, No. 06-81-P-S, 2007 WL 551516, at \*1, \*17 (D. Me. Feb. 16, 2007) (environmental allergies); *Smith v. Tangipahoa Parish Sch. Bd.*, No. 05-6648, 2006 WL 3395938, at \*8 (E.D. La. Nov. 22, 2006) (horse allergy); *Gallagher v. Sunrise Assisted Living of Haverford*, 268 F. Supp. 2d 436, 441 (E.D. Pa. 2003) (cat and dog allergy); *Minor v. Stanford Univ./Stanford Hosp.*, No. C-98-2536 MJJ, 1999 WL 414305, at \*1, \*3 (N.D. Cal. June 14, 1999) (chemical sensitivities); *Emery v. Caravan of Dreams, Inc.*, 879 F. Supp. 640, 642–43 (N.D. Tex. 1995) (smoke allergy).

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

Congress intended these amendments to restore the ADA's original purpose of providing broad coverage for individuals with disabilities.<sup>211</sup> In doing so, Congress did not alter the actual definition of disability but instead made several key changes in how its definition is to be interpreted and applied,<sup>212</sup> both in the ADA and in section 504 of the Rehabilitation Act.<sup>213</sup>

Four amendments in particular are significant for analyzing food allergy as a disability. First, Congress specifically rejected the Supreme Court's narrow interpretation of the ADA's substantial limitation requirement and mandated that the disability definition "shall be construed in favor of broad coverage . . . , to the maximum extent permitted by the terms of this chapter."<sup>214</sup> Second, in another direct repudiation of the Supreme Court, Congress eliminated the mitigating measures rule, stating that the "determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures" such as medication, medical equipment, and learned behavioral adaptations.<sup>215</sup> Third, for episodic impairments or those in remission, substantial limitation must be assessed based on the circumstances present when the impairment is active.<sup>216</sup> Finally, Congress rejected the Supreme Court's narrow construction that a major life activity must be "of central importance to most people's daily

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211. See Pub. L. No. 110-325, § 2(a)(4), (5), (7) (declaring that the Supreme Court's ADA decisions narrowed and eliminated protections Congress intended to provide in the original ADA); *id.* § 2(b)(1) (declaring that the ADAAA is intended to "reinstat[e] a broad scope of protection to be available under the ADA"); 28 C.F.R. § 35.101(b) (2016) (stating that the ADAAA's "primary purpose" is "to make it easier for people with disabilities to obtain protection under the ADA").

212. See ADAAA Managers Statement, *supra* note 180, at S8841; Edmonds, *supra* note 180, at 9–10; Porter, *supra* note 183, at 389.

213. See Pub. L. No. 110-325, § 7 (amendments to conform the Rehabilitation Act and ADA disability definitions); ADAAA Managers Statement, *supra* note 180, at S8843 ("The bill ensures that the definition of disability in Section 7 of the Rehabilitation Act of 1973, which shares the same definition, is consistent with the ADA."); see also ROTHSTEIN & IRZYK, *supra* note 21, § 1:18, at 58.

214. 42 U.S.C. § 12102(4)(A), (B); see Pub. L. No. 110-325, § 2(a)(5), (7), (b)(4) (ADAAA enacted to reject Supreme Court holding that the ADA is interpreted strictly to create a demanding standard).

215. 42 U.S.C. § 12102(4)(E); see Pub. L. No. 110-325, § 2(a)(4), (b)(2) (ADAAA enacted to reject Supreme Court holding that mitigating measures are to be assessed when determining substantial limitation). The only exception to this rule is that courts should consider ordinary eyeglasses and contact lenses when assessing visual impairments. See 42 U.S.C. § 12102(4)(E)(ii).

216. 42 U.S.C. § 12102(4)(D); see also ADAAA Managers Statement, *supra* note 180, at S8842.

lives.”<sup>217</sup> It provided a non-exclusive list covering a variety of tasks such as caring for oneself, seeing, hearing, sleeping, speaking, walking, and, most significantly for food allergy sufferers, eating and breathing.<sup>218</sup> Congress also specified that a major life activity “includes the operation of a major bodily function,” such as the functions of the immune, digestive, respiratory, and circulatory systems.<sup>219</sup>

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

Since the ADAAA’s passage, many commentators have expressed hope that the ADA will now cover food allergies,<sup>220</sup> and to some extent, the signs have been positive. Several food allergy cases that surely would have been dismissed under the old law have survived.<sup>221</sup> For example, a dairy-allergic boy sufficiently pleaded an ADA claim based on the allegation that if he ate dairy products, he could suffer anaphylaxis and die, which “restricts him from eating the way most people” eat.<sup>222</sup> Government agencies are also considering food allergy to be a disability in many circumstances, including air travelers needing

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217. See Pub. L. No. 110-325, § 2(a)(5), (b)(4).

218. 42 U.S.C. § 12102(2)(A).

219. *Id.* § 12102(2)(B).

220. See *supra* note 21 and accompanying text.

221. See *Mills v. St. Louis Cnty. Gov’t*, No. 4:17CV0257 PLC, 2017 WL 3128916, at \*5 (E.D. Mo. July 24, 2017) (denying motion to dismiss claim based on fish and shellfish allergy, which caused plaintiff to be hospitalized, rejecting defendant’s argument that she was not substantially limited because her reactions were infrequent and manageable); *Hebert v. CEC Entm’t, Inc.*, No. 6:16-cv-00385, 2016 WL 5003952, at \*3 (W.D. La. July 6, 2016) (refusing to dismiss claim of boy with dairy allergy who alleged that eating dairy could cause anaphylaxis and death); *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at \*2–3 (Iowa Ct. App. Jan. 9, 2013) (reversing summary judgment on plaintiff’s tree nut allergy claim and remanding for trial court to evaluate substantial limitation based on when the allergy is active).

222. *Hebert*, 2016 WL 5003952, at \*3.



accommodations,<sup>223</sup> children participating in school meal programs,<sup>224</sup> and college students being required to purchase meal plans.<sup>225</sup>

Equally encouraging results have arisen in cases involving celiac disease. Celiac disease, a digestive disorder triggered by consuming gluten,<sup>226</sup> raises issues similar to a food allergy in that it requires constant vigilance in food choices because ingesting even a small amount of gluten can cause an immune response with serious health consequences.<sup>227</sup> In a closely watched case, the Department of Justice reached a public settlement with Lesley University over its refusal to allow students with celiac disease to opt out of a mandatory dining program, even though they could not eat the food.<sup>228</sup> The DOJ equated celiac disease with food allergies and said that individuals who “have [an] autoimmune [response] to certain foods, the symptoms of which may include difficulty swallowing and breathing, asthma, or anaphylactic shock” would have a disability under the ADA.<sup>229</sup>

223. See Roni Caryn Rabin, *Boarding Now: Parents of Children with Food Allergies*, N.Y. TIMES (June 19, 2019), <https://www.nytimes.com/2019/06/19/health/nut-allergies-airlines.html> [<https://perma.cc/7VBW-8CWF>] (reporting that the Department of Transportation has announced that it considers severe food allergies to be disabilities under the Air Carrier Access Act if they substantially impact the ability to breathe or another major life activity).

224. See Memorandum from Angela Kline, Director, Policy and Program Development Division, U.S. Dep’t of Agric., to Regional Directors, Special Nutrition Programs, U.S. Dep’t of Agric., (Sept. 27, 2016), <https://fns-prod.azureedge.net/sites/default/files/cn/SP59-2016os.pdf> [<https://perma.cc/YC6Q-AKDV>].

225. See U.S. Dep’t of Justice, Civil Rights Div., Disability Rights Section, *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, ADA.GOV (Jan. 25, 2013), [https://www.ada.gov/q&a\\_lesley\\_university.htm](https://www.ada.gov/q&a_lesley_university.htm) [hereinafter *Lesley Settlement Q&A*] [<https://perma.cc/MG75-7SHE>].

226. See Beyond Celiac, *What is Celiac Disease?*, <https://www.beyondceliac.org/celiac-disease/what-is-celiac-disease/> (last visited Aug. 6, 2020) [<https://perma.cc/557E-QDYZ>].

227. See *Lesley Settlement Q&A*, *supra* note 225; Claudia Trotch, Recent Development, *It’s Not Easy Being G-Free: Why Celiac Disease Should Be a Disability Covered Under the ADA*, 22 AM. U. J. GENDER, SOC. POL’Y & L. 219, 222–23, 230–31 (2013).

228. See *Lesley Settlement Q&A*, *supra* note 225; Travis Anderson, *Lesley University Agrees to Gluten-Free Food Choices*, BOS. GLOBE (Jan. 9, 2013), <https://www.bostonglobe.com/metro/2013/01/09/justice-department-agreement-ensures-lesley-university-meal-plan-accommodates-those-with-celiac-disease-food-allergies/JgVUf1Dx6FpTYyCMr8nKPL/story.html> [<https://perma.cc/M2GK-BN2T>].

229. *Lesley Settlement Q&A*, *supra* note 225.

Several disability cases involving celiac disease have now progressed past the dispositive motions stage.<sup>230</sup>

Cases involving diabetics have also fared well under the new standards,<sup>231</sup> as have analogous cases involving a similar type of endocrine-system disorder<sup>232</sup> or a condition that requires detailed meal planning.<sup>233</sup> So too with cases involving non-food allergies, such as latex,<sup>234</sup> chemicals,<sup>235</sup> fragrances,<sup>236</sup> and mold.<sup>237</sup>

Not all food allergy and analogous cases, however, have been treated so favorably. Two food allergy<sup>238</sup> and two celiac disease<sup>239</sup> cases were dismissed either on thin reasoning or after the court relied on pre-ADAAA precedents or rationales. Some

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

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

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

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

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

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

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

237. See *O'Reilly v. Gov't of V.I.*, No. 11-0081, 2015 WL 4038477, at \*6–7 (D.V.I. June 30, 2015).

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

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

diabetes cases have suffered a similar fate.<sup>240</sup> Although this wooden application of a defunct standard is certainly disappointing, as demonstrated in the following Section, food-allergic children still stand to benefit from a faithful application of the ADA.

### 3. If the Law Is Properly Interpreted and Used, Food Allergy Should Usually Be a Disability

Considering the flaws in the older cases and the impact of a faithful application of the ADA, food allergy should usually constitute a disability. A disability is an impairment that substantially limits one or more of an individual's major life activities.<sup>241</sup> In most cases, plaintiffs will readily be able establish the existence of an impairment. An impairment includes "[a]ny

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240. See, e.g., *Sanders v. Bemis Co.*, No. 3:16-cv-00014-GFVT, 2017 WL 405920, at \*5 (E.D. Ky. Jan. 30, 2017) (finding diabetes not a disability because plaintiff's doctor stated it caused him no functional limitations); *Dominelli v. N. Country Acad.*, No. 1:15-cv-0087 (LEK/CFH), 2016 WL 616375, at \*5 (N.D.N.Y. Feb. 16, 2016) ("Diabetes is often held not to constitute a disability, particularly if symptoms are sporadic or can be controlled by minor changes in lifestyle."). Several food allergy and diabetes cases involving inmates have been dismissed based on outdated opinions and reasoning, when any was even given. See *Banks v. LeBlanc*, No. 16-649-JWD-EWD, 2019 WL 4315018, at \*8 (M.D. La. Aug. 27, 2019) (dismissing diabetic prisoner's claim because no evidence it limited his walking or seeing); *Kokinda v. Pa. Dep't of Corr.*, No. 16-1303, 2016 WL 5122033, at \*6 & n.2 (W.D. Pa. Sept. 6, 2016) (suggesting in a single sentence that prisoner's soy allergy is not a disability); *Bonds v. S. Health Partners, Inc.*, No. 2:15-CV-209-WOB, 2016 WL 1394528, at \*7 (E.D. Ky. Apr. 6, 2016) (dismissing diabetic inmate's claim because he did not allege how diabetes substantially limited a major life activity); *Shirley v. Collier Cnty. Sheriff's Office*, No. 2:13-cv-16-FtM-29UAM, 2013 WL 2477261, at \*2 (M.D. Fla. June 10, 2013) (dismissing prisoner's food allergy claim in a single sentence with no citation to authority); *Rodriguez v. Putnam*, No. CV 11-8772-CJC (PJW), 2013 WL 1953687, at \*5 (C.D. Cal. May 8, 2013) (rejecting, in one sentence of analysis, prisoner's claim that his peanut allergy, which caused two allergic reactions in prison, was a disability, citing *Land*); *Dunbar v. Byars*, No. 2:11-cv-2243-JFA-BHH, 2013 WL 667930, at \*2 (D.S.C. Jan. 30, 2013) (dismissing diabetic inmate's claim, concluding he was not disabled because he was not substantially limited in working, even though the defendant did not dispute plaintiff's disability status). This may reflect a general hostility toward prisoner litigation, with courts that are eager to clear their dockets giving these cases less attention. *But see Borella*, *supra* note 21, at 770 (asserting that prisoners allege they suffer from food allergies without providing adequate factual support, which desensitizes courts "to legitimate claims . . . from food allergy sufferers"). Professor Rothstein has highlighted several issues relating to individuals with disabilities in the criminal justice system and emphasized the need for training law enforcement officials and others involved in the system regarding the needs of those individuals. See ROTHSTEIN & IRZYK, *supra* note 21, § 9:11.

241. 42 U.S.C. § 12102(1)(A).

physiological disorder or condition . . . affecting one or more body systems,” including specifically the immune system.<sup>242</sup> If an individual has been diagnosed with a food allergy—which is by definition an immune system malfunction<sup>243</sup>—the food allergy should easily qualify as an impairment. The real issue, then, is whether a particular food allergy substantially limits a major life activity.

In assessing substantial limitation of a major life activity, courts should interpret the new standard “broadly in favor of expansive coverage,” and “the threshold issue of whether an impairment substantially limits a major life activity should not demand an extensive analysis.”<sup>244</sup> A substantial limitation need not prevent or severely restrict the ability to perform a major life activity as long as the individual is substantially limited compared “to most people in the general population.”<sup>245</sup> That comparison can include factors such as “the difficulty, effort or time required to perform” the activity.<sup>246</sup> Impairments that are episodic should be evaluated based on whether the condition imposes a substantial limitation “when active,”<sup>247</sup> and all limitations should be analyzed “without regard to the ameliorative effects of mitigating measures” such as medication and learned behavioral adaptations.<sup>248</sup>

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

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242. 28 C.F.R. § 35.108(b)(1)(i). This discussion will cite the ADA Title II agency regulations regarding the parameters of the disability definition, but the Title III and section 504 regulations are the same. See 28 C.F.R. Pt. 35, App. C; 28 C.F.R. § 36.105.

243. See *supra* note 29 and accompanying text.

244. 28 C.F.R. § 35.108(d)(1)(i), (ii); see also 42 U.S.C. § 12102(4)(A); Pub. L. No. 110-325, § 2(b)(5); *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 670 (4th Cir. 2019); *Williams v. Tarrant Cnty. Coll. Dist.*, 717 F. App'x 440, 446–47 (5th Cir. 2018).

245. 28 C.F.R. § 35.108(d)(1)(v); see also *J.D.*, 925 F.3d at 670; *Williams*, 717 F. App'x at 446.

246. 28 C.F.R. § 35.108(d)(3) (ii); see also *Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) (“Although [the plaintiff]’s treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating.”); *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 860 (9th Cir. 2009) (stating as to diabetic plaintiff that “the effort required to control his diet is itself substantially limiting”).

247. 42 U.S.C. § 12102(4)(D); see also *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at \*3 (Iowa Ct. App. Jan. 9, 2013).

248. 42 U.S.C. § 12102 (4)(E)(i)(I), (IV); see also *J.D.*, 925 F.3d at 670 (stating that impairments must be assessed “in their unmitigated state” (internal quotation marks and emphasis omitted)); accord *Rohr*, 555 F.3d at 862.

As to eating, the statute now explicitly includes eating as a major life activity.<sup>249</sup> Individuals with a food allergy cannot eat certain food without risking an allergic reaction. These reactions can be serious, even fatal.<sup>250</sup> Strict avoidance of the allergen is the only safe course, which means that all food choices must be carefully scrutinized.<sup>251</sup> Allergic individuals must use extreme care to avoid ingesting any amount of the allergen because even a trace can cause an immediate, acute response.<sup>252</sup> There is no margin for error.<sup>253</sup> Contrary to the rationale in the old food allergy cases,<sup>254</sup> being able to eat other foods does not lessen the limitation on eating that the allergy demands. Most people do not have allergic reactions to eating any food and do not have to meticulously analyze every bite they eat to stay safe. Under the broad interpretation the ADAAA requires, this should almost always qualify as a substantial limitation on the major life activity of eating.<sup>255</sup>

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249. 42 U.S.C. § 12102(2)(A).

250. See *supra* notes 29–34 and accompanying text.

251. See *supra* note 43 and accompanying text; see also *J.D.*, 925 F.3d at 671.

252. See *supra* notes 44–52 and accompanying text; see also *J.D.*, 925 F.3d at 671.

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

254. See *Land v. Baptist Med. Ctr.*, 164 F.3d 423, 425 (8th Cir. 1999); *Bohacek v. City of Stockton*, No. CIV S-04-0939, 2005 WL 2810536, at \*4 (E.D. Cal. Oct. 26, 2005).

255. See *Mills v. St. Louis Cnty. Gov't*, No. 4:17CV0257 PLC, 2017 WL 3128916, at \*5 (E.D. Mo. July 24, 2017) (implying that pleading that exposure to shellfish caused plaintiff to become ill and be hospitalized for several days sufficiently alleged a substantial limitation on eating); *Hebert v. CEC Entm't, Inc.*, No. 6:16-cv-00385, 2016 WL 5003952, at \*3 (W.D. La. July 6, 2016) (holding that allegation that plaintiff cannot eat dairy products without risking an anaphylactic reaction sufficiently pleads a physical impairment that "restricts him from eating the way most people in the general population eat"); see also *Fraser*, 342 F.3d at 1042 (concluding that diabetic plaintiff "presented evidence that the major life activity of eating is substantially limited because of her demanding and highly difficult treatment regimen," including severe dietary restrictions). Commentators agree that food allergies substantially limit the major life activity of eating. See, e.g., *Borella*, *supra* note 21, at 773; *Mustard*, *supra* note 21, at 188; *O'Brien-Heizen*, *supra* note 21, at 569.

Focusing on the mechanical act of eating is too limiting.<sup>256</sup> Indeed, cases involving diabetics recognize that limitations imposed by a treatment regimen can substantially limit eating, even if unrelated to the physical ability to ingest food.<sup>257</sup> Eating is more than chewing and swallowing. It includes activities such as meal planning and selecting, purchasing, preparing, and consuming food.<sup>258</sup> Not every condition that forces certain food choices to avoid discomfort or some health consequence will substantially limit eating, but the lengths that many with food allergies must go to—just to eat safely—extend well beyond the substantial limitation threshold.<sup>259</sup>

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256. See *supra* note 194 and accompanying text (discussing the *Land and Bohacek* language that deals with eating as a mechanical action); see also *Telemaque v. Marriott Int'l, Inc.*, No. 14 Civ. 6336 (ER), 2016 WL 406384, at \*8 (S.D.N.Y. Feb. 2, 2016) (“These dietary restrictions, unaccompanied by any impairment to his ability to eat and ingest food, simply do not rise to a substantial level.” (internal quotation marks omitted)).

257. See *Lawson v. CSX Transp., Inc.*, 245 F.3d 916, 924 (7th Cir. 2001) (reversing district court’s determination that diabetic plaintiff was substantially limited in eating only if his “actual physical ability to ingest food is restricted” because that failed to consider the restrictions his treatment regimen imposes and the consequences of noncompliance); see also *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 860 (9th Cir. 2009) (stating diabetic plaintiff’s “effort required to control his diet is itself substantially limiting”).

258. See *Bollinger et al.*, *supra* note 44, at 415 (“Simple tasks such as grocery shopping become time-consuming and often expensive endeavors for families of food allergic children.”); *Feng & Kim*, *supra* note 5, at 74 (explaining how food allergies can “trickl[e] into aspects of day-to-day living both large and small,” including grocery shopping, food preparation, dining out, vacation planning, and participating in social activities such as parties, sports, and camps); *Herbert et al.*, *supra* note 5, at 206 (describing the time-intensive nature of food allergy management, including reading labels; preparing allergy-free meals; monitoring for cross-contact with kitchen items; carrying emergency medicine; educating restaurant staff, friends, and family; and planning to avoid allergens during travel).

259. See 28 C.F.R. § 35.108(d)(3)(ii) (2016) (directing that substantial limitation should include factors such as “the difficulty, effort or time required to perform a major life activity”); *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 671 (4th Cir. 2019) (“To be sure, no one can eat whatever he or she desires without experiencing some negative health effects. Nonetheless, we must permit those who are disabled because of severe dietary restrictions to enjoy the protections of the ADA.” (internal quotation marks omitted)); *Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) (“Although [the plaintiff]’s treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating.”); *Fraser*, 342 F.3d at 1040 (“If a person is impaired only from eating chocolate cake, he is not limited in a major life activity because eating chocolate cake is not a major life activity. On the other hand, peanut allergies might present a unique situation because so many seemingly innocent foods contain trace amounts of peanuts that could cause severely adverse reactions.”); *Lawson*, 245 F.3d at 924 (reversing summary judgment because plaintiff’s “perpetual, multi-faceted treatment regime required constant vigilance” and if not followed, “he could experience

Food allergies also typically substantially limit the major life activity of breathing. As with eating, breathing is an express statutory major life activity.<sup>260</sup> An allergic response to food can impair breathing in many ways, including a swollen throat, asthma, direct respiratory distress, and anaphylaxis.<sup>261</sup> Most people in the general population do not risk severe breathing impediments from eating any food. Not every allergic reaction will involve impaired breathing, but nothing in the statute or regulations requires that a condition's effects be uniform every time. Allergic reactions can vary, and so the risk of breathing problems exists with any exposure.<sup>262</sup> That an allergic person's breathing is normal when not eating or when eating other food is irrelevant<sup>263</sup> because episodic impairments must be assessed based on when they are active.<sup>264</sup> When active, an allergic reaction risks causing severe breathing problems, which means food

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debilitating, and potentially life-threatening, symptoms" and thus could support a finding that his eating was substantially limited); *Phillips v. P.F. Chang's China Bistro, Inc.*, No. 5:15-cv-00344-RMW, 2015 WL 7429497, \*3–4 (N.D. Cal. Nov. 23, 2015) (denying motion to dismiss celiac plaintiff's claim based on allegations that gluten ingestion causes severe health consequences and that she has to carefully monitor her food intake to avoid gluten); *Kravtsov v. Town of Greenburgh*, No. 10-CV-3142 (CS), 2012 WL 2719663, at \*1, \*11 (S.D.N.Y. July 9, 2012) (denying summary judgment on claim that plaintiff's ability to eat was substantially limited by the his need to eat 8–10 times per day in specific physical positions and the severe restrictions on the types of food he could eat).

260. 42 U.S.C. § 12102(2)(A).

261. See *supra* notes 31–34 and accompanying text; see also *Lesley Settlement Q&A*, *supra* note 225 (stating that celiac disease and food allergies that cause an autoimmune response with potential symptoms of difficulty breathing, asthma, and anaphylactic shock are disabilities).

262. See *supra* notes 32, 38 and accompanying text.

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

264. 42 U.S.C. § 12102(4)(D); see also *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at \*3 (Iowa Ct. App. Jan. 9, 2013).

allergies usually substantially limit the major life activity of breathing.<sup>265</sup>

Apart from these more typical grounds, most food allergies should readily qualify under the new standard focusing on substantial limitation of a major bodily function.<sup>266</sup> A food allergy is an immune system disorder in which the immune system responds inappropriately when a certain food is present, leading to a host of health risks, including death, from even a minute amount of the food.<sup>267</sup> This is not how most people's immune systems work. An allergic reaction can also substantially impair the functioning of many other body systems, including the cutaneous, respiratory, circulatory, and gastrointestinal systems.<sup>268</sup> The impacts on any of these systems should normally provide a basis for finding a substantial limitation on a major bodily function.<sup>269</sup>

That allergic reactions are (theoretically) preventable is no defense. Avoiding exposure is no easy task, and even with extreme diligence, accidental ingestion is a significant risk.<sup>270</sup> It is not, as one pre-ADAAA court suggested, a "simple" matter of not eating the allergen.<sup>271</sup> Choosing not to engage in a certain

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265. See *Farmer*, 2017 WL 6347962, at \*2; *Mills*, 2017 WL 3128916, at \*5; O'Brien-Heinzen, *supra* note 21, at 56.

266. See 42 U.S.C. § 12102(2)(B); see also WEBER, *supra* note 156, at 33 (noting that expanding major life activity to include bodily functions was a "signal change").

267. See *supra* notes 29, 45–46 and accompanying text.

268. See *supra* notes 30–31 and accompanying text.

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

270. See *supra* notes 43–50 and accompanying text; see also *J.D. v. Colonial Williamsburg Found.*, 925 F.3d 663, 667 (4th Cir. 2019) (discussing plaintiff's difficulty, despite diligence, in avoiding consuming gluten).

271. *Slade v. Hershey Co.*, No. 1:09CV00451, 2011 WL 3159164, at \*5 (M.D. Pa. July 26, 2011). Other courts misunderstood or downplayed the seriousness of food



behavior—such as eating an allergen—does not lessen the impact of the impairment.<sup>272</sup> Indeed, the effort involved in attempting to prevent accidentally eating an allergen demonstrates the degree to which the allergy impairs major life activities.<sup>273</sup> What is more, steps taken to avoid the allergen constitute learned behavioral adaptations, which are a type of mitigating measure that courts cannot consider in analyzing substantial limitation.<sup>274</sup> The allergy's impact must be evaluated in the unmitigated state—that is, when the individual has a reaction.<sup>275</sup> In other words, the focus should be on the risks of an

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

272. *See* *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998) (“In the end, the disability definition does not turn on personal choice. When significant limitations result from the impairment, the definition is met even if the disabilities are not insurmountable.”); *WEBER*, *supra* note 156, at 29 (“There are many things that a person with an impairment can do, but not necessarily do safely.”).

273. *See* 28 C.F.R. § 35.108(d)(3)(i), (ii) (2016); *Kapche v. Holder*, 677 F.3d 454, 463 (D.C. Cir. 2012) (“Although [the plaintiff's] treatment regimen allows him to control his diabetes, the treatment regimen itself substantially limits his major life activity of eating.”); *Rohr v. Salt River Project Agric. Improvement & Power Dist.*, 555 F.3d 850, 860 (9th Cir. 2009) (stating as to diabetic plaintiff that “the effort required to control his diet is itself substantially limiting”).

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

275. *See J.D.*, 925 F.3d at 671 (“[T]he district court was required to consider the effects of [the plaintiff's] impairment when he's not on a strict gluten-free diet.”); *Rohr*, 555 F.3d at 861–62 (“Impairments are to be evaluated in their *unmitigated* state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does *not* take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.” (emphasis in original)); *Hensel v. City of Utica*, No. 6:15-CV-0374 (LEK/TWD), 2017 WL 2589355, at \*4 (N.D.N.Y. June 14, 2017) (analyzing substantial limitation based on effects of plaintiff's diabetes when untreated).

allergic reaction, not on how successful allergic individuals are in preventing reactions in the first place.<sup>276</sup>

That allergic reactions are (theoretically) treatable with medication is also no defense. Many allergic individuals carry inhalers, epinephrine, and other medications to treat allergic reactions.<sup>277</sup> Even though some courts are continuing to evaluate substantial impairment based on the use of these medications,<sup>278</sup> medications are mitigating measures and are explicitly prohibited from consideration.<sup>279</sup> The limitation must be evaluated based on what happens if the allergic individual is not medicated.<sup>280</sup> Besides, epinephrine cannot always stop anaphylaxis.<sup>281</sup> That would be like downplaying the risk of a heart attack because a defibrillator is nearby. The availability of emergency treatment should never be used to minimize the impact of an impairment.<sup>282</sup>

Each case must be evaluated individually.<sup>283</sup> The ADA does not envision *per se* classes of disabilities.<sup>284</sup> At the same time,

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276. A plaintiff's ability to lead a normal life in spite of an impairment does not mean the plaintiff does not have a disability. *See Williams v. Tarrant Cnty. Coll. Dist.*, 717 F. App'x 440, 448 (5th Cir. 2018) (rejecting the implication that plaintiff "could not show a disability without showing she is a person who has difficulty leading a normal life" (internal quotation marks omitted)); *see also* ADAAG Managers Statement, *supra* note 180, S8842 (stating that individuals with impairments "should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received accommodations . . . that have the effect of lessening the deleterious impacts of their disability").

277. *See supra* notes 35–36 and accompanying text.

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

279. 42 U.S.C. § 12102(4)(E). *Slade*, one of the pre-ADAAG food allergy cases, expressly relied on the plaintiff's ability to avoid breathing problems by using an inhaler and is thus invalid under the ADAAG. *See* 2011 WL 3159164, at \*5.

280. *See Rohr*, 555 F.3d at 861–62 (stating that diabetes should be evaluated based on the limitations present when plaintiff does not take insulin or other medications); *Barlia v. MWI Veterinary Supply, Inc.*, 721 F. App'x 439, 446 (6th Cir. 2018) (explaining that plaintiff's hyperthyroidism should be assessed based on the absence of medication).

281. *See supra* note 37 and accompanying text.

282. *See Borella, supra* note 21, at 772.

283. *See Alston v. Park Pleasant, Inc.*, 679 F. App'x 169, 172 (3d Cir. 2017); *Cloutier v. GoJet Airlines, LLC*, 311 F. Supp. 3d 928, 937 (N.D. Ill. 2018); *see also* 28 C.F.R. § 35.108(d)(2)(ii) (2016) (referring to the "individualized assessment of . . . impairments"); ADAAG Managers Statement, *supra* note 180, at S8841 (explaining that the ADAAG did not change the necessity of determining whether a disability exists "on an individual basis").

284. *See* 28 C.F.R. Pt. 35, App. C; *Griffin v. United Parcel Serv., Inc.*, 661 F.3d 216, 223 (5th Cir. 2011); *Ellenberg v. N.M. Mil. Inst.*, 572 F.3d 815, 821 (10th Cir.

most food allergies, if properly pleaded and explained, should usually qualify as a disability. All food allergies are immune system malfunctions. Reactions can vary and can become life threatening with no prior notice. The extreme efforts involved in reducing the risk of exposure, combined with the grave consequences that exposure can cause, should qualify most food allergies as disabilities.

This all, of course, depends on courts properly applying the statute. Unquestionably, the ADAAA has expanded protections for individuals with disabilities. Many cases that surely would have been doomed under pre-ADAAA jurisprudence—including some specifically involving plaintiffs with food allergies and analogous conditions—have withstood dismissal attempts.<sup>285</sup>

At the same time, many courts have misapplied the statute to the detriment of some plaintiffs with food allergies and other conditions involving eating.<sup>286</sup> Scholars have methodically analyzed post-ADAAA disability cases and found hundreds of errors, either in courts' rulings or in how litigants have pursued the cases.<sup>287</sup> For example, many courts have continued to reflexively rely on *Land* and other pre-ADAAA cases, despite the substantial statutory changes.<sup>288</sup> Though Congress expressly intended

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2009); Edmonds, *supra* note 180, at 28–29. The regulations refer to a non-exclusive category of impairments called “predictable assessments,” where these impairments “will, in virtually all cases, result in a determination of coverage,” because “the necessary individualized assessment should be particularly simple and straightforward.” 28 C.F.R. § 35.108(d)(2)(i), (ii). Examples include blindness substantially limiting seeing, cancer substantially limiting normal cell growth, and diabetes substantially limiting endocrine function. *Id.* § 35.108(d)(2)(iii). Some commentators worry that the regulations create too much tension with the individualized assessment requirement and thus may have overreached. *See, e.g.*, Edmonds, *supra* note 180, at 28–29.

285. *See supra* notes 231–237 and accompanying text.

286. *See supra* notes 238–240 and accompanying text.

287. *See* Edmonds, *supra* note 180, at 4–5; Porter, *supra* note 183, at 385–86.

288. *See* Porter, *supra* note 183, at 393; *see also* Hustvet v. Allina Health Sys., 283 F. Supp. 3d 734, 740 (D. Minn. 2017); Kelly v. Kingston City Sch. Dist., Inc., No. 1:16-CV-00764 (MAD/DJS), 2017 WL 976943, at \*4 (N.D.N.Y. Mar. 13, 2017); Sanders v. Bemis Co., No. 3:16-cv-00014-GFVT, 2017 WL 405920, at \*4 (E.D. Ky. Jan. 30, 2017); Rodriguez v. Putnam, No. CV 11-8772-CJC (PJW), 2013 WL 1953687, at \*5 (C.D. Cal. May 8, 2013). Many courts, however, have disapproved of relying on such outdated cases. *See* J.D. v. Colonial Williamsburg Found., 925 F.3d 663, 671 (4th Cir. 2019); Cloutier v. GoJet Airlines, LLC, 311 F. Supp. 3d 928, 938 (N.D. Ill. 2018); Powell v. Merrick Acad. Charter Sch., No. 16-CV-5315 (NGG) (RLM), 2018 WL 1135551, at \*6 (E.D.N.Y. Feb. 28, 2018); Mills v. St. Louis Cnty. Gov't, No. 4:17CV0257 PLC, 2017 WL 3128916, at \*5 (E.D. Mo. July 24, 2017); Hensel v. City of Utica, 6:15-CV-0374 (LEK/TWD), 2017 WL 25893555, at \*4 & n.3 (N.D.N.Y. June 14, 2017); Frazier v. Burwell, No. 1:14-cv-3529-WBH-JKL, 2016 WL

to overrule Supreme Court precedent requiring that limitations be evaluated considering mitigating measures, some courts have continued to reject claims after viewing the plaintiff's condition as mitigated by medication, behavioral modifications, or other measures.<sup>289</sup> Other courts have continued to consider whether a condition is sporadic or in remission, despite explicit statutory language to the contrary.<sup>290</sup> Courts and litigants alike have struggled with the new "major life activity" category involving the operation of a major bodily system. For example, plaintiffs have often failed to plead limits on bodily system functions or have done so in such a cursory manner that courts are left with insufficient information to conduct an individual assessment.<sup>291</sup> Similarly, some courts have not been as receptive to these claims as they have been to claims based on traditional major life activities.<sup>292</sup> Whether due to courts' ignorance, incompetence, or hostility toward the changes, the ADA has not, so far, consistently accomplished Congress's goal of expanding protections for individuals with disabilities.<sup>293</sup>

To maximize the likelihood of success in litigating food allergy as a disability, plaintiffs should plead carefully and brief thoroughly, both to take advantage of as much of the statute as possible<sup>294</sup> and to educate the court. Pleadings should include

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10650814, at \*8 & n.17 (N.D. Ga. July 15, 2016); *Knudsen v. Tiger Tots Cmty. Child Care Ctr.*, No. 12-0700, 2013 WL 85798, at \*1-3 (Iowa Ct. App. Jan. 9, 2013).

289. See *Porter*, *supra* note 183, at 404-05; Deborah A. Widiss, *Still Kickin' After All These Years: Sutton and Toyota as Shadow Precedents*, 63 *DRAKE L. REV.* 919, 920-21 (2015); see also, e.g., *Kelly*, 2017 WL 976943, at \*3-4; *Sanders*, 2017 WL 405920, at \*4-5; *Amaker v. Annucci*, No. 14-CV-9692 (KMK), 2016 WL 5720798, at \*7 n.10 (S.D.N.Y. Sept. 30, 2016); *Dominelli v. N. Country Acad.*, No. 1:15-cv-0087 (LEK/CFH), 2016 WL 616375, at \*5 (N.D.N.Y. Feb. 16, 2016); *Rathy v. Wetzel*, No. 13-72, 2014 WL 4104946, at \*6 (W.D. Pa. Aug. 19, 2014); *Pleasant v. D&N Elec. Co.*, No. 1:11-CV-2748-TWT, 2013 WL 1340511, at \*2 (N.D. Ga. Apr. 1, 2013).

290. See *Porter*, *supra* note 183, at 405-06; see, e.g., *Dominelli*, 2016 WL 616375, at \*5.

291. See *Edmonds*, *supra* note 180, at 23-27; *Porter*, *supra* note 183, at 400-02; *Widiss*, *supra* note 289, at 920-21; see also *Alston v. Park Pleasant, Inc.*, 679 F. App'x 169, 172-73 (3d Cir. 2017); *Banks v. LeBlanc*, No. 16-649-JWD-EWD, 2019 WL 4315018, at \*8 (M.D. La. Aug. 27, 2019); *Bonds v. S. Health Partners, Inc.*, No. 2:15-CV-209-WOB, 2016 WL 1394528, at \*7 (E.D. Ky. Apr. 6, 2016); *Dominelli*, 2016 WL 616375, at \*5; *Quarles v. Md. Dep't of Hum. Res.*, No. MJG-13-3553, 2014 WL 6941336, at \*4 (D. Md. Dec. 5, 2014).

292. See *Edmonds*, *supra* note 180, at 22-27; *Porter*, *supra* note 183, at 405-06; see also, e.g., *Alston*, 679 F. App'x at 172-73; *Hustvet*, 283 F. Supp. 3d at 740.

293. See *Porter*, *supra* note 183, at 385-86.

294. Plaintiffs could also plead parallel claims under state disability statutes, which might, in some instances, provide even more protection. See *Sacks & Salem*, *supra* note 22, at 161-62; *L.W. v. Toms River Reg'l Schs. Bd. of Educ.*, 915 A.2d 535,

impaired functioning of the immune system and other bodily systems, but they should also cover the traditional major life activities of eating and breathing, particularly because the statute now expressly lists them. Plaintiffs should thoroughly explain how their food allergies impact those systems and activities. They should also detail both the health consequences they have suffered in the past and the possible risks from future exposure, including anaphylaxis and death. Further, plaintiffs should demonstrate the measures required to prevent accidental ingestion so that courts see that avoidance is not a simple matter but rather requires constant vigilance. Finally, plaintiffs must ensure that courts completely understand the change in the law to prevent them from relying on outdated opinions and repudiated rationales.

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

### C. Food Allergy Bullying as Disability Harassment

Against a background of sex and race discrimination law, courts have recognized a cause of action against peers and teachers for harassment based on a student's disability.<sup>295</sup> Proving these claims can be challenging, but the unique circumstances of food allergy bullying increase the odds of success. This threat of liability will motivate some schools to act appropriately in the face of food allergy bullying, justifying a litigation strategy.

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549 (N.J. 2007); see also Dear Colleague Letter: Disability Harassment, Norma V. Cantu, Office for Civil Rights, U.S. Dep't of Educ. (July 25, 2010) <https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html> [hereinafter Dear Colleague Letter on Disability Harassment] [<https://perma.cc/J4W2-JCGF>] ("Harassing conduct also may violate state and local civil rights, child abuse, and criminal laws.").

295. Courts have recognized a disability harassment claim in the employment context as well. See William Goren, *Hostile Work Environment Issues and Demotion as a Reasonable Accommodation*, UNDERSTANDING THE ADA (Nov. 18, 2019), <https://www.williamgoren.com/blog/2019/11/18/hostile-work-environment-ada-demotion-reasonable-accommodation/> [<https://perma.cc/F2NH-8WWA>]. For a discussion of how the ADA might apply in the workplace bullying context, see David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 515-17 (2000).

### 1. A Cause of Action Exists for Disability Harassment

It is well established that harassment based on a protected characteristic such as race or sex is a form of discrimination.<sup>296</sup> In the education context, the Supreme Court held in *Davis v. Monroe County Board of Education*<sup>297</sup> that a school board can be liable for student-on-student sexual harassment under Title IX of the Education Amendments Act of 1972, which prohibits gender discrimination by federal financial assistance recipients.<sup>298</sup> To establish liability, a plaintiff must show: (1) she was harassed based on her sex, (2) the harassment was sufficiently severe, pervasive, and objectively offensive as to deprive her access to the educational benefits or opportunities the school provides, (3) the defendant had actual knowledge of the harassment, and (4) the defendant was deliberately indifferent to the sexual harassment.<sup>299</sup> When a teacher sexually harasses a student, the elements are the same, except that the specific personnel within the school who must have actual knowledge might differ.<sup>300</sup> In either case, the school's liability is based not on vicarious liability for the harasser's conduct but on the school's own failure to respond appropriately to known harassment.<sup>301</sup> Title VI of the Civil Rights Act of 1964 prohibits federal financial assistance recipients from discriminating based on race, color, or national origin.<sup>302</sup> Because Title IX and Title VI are so similar, courts

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

297. 526 U.S. at 650.

298. See 20 U.S.C. § 1681(a).

299. See *Davis*, 526 U.S. at 650; *Wolfe v. Fayetteville, Ark. Sch. Dist.*, 648 F.3d 860, 864 (8th Cir. 2011); see also *McCabe & Parker*, *supra* note 130, § 11.

300. See *Gebser*, 542 U.S. at 277 (holding that plaintiff alleging teacher sexual harassment may not recover damages unless “an official of the school district who at a minimum has authority to institute corrective measures on the district’s behalf” has actual notice of the teacher’s misconduct); see also *Davis*, 526 U.S. at 679–80 (Kennedy, J., dissenting).

301. See *Davis*, 526 U.S. at 640–41; *Gebser*, 542 U.S. at 288; see also *Brookshire*, *supra* note 22, at 373; *KIMMEL*, *supra* note 1, at 6. This is analogous to parental negligence liability for children’s bullying behavior, which is based not on direct liability for the child’s conduct but on the parent’s own negligence in failing to exercise appropriate care to protect other children from their child’s conduct. See *Shu*, *supra* note 20, at 1493–94, 1498–99.

302. See 42 U.S.C. § 2000d.

have extended the *Davis* cause of action to cover racial harassment.<sup>303</sup>

Congress modeled section 504 of the Rehabilitation Act after Title IX and Title VI,<sup>304</sup> which in turn incorporated many of the same protections into the ADA.<sup>305</sup> As a result, courts have begun to apply the *Davis* framework to recognize a cause of action for disability-based harassment.<sup>306</sup> The elements are the same as in sex and race cases, except that plaintiffs must also show that they have a disability and link the harassment to disability rather than race or sex.<sup>307</sup> Since food allergy should usually qualify as a disability,<sup>308</sup> food allergy bullying should constitute disability harassment in those cases if plaintiffs can prove the other elements of the claim.

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

304. See 29 U.S.C. § 794a(a)(2) (“The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved” under section 504.); S. REP. NO. 93-1297 (1974), as reprinted in 1974 U.S.C.C.A.N. 6373, 6390 (“Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin), and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex).”); see also *Barnes v. Gorman*, 536 U.S. 181, 185 (2002); *Brown v. Sibley*, 650 F.2d 760, 769 (5th Cir. Unit A July 1981); ROTHSTEIN & IRZYK, *supra* note 21, § 2:2, at 103.

305. See 42 U.S.C. § 12133; see also *supra* note 163 and accompanying text.

306. See, e.g., *Doe v. Columbia-Brazoria Indep. Sch. Dist.*, 855 F.3d 681, 690 (5th Cir. 2017); *S.B. v. Bd. of Educ. of Hartford Cnty.*, 819 F.3d 69, 75 (4th Cir. 2016); *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008); see also KIMMEL, *supra* note 1, at 15–18 (collecting cases). The Department of Education recognizes that the ADA and section 504 prohibit disability-based harassment. See Dear Colleague Letter on Disability Harassment, *supra* note 294; Dear Colleague Letter on Harassment and Bullying, *supra* note 128; Dear Colleague Letter on Disability Bullying, *supra* note 146; see also Dear Colleague Letter: Bullying of Students with Disabilities, Melody Musgrove, Office of Special Educ. Programs, U.S. Dep’t of Educ. (Aug. 20, 2013), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf> [<https://perma.cc/M34P-3HHQ>].

307. See *Doe*, 855 F.3d at 690; *S.S.*, 532 F.3d at 454; KIMMEL, *supra* note 1, at 16.

308. See *supra* Section IV.B.3.

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

No cases have analyzed food allergy bullying as disability harassment. Accordingly, studying how courts have applied the claim's elements in other types of disability cases, as well as in sex and race cases, establishes the framework for using this harassment theory to provide relief for victims of food allergy bullying.

"Harassment is a form of discrimination. It reinforces hierarchies of prestige and peer acceptance within the school setting. . . . [D]isability harassment constantly reinforces the message that the child with disabilities does not belong and that nothing he or she does can change that reality."<sup>309</sup> A viable disability harassment claim for food allergy bullying victims can help put an end to food allergy bullying and is therefore a step toward changing that reality for these children.

### *a. Harassment Because of Disability*

Being bullied and having a disability, without more, is insufficient to maintain a disability harassment claim.<sup>310</sup> Rather, a plaintiff must show a nexus between the disability and the mistreatment.<sup>311</sup> The ADA and section 504 "are not general protection statutes for vulnerable people with disabilities."<sup>312</sup> They are, instead, antidiscrimination statutes, which require the disability and the bullying to be linked.<sup>313</sup> "The conduct of jerks, bullies, and persecutors is simply not actionable" unless they are acting because of the victim's disability.<sup>314</sup>

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309. Weber, *supra* note 22, at 1091–92.

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

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

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

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

314. *Hoffman*, 2012 WL 2450805, at \*1.



Courts have consistently dismissed claims when plaintiffs fail to show this connection.<sup>315</sup> For example, in cases concerning learning disabilities, general bullying allegations—including very serious ones involving threats and violence—were insufficient to state a claim because those actions were unrelated to the plaintiff's condition.<sup>316</sup> But, when the bullying involved name-calling such as “retard,” “idiot,” “special ed,” and “stupid,” those cases avoided dismissal because a jury could reasonably conclude those words tied the disability to the bullying.<sup>317</sup>

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

#### *b. Severe and Pervasive Harassment that Impacts Education*

Disability harassment is actionable only when it “is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>318</sup> When determining if harassing conduct is severe and pervasive, courts are to consider the “constellation of surrounding circumstances,” including that children are immature and still learning social navigation.<sup>319</sup> “Damages are not available for simple

315. See *Vargas*, 2019 WL 2173928, at \*6, \*8; *Wormuth*, 305 F. Supp. 3d at 1126; *Doe*, 179 F. Supp. 3d at 196–97; *Eskenazi*, 84 F. Supp. 3d at 232–33.

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

317. See *Sutherland v. Indep. Sch. Dist. No. 40*, 960 F. Supp. 2d 1254, 1267 (N.D. Okla. 2013) (child with on autism spectrum called retard, crazy, freaky, and creepy); *M.J. v. Marion Indep. Sch. Dist.*, No. SA-10-CV-00978-DAE, 2013 WL 1882330, at \*7 (W.D. Tex. May 3, 2013) (child with bipolar disorder and ADHD called retard, dumb, stupid, idiot, special ed, and psycho); *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 238–39, 242 (W.D.N.Y. 2012) (child on autism spectrum called “[\*]cking retard” and “autistic piece of sh[\*]t”); *Long v. Murray Cnty. Sch. Dist.*, No. 4:10-CV-00015-HLM, 2012 WL 2277836, at \*26 (N.D. Ga. May 21, 2012) (child on autism spectrum called retard, slow, and stupid); see also *Dorsey v. Pueblo Sch. Dist.* 60, 215 F. Supp. 3d 1082, 1084–85, 1089 (D. Colo. 2016) (child with muscular and skeletal weakness condition called freak and cripple).

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

319. *Id.* at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)); accord *Hoffman*, 2012 WL 2450805, at \*6–7; see also *Sanchez v.*

acts of teasing and name-calling among schoolchildren.”<sup>320</sup> Cases finding severe and pervasive conduct generally involve repeated harassing acts, often with a physical component,<sup>321</sup> though a single incident will suffice if severe enough.<sup>322</sup> The harassing conduct must also “so undermine[] and detract[] from the victims’ educational experience” that they “are effectively denied equal access to an institution’s resources and opportunities.”<sup>323</sup> Courts look for a “concrete” impact on the victim’s education,<sup>324</sup> such as declining grades, absenteeism, a change in demeanor or behavior, or a complete removal from the educational environment, such as dropping out or suicide.<sup>325</sup>

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Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156, 159, 166–67 (5th Cir. 2011) (holding that high school girl drama involving boyfriends and the cheerleading squad was not severe and pervasive).

320. *Davis*, 526 U.S. at 652.

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

322. *See Davis*, 526 U.S. at 652–53 (stating that although it is unlikely Congress would have envisioned it, “in theory, a single instance of sufficiently severe one-on-one peer harassment” could “be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity”); *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 270 (E.D.N.Y. 2009) (collecting authority that a single incident can be severe and pervasive, and denying summary judgment based on plaintiff being sexually assaulted); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62–63 (D. Me. 1999) (denying summary judgment for claim based on single incident of teacher getting student drunk and then having sex with him); *see also* *Weber*, *supra* note 22, at 1101 (stating that because a single, severe incident can support a Title IX sexual harassment claim, that same rule should apply by analogy in disability harassment cases).

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

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

325. *See Davis*, 526 U.S. at 652 (stating that plaintiff’s declining grades “provides necessary evidence of a potential link between her education and [the] misconduct”); *Doe v. E. Haven Bd. of Educ.*, 200 F. App’x 46, 49 (2d Cir. 2006) (affirming

Food allergy bullying victims will likely meet these standards in many instances. One of the “constellation of surrounding circumstances” is the danger dynamic—over half of food allergy bullying physically involves the allergen and puts the child at risk for an allergic reaction, including anaphylaxis.<sup>326</sup> This is just as serious as if a bully used a more traditional deadly weapon, like a knife or gun,<sup>327</sup> which should easily satisfy the severe and pervasive standard, even if only a single incident occurs. But it probably will not be just one incident. Eighty-six percent of bullied allergic children are bullied repeatedly,<sup>328</sup> adding to the severity of the bullying. And for the 20% of allergic children who are bullied by teachers or other school personnel, the power imbalance further amplifies the bullying’s severity and the impact on the child’s educational environment.<sup>329</sup>

The fear factor magnifies the bullying’s severity even more. For children with a food allergy, being threatened with their allergen is terrifying.<sup>330</sup> Bullied students may become fearful of the lunchroom, classroom, or any place where food is present, which impacts their educational environment and ability to learn.<sup>331</sup> Allergic students cannot safely participate in school

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jury verdict based on evidence that harassment upset plaintiff and caused her to miss school, even though her grades did not fall); *D.A.*, 289 F.R.D. at 629 (stating that “recognized examples” of educational impact “include dropping grades, change in the student’s demeanor or classroom participation, becoming homebound or hospitalized due to harassment, or self-destructive and suicidal behavior” and concluding that bullying, which caused plaintiff’s destructive behavior and subsequent incarceration, met the standard); *Preston v. Hilton Cent. Sch. Dist.*, 876 F. Supp. 2d 235, 242 (W.D.N.Y. 2012) (denying motion to dismiss based on allegations that the bullied plaintiff stopped going to school and could not take final exams); *Long v. Murray Cnty. Sch. Dist.*, No. 4:10-CV-00015-HLM, 2012 WL 2277836, at \*28 (N.D. Ga. May 21, 2012) (“Plaintiffs provide evidence that the years of harassment ultimately caused Tyler to commit suicide—necessarily barring Tyler from educational opportunities.”).

326. See *supra* notes 91–99, 105–106 and accompanying text.

327. See *supra* notes 105–106 and accompanying text.

328. See *Annunziato et al.*, *supra* note 5, at 639; *Lieberman et al.*, *supra* note 5, at 285.

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

330. See *supra* note 107–113 and accompanying text.

331. See *Bauman & Del Rio*, *supra* note 127, at 219 (“School bullying negatively impacts school climate, as fear, depression, and physical complaints affect students’ attendance, concentration, and academic performance.”); *Dear Colleague Letter on Harassment and Bullying*, *supra* note 128, at 1 (“Bullying fosters a climate of fear and disrespect that can seriously impair the physical and psychological health of its victims and create conditions that negatively affect learning, thereby

activities involving certain foods,<sup>332</sup> and excluding them denies them these educational opportunities. Allergic students who miss school because of, for example, an allergic reaction from bullying, trauma from past bullying, or fear of future bullying cannot fully participate in school when they are not there. Simply put, harassment based on food allergy excludes these students from the educational environment provided to students without food allergies.<sup>333</sup>

*c. Actual Notice*

Disability harassment claims for money damages lie only for “known acts of harassment.”<sup>334</sup> Liability is thus based on actual, not constructive, notice,<sup>335</sup> and so what a school should have known—even something open and obvious—is irrelevant in a damages suit.<sup>336</sup> Plaintiffs can establish actual notice by showing they reported the harassment or that specific school officials otherwise had direct knowledge of it.<sup>337</sup> Plaintiffs can also prove actual knowledge by notice of prior complaints similar enough to

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undermining the ability of students to achieve their full potential.”); Dear Colleague Letter on Disability Harassment, *supra* note 294 (“Students [cannot] learn in an atmosphere of fear, intimidation, or ridicule.”).

332. See *supra* notes 118–120 and accompanying text.

333. See WEBER, *supra* note 101, at 67–68.

334. *Davis*, 526 U.S. at 649–50. Though recovering damages in a private suit requires proving actual notice of harassment, the Department of Education can bring enforcement actions seeking injunctive relief against schools that should have known of harassment and failed to respond appropriately. See Dear Colleague Letter on Disability Bullying, *supra* note 146, at 4 & n.18; RAPP, *supra* note 129, § 10C.02[2][b][iii].

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

336. See *Davis*, 526 U.S. at 642; *S.B. v. Bd. of Educ. of Hartford Cnty.*, 819 F.3d 69, 76 (4th Cir. 2016); *Moore v. Chilton Cnty. Bd. of Educ.*, 1 F. Supp. 3d 1281, 1300–01 (M.D. Ala. 2014). Though actual knowledge is required in suits for money damages, constructive knowledge is sufficient in administrative enforcement actions and suits seeking only injunctive relief. See Dear Colleague Letter on Disability Bullying, *supra* note 146, at 4 & n.18.

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

the complained-of behavior to put the school on notice that it might occur.<sup>338</sup>

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

#### *d. Deliberate Indifference*

School districts can be held liable only if they are deliberately indifferent to known harassment, which means their actions are “clearly unreasonable in light of the known circumstances.”<sup>339</sup> This is an “exacting” standard.<sup>340</sup> Neither negligence nor unreasonableness is enough—the school must make “an official decision . . . not to remedy the violation.”<sup>341</sup> Schools need not actually stop harassment as long as their

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

339. *Davis*, 526 U.S. at 648.

340. *Doe*, 604 F.3d at 1259; see also *S.B.*, 819 F.3d at 76 (“sets the bar high”); *Domino v. Tex. Dep’t of Crim. Just.*, 239 F.3d 752, 756 (5th Cir. 2001) (“extremely high standard”).

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

actions are not clearly unreasonable under the circumstances.<sup>342</sup> “[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators”<sup>343</sup> and instead allow them the flexibility to respond to the conditions in each case.<sup>344</sup>

Most courts interpret the deliberate indifference requirement so rigidly that it can be nearly impossible to meet.<sup>345</sup> If a school takes some action—any action at all—in response to a complaint, these courts will find the school not liable.<sup>346</sup> If the school stops one harasser, many courts will find that response to be sufficient, even when others continue to rise up to replace the prior bully.<sup>347</sup> As one commentator put it, the standard often means “that a school literally has to ignore bullying behavior brought to its attention” to be held liable.<sup>348</sup>

Even so, not all courts have taken such a restrictive approach. These courts hold that just doing “something” in response to harassment is not enough.<sup>349</sup> Rather, the school’s actions must be evaluated based on the known circumstances, and

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

343. *Davis*, 526 U.S. at 648.

344. See *Estate of Barnwell v. Watson*, 880 F.3d 998, 1007 (8th Cir. 2018) (“This ‘clearly unreasonable’ standard is intended to afford flexibility to school administrators.”); *S.B.*, 819 F.3d at 77 (noting that “school administrators are entitled to substantial deference when they calibrate a disciplinary response to student-on-student bullying or harassment”); *Estate of Lance*, 743 F.3d at 996 (“Judges make poor vice principals . . .”).

345. See *Sacks & Salem*, *supra* note 22, at 149; *Secunda*, *supra* note 22, at 181, 183; *Ferster*, *supra* note 22, at 203; *Weddle*, *supra* note 123, at 659.

346. See *Doe v. Torrington Bd. of Educ.*, 179 F. Supp. 3d 179, 196 (D. Conn. 2016) (concluding deliberate indifference claim fails because plaintiffs did not allege a “complete failure to address bullying”); *Long v. Murray Cnty. Sch. Dist.*, No. 4:10-CV-00015-HLM, 2012 WL 2277836, at \*35 (N.D. Ga. May 21, 2012) (rejecting deliberate indifference claim because defendants “responded to each incident”); *P.R. ex rel. Rawl v. Metro. Sch. Dist. of Wash. Twp.*, No. 1:08-cv-1562-WTL-DML, 2010 WL 4457417, at \*9 (S.D. Ind. Nov. 1, 2010) (dismissing claim because it was undisputed that the defendant “took *some* action after every reported incident” (emphasis in original)); *Biggs v. Bd. of Educ. of Cecil Cnty.*, 229 F. Supp. 2d 437, 445 (D. Md. 2002) (granting summary judgment because “each and every time [the plaintiff] complained, the school took action”).

347. See *Doe v. Bellefonte Area Sch. Dist.*, 106 F. App’x 798, 799–800 (3d Cir. 2004); see also *Patterson v. Hudson Area Schs.*, 551 F.3d 438, 456 (6th Cir. 2009) (Vinson, J., dissenting); *Sacks & Salem*, *supra* note 22, at 155.

348. *Secunda*, *supra* note 22, at 180.

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

one of those circumstances is the effectiveness of past responses.<sup>350</sup> Thus, in the face of repeated harassment, duplicating the same ineffectual tactics is clearly unreasonable.<sup>351</sup> So, for example, when a student is continually harassed by a series of different bullies who receive little, if any, discipline, stopping one bully does not remedy the overall problem of that student being harassed, and the school should do more to protect that student.<sup>352</sup> The “whack-a-mole” approach is insufficient. These courts also assess circumstances such as the existence and quality of the school’s investigation,<sup>353</sup> any time lag between notice of an incident and the school’s response,<sup>354</sup> whether the school takes any action beyond a simple investigation,<sup>355</sup> and the school’s overall attitude toward the situation.<sup>356</sup>

The deliberate indifference element will present challenges in the food allergy bullying context as in any other. Courts that are overly strict in applying this element will allow horrible injuries to go unremedied.<sup>357</sup> Other courts that take a broader view of the “known circumstances”<sup>358</sup> should recognize that the particular known circumstances of food allergy bullying—the terror and direct safety risk from being bullied with the allergen—call for strong remedial measures.

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

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

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

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

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

355. See *Vance*, 231 F.3d at 260; see also *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 521, *vacated on other grounds*, 599 F. App’x 534 (5th Cir. 2013).

356. See *Doe*, 10 F. Supp. 3d at 650, 653.

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

358. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

### 3. Crafting a Disability Harassment Litigation Strategy for Food Allergy Bullying Is Worthwhile

Because of the tough legal standards, severe food allergy bullying cases—those involving bullying with the allergen—are most likely to succeed. Even so, a litigation strategy for food allergy bullying is valuable for several reasons.

First, these children need protection. Food allergy bullying risks serious, potentially life-threatening consequences whenever the bully weaponizes the allergen, which happens 57% of the time.<sup>359</sup> With 5.6 million allergic children, and around one-third of them being bullied because of it, that equates to over one million children being physically bullied with their allergen.<sup>360</sup> Even if disability harassment claims succeed primarily in these cases, they are worth pursuing to provide an avenue to protect a million children.

Second, litigants can take measures to improve their odds of success. The Second, Sixth, and Eleventh Circuits do not follow the draconian deliberate indifference interpretations of other circuits.<sup>361</sup> These circuits would likely recognize the unique known circumstances of food allergy bullying and take a harder look at whether schools have adapted as needed to ensure they do not rotely repeat prior ineffective measures. The Fourth Circuit has also indicated a potential willingness to adopt a less strict deliberate indifference theory,<sup>362</sup> and district courts in the First, Ninth, and Tenth Circuits have followed similar analysis.<sup>363</sup> Plaintiffs suing in these jurisdictions thus have a higher likelihood of prevailing.

Though the deliberate indifference path for disability harassment is well established, some authority suggests that

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359. See *supra* note 91 and accompanying text.

360. See *supra* note 19 and accompanying text.

361. See *Doe v. Sch. Bd. of Broward Cnty.*, 604 F.3d 1248, 1259–63 (11th Cir. 2010); *Zeno v. Pine Plains Cent. Sch. Dist.*, 702 F.3d 655, 668–70 (2d Cir. 2012); *Patterson v. Hudson Area Schs.*, 551 F.3d 438, 446–48 (6th Cir. 2009); *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 49 (2d Cir. 2006); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 260–62 (6th Cir. 2000).

362. See *S.B. v. Bd. of Educ. of Hartford Cnty.*, 819 F.3d 69, 77 (4th Cir. 2016).

363. See, e.g., *Dorsey v. Pueblo Sch. Dist.* 60, 215 F. Supp. 3d 1082, 1084–85, 1089 (D. Colo. 2016); *Doe v. Univ. of Tenn.*, 186 F. Supp. 3d 788, 806–07 (M.D. Tenn. 2016); *D.A. v. Meridian Joint Sch. Dist.*, 289 F.R.D. 614, 630–31 (D. Idaho 2013); *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 965–66, 977 (D. Kan. 2005); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 64–65 (D. Me. 1999).



schools might also be subject to liability for responding inappropriately to disability-based bullying on the theory that schools have failed to make reasonable accommodations necessary to provide an appropriate educational experience.<sup>364</sup> This would require a showing of gross misjudgment rather than deliberate indifference; as a “species of heightened negligence,” gross misjudgment is easier to prove.<sup>365</sup>

Plaintiffs with educational plans in place under section 504 might be able to bring such a claim. Some students with food allergies have section 504 plans, and these plans require schools to take steps to help ensure the child’s safety in school.<sup>366</sup> Parents of a food-allergic child who has been bullied could insist on modifications to this section 504 plan to protect the child from bullying.<sup>367</sup> A school’s failure to take appropriate remedial actions, for any allergic child as well as for an allergic child with a 504 plan calling for specific measures, could subject it to liability for failure to accommodate in a court that will recognize the claim.<sup>368</sup> Thus, in addition to deliberate indifference, food allergy bullying litigants can consider pleading a failure to accommodate claim.

As with litigating the food allergy as disability aspect,<sup>369</sup> thoroughly educating the court will be critical. Courts must be made to realize that bullying can cause allergic children to fear for their lives, which obviously magnifies the psychological and educational impacts of bullying.<sup>370</sup> Far worse is the direct risk

364. See *M.P. v. Indep. Sch. Dist. No. 721*, 326 F.3d 975, 982 (8th Cir. 2003); *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 523–26, *vacated on other grounds*, 599 F. App’x 534 (5th Cir. 2013); KIMMEL, *supra* note 1, at 16–18.

365. *Stewart*, 711 F.3d at 524; see KIMMEL, *supra* note 1, at 18; see also Secunda, *supra* note 22, at 200–10 (advocating for abandoning deliberate indifference and adopting a gross misjudgment/reasonable accommodation standard of liability for special education bullying).

366. See Dear Colleague Letter on Disability Bullying, *supra* note 146, at 3, 11–12; see also *Section 504 and Written Management Plans*, FOOD ALLERGY RES. & EDUC., <https://www.foodallergy.org/resources/section-504-and-written-management-plans> (last visited Aug. 25, 2020) [<https://perma.cc/FAC3-VK2B>]; Stan F. Shaw & Joseph W. Madaus, *Preparing School Personnel to Implement Section 504*, 43 INTERVENTION SCH. & CLINIC 226, 227, 229 (2008).

367. See Dear Colleague Letter on Disability Bullying, *supra* note 146, at 11–12. Indeed, bullied allergic children who do not have a 504 plan in place could request one specifically to address the bullying.

368. A full exploration of a reasonable accommodation claim—including the gross misjudgment standard and the details of how section 504 plans can work in the food allergy bullying context—is beyond the scope of this Article.

369. See *supra* Section IV.B.3.

370. See *supra* notes 102–103, 107–113 and accompanying text.

of serious health consequences or even death resulting from allergic children being bullied with their allergen.<sup>371</sup> This leaves little room for schools to take a wait-and-see approach. And when allergic children are bullied repeatedly—as the statistics suggest they will be<sup>372</sup>—that signals to schools that they need to adjust and strengthen their response. Failing to do so puts some of these children’s lives on the line, and that is clearly unreasonable based on these known circumstances. Litigants must ensure that courts understand these circumstances so they can properly assess the reasonableness of schools’ response to food allergy bullying.

Finally, wins in severe cases can trickle down benefits to all children being bullied because of their food allergies. Victories serve symbolic purposes. “Social disapproval of disability harassment is crucial to taking harassment seriously and stopping it.”<sup>373</sup> When a food allergy bullying victim prevails in court, it shows that the issue is important and worthy of federal protection, thereby promoting awareness and education.<sup>374</sup> Indeed, further education about food allergies will hopefully increase understanding and empathy, which should also reduce bullying.<sup>375</sup>

In addition to symbolism, the fear of liability from litigation successes can convince schools to implement effective policies and procedures to respond to and deter bullying. Compensatory damages and attorneys’ fees are available for prevailing parties in section 504 and Title II deliberate indifference cases.<sup>376</sup>

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371. See *supra* notes 91–99, 105–106 and accompanying text.

372. See Annunziato et al., *supra* note 5, at 639; Lieberman et al., *supra* note 5, at 285.

373. WEBER, *supra* note 101, at 74.

374. *Cf. id.* at 40 (stating that the Supreme Court upholding a federal remedy for teacher and peer sexual harassment of students “sends a signal that harassment of public school students should be taken seriously”).

375. See CDC, VOLUNTARY GUIDELINES, *supra* note 23, at 39 (“Among adolescents, food allergy education and awareness can be an effective strategy to improve social interactions, reduce peer pressure, and decrease risk-taking behaviors that expose them to food allergens.”); FAACT, *Bullying*, *supra* note 104 (stating that food allergy bullies often act out of ignorance and model insensitive behavior from adults such as teachers); Gagné, *supra* note 112 (discussing positive response to teen’s food allergy bullying experience when she and her parents reported the incident and educated the bullies about the seriousness of her allergies); see also Foong et al., *supra* note 98, at 333 (stressing the need for whole-school education about food allergies to help solve the problem of food allergy bullying).

376. Section 504 and Title II of the ADA have the same rights and remedies. See 42 U.S.C. § 12133; see also *Barnes v. Gorman*, 536 U.S. 181, 185 (2002) (explaining that Title II and section 504 both provide private rights of action). A plaintiff can recover compensatory damages based on a showing of intent, and a majority of

Although far from an ideal solution, the threat of litigation and liability is generally recognized as an important tool to promote disability rights<sup>377</sup> and can force an otherwise reluctant school to step up.<sup>378</sup> “If disability harassment is ever to be stopped, the threat of damages will be an important reason for the change.”<sup>379</sup>

Some schools do not need this incentive to prompt anti-bullying measures, but far too many do. Currently, the immunity defense takes the teeth out of much potential litigation. But if food allergy is a disability and can form the foundation of a federal disability harassment claim, that defense disappears. This potential for liability can only help motivate schools to take more proactive measures to address food allergy bullying, thereby

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courts have held that deliberate indifference constitutes sufficient intentional discrimination to justify compensatory damages. *See* S.H. v. Lower Merion Sch. Dist., 729 F.3d 248, 263 (3d Cir. 2013) (“We now follow in the footsteps of a majority of our sister courts and hold that a showing of deliberate indifference may satisfy a claim for compensatory damages” under the intentional discrimination requirement of Title II and section 504.); *see also* *Barnes*, 536 U.S. at 189 (discussing compensatory damages in cases under Title II, section 504, and Title VI of the Civil Rights Act of 1964); RAPP, *supra* note 129, § 10C.13[4][e] (explaining that most courts allow monetary damages under the ADA and section 504 based on a showing of deliberate indifference); WEBER, *supra* note 156, at 183 (stating that compensatory damages under Title II and section 504 can be awarded for deliberate indifference). Section 504 and the ADA expressly authorize attorneys’ fees for prevailing parties. *See* 29 U.S.C. § 794a(b); 42 U.S.C. § 12205.

377. *See* Rothstein, *supra* note 164, at 1299 (“It is generally recognized that litigation is an essential component of effectively accomplishing federal disability policy goals.”).

378. *See* KIMMEL, *supra* note 1, at 28 (“We cannot eliminate all bullying among schoolchildren, but we can make schools and school districts respond appropriately to it—and help stop and deter a great deal of it—through effective litigation under federal and state laws. Litigation is a critical tool in our arsenal.”); Secunda, *supra* note 22, at 179 (explaining that “[i]f such prophylactic, in-school steps fail to remedy ongoing bullying of special education students, or if schools turn a blind eye to such behavior, litigation may be the only alternative to provide effective relief”); Weddle, *supra* note 123, at 644 (discussing the need “to align legal incentives and penalties with the realities of schooling and the seriousness of the problem of bullying” to protect “far too many children [who] suffer needlessly at the hands of their peers, unprotected by the very adults into whose care they have been entrusted”); *see also* Mark C. Weber, *Damages Liability in Special Education Cases*, 21 REV. LITIG. 83, 83 (2002) (“Compensatory damages provide relief for pain and suffering, humiliation, and other physical or psychic harm. Damages of that kind may escalate beyond predictable limits and should make administrators concerned about how to protect themselves . . .”).

379. Weber, *supra* note 22, at 1109.

benefitting all victims—including ones who would have little chance of prevailing in court.<sup>380</sup>

Some might worry about the economic costs of subjecting schools to increased liability. Indeed, protecting state coffers is a primary justification for the various immunity defenses that have thus far insulated schools from most bullying liability.<sup>381</sup> But food allergy bullying has its costs too. Bullied students are absent more often and are much more likely to drop out of school,<sup>382</sup> causing a cascade of economic consequences to schools and society at large.<sup>383</sup> Bullied students can require costly medical care, particularly if physical bullying causes an allergic reaction.<sup>384</sup> Bullying is not cost-free. Given the life-threatening nature of food allergy bullying and the costs associated with it, the risk of liability is justified, particularly if that risk prompts schools to protect these children.<sup>385</sup>

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380. See KIMMEL, *supra* note 1, at 28 (“Litigation can motivate [school officials] to insist that bullying is confronted, rather than ignored, put teeth into school policies, require anti-bullying training, and teach tolerance to students.”); Weber, *supra* note 22, at 1155 (noting that “the legal system operates as the ultimate tool to ensure equal participation in school without harassment for children with disabilities”); Weddle, *supra* note 123, at 682–83 (“[When] there can be no real fear of damage awards for ignoring best practices in the face of what schools should know is a dangerous and pervasive problem[,] . . . no urgency exists for schools to clean up their supervision approaches and undertake serious efforts to change the school culture.”).

381. See, e.g., *Tooke v. City of Mexia*, 197 S.W.3d 325, 332 (Tex. 2006) (“[A]n important purpose” of sovereign immunity is “to shield the public from the costs and consequences of improvident actions of their governments.”).

382. See *supra* note 101 and accompanying text.

383. See Baams et al., *supra* note 101, at 424 (discussing direct costs to schools of absenteeism and mental health services from bullying); NAT'L DROPOUT PREVENTION CTR., *Economic Impacts of Dropouts*, <http://dropoutprevention.org/resources/statistics/quick-facts/economic-impacts-of-dropouts/> (last visited Aug. 25, 2020) [<https://perma.cc/HEH2-L98D>] (detailing a wide variety of economic and social costs of school dropout, including that “[e]ach year’s class of dropouts will cost the country over \$200 billion in their lifetime in lost earnings and unrealized tax revenue”).

384. In 2016, the average cost for an emergency room visit for anaphylaxis was \$1,419. See Maggie Fox, *More Kids Are Going to Emergency Rooms with Severe Allergies*, NBC NEWS (Mar. 13, 2018, 12:26 PM), <https://www.nbcnews.com/health/health-news/more-kids-are-going-emergency-rooms-severe-allergies-n856146> [<https://perma.cc/UC85-8JYC>].

385. See Baams et al., *supra* note 101, at 430 (“Changing school norms and values that ultimately protect and improve student well-being is not only a school’s responsibility, but is economically strategic.”).

## CONCLUSION

Schools are a critical component in the fight against food allergy bullying. They have a responsibility to ensure equal educational opportunities for all students, including those with food allergies.<sup>386</sup> The vast majority of food allergy bullying happens at school, sometimes by teachers and coaches. The school's environment contributes substantially to the amount of bullying in a school. When schools ignore or downplay bullying—or worse, when school personnel themselves engage in bullying—schools embolden bullies by signifying that they accept or even encourage this behavior. As the Tenth Circuit eloquently explained,

School administrators are not simply bystanders in the school. They are the leaders of the educational environment. They set the standard for behavior. They mete out discipline and consequences. They provide the system and rules [that] students are expected to follow.<sup>387</sup>

Of course, suing schools for disability harassment is not a cure-all. Bullies' parents are important role models and can substantially influence their children's propensity to bully, either by their own insensitive or negative behavior or in failing to respond appropriately to their child's bullying.<sup>388</sup> Education and awareness, both in the school setting and throughout society, are essential to promote tolerance and understanding. But given the stakes and the impact that schools can have in preventing bullying—and the harm schools can contribute to when they ignore or participate in bullying—schools should be subject to liability for food allergy bullying as disability harassment.

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386. See Dear Colleague Letter on Disability Harassment, *supra* note 294.

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

388. See Shu, *supra* note 20, at 1491–92.