

April 2016

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Recommended Citation

Aimee Nienstadt, *The Insufficiency of the Law Surrounding Food Allergies*, 36 Pace L. Rev. 595 (2016)

DOI: <https://doi.org/10.58948/2331-3528.1924>

Available at: <https://digitalcommons.pace.edu/plr/vol36/iss2/6>

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The Insufficiency of the Law Surrounding Food Allergies

Aimee Nienstadt

Natalie Giorgi was a normal, happy thirteen-year-old girl who happened to have a peanut allergy.¹ While away at summer family camp in 2013, Natalie accidentally ate a snack that contained peanut butter.² Natalie spit the treat out right away, but she began suffering a severe allergic reaction twenty minutes later.³ Her father administered three shots of epinephrine that unfortunately did not work.⁴ Natalie died as a result of this reaction.⁵

Natalie was one of fifteen million Americans who have food allergies,⁶ which can now be considered a disability under the Americans with Disabilities Act (“ADA”).⁷ This classification alone, however, was not enough to save Natalie. People with food allergies need even more legal protection. “The prevalence of food allergies among children increased 18% during 1997–2007, and allergic reactions to foods have become the most common cause of anaphylaxis in community health settings.”⁸ According to the Centers for Disease Control and Prevention, “in 2006, about 88% of schools had one or more students with a food

1. Durrell Dawson, *After Daughter's Death, Parents Vow to Prevent Food Allergy Fatalities*, TODAY (June 17, 2014), <http://www.today.com/parents/after-daughters-death-parents-vow-prevent-food-allergy-fatalities-1D79814757>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Facts and Statistics*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/facts-and-stats> (last visited Feb. 11, 2016).

7. *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., DISABILITY RIGHTS SECTION (Jan. 25, 2013), http://www.ada.gov/q&a_lesley_university.htm.

8. *Food Allergies in Schools*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 17, 2015), <http://www.cdc.gov/healthyyouth/foodallergies/index.htm>.

allergy.”⁹ Since food allergies are becoming more prevalent, now is the time to move forward and enact laws to help people with food allergies. In particular, schools need to be fully aware of food allergies and have ways to aid students who have food allergies. Additionally, the rest of the public must become educated about food allergies. While the ADA’s expansion is a good start, there needs to be more effective action to protect people with food allergies. This paper proceeds in five parts. First, I will give an overview of food allergies. The second section will discuss legal protections at the federal level, including the ADA and other specific federal laws that are aimed at food allergies. The third section will discuss legal protections at the state level, including state laws directed at school districts and state laws directed at restaurants. The fourth section will discuss actions by the private/non-profit sector. The final section of my paper will discuss further necessary legislative changes for people with food allergies.

I. Food Allergies: An Overview

Food allergies would seemingly qualify as examples of concealed disabilities that may not be noticeable or obvious. “A food allergy results when the immune system mistakenly targets a harmless food protein – an allergen – as a threat and attacks it.”¹⁰ Severe symptoms of a food allergy include: “[o]bstructive swelling of the lips, tongue, and/or throat, [t]rouble swallowing, [s]hortness of breath or wheezing, [t]urning blue, [d]rop in blood pressure (feeling faint, confused, weak, passing out), [l]oss of consciousness, [c]hest pain, [or] [a] weak or ‘thread’ pulse . . .”¹¹ Additionally, “[s]evere symptoms, alone or in combination with milder symptoms, may be signs of anaphylaxis and require immediate treatment.”¹² When a person is having an anaphylactic reaction, allergic symptoms disturb different areas of the body and can “threaten breathing

9. *Id.*

10. *About Food Allergies*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/about-food-allergies> (last visited Feb. 11, 2016).

11. *Symptoms*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/symptoms> (last visited Feb. 11, 2016).

12. *Id.*

and blood circulation.”¹³ Currently, the only way to prevent an anaphylactic reaction is to avoid the problem food.¹⁴ Food allergy sufferers have to be very conscientious about what they eat.

Numerous statistics show the prevalence and severity of food allergies. Food allergies affect one in every thirteen children in the United States, which is around two in every classroom.¹⁵ The Centers for Disease Control and Prevention released a study in 2013 indicating that food allergies in children increased about 50% between the years 1997 and 2011.¹⁶ In fact, someone goes to the emergency room for a food allergy reaction every three minutes.¹⁷ “[T]hat is more than 200,000 emergency [room] visits per year.”¹⁸ “A reaction to food can range from a mild response (such as an itchy mouth) to anaphylaxis,” which is a very severe reaction that can cause death.¹⁹ “The U.S. Centers for Disease Control reported that food allergies result in more than 300,000 ambulatory-care visits a year among children under the age of 18.”²⁰ Food allergy reactions are also the leading cause of anaphylaxis for people outside the hospital setting.²¹ Additionally, young adults and teenagers who have food allergies have “the highest risk of fatal food-induced anaphylaxis.”²² Someone with a food allergy might look at a food item and think that it does not contain an allergen, but that food might have a minuscule trace of the allergen that they cannot see. If that allergen is present in the food, that person can then go into anaphylactic shock. Even the tiniest trace of a nut can cause someone to go into anaphylactic shock.

II. Existing Legal Protections at the Federal Level

13. *About Anaphylaxis*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/anaphylaxis> (last visited Feb. 11, 2016).

14. *Id.*

15. *Facts and Statistics*, *supra* note 6.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

A. *The Americans with Disabilities Act and the Rehabilitation Act of 1973*

The ADA protects millions of disabled Americans, and was recently expanded in terms of how a disability is defined.²³ This change, among others, was part of the ADA Amendments Act of 2008, and part of the purpose of those changes was to broaden the definition of a disability.²⁴ Under the ADA, “[t]he term ‘disability’ means, with respect to an individual—(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”²⁵ “[M]ajor life activities [can] include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”²⁶ The list that covers major life activities is obviously expansive and covers many daily activities. Major life activities can also include major bodily functions, defined as, “functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.”²⁷ If someone has an anaphylactic reaction, major life activities will be impaired including breathing, speaking, and most of the other activities because a person having a severe allergic reaction will not be able to do anything.²⁸ Also, major bodily functions such as respiratory functions will be impaired if someone is having an anaphylactic reaction.²⁹

Although the ADA covers a wide number of different disabilities, discerning what exactly constitutes as a disability can be a difficult task. There are some disabilities that are

23. *The ADA Amendments Act of 2008: Frequently Asked Questions*, U.S. DEPT. OF LABOR, OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, <http://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm> (last visited Feb. 11, 2016).

24. *Id.*

25. 42 U.S.C. § 12102(1)(A)-(C) (2009).

26. 42 U.S.C. § 12102(2)(A).

27. 42 U.S.C. § 12102(2)(B).

28. *See* 42 U.S.C. § 12102(2)(A).

29. *See* 42 U.S.C. § 12102(2)(B).

obviously covered by the ADA such as serious physical disabilities, but there are other impairments that are less clear. Since food allergies can substantially impact a person's breathing, eating, working, and going to school, which are all major life activities, food allergies – depending on their severity – may be considered ADA covered disabilities.³⁰ Additionally, “allergies are still considered disabilities under the ADA, even if symptoms are controlled by medication.”³¹ Under the ADA, people with allergies are protected by safer and healthier environments at restaurants, stores, schools, and places of employment.³² However, the protection under the ADA is not enough. There must be more protection and other legislation to help people with food allergies, and there needs to be consequences when the law is not adhered to.

Despite the high numbers of children that suffer from food allergies and related complications, not all people with food allergies or asthma are considered to have a disability under the ADA. In most situations, only the people who have more significant or severe reactions are considered to have a disability.³³ The category of severe sufferers “include[s] individuals with celiac disease and others who have autoimmune responses to certain foods, the symptoms of which may include difficulty swallowing and breathing, asthma, or anaphylactic shock.”³⁴

However, there remains a variety of ways the ADA helps people with disabilities. The ADA has far reaching power and applies to many different places, organizations, and people. “The ADA ‘prohibits discrimination against individuals with disabilities by public accommodations, including colleges and universities, in their full and equal enjoyment of goods, services,

30. *Americans with Disabilities Act*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/tools-and-resources/resources-for/child-care-facilities/ada/> (last visited Feb. 11, 2016).

31. *Id.*

32. *Id.*

33. See *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, *supra* note 7.

34. Cynthia Marcotte Stamer, *Food Allergies May Be Disabilities Requiring Accommodation Under The ADA*, SOLUTIONS LAW PRESS (Jan. 28, 2013), <http://slproc.wordpress.com/2013/01/28/food-allergies-may-be-disabilities-requiring-accommodation-under-the-ada/>.

and facilities.”³⁵ According to the ADA’s website, “The Americans with Disabilities Act of 1990 (ADA) prohibits discrimination and ensures equal opportunity for persons with disabilities in employment, State and local government services, public accommodations, commercial facilities, and transportation.”³⁶

The ADA helps people in the workforce by giving them equal access to jobs and preventing employers from not hiring someone just because they are disabled.³⁷ According to the statute,

[a]n employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an ‘undue hardship’ on the operation of the employer’s business. Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. [A reasonable accommodation varies] depending upon the needs of the individual applicant or employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation.³⁸

The ADA protection for people with employment is not often applicable to people with food allergies because most such people would not be denied employment, given that it would be unlikely to affect their job performance. However, it could apply if food allergy sufferers are denied a jobs in a restaurant or other food establishment because of their allergy. It could also apply in a

35. Dave Bloom, *DOJ Agreement May Expand Accommodation of People with Food Allergies*, SNACKSAFELY (Jan. 18, 2013), <http://snacksafely.com/2013/01/doj-agreement-may-expand-accommodation-of-people-with-food-allergies/>.

36. *The Americans with Disabilities Act of 1990 and Revised ADA Regulations Implementing Title II and Title III*, ADA, http://www.ada.gov/2010_regs.htm (last visited Feb. 11, 2016).

37. *Employment (Title I)*, ADA, http://www.ada.gov/ada_title_I.htm (last visited Feb. 11, 2016).

38. *Facts About the Americans with Disabilities Act*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Sept. 9, 2008), <http://www.eeoc.gov/facts/fs-ada.html>.

business position where a promotion would involve traveling to Asia and the person applying for the job has a peanut allergy and would have trouble eating in Asia because many Asian countries use a lot of peanut products. In this example, having a food allergy should not prevent someone from getting a job just because they have to travel somewhere where his or her food allergy might be an issue.

The ADA and Section 504 of the Rehabilitation Act help children in public schools get the help they need and deserve because public schools have to comply with the ADA.³⁹ Under Section 504 of the Rehabilitation Act of 1973, public schools and programs cannot evade the responsibility they have to their students by claiming they have limited funds or resources.⁴⁰ They also cannot impose a “disparate impact” on people who have disabilities.⁴¹ Under Section 504 of the Rehabilitation Act of 1973, parents can have a plan that protects their children in the school environment. These plans are called 504 Plans.⁴² “A 504 plan outlines how a child’s specific needs are met with accommodations, modifications and other services.”⁴³ Parents are able to have a 504 Plan for their children now since food allergies can be considered a disability under the ADA if the allergy is severe enough.⁴⁴ Children are able to obtain more protection at school which helps parents because they will be more relaxed since they know their children are safer. The school lunchroom can be scary for parents of children with food allergies because they cannot watch over their children and they do not know exactly what their children are eating. Since a

39. *Frequently Asked Questions on Effective Communication for Students with Hearing, Vision, or Speech Disabilities in Public Elementary Schools*, U.S. DEP’T OF JUSTICE, CIVIL RIGHTS DIV. & U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, http://www.ada.gov/doe_doj_eff_comm/doe_doj_eff_comm_faqs.htm (last visited Feb. 11, 2016).

40. *Section 504 and Written Management Plans*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/advocacy/section-504-plans> (last visited Feb. 11, 2016).

41. *Id.*

42. *Id.*

43. Kristin Stanberry, *Understanding 504 Plans*, UNDERSTOOD (June 3, 2014), <https://www.understood.org/en/school-learning/special-services/504-plan/understanding-504-plans>.

44. See *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, *supra* note 7.

teacher or monitor cannot watch every student at the same time, children with food allergies should have a 504 Plan so all the teachers, administrators, and other personnel know how to help the child. "For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability."⁴⁵ Parents should take advantage of these safeguards and protect their children.

Part of the progression towards making food allergies an ADA recognized disability comes from a settlement between Lesley University and the United States Department of Justice.⁴⁶

"In or around October 2009, the United States Department of Justice . . . received a complaint alleging that Lesley University . . . violated Title III of the Americans with Disabilities Act of 1990, . . . by failing to make necessary reasonable modifications in policies, practices, and procedures to permit students with celiac disease and/or food allergies . . . to fully and equally enjoy the privileges, advantages, and accommodations of its food service and meal plan system. The United States [Department of Justice] initiated an investigation into the claims and [Lesley] University ha[d] cooperated [in the investigation]. The United States [Department of Justice] allege[d] that the University's policies and practices [did violate the ADA]. The University maintain[ed] that it ha[d] taken and [would] continue to take positive, good faith steps to make reasonable modifications to its food service policies, practices, and procedures and to work

45. *Questions and Answers on the ADA Amendments Act of 2008 for Students with Disabilities Attending Public Elementary and Secondary Schools*, U.S. DEPT OF EDUC. (Jan. 19, 2012), <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-504faq-201109.html>.

46. Settlement Agreement Between the United States of America and Lesley University, DJ 202-36-231 (Dep't of Justice Dec. 20, 2012), <http://www.justice.gov/iso/opa/resources/75920121220161432503826.pdf>.

with students on a case-by-case basis to address the needs of individual students with food allergies.”⁴⁷

However, Lesley University and the United States decided to settle.⁴⁸ The University was mandated to provide services and protect students with food allergies.⁴⁹ The settlement agreement states:

[a]s a public accommodation, Lesley acknowledges that it must also make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.⁵⁰

The settlement, while not a lawsuit, should become influential. This protection can also sometimes extend to private facilities in addition to public schools.⁵¹ However, private religious schools can be exempt from the ADA.⁵² It depends on the relationship between the religion that is promoted at the school and the inner workings of the school.⁵³ An example of this protection comes from a public settlement agreement under the ADA where a private child care facility had to enroll children with food allergies.⁵⁴ The school also had to “take appropriate steps to assure that the facility was prepared to recognize an

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Americans with Disabilities Act*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/tools-and-resources/resources-for/child-care-facilities/ada> (last visited Feb. 11, 2016).

53. *Id.*

54. *Id.*

allergic reaction, and respond appropriately.”⁵⁵ “The settlement may have far reaching consequences as other places of public accommodation move to adopt the settlement guidelines to avoid similar litigation.”⁵⁶ The settlement was reached with Lesley University of Cambridge Massachusetts. It was a suit brought under the ADA.⁵⁷ As the Department of Justice explained,

In or around October 2009, the United States Department of Justice received a complaint alleging that Lesley University violated Title III of the Americans with Disabilities Act of 1990, by failing to make necessary reasonable modifications in policies, practices, and procedures to permit students with celiac disease and/or food allergies to fully and equally enjoy the privileges, advantages, and accommodations of its food service and meal plan system.⁵⁸

The Department of Justice issued an investigation into the claims and Lesley University cooperated in the investigation.⁵⁹ The Department of Justice alleged that the University policies and practices did violate the ADA.⁶⁰ “The University maintains that it has taken and will continue to take positive, good faith steps to make reasonable modifications to its food service policies, practices, and procedures and to work with students on a case-by-case basis to address the needs of individual students with food allergies.”⁶¹ However, Lesley University and the

55. *Id.*

56. Dave Bloom, *DOJ Agreement May Expand Accommodation of People with Food Allergies*, SNACKSAFELY (Jan. 18, 2013), <http://snacksafely.com/2013/01/doj-agreement-may-expand-accommodation-of-people-with-food-allergies/>.

57. Settlement Agreement Between the United States of America and Lesley University, DJ 202-36-231 (Dep’t. of Justice Dec. 20, 2012), <http://www.justice.gov/iso/opa/resources/75920121220161432503826.pdf> (listing a variety of services the University has to provide for people with food allergies).

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

United States decided to settle.⁶² The University has to provide services and protect students with food allergies.⁶³

As a public accommodation, Lesley acknowledges that it must also make reasonable modifications in policies, practices, or procedures, when the modifications are necessary to afford goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations.⁶⁴

This settlement is helpful to other schools and universities that should take steps to protect their students with food allergies. Because its meal plan was mandatory for all students living on campus, the ADA required that the University make reasonable modifications to the plan to accommodate students with celiac disease and other food allergies.⁶⁵ The Lesley University settlement establishes the precedent that it is important to make accommodations for people who suffer from food allergies.

The settlement was followed by a recent Iowa Appellate Court ruling that deemed food allergies to be a covered disability under state law.⁶⁶ The court ruled 2-1 that the Iowa Civil Rights Act and the federal Americans with Disabilities Act protects people with food allergies.⁶⁷ Shannon Knudsen sued a community care center after the facility would not accept her son because of staffing and liability concerns.⁶⁸ “The two events taken together [the Lesley University settlement and the Iowa

62. *Id.*

63. *Id.*

64. *Id.*

65. *Questions and Answers About the Lesley University Agreement and Potential Implications for Individuals with Food Allergies*, *supra* note 7.

66. Dave Bloom, *Iowa Court Rules Tree Nut Allergy is a Disability*, SNACKSAFELY (Jan. 14, 2013), <http://snacksafely.com/2013/01/iowa-court-rules-tree-nut-allergy-is-a-disability>.

67. *Id.*

68. *Id.*

Appeals Court decision] mark a movement toward recognizing food allergy as a serious disability requiring accommodation as such.”⁶⁹ Overall, broadening the definition of the ADA to include food allergies sufferers is a step in the right direction.

B. *The Food Allergen Labeling and Consumer Protection Act*

Another legal step that has been taken to protect people who suffer from food allergies is the Food Allergen Labeling and Consumer Protection Act (FALCPA), passed in 2004.⁷⁰ FALCPA is an amendment to the Federal Food, Drug, and Cosmetic Act.⁷¹ The Act “requires that the label of a food that contains an ingredient that is or contains protein from a ‘major food allergen’ declare the presence of the allergen in the manner described by the law.”⁷² According to the U.S. Food and Drug Administration

Congress passed this Act to make it easier for food allergic consumers and their caregivers to identify and avoid foods that contain major food allergens. In fact, in a review of the foods of randomly selected manufacturers of baked goods, ice cream, and candy in Minnesota and Wisconsin in 1999, FDA found that 25 percent of sampled foods failed to list peanuts or eggs as ingredients on the food labels although the foods contained these allergens.⁷³

As Food Allergy Research and Education (FARE) explains:

[t]he Food Allergen Labeling and Consumer Protection Act (FALCPA), which took effect

69. Bloom, *supra* note 66.

70. Food Allergen Labeling and Consumer Protection Act of 2004, 21 U.S.C. § 374a (2012).

71. *Food Allergen Labeling And Consumer Protection Act of 2004 Questions and Answers*, U.S. FOOD & DRUG ADMIN. (July 18, 2006), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Allergens/ucm106890.htm>.

72. *Id.*

73. *Id.*

January 1, 2006, requires that the labels of foods (including conventional foods, dietary supplements, infant formula, and medical foods) containing major food allergens (milk, eggs, fish, crustacean shellfish, peanuts, tree nuts, wheat and soy) note the allergen in plain language, either in the ingredient list or via: the word “Contains” followed by the name of the major food allergen – for example, “Contains milk, wheat” – OR – in the ingredient list in parentheses – for example, “albumin (egg).”⁷⁴

This Act helps protect people with food allergies because it focuses on labeling products at the grocery store. When someone with a food allergy goes to the grocery store, he or she has to read almost every food label to see what allergens are in the product. Even the smallest trace of an allergen can cause a severe reaction. Therefore, it is important for ingredients to be labeled correctly and clearly, including language such as “may contain.”⁷⁵ “A company will be subject to the civil and criminal penalty provisions of the Federal Food, Drug, and Cosmetic Act if one of the company’s packaged food products does not comply with the FALCPA labeling requirements.”⁷⁶ Therefore, the parts of the Act that require the food allergen labeling have provisions that will penalize organizations that do not follow the law.⁷⁷ In addition, “food products containing undeclared allergens will likely be subject to recall.”⁷⁸ However, “[t]he use of advisory labeling (i.e., precautionary statements such as ‘may contain,’ ‘processed in a facility that also processes,’ or ‘made on equipment with’) is voluntary and optional for manufacturers.”⁷⁹ As discussed further in Part V, this voluntary suggestion should

74. *Food Labels*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/food-labels> (last visited Feb. 11, 2016).

75. “May contain” means that the allergen may be present in the food item.

76. *Answers to Frequently Asked Questions About FALCPA*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/falcpa-faq> (last visited Feb. 11, 2015).

77. *Id.*

78. *Id.*

79. *Food Labels*, *supra* note 74.

be mandatory so that people with food allergies can be certain that the food item they are buying does not contain their allergen. Currently, “[t]here are no laws governing or requiring these statements, so they may or may not indicate if a product contains a specific allergen.”⁸⁰

C. *School Access to Emergency Epinephrine Act*

The movement towards enacting laws to help people with food allergies has been aided by the efforts of the Executive Branch and President Obama, as well as Congress. In 2014, President Obama signed into law an act that will “provide financial incentives to states that enable schools to stock emergency epinephrine devices, which are used to treat allergic reactions to food.”⁸¹ The act is called the School Access to Emergency Epinephrine Act and was passed with bipartisan support.⁸² Food allergies are very personal to President Obama since his daughter suffers from a peanut allergy.⁸³ President Obama said, “[s]ome people may know that Malia actually has a peanut allergy. She doesn’t have asthma, but obviously making sure that EpiPens are available in case of emergency in schools is something that every parent can understand.”⁸⁴ President Obama also said, “[t]his is something that will save children’s lives. . . . [a]nd, thanks to the bipartisan work of the folks behind us and the advocacy communities that have been pushing this so hard, we’re going to be giving states a lot more incentives to make sure that that happens.”⁸⁵ The act demonstrates that there has been increased awareness in the severity of food allergies.

80. *Id.*

81. Allie Bidwell, *Obama Signs Law That Could Help Kids With Food Allergies*, U.S. NEWS & WORLD REPORTS (Nov. 14, 2013), <http://www.usnews.com/news/articles/2013/11/14/obama-signs-law-that-could-help-kids-with-food-allergies>.

82. CNN Political Unit, *Obama reveals daughter Malia's peanut allergy at bill signing*, CNN (Nov. 13, 2013), <http://politicalticker.blogs.cnn.com/2013/11/13/obama-reveals-daughter-malias-peanut-allergy-at-bill-signing>.

83. *Id.*

84. David Jackson, *Obama reveals daughter's peanut allergy*, USA TODAY (Nov. 14, 2013), <http://www.usatoday.com/story/theoval/2013/11/14/obama-malia-obama-food-allergies-bill-signing/3524363>.

85. *Id.*

The School Access to Emergency Epinephrine Act was an amendment to the Public Health Service Act.⁸⁶ The Act “give[s] an additional preference to a state that allows self-administration of asthma and anaphylaxis medication and makes a certification concerning the adequacy of the state’s civil liability protection law to protect trained school personnel who may administer epinephrine to a student reasonably believed to be having an anaphylactic reaction.”⁸⁷ If a state is given this preference and follows the first part of the act, the elementary and secondary schools in those states are required to:

- (i) permit[] trained personnel of the school to administer epinephrine to any student of the school reasonably believed to be having an anaphylactic reaction; (ii) maintain[] a supply of epinephrine in a secure location that is easily accessible to trained personnel of the school for the purpose of administration to any student of the school reasonably believed to be having [such reaction]; and (iii) ha[ve] in place a plan for having on the premises of the school during all operating hours of the school one or more individuals who are trained personnel of the school.⁸⁸

The act was introduced in the Senate in September 2013 and became Public Law 113-48 on November 13, 2013.⁸⁹

D. *The Food Allergy and Anaphylaxis Management Act*

Additionally, on the federal level, the Food Allergy & Anaphylaxis Management Act (FAAMA) was passed to help protect people who suffer from food allergies. According to FAMMA,

86. School Access to Emergency Epinephrine Act, S. 1503, 113th Cong. (2013), <https://www.congress.gov/bill/113th-congress/senate-bill/1503>.

87. *Id.*

88. *Id.*

89. *Id.*

[t]he Secretary of Health and Human Services, acting through the Director of the Centers for Disease Control and Prevention and in consultation with the Commissioner of Food and Drugs, shall improve (including by educating physicians and other health care providers) the collection of, and publish as it becomes available, national data on—(1) the prevalence of food allergies; (2) the incidence of clinically significant or serious adverse events related to food allergies; and (3) the use of different modes of treatment for and prevention of allergic responses to foods.⁹⁰

The act “[r]equires the U.S. Secretary of Health and Human Services to develop and make available to schools a voluntary policy to manage the risk of food allergy and anaphylaxis in schools.”⁹¹ FAAMA is a good start towards getting more recognition for food allergies because, under the bill, more statistics will be introduced about food allergies.

III. Existing Legal Protections at the State Level

A. *State Laws Directed at School Districts*

While the executive branch of the federal government is making changes, state governments are also making changes in the state legislature. Some states are in the process of passing legislation.⁹² In Michigan, State Representative Lisa Posthumus Lyons proposed a law that would help children with food allergies by requiring the school to stock two EpiPens and also have two staff members who are trained in how to use EpiPens.⁹³ In addition, under this proposal, doctors and

90. 42 U.S.C. § 242r(a)(1)-(3) (2004).

91. *Food Allergy & Anaphylaxis Management Act*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/laws-and-regulations/faama> (last visited Feb. 11, 2016).

92. *See All Michigan schools will now be equipped with lifesaving epi-pens* MICH. HOUSE REPUBLICANS, <http://gophouse.org/michigan-schools-will-now-equipped-lifesaving-epi-pens> (last visited Feb. 11, 2016).

93. *Id.*

pharmacies could even prescribe EpiPens to school districts.⁹⁴ The bills became Michigan Compiled Law Sections 333.17744a, 380.1178, 380.1178a, and 380.1179.⁹⁵ These sections discuss epinephrine devices and what steps schools have to take to protect their students who can go into anaphylactic shock. It also discusses potential liability for school district employees.

Numerous other states are passing laws to protect people with food allergies, and are following different approaches. While only fifteen states have guidelines for food allergy management, forty six states have some sort of school epinephrine legislation and guidelines.⁹⁶ However, many states have laws in place about schools and food allergies because state legislatures understand how important it is for children to be protected when they are in school. Also according to FARE,

[o]n October 30, 2013, the Centers for Disease Control & Prevention (CDC) published 'Voluntary Guidelines for Managing Food Allergies in Schools and Early Care and Education Programs' - the first national comprehensive guidelines for school food allergy management. The guidelines are intended to support the implementation of school food allergy management policies in schools and early childhood programs, and guide improvements to existing practices.⁹⁷

These guidelines should help states take appropriate measures in protecting people with food allergies and advising them on the policies they should enact.

While FARE has guidelines for how states should prepare their laws, the statute in Colorado does not follow these guidelines and thus the law is very unclear and thus not overly

94. *Id.*

95. MICH. COMP. LAWS ANN. § 333.17744a (West 2014).

96. *School Access to Epinephrine Map*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/advocacy/epinephrine/map> (last visited Feb. 11, 2016).

97. *School Guidelines*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/laws-and-regulations/guidelines-for-schools> (last visited Feb. 11, 2016).

helpful. Colorado's statute says,

[t]he department has, in addition to all other powers and duties imposed upon it by law, the duty to develop, maintain, and make available to school districts and institute charter schools a standard form to be used by school districts and institute charter schools to gather information from physicians and parents and guardians of students concerning students' risks of food allergies and anaphylaxis and the treatment thereof.⁹⁸

It does not give a lot of information about what schools or organizations should do to help people with food allergies. It also does not have guidelines for any schools, employers, or organizations. States should not follow this law and other states should set up more stringent regulations and explanations so school districts and other establishments have clear guidelines and know what they should do.

Fewer than ten states have a law requiring schools to stock epinephrine, which is another part of the law that needs to be changed. The other states just have laws allowing schools to stock epinephrine.⁹⁹ Allowing a school to stock epinephrine is not sufficient. School districts should not even have a choice about stocking epinephrine—it should always be a requirement. Each state has a slightly different approach with how they handle food allergies for kids in schools. New Jersey, Pennsylvania, and Texas all have differing statutes that give responsibilities to school districts on keeping their schools safe for their students with food allergies. In New Jersey the law says,

The Department of Education, in consultation with the Department of Health, appropriate medical experts, and professional organizations representing school nurses, principals, teachers,

98. COLO. REV. STAT. ANN. § 25-1.5-109 (West 2009).

99. *Id.*

and the food allergy community, shall establish and disseminate to each board of education and chief school administrator of a nonpublic school guidelines for the development of a policy by a school district or nonpublic school for the management of food allergies in the school setting and the emergency administration of epinephrine to students for anaphylaxis.¹⁰⁰

This is very vague and does not give a lot of guidance. However, New Jersey's law continues by saying:

The policy for the administration of medication to a pupil shall provide that the school nurse shall have the primary responsibility for the administration of the epinephrine. The school nurse shall designate, in consultation with the board of education, or chief school administrator of a nonpublic school additional employees of the school district or nonpublic school who volunteer to administer epinephrine via a pre-filled auto-injector mechanism to a pupil for anaphylaxis when the nurse is not physically present at the scene.¹⁰¹

This statute helps with some of the ambiguities in the other statute, but the statute could still provide more guidance to schools about storing epinephrine and how many EpiPens the school should carry. In contrast, Pennsylvania's statute discusses the reasons for having the statute and says it is the Department of Education's job: "(1) To every extent possible, include programs related to child health, nutrition, food allergy management and physical education as part of the continuing professional education courses, programs, activities or learning experiences required under section 1205.2(f)."¹⁰² The

100. N.J. STAT. ANN. § 18A:40-12.6a (West 2012).

101. *Id.*

102. 24 PA. CONS. STAT. ANN. § 14-1422.3 (West 2011).

Pennsylvania statute lists a number of other requirements.¹⁰³ This statute effectively shows that there are reasons to train and explain food allergies to professionals that are in charge of taking care of children while they are at school. Texas also has requirements that discuss food allergies, but there are differences between all the states. The Texas statute says,

In this section, “severe food allergy” means a dangerous or life-threatening reaction of the human body to a food-borne allergen introduced by inhalation, ingestion, or skin contact that requires immediate medical attention. . . .(b) On enrollment of a child in a public school, a school district shall request, by providing a form or otherwise, that a parent or other person with legal control of the child under a court order: (1) disclose whether the child has a food allergy or a severe food allergy that, in the judgment of the parent or other person with legal control, should be disclosed to the district to enable the district to take any necessary precautions regarding the child’s safety; and (2) specify the food to which the child is allergic and the nature of the allergic reaction.¹⁰⁴

This statute is different than the other statutes because it puts pressure on the parents to be proactive about taking care of their child. Parents should take the necessary steps to protect their children and as long as the parent has done their part it should be up to the school district to take appropriate action. A different section of the statute in Texas states,

The board of trustees of each school district and the governing body or an appropriate officer of each open-enrollment charter school shall adopt and administer a policy for the care of students with a diagnosed food allergy at risk for

103. *Id.*

104. TEX. EDUC. CODE ANN. § 25.0022 (West 2011).

anaphylaxis based on guidelines developed by the commissioner of state health services in consultation with an ad hoc committee appointed by the commissioner of state health services.¹⁰⁵

The statute then says the guidelines may not “require a school district or open-enrollment charter school to purchase prescription anaphylaxis medication, such as epinephrine, or require any other expenditure that would result in a negative fiscal impact on the district or charter school.”¹⁰⁶ The guidelines also may not “require the personnel of a district or charter school to administer anaphylaxis medication, such as epinephrine, to a student unless the anaphylaxis medication is prescribed for that student.”¹⁰⁷ The Texas statute seems to be effective because it puts some pressure on parents to make sure the school district knows about the allergy and puts pressure on the school district to make policies. The school districts get to make their own policies, which is helpful because school districts have different needs and priorities and, thus, might need different policies.

Connecticut and Maryland both have statutes that discuss what school districts have to do to help people with food allergies. Connecticut’s statute is somewhat similar to Texas in that the school district has to make a plan on how to handle students with food allergies.

The Connecticut State Department of Education [has] to develop guidelines for the management of students with life-threatening food allergies and have these guidelines available by January 1, 2006. In addition, not later than July 1, 2006, each local and regional board of education shall implement a plan based on these guidelines for the management of students with life-threatening food allergies enrolled in the schools under its jurisdiction which includes the development of an individualized health care plan for every student

105. TEX. EDUC. CODE ANN. § 38.0151 (West 2012).

106. *Id.*

107. *Id.*

with life-threatening food allergies.”¹⁰⁸ The statute also discusses the administration of medications in schools and the administration of medications in schools by a paraprofessional. There are also regulations that discuss administering medication during before and after school programs.¹⁰⁹

Like Texas, this statute is effective in making sure there is a plan in place to help food allergy sufferers and gives school districts the authority to come up with plan that best fit their district’s needs. In Maryland, The Annotated Code of Maryland, Education Article, §7-426 specifies that “certain school and school administrator responsibilities for the care of students with a diagnosis of anaphylaxis or who are at risk for anaphylaxis as documented by a health care provider.”¹¹⁰ However, there is a guidebook that specifies health services guidelines that help school districts implement policies and goes into more detail. Additionally, “The school administrator must be aware of students with a diagnosis of anaphylaxis or at risk for anaphylaxis as documented by a health care provider, and work with the school nurse to support the effective implementation of health care plans for these students.”¹¹¹ These guidelines are interesting because it puts pressure on individual people to make plans for students with food allergies. The guidelines continue by stating, “Implementation of the health care plans includes supporting reasonable accommodations that are based on the school nurse’s

108. *Guidelines for Managing Life-Threatening Food Allergies in Connecticut Schools*, CONN. STATE DEP’T OF EDUC., http://www.sde.ct.gov/sde/lib/sde/pdf/publications/food_allergies/food_allergies.pdf (last visited Feb. 11, 2016).

109. *Id.*

110. *Management of Students at Risk for Anaphylactic Reaction*, MD. STATE DEP’T OF EDUC., http://www.msde.maryland.gov/NR/rdonlyres/6561B955-9B4A-4924-90AE-F95662804D90/35018/Asthma_Guidelines_02272013_.pdf (last visited Feb. 11, 2016). Maryland’s statute just gives basic guidelines and says there needs to be a health services program coordinator that has to “implement state and local health policies in the public schools.” Md. Educ. Code Ann. § 7-401. The statute does not say anything further about children with food allergies.

111. *Id.*

assessment, healthcare provider orders, and the unique needs of each individual student.”¹¹² This statute should probably put more pressure on school districts in general rather than on specific people to make plans. The guidelines are helpful, but Maryland should put some of the information from their guidelines into a statute that makes something required, rather than recommended.

Although New York does not have legislation like New Jersey, Pennsylvania, Connecticut, and Texas that directly addresses food allergies, New York has a research guide from the Department of Health that goes over how serious food allergies can be and how to care for children with food allergies. The guide is similar to the guide in Maryland. The guidelines discuss four student accommodations and care plans that are recommended by the New York State Department of Health for students who have health issues that could impact their well-being at school. This includes students with food allergies.¹¹³ However, these plans are not legally required for each student.¹¹⁴ The four plans are an Emergency Care Plan, an Individualized Healthcare Plan, a Section 504 Plan, or an Individualized Education Plan.¹¹⁵ The Department of Health also discusses guidelines for the students,¹¹⁶ parents,¹¹⁷ school administrators,¹¹⁸ nurses,¹¹⁹ and teachers.¹²⁰ The guidelines discuss the responsibilities of each person to make the school safe for the student who suffers from a food allergy.¹²¹

Arizona has a similar research guide from the Department of Health Services. Arizona’s research guide also discusses the

112. *Id.*

113. *Caring for Students with Life-Threatening Allergies*, N.Y. DEPT. OF HEALTH, http://www.health.ny.gov/professionals/protocols_and_guidelines/docs/caring_for_students_with_life_threatening_allergies.pdf (last visited Feb. 11, 2016).

114. *Id.* at 16.

115. *Id.* at 16-18.

116. *Id.* at 19.

117. *Id.* at 20.

118. *Id.* at 21.

119. *Id.* at 22.

120. *Id.* at 24.

121. *Id.* at 19-28.

responsibilities of parents,¹²² students,¹²³ administrators,¹²⁴ nurses,¹²⁵ as well as coaches,¹²⁶ and employees who work in the cafeteria.¹²⁷ Both New York and Arizona's research guides go over how to keep the student safe in the classroom and in the lunchroom.¹²⁸ However, Arizona's guide discusses that students can have an Individual Health Care Plan as well as a 504 Plan.¹²⁹

B. *State Laws Directed at Restaurants*

While many states have statutes in place that direct school districts to take action and help children with food allergies, most states do not have statutes in place about restaurants and food allergies. However, one state that does have legislation which requires restaurants to have some sort of food allergy awareness is Massachusetts. In Massachusetts, the Department of Health requires people who serve food to take a variety of steps to help people with food allergies.¹³⁰ Restaurants have to "include on all menus a notice to customers of the customer's obligation to inform the server about any food allergies, the language of the notice shall be developed by the department in consultation with the Massachusetts Restaurant Association and the Food Allergy & Anaphylaxis Network."¹³¹ Restaurants now also have to put posters in the employee areas

122. *Arizona Resource Guide for Supporting Children with Life-Threatening Food Allergies*, ARIZ. DEP'T OF EDUC. 17, <http://www.azdhs.gov/phs/oeh/fses/pdf/allergies1007.pdf> (last visited Feb. 11, 2016).

123. *Id.* at 5.

124. *Id.* at 18.

125. *Id.* at 20.

126. *Id.* at 27.

127. *Id.* at 25.

128. *See Caring for Students with Life Threatening Allergies*, *supra* note 113, at 29-32; *Arizona Resource Guide for Supporting Children with Life-Threatening Food Allergies*, *supra* note 122, at 24-25.

129. *Arizona Resource Guide for Supporting Children with Life-Threatening Food Allergies*, *supra* note 122, at 8.

130. MASS. GEN. LAWS ch.140, § 6B(a) (2010).

131. MASS. GEN. LAWS § 6B(b)(2).

that give information about food allergies.¹³² There also has to be a sign on menus and menu boards that reads “Before placing your order, please inform your server if a person in your party has a food allergy.”¹³³

Rhode Island and Maryland have laws that are similar to Massachusetts. In Rhode Island, as a part of the state’s general laws under health and safety there is a chapter of the law that is called “Food Allergy Awareness in Food-Service Establishments.”¹³⁴ This section says “[t]he director of health shall establish a food allergy awareness program” that imposes regulations of food-service establishments that includes having a poster in the staff area about food allergy awareness, a notice on menus to customers about food allergies, and requires establishments have to have a manager who is knowledgeable about food allergies and has responsibilities regarding food allergies.¹³⁵ This is an excellent law that other states should begin following and implementing to protect people with food allergies.

The law in Maryland says, “Beginning March 1, 2014, a food establishment shall display prominently in the staff area of the food establishment a poster relating to food allergy awareness that includes information regarding the risk of an allergic reaction.”¹³⁶ Additionally in Maryland, beginning on March 1, 2015, a food establishment must have an employee working who has completed and passed a training course and can discuss meal options for people with allergies.¹³⁷

The laws in Massachusetts, Rhode Island, and Maryland all put some pressure on restaurant establishments to train employees on the severity of food allergies. However, just requiring a poster to be displayed does not teach employees exactly how serious a food allergy can be. It is still difficult for people with food allergies to go to restaurants and there are still

132. *Food Allergies and Restaurants*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/advocacy/restaurants> (last visited Feb. 11, 2016).

133. *Id.*

134. R.I. GEN. LAWS § 23-20.12-2 (2012).

135. R.I. GEN. LAWS § 23-20.12-2(1)-(3).

136. MD. CODE ANN., HEALTH-GEN. § 21-330.2 (West 2013).

137. S. 409, 2014 Gen. Assemb., (Md. 2014)

<http://mgaleg.maryland.gov/2014RS/bills/sb/sb0409f.pdf>.

ways a restaurant can make people with food allergies feel safer when they eat at restaurants. As discussed further below, states should put pressure on food establishments to protect people with food allergies.

IV. Actions By The Private/Non-Profit Sector

There are some restaurants and businesses that protect people with food allergies and make them feel safe without being required to do so by law. Disney World and Disneyland exemplify the attempt to protect people with food allergies. There are many restaurants throughout Disney World and Disneyland that protect people with food allergies. On the Disney website, there is a page for special dietary requests. This page outlines the steps Disney World and Disneyland will go through to help people with food allergies. The page talks about food alternatives at restaurants, how to go about requesting a special meal, and lists the restaurants that participate (most restaurants participate).¹³⁸ According to an article about dining at Disneyland and Disney World, “At any sit-down dining experience we had at any Disney resort or park, the chef came out of the kitchen to speak with us. He or she informed us of the foods that would cause no issue and which foods they could not speak for.”¹³⁹ The author gave an example that the chef let her know breads were not made at Disney, so he could not guarantee how safe they were to eat.”¹⁴⁰ Additionally, “At every food cart, the cast members were happy to hand over the product before purchase to allow me (or any parent) the option of checking the label with their own eyes. Some stands were even equipped with a book that contained the labels and ingredients for all of the products.”¹⁴¹ As Disney’s approach to caring for people with food allergies shows, there are ways for restaurants to train their

138. *Special Dietary Requests*, WALT DISNEY WORLD, <https://disneyworld.disney.go.com/guest-services/special-dietary-requests/> (last visited Feb. 11, 2016).

139. *Traveling With A Food Allergy: Disney World Edition*, HUFFINGTON POST, http://www.huffingtonpost.com/katelyn-mullen/traveling-food-allergies-disney-world_b_3776757.html (last visited Feb. 11, 2016).

140. *Id.*

141. *Id.*

employees to understand the severity of food allergies and ways to make patrons with food allergies feel safer and have confidence that they can eat the meal in front of them without suffering a reaction. States can impose laws that mirror Disney's approach to food allergies. Restaurants can take similar measures that Disney takes.

In addition to laws that help people with food allergies, there are organizations that help people with food allergies and their parents. These organizations research food allergies and their websites have an abundance of information about food allergies. Many of the organizations help get laws passed to help people with food allergies or explain the laws so people understand. One of these organizations is called the Food Allergy Research and Education (FARE). FARE "works on behalf of fifteen million Americans with food allergies, including all those at risk for life-threatening anaphylaxis."¹⁴² FARE has a lot of information about food allergies including different types of allergens, advocacy, laws and regulations, diagnosis and testing, treatment, symptoms, and clinical trials.¹⁴³ The website gives people tips on how to deal with these food allergies or their children's food allergies.¹⁴⁴ It also shares information about finding a cure and food allergy research.¹⁴⁵ "FARE recommends that parents of children with food allergy create, in collaboration with their school, a written food allergy management plan."¹⁴⁶ FARE's mission is to improve the quality of life and the health of individuals with food allergies, and to provide them hope through the promise of new treatments.¹⁴⁷ FARE is a great resource for people to learn more about food allergies.

V. Further Necessary Legislative Change

142. *About FARE*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/about> (last visited Feb. 11, 2016).

143. *Id.*

144. *Id.*

145. *Food Allergy Research*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/research> (last visited Feb. 11, 2016).

146. *Section 504 and Written Management Plans*, FOOD ALLERGY RES. & EDUC., <http://www.foodallergy.org/advocacy/section-504-plans> (last visited Feb. 11, 2016).

147. *About FARE*, *supra* note 142.

Both state governments and the federal government should be working towards making laws to help people suffering from food allergies. Their first priority should be to make sure students are safe when they are at school. School districts have the enormous responsibility to care for a very vulnerable group of people, young children. Young children are probably the most at risk because they do not yet understand the implications of having a food allergy and how dangerous having a food allergy can be. Many states and the federal government already have laws in place that govern school districts responsibilities regarding their students and stocking epinephrine. However, more states should follow their lead, and some states should amend their laws to make them more cohesive. States should have very clear cut laws on the measures schools districts have to take to keep their students safe. It is appropriate to have school districts set their own policies to an extent, but the state should tell the individual school districts what should be in the policies.

There should also be an increase in protection for people with food allergies outside of schools where food allergy sufferers are at risk of having an allergic reaction. Children need protection outside of school and adults need protection in their daily lives. Everyone with food allergies should have protection when they are at work, when they eat at restaurants, and when they cook at home. The ADA as written does not address the issue stemming from the fact that certain ingredients are concealed in food and it does not address the issue stemming from the prevalence of cross-contamination. There should be a new law to address these and other concerns. There should also be regulations that protect people with food allergies elsewhere too because it is a hidden disability. It is impossible to tell just by looking at someone that they have a food allergy. When someone has a reaction, they need an immediate response and immediate help. The time it takes for someone to figure out what to do and try to locate an epi-pen could be too long and it might be too late. Another problem that people with food allergies face is that ingredients are not always visible in food. If someone is allergic to peanuts, they might not see a nut in something, or something can be cooked in peanut oil or a peanut sauce. There is also the fear of cross contamination. The

same risks are involved for someone with an allergy to milk or gluten. It is not always obvious if milk or wheat is in something. It is impossible to determine when someone is going to have a reaction and how bad the reaction will be. Overall, the expansion of the definition of a disability in the ADA should prompt a change in laws on the state and federal to give more protection to people with food allergies. Since food allergies can now be considered a disability under the ADA, state legislatures should come to the conclusion that food allergies are very serious and put legislation in place that restaurants have to follow to protect people with food allergies.