

No. 13-4624

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**UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT**

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T.F. A MINOR BY HIS PARENTS AND  
D.F. AND T.S.F., ON THEIR OWN BEHALF,

*Plaintiff-Appellants,*

v.

FOX CHAPEL AREA SCHOOL DISTRICT,

*Defendant-Appellee.*

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On Appeal from the United States District Court  
for the Western District of Pennsylvania  
The Honorable Arthur J. Schwab

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**BRIEF OF AMICI CURIAE  
FOOD ALLERGY RESEARCH & EDUCATION, &  
COUNCIL OF PARENT ATTORNEYS AND ADVOCATES  
IN SUPPORT OF PLAINTIFF-APPELLANTS AND URGING REVERSAL**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. Rule 26.1(a), none of the proposed *Amici* have a parent corporation, nor is there any publicly held corporation that owns 10% or more of the stock of any of the proposed *Amici*.

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## RELEVANT STATUTES & REGULATIONS

### 29 U.S.C. § 794

(a) No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

(b) “Program or activity” defined [as] . . .

(2)(B) a local educational agency (as defined in section 7801 of Title 20), system of vocational education, or other school system

### 34 C.F.R. § 104.33

(a) General. A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

(b) Appropriate education.

(1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36.

(2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.

### 34 C.F.R. § 104.35

(c) Placement procedures. In interpreting evaluation data and in making placement decisions, a recipient shall (1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior, (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and (4) ensure that the

placement decision is made in conformity with § 104.34.

### **34 C.F.R. § 104.36**

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

## STATEMENTS OF INTEREST<sup>1</sup>

### **Food Allergy Research & Education (FARE)<sup>2</sup>**

FARE is the nation's leading nonprofit organization dedicated to working on behalf of the 15 million Americans with a food allergy, including all those at risk for anaphylaxis, a life-threatening allergic reaction. FARE's mission is to find a cure for food allergy, and to keep individuals with a food allergy safe and included. The organization accomplishes this mission by investing in world-class research that advances treatment and understanding of food allergy, providing evidence-based education and resources, advocating at all levels of government, and increasing awareness of food allergy as a serious public health issue.

Over the last two decades, FARE has been involved in historic federal legislation that requires food labels to warn consumers about potential allergens,<sup>3</sup> and that encourages states to require schools to stock epinephrine to treat anaphylactic emergencies.<sup>4</sup> Countless schools and entities across the country have used educational programs and guidance from FARE, making it the most trusted source of information about managing and living with a food allergy. FARE is

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<sup>1</sup> Pursuant to Fed. R. App. Proc. 29(c)(5), counsel certifies that neither party's counsel authored this brief in whole or in part; neither party nor their counsel contributed money that was intended to fund preparing or submitting the brief; and no one other than *Amici*, their members, or counsel contributed money that was intended to fund preparing or submitting the brief.

<sup>2</sup> FARE is an organization formed by the merger of the Food Allergy Initiative and the Food Allergy & Anaphylaxis Network (FAAN).

<sup>3</sup> See *infra*, n.13.

<sup>4</sup> Pub. L. No. 113-48, 127 Stat. 575 (2013).

interested in this case because it believes students with the disability of a severe food allergy have the right to individualized plans that ensures their access to education and safety while in schools.

### **Council of Parent Attorneys and Advocates (COPAA)**

Council of Parent Attorneys and Advocates (COPAA) is a nonprofit organization for parents of children with disabilities, as well as their attorneys and advocates. While it does not undertake individual representation for children with disabilities, COPAA provides resources, training, and information to parents, attorneys, and advocates that ensure the civil rights of children with disabilities are protected. COPAA has an interest in ensuring children with disabilities enjoy their full rights under federal law regardless of whether they receive special education. COPAA has an interest in this case because it believes effective educational programs for children with disabilities can only be developed and implemented with collaboration between parents and educators as equal parties.

### **Authority to File**

FARE and COPAA seek the authority to file this brief from this Court through its submission of the Motion For Food Allergy Research & Education, & Council of Parent Attorneys and Advocates To File As Amicus Curiae Brief In Support Of Plaintiff-Appellant.

## ARGUMENT

### I. The Importance of Protecting Students with the Hidden Disability of a Severe Food Allergy

Food allergy is a potentially life-threatening condition that affects up to 15 million Americans,<sup>5</sup> including one in 13 children, or roughly two students per classroom.<sup>6</sup> According to the Centers for Disease Control and Prevention (CDC), the number of children with a food allergy has increased by 50 percent in the United States between 1997 and 2011.<sup>7</sup> A recent study has found that 40 percent of children with a food allergy have experienced severe allergic reactions, such as anaphylaxis.<sup>8</sup> Anaphylaxis affects multiple life systems, including breathing, immune, and circulatory systems, and may cause death.<sup>9</sup> One study has found that, among preschool and school-aged children, nine out of 32 food allergy related fatalities occurred in school.<sup>10</sup>

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<sup>5</sup> See generally AMY M. BRANUM & SUSAN A. LUKACS, CDC, FOOD ALLERGY AMONG U.S. CHILDREN: TRENDS IN PREVALENCE AND HOSPITALIZATIONS (2008), available at <http://www.cdc.gov/nchs/data/databriefs/db10.htm>.

<sup>6</sup> Ruchi Gupta, et al., *The Prevalence, Severity, and Distribution of Childhood Food Allergy in the United States*, J. AM. ACAD. OF PEDIATRICS 11 (2011), available at <http://pediatrics.aappublications.org/content/128/1/e9.full.pdf+html>.

<sup>7</sup> See generally KRISTEN D. JACKSON, ET AL., CDC, TRENDS IN ALLERGIC CONDITIONS AMONG CHILDREN: UNITED STATES, 1997-2011 (2013), available at <http://www.cdc.gov/nchs/data/databriefs/db121.htm>.

<sup>8</sup> See *supra*, Note 6, at 12.

<sup>9</sup> *Id.*

<sup>10</sup> Scott H. Sicherer, et al., *Clinical Report – Management of Food Allergy in the School Setting*, J. AM. ACAD. OF PEDIATRICS 1231 (2011) (citations omitted), available at <http://pediatrics.aapublications.org/content/126/6/1232.full.pdf+html>.

Over 160 foods can cause severe food allergy reactions.<sup>11</sup> Within the United States, eight foods account for 90 percent of all food allergy reactions: peanuts, tree nuts, milk, egg, wheat, soy, fish, and shellfish.<sup>12</sup> These are the same food allergens that the Food Allergen Labeling and Consumer Protection Act (FALCPA) requires food labels to identify.<sup>13</sup> Congress passed this Act due to concern about the growing rates of food allergies within the population, as well as the serious risk of death associated with the condition.<sup>14</sup> In addition to the food label requirements, the Act requires the CDC and other federal agencies to research and monitor the growing prevalence of food allergy.<sup>15</sup>

Food allergy results when the immune system mistakenly targets a harmless food protein known as an allergen.<sup>16</sup> As a result, the body sends antibodies to combat the allergen, which releases histamine and other chemicals to trigger the symptoms of an allergic reaction. These allergic reactions can range from mild to severe and may include: obstructive swelling of the lips, tongue, or throat; shortness of breath or wheezing; a drop in blood pressure; chest pain; or a loss of

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<sup>11</sup> FDA, CENTER FOR FOOD SAFETY AND APPLIED NUTRITION. FOOD ALLERGIES: WHAT YOU NEED TO KNOW 1 (2010), *available at* <http://www.fda.gov/downloads/Food/ResourcesForYou/Consumers/UCM220117.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> Pub. L. No. 108-282, § 202,118 Stat. 906 (2004) (“[A]pproximately 2 percent of adults and about 5 percent of infants and young children in the United states suffer from food allergies; and each year, roughly 30,000 individuals require emergency room treatment and 150 individuals dies because of allergic reactions to food.”).

<sup>14</sup> *Id.* at 8–9, 12.

<sup>15</sup> *Id.*

<sup>16</sup> AM. COLL. OF ALLERGY, ASTHMA & IMMUN., FOOD ALLERGIES, <http://www.acaai.org/allergist/allergies/Types/food-allergies/Pages/default.aspx> (last visited Apr. 30, 2014)

consciousness. These symptoms, either alone or in combination, may be signs of the potentially life-threatening allergic reaction known as anaphylaxis.

Anaphylaxis frequently begins within minutes after an individual with a food allergy is exposed to an allergen.<sup>17</sup> For those with a severe food allergy, exposure to an allergen can happen via ingestion, skin contact or inhalation of the food protein.<sup>18</sup> The first-line treatment for anaphylaxis is epinephrine, which is a hormone that increases heart rate, constricts the blood vessels, and opens the airways.<sup>19</sup> To ensure effectiveness, epinephrine must be administered promptly during the onset of anaphylaxis.<sup>20</sup> Delayed administration of epinephrine can result in death in as little as 30 minutes.<sup>21</sup> Many fatalities from anaphylaxis can be prevented when life-saving medications, such as epinephrine, are administered immediately.<sup>22</sup>

A key challenge in managing a food allergy is the fact that the severity of a previous allergic reaction does not predict the severity of a future reaction.<sup>23</sup>

Therefore, a previously mild allergic reaction does not predict whether the next

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<sup>17</sup> NAT'L INST. OF ALLERGY &S INFECT. DISEASES, ALLERGIC DISEASES: UNDERSTANDING ANAPHYLAXIS (2012), *available at* <http://www.niaid.nih.gov/topics/allergicdiseases/understanding/Pages/Anaphylaxis.aspx> (last updated June 7, 2012).

<sup>18</sup> Steven J. Simonte, et al., *Relevance of Casual Contact with Peanut Butter in Children with Peanut Allergy*, J. ALLERGY CLINICAL IMMUN., 180 (2003).

<sup>19</sup> *Id.*

<sup>20</sup> Scott H. Sicherer, et al., *Self-Injectable Epinephrine for First-Aid Management of Anaphylaxis*, PEDIATRICS, 638 (2007).

<sup>21</sup> *Id.* at 639.

<sup>22</sup> *Id.* at 644; *see also supra*, n.10 (noting school deaths were associated with lack of prompt administration of epinephrine).

<sup>23</sup> *See supra*, n. 17.

exposure to an allergen could be life threatening. Currently, there is no cure for a food allergy.<sup>24</sup> The only way to prevent a reaction is to avoid the allergen completely. Individuals with a severe food allergy therefore face an omnipresent risk of a life-threatening allergic reaction. Food allergy reactions are so common within the United States that someone is sent to the emergency room every three minutes due to a food allergy reaction.<sup>25</sup> Peanuts and tree nuts account for 50-62% and 15-30% of fatal or near-fatal allergic reactions in the emergency room.<sup>26</sup>

Approximately 16-18% of school-age children with food allergies have had an allergic reaction while in school.<sup>27</sup> Schools are a particularly hazardous setting for students who with food allergies. Incidental and unintended contact often occurs with food allergens in several ways, such as other students sharing or spilling food from their snacks or lunches; snacks being handed out in class or at school events; food allergens being used in classroom crafts or experiments; and children with unwashed hands containing trace allergens.

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<sup>24</sup> *See supra*, n. 11.

<sup>25</sup> Sunday Clark, et al., *Frequency of U.S. Emergency Department Visits for Food-Related Acute Allergic Reactions*, J. ALLERGY CLINICAL IMMUN. 682 (2011).

<sup>26</sup> Corinne A. Keet, et al., *Food Allergy and Anaphylaxis*, IMMUNO. ALLERGY CLINIC N. AM. 193 (2007).

<sup>27</sup> Scott H. Sicherer, et al., *The U.S. Peanut & Tree Nut Allergy Registry: Characteristics of Reactions in Schools & Day Care*, J. PEDIATRICS 561 (2001).

## II. Schools are Required to Develop Individualized § 504 Plans to ensure a FAPE for Students with Disabilities

Prior to the passage of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Congress found that discrimination on the basis of disability was “most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect” or “apathetic attitudes.” *Alexander v. Choate*, 469 U.S. 287, 295 (1985). For some students with the hidden disability of a severe food allergy, schools have shown such apathy and thoughtlessness. *See, e.g., Smith v. Tangipahao Parish Sch. Bd.*, 2006 WL 3395939, No. 05-6648 (Nov. 22, 2006) (school planned events with horses, despite knowing one of its students had a severe horse allergy, thus causing the student to miss school to avoid contact). To establish a claim against a school under § 504, a student must prove that “(1) he is ‘disabled’ under the meaning of this Act;<sup>28</sup> (2) he is ‘otherwise qualified’ to participate in school activities; (3) the school or the board of education receives federal financial

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<sup>28</sup> A severe food allergy is a disability within the meaning of § 504. While historically the episodic nature of severe food allergies, coupled with mitigating measures, have allowed schools to avoid their legal obligations under § 504, *see, e.g., Smith*, 2016 WL 3395939 \*6–10, this has been remedied by the advent of the American with Disabilities Amendments Act of 2008 (ADAA), Pub. L. 110–325, § 8, 122 Stat. 3553 (2008). The implementing regulations for § 504, like those proposed for the ADAA, define “disability” as a “physical or mental impairment” that affects the “digestive” and “immune” systems, such as occurs with an individual suffering from a food allergy. Office of the Attorney General, Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, 79 Fed. Reg. 20, 4839–62 (proposed Jan. 30, 2014) (to be codified at 34 C.F.R. § 104.3(j)(1)(2)(i), 28 C.F.R. §§ 35.108(2)(b)(i), 36.105(2)(b)(i)); *see also* USDA, ACCOMMODATING CHILDREN WITH SPECIAL DIETARY NEEDS IN THE SCHOOL NUTRITION PROGRAMS 5 (2001) (requiring accommodations for students with special dietary concerns and stating a physician’s diagnosis of a food allergy as potentially causing life-threatening reactions meets the definition of a disability).

assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school.” *Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.*, 172 F.3d 238, 253 (3rd Cir. 1999) (citation omitted).

This Court has previously held “§ 504's ‘negative prohibition’ is similar to the IDEA's ‘affirmative duty’” as it requires the provision of a “free appropriate public education” or “FAPE” to students with a disability. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 280 (3rd Cir. 2012) (citation omitted). Under FAPE, an appropriate education considers the “individual educational needs” of a student with a disability. 34 C.F.R. § 104.33(b)(1); *Centennial Sch. Dist. v. Phil L.*, 799 F. Supp. 2d 473, 490 (E.D. Pa. 2011) (drawing an analogy between an IEP “tailored to the unique needs” of a student with a disability under the IDEA and the requirements for an individualized § 504 Plan). It also must ensure that a student with a disability can participate to the “maximum extent possible” within an educational setting. 34 C.F.R. § 104.34(b); *Ridley Sch. Dist.*, 680 F.3d at 280. An educational setting includes both academics and nonacademic “extracurricular services and activities,” such as meals and recess. 34 C.F.R. § 104.34(b).

Under § 504’s regulations, schools must comply with certain procedural and substantive requirements to ensure a FAPE. 34 C.F.R. § 104.33(b)(1). As argued *infra*, the key to these requirements is the individualization of any § 504 Plan. This ensures the individual educational needs of each student with a disability are met to

provide meaningful participation in and meaningful access to the educational benefits of a FAPE. *Timothy F. v. Antietam Sch. Dist.*, 2014 WL 1301955, No. 12-2719, \*5 (E.D. Pa. March 31, 2014) (citing *Ridley Sch. Dist.*, 680 F.3d at 280).

**A. Section 504 regulations contain procedural requirements for the development of individualized § 504 Plans**

There are two procedural requirements under § 504 regulations that ensure parent and/or guardian involvement in the development of an individualized § 504 Plan. The first requires an individual “knowledgeable about the child” to be included in the group that evaluates and places a student with a disability. 34 C.F.R. § 104.35(c). The second requires that parents and/or guardians have “notice, [and] an opportunity . . . to examine relevant records” from a placement procedure. 34 C.F.R. § 104.36. Parental and/or guardian involvement is essential to ensuring schools consider the individual educational needs of a student with a disability.

**1. Under § 504, parents and/or guardians must be involved in the individualized evaluation and placement of students with disabilities**

One procedural requirement outlined in the § 504 regulations establishes an evaluation and placement process for students with disabilities. 34 C.F.R. § 104.35.

According to implementing regulations, such an evaluation must:

(1) draw upon information from a variety of sources . . . (2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered, (3) ensure that the placement decision is made by a group of persons, including persons

knowledgeable about the child . . . and (4) ensure that the placement decision is made in conformity with § 104.34.

34 C.F.R. § 104.35(c). While a FAPE for one student with a disability may require special education and related services through the provision of an Individualized Education Plan (IEP), for another it may require environmental modification through an individualized § 504 Plan. Therefore the regulations require schools to consider more than academic measures for assessment and placement; they must consider all of the student's needs. 34 C.F.R. § 104.35(c).

For students with disabilities who require medical care, schools must evaluate the student for an individualized § 504 Plan. *See generally* Daniel Kim & Elizabeth Samples, *Comparing Individualized Healthcare Plans and Section 504 Plans: School Districts' Obligations to Determine Eligibility for Students with Health Related Conditions*, 45 URB. LAW 263 (2013) (hereinafter "*IHP and § 504 Plans*"). This is true regardless of whether a school has other plans that address the student's medical needs.<sup>29</sup> *IHP and § 504 Plans* at 272 (citing U.S. Department of Education's Office on Civil Rights findings of noncompliance for schools providing only Individualized Health Plans for students with the disability of diabetes because evaluation under § 504 was also required). Such a requirement

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<sup>29</sup> For example, schools may create an Individualized Health Plan (IHP) that "fulfill[s] administrative and clinical purposes, including management of healthcare conditions to promote learning; facilitating communication, coordination, and continuity of care among service providers; and evaluation/revision of care provided." *IHP and § 504 Plans* at 272.

ensures that schools will consider the individual medical needs of students with a disability and any further modifications that may be necessary to provide a FAPE under § 504.

**2. Parents and/or guardians must have notice and an opportunity to review essential documents used in the development of a § 504 Plan**

Following any “identification, evaluation, or educational placement” of a student with a disability, the regulations for § 504 provide parents and/or guardians with the ability to review the basis for a school’s decision. *See* 34 C.F.R. § 104.36. This review process includes certain procedural safeguards, such as the right to notice along with the right to examine relevant records. *Id.* Relevant records are those pertaining to a student with a disability as well as their placement and related services. *See* ED, GUIDELINES FOR EDUCATORS AND ADMINISTRATORS FOR IMPLEMENTING SECTION 504 OF THE REHABILITATION ACT OF 1973 – SUBPART D, 55 (2010) (“You have the right to see and examine any educational records that pertain to your child or are relevant in *servicing* your child.”) (emphasis added).

**B. Section 504 regulations contain the substantive requirement that § 504 Plans be individualized to ensure a FAPE**

Schools must provide a FAPE to every student with a disability “regardless of the nature or severity” of that disability. 34 C.F.R. § 104.33(a). As part of that requirement, schools must provide “regular or special education and related aids and services” to meet the individual educational needs of a student with a disability.

34 C.F.R. § 104.33(b)(1). The requirement that any services offered by the school be “individualized” is essential to compliance with § 504 as it ensures that a student with a disability has the same access to education as students without disabilities. *See* 34 C.F.R. § 104.33(b)(1).

Regulations for § 504 allow some latitude for schools to comply with the requirement of providing a FAPE to students with disabilities. *See* 34 C.F.R. § 104.33(b)(2); *Molly L. ex rel. B.L. v. Lower Merion Sch. Dist.*, 194 F.Supp.2d 422, 427 (E.D. Pa. 2002) (“There are no bright line rules to determine when a school district has provided an appropriate education as required by § 504 and when it has not.”). One means of providing a FAPE is through the implementation of an IEP in accordance with the IDEA. 34 C.F.R. § 104.33(b)(2). Alternatively, schools may develop individualized § 504 Plans to meet the specific educational needs of a student with a disability. *See Ridley*, 680 F.3d at 265 (noting a school’s use of a § 504 Plan to address the needs of a student with severe allergies). *But see C.T.L. v. Ashland School District*, 743 F.3d 524, 529 (7th Cir. 2013) (interpreting § 504 regulations not to require blanket implementation of an individualized plan). Uniform guidelines or a policy may not meet the individual needs of a student with a disability to satisfy the requirements of § 504. *See Davis v. Francis Howell Sch. Dist.*, 138 F.3d 754, 757 (8th Cir. 1998) (raising the question of whether failure to make reasonable modifications to a school policy applicable to the treatment of a

student with a disability violates § 504, but finding no discrimination due to the school offering an alternative proposal to this policy).

**III. This Court should require Schools to Develop Individualized § 504 Plans for Students with the Hidden Disability of a Severe Food Allergy**

A free, appropriate public education (FAPE) under § 504 requires consideration of the “individual education needs” of a student with a disability both within academic and nonacademic educational settings. 34 C.F.R. § 104.33 (citing 34 C.F.R. § 104.34). Therefore, a school does not provide a FAPE to a student with a disability through the use of a generic policy. Rather schools provide a FAPE by working with parents and/or guardians to determine whether “regular or special education and related aids and services” meets the individual needs of a student with a disability. 34 C.F.R. § 104.33(b)(1) (emphasis added). This includes students with the hidden disability of a severe food allergy. *See* ED, THE CIVIL RIGHTS OF STUDENTS WITH HIDDEN DISABILITIES UNDER SECTION 504 OF THE REHABILITATION ACT OF 1973 (1995). To ensure a FAPE for a student with the hidden disability of a severe food allergy, schools must provide an individualized § 504 Plan to ensure both meaningful participation in and meaningful access to educational benefits.

Students who require special education and related services require an Individualized Education Plan to meet these needs; a generic school-wide plan

does not suffice. *See Bd. of Educ. of Hendrick Central Sch. Dist.*, 458 U.S. 176, 181–182 (1982) (citing 20 U.S.C. § 1401(18)). Likewise, a generic allergy policy cannot take the place of an individualized § 504 Plan for a student with the hidden disability of a severe food allergy. Relying on anything other than an individualized § 504 plan to meet the individual needs of such a student circumvents the protections afforded to students with disabilities under § 504. *C.f. IHP and § 504 Plans* at 275–74 (citing *Tyler v. Texas Indep. Sch. Dist.*, 111 L.R.P. 1839 (2010) (finding reliance on an IHP rather than conducting an evaluation and placement procedure under § 504 regulations circumvents the procedural requirements under the law)). In particular, reliance on a generic policy as part of a § 504 plan undermines the procedural safeguards provided in regulations to parental and/or guardians. *See* 34 C.F.R. §§ 104.35(c), 104.36.

In 2011, Congress passed the Food Allergy & Anaphylaxis Management Act (FAAMA) to require the establishment of national guidelines to assist schools in developing and voluntarily implementing “plans for *individuals* to manage the risk of food allergy and anaphylaxis in schools and early childhood education programs.” 21 U.S.C. § 2205(b) (emphasis added). The CDC developed these guidelines with input from the U.S. Department of Education, U.S. Department of Agriculture, U.S. Department of Health and Human Services, the Food and Drug Administration, and National Institutes of Health, and FARE. *See* CDC,

VOLUNTARY GUIDELINES FOR MANAGING FOOD ALLERGIES IN SCHOOLS AND EARLY CARE AND EDUCATION PROGRAMS (2013). These guidelines echo the requirements of § 504 by calling for the “creation and maintenance of an *individual* plan for food allergy management, in consultation with the parents, tailored to the needs of each child.” *Id.* at 10. Individualization ensures that the needs of each student managing the hidden disability of a food allergy are met to provide a FAPE under § 504.

*Amici* therefore asks this Court to impose a minimal bright-line rule that a § 504 Plan must be individualized when it is required for a student with the hidden disability of a food allergy. This ensures that school will collaborate with parents and/or guardians to create individualized § 504 Plans that detail how adults responsible for such a student will be prepared to avoid, recognize, and treat allergic reactions. This would be in addition to any appropriate modifications that would ensure the safety and inclusion of an individual student with the hidden disability of a severe food allergy within both academic and nonacademic settings.

While schools are allowed some latitude in providing a FAPE, an individualized § 504 Plan that sufficiently addresses the individual needs of a student with the hidden disability of severe food allergy should include two key components. First, it should include all individualized accommodations designed to ensure students with the hidden disability of a severe food allergy have meaningful participation in and access to educational benefits within academic and

nonacademic settings. Second, it should include an individualized Emergency Care Plan that details how to recognize and treat an allergic reaction and prevent anaphylaxis. This latter requirement is essential to properly address a food allergy, which affects students with the disability in unique and unpredictable ways.

As detailed further in Appendix A, a sufficient individualized 504 Plan also would take into account each of the following factors: (1) a student's medical history; (2) the type of allergy and level of sensitivity to the allergen; (3) the number of allergies, if applicable; (4) the presence of atopic conditions, such as eczema or asthma; (5) the mental health, age and maturity level of the student; (6) any developmental disorders or learning disabilities, if applicable; (7) past bullying or harassment; (8) the presence or absence of a school nurse; and (9) transportation needs. Greater detail would be included in the final plan regarding who, what, where, when, and how this policy would unfold. Section 504 Plans that lack these details could not be properly executed or enforced during times of emergency and thus leave students with the hidden disability of a severe food allergy at significant risk of anaphylaxis and death. Such considerations ensure schools are providing a FAPE to students with the hidden disability of a severe food allergy.

## CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse the District Court and remand for a trial on the merits.

Respectfully submitted,

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<sup>31</sup> The views expressed in this Amicus Brief are those of FARE and COPAA. They do not expressly or impliedly represent the views of the University of Maryland Francis King Carey School of Law or its Clinical Law Program.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 3rd Cir. R. 32(a)(7)(C) because it contains 3,064 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on May 2, 2014 the foregoing document was filed electronically using the court's CM/ECF system, which will send notification of such filing to the following.

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Marcy C. Vargas  
Patricia Andrews

/s/ Marc P. Charmatz

# APPENDIX A