

**DECISION**

OAL DKT. NO. EDS 676-07

AGENCY DKT. NO. 2007 11737

**J.B. & T.B. o/b/o J.B., Jr.,**

Petitioners,

v.

**MANALAPAN-ENGLISHTOWN REGIONAL**

**BOARD OF EDUCATION,**

Respondent.

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**Michael Inzelbuch, Esq.,** for petitioners

**Patricia Connelly, Esq.,** for respondent (Brown & Connelly, attorneys)

BEFORE **JOHN R. TASSINI, ALJ:**

Record Closed: April 13, 2007

Decided: April 13, 2007

**STATEMENT OF THE CASE**

Petitioner J.B., Jr., a kindergartner in the school system operated by the respondent Manalapan-Englishtown Regional Board of Education (BOE), has a severe allergy to nuts, particularly peanuts, which can cause him to immediately suffer reactions, including respiratory problems and severe hives. Petitioners J.B. and T.B., his parents, demanded amendment and implementation of an accommodation plan under Section 504 of the Rehabilitation Act of 1973 relative to bus transportation of J.B., Jr. 29 U.S.C. 794. More particularly, petitioners claim that the BOE should be ordered to provide a regular education school bus to transport J.B., Jr., to and from school and school-related activities, to provide an aide on such a bus, and to train such an aide to

monitor J.B., Jr., and take action, including use of an EpiPen®, an epinephrine injector, to control an allergic reaction that J.B., Jr., may experience. The BOE represents that it is seeking such an aide and submits that it is now in compliance with relevant laws, so that the petitioners' claims should be dismissed.

### **PROCEDURAL HISTORY**

The petitioners filed papers with the Department of Education, Office of Special Education Services, seeking relief. 20 U.S.C.A. § 1415; N.J.A.C. 6A:14-2.7. The Department transmitted the case to the Office of Administrative Law (OAL), where it was filed on February 16, 2007, and scheduled for a hearing. N.J.S.A. 52:14B-2(b). The BOE filed papers in response to the petitioners' papers and, on March 14, 2007, the attorneys and I conferred. On March 16, 2007, the parties appeared, the attorneys argued on the record, petitioners moved for an order granting partial summary decision and providing relief, and some testimony was taken. On March 19, 2007, I issued an order granting partial summary decision, ordering the 504 Plan amended and requiring the BOE to provide bus transportation with an aide or other adult trained to monitor J.B., Jr., and to administer the EpiPen® as soon as practicable. On March 27, 2007, the BOE filed papers in support of its motion for a decision, dismissing the case. The petitioners' attorney responded to the motion and, on the record closed date, the attorneys and I conferred.

### **FINDINGS OF FACT**

J.B. and T.B., and their son J.B. Jr., born April 26, 2001, reside in the BOE's district. J.B., Jr.'s teacher describes him as a "very sweet and thoughtful child," who is a "good listener and excited to learn." P-E.

Unfortunately, J.B., Jr., suffers a severe allergy to nuts and records of physicians providing care for J.B., Jr., show the following: In February 2005, J.B., Jr., ate a peanut butter cookie and, shortly thereafter, he had a cough, became tired and restless,

napped for a few hours and, upon waking, hives covered his body. J.B., Jr.'s pediatrician referred J.B., Jr., to Ruby Reyes, M.D., a diplomate of the American Board of Allergy, Asthma & Immunology. Dr. Reyes examined and tested J.B., Jr., for allergies and the degree of allergy to nuts and determined that he has an allergy to certain nuts and severe peanut allergy with anaphylaxis. Thereafter, Dr. Reyes continued to see J.B., Jr. P-B, P-C, P-1.

Prior to the start of the 2006-07 school year, when J.B., Jr. was in the BOE's kindergarten, petitioners requested that the BOE's school system provide an accommodation plan and the plan for the start of the school year providing that his classroom would be peanut-free and that each child's snack would be checked daily to ensure that it is peanut-free. P-E.

The BOE's "School Bus Rules" are:

1. Obey the bus driver.
2. Walk as you get on and off the bus. Don't run.
3. Keep aisles clear of books and bags.
4. Talk quietly.
5. Keep your hands and head inside the windows.
6. Stay in your seat.
7. Cross the street carefully when you get off the bus.

[P-8.]

The National School Boards Association provides "School Guidelines for Managing Students with Food Allergies," including "Food Allergies and School Buses: Finding a Safe Balance" with the accommodations, including the following:

[1] Making sure the bus driver knows the allergic child, their food allergy and symptoms that they may suffer during a reaction.

[2] Ensuring that the bus driver knows to call 911 or other emergency numbers and request an Advanced Life Support Unit if a reaction occurs. (This is especially important in states where only paramedics are allowed to carry epinephrine.)

- [3] Providing the bus driver with a cellular phone for use in the event of an emergency.
- [4] Having the food-allergic child sit in the front seat near the driver.
- [5] Enforcing a “no-food on the bus” policy.
- [6] Allowing a responsible child to carry his or her own self-injectable epinephrine (EpiPen® or EpiPen® Jr. or TwinJet®) in his/her backpack.
- [7] Having an aide or other adult ride the bus and keep an eye on the food-allergic child.
- [8] Implementing an epinephrine handoff system. Some parents pass the epinephrine to the driver who gives it to the school nurse once the bus arrives at school. The process is reversed for the ride home in the afternoon. CAUTION NOTE: Due to the number of handoffs and people involved in the process, there is a greater risk of leaving the epinephrine either at school or on the bus.
- [9] Having the child ride the special needs bus to and from school.

[P-2, emphasis added.]

By the start of the 2006-07 school year, the BOE’s school nurse had custody of health records, documenting and describing T.B., Jr.’s severe allergy and a medication order for administration of medication to control possible allergic reaction. R-2A. Also, by letter dated September 11, 2006, T.B. notified Kelly Strenkowski, J.B., Jr.’s kindergarten teacher in the BOE’s Clark Mills School, of the following: J.B., Jr., is severely allergic to nuts, including peanuts. The administrators advised J.B. and T.B. that they should wait for the start of the 2006-07 school year to request a food allergy action plan. J.B. and T.B. have explained to J.B., Jr., that he must take precautions to avoid an allergic reaction, including avoiding drinking from water fountains, avoiding trading food or drinks, and using hand wipes before eating. Petitioners appreciated the teachers sending a request to parents of classmates that, because of J.B., Jr.’s severe allergy they not send in snacks with nuts. Since the BOE was not providing anyone on the school bus trained to administer the EpiPen®, T.B. would drive J.B., Jr. to school. The teacher should call T.B. with any question or if she could help in class. P-E.

The BOE’s school system put into place an Emergency Health Care Plan to

protect and provide care for J.B., Jr. and provided accommodations for him: Consistent with his Emergency Health Plan, the school nurse or delegates trained by the nurse were available to administer epinephrine. A peanut-free classroom was provided. The school system's administrator and kindergarten teacher notified parents of classmates that peanut products should not be admitted to the classroom. The teacher checked snacks brought into the classroom. A custodian and the teacher regularly wiped classroom tables and mopped the floor daily with water not used in other classrooms. The BOE's administrator sent a letter to classmates' parents, reiterating that peanut products should not be brought to the classroom and to call with any question. R-2, R-2A, R-2B.

On October 4, 2006, the petitioners and BOE's officials met and the petitioners provided copies of medical records, including Dr. Reyes' letter dated September 29, 2006, wherein she wrote the following:

Food allergies can be life threatening. The risk of accidental exposure to foods can be reduced in the school setting if schools work with students, parents and physicians to minimize the risk and provide a safe environment for food-allergic students. The American Academy of Allergy, Asthma & Immunology (AAAAI), College of Allergy, Asthma & Immunology (ACAAI) together with the Food Allergy and Anaphylaxis Network are the major organizations who have developed guidelines and programs to help provide a safe school environment for the food allergic students which have been endorsed and followed by many schools around the country.

It is my strong recommendation that [J.B., Jr.] be placed in a peanut/nut free environment and have peanut allergy measures in place in school.

[P-B.]

The BOE's 504 Committee members prepared and signed a Section 504 Individual Accommodation Plan which, on or about October 11, 2006, they forwarded to the petitioners for their signature. The transmittal letter advised the petitioners that they

should call the school system's 504 Coordinator with any question; that J.B., Jr.'s physician should evaluate the proposed plan; and that the petitioners had a right to appeal the matter. R-2E. The proposed plan acknowledged J.B., Jr.'s "severe peanut allergy" and that his symptoms could "potentially progress to a life-threatening situation." The proposed plan provided, among other features, for access to the EpiPen® in school in the nurse's office and provided for transportation on a regular bus with the following accommodations:

- 1) Transportation on a regular bus with the following accommodations:
  - a) make sure the bus driver knows the student and his allergy symptoms
  - b) ensure that the bus has a communication device
  - c) ensure that the bus driver knows to call 911 if a reaction occurs
  - d) have the student sit in the front near the driver
  - e) enforce a "no food on the bus" policy
  - f) if possible, assign student a bus buddy whose parents agree that the child will not eat nuts prior to boarding the school bus
  
- 2) If the severity of the peanut allergy warrants isolation, student will be transported alone on a minibus with the following accommodations:
  - a) make sure the bus driver knows the student and his food allergy problems
  - b) ensure that the bus has a communication device
  - c) ensure that the bus driver knows to call 911 if a reaction occurs
  - d) have student sit in the front seat near the driver

[P-3]

The proposed Section 504 Individual Accommodation Plan did not provide bus transportation with an aide trained to monitor J.B., Jr., and administer the EpiPen®, so T.B. transported J.B., Jr. to and from school.

On October 16, 2006, the BOE's 504 Committee prepared another Section 504 Individual Accommodation Plan, which again acknowledged J.B., Jr.'s "severe peanut

allergy” and that his symptoms could “potentially progress to a life-threatening situation.” The plan provided basically the same features as the above-described plan, but noted that petitioners had raised the issue of bus transportation and stated that the school system would “start looking into an aide to be trained to ride the bus.” T.B. signed the plan (and, recently, the BOE represented that it has posted a request for applicants to serve as an aide, although it does not admit that it is obligated to provide an aide). P-5.

By letter, dated October 29, 2006, Dr. Reyes, reiterated that J.B., Jr., has a “**severe** peanut allergy,” confirmed by clinical history and by a positive skin test. P-4, bold original.

In a letter, dated January 7, 2007, Dr. Reyes wrote:

[J.B., Jr.] has a **severe peanut allergy** which has been **documented** with a clinical history of an allergic reaction and confirmed by a very large positive skin test reaction as well as markedly elevated specific peanut IgE (RAST)>100 kiU/L, Class 6 of 6. This puts [J.B., Jr.] in the highest category of severity with a very high risk of a potentially life-threatening reaction from exposure to even a trace amount of peanut protein whether ingested, touched or inhaled (through smelling.)

[P-7, bold and underlining original.]

Dr. Reyes also addressed the accommodation plan, writing that additional safeguards were necessary, for example, for cleaning areas where J.B., Jr., would be present, tools used should be separate from tools used in other areas. Dr. Reyes also enclosed a “Food Allergy Action Plan.” Dr. Reyes also wrote that the above-described bus proposals are unsafe for [J.B., Jr.] because neither . . . includes having his EpiPen® on the bus with a trained adult to administer them. Without a trained person on the bus to administer the EpiPen® there is absolutely no way that the EpiPen® would be administered in the time required to save his life, since [he] would have to wait for paramedics to be called and arrive before his medication would be administered.” Dr. Reyes also wrote that J.B., Jr. “wants to be able to ride the bus with his friends and we

want him to be part of the social interaction on the bus.” P-6.

The BOE consulted with Clement Maccia, M.D., who, in a letter, dated March 14, 2007, agreed that J.B., Jr., “had a significant severe reaction to peanuts and had respiratory problems immediately with severe hives.” He also wrote that he found the above-described accommodation plan to be adequate. He offered the legal opinion that, “because of contractual agreements between the school and bus company, the school cannot force the bus driver to take responsibility for [the] EpiPen® and the instruction on the usage of the EpiPen®.” He also suggested that, if J.B., Jr., takes the bus, his mother come with baby wipes to wipe down the bus and that his mother “put baby wipes in his lunch box, so that he can clean the table.” He also wrote, “It is almost impossible to make a school completely peanut free” and that, therefore, “many of these [allergic] children are at risk.” He speculated that, “[p]utting an aide on the bus for peanut allergy patients would then continue to escalate to the point that other children who have other food allergies, which might be anaphylactic would also request a personal aide.” He also suggested repeating the RAST test, to determine if J.B., Jr.’s allergy is decreasing. R-1.

The BOE has agreed to implement the Section 504 Accommodation Plan amended consistent with my March 19, 2007, Order (1) ordering that the Section 504 Accommodation Plan be amended to require the BOE to provide J.B., Jr., with bus transportation to and from school with an aide or other adult trained to monitor him and, when necessary to administer the EpiPen® and (2) ordering the BOE, as soon as practicable, to comply with the amended Section 504 Accommodation Plan. Also, two teacher delegates have volunteered to be responsible, if necessary, for use of the EpiPen® at J.B., Jr.’s school, and the BOE’s school nurse has trained them in the procedures to be followed for its use. Based on requests and information from the petitioners, the parties also agreed to other amendments of the Plan. For example, the EpiPen® will be in J.B., Jr.’s classroom and transported to alternate locations, so it will be in close proximity to him.



J.B., Jr., now rides the (regular education) school bus and the BOE's attorney represented that the BOE advertised for an aide for that purpose and that the BOE is interviewing persons to serve that purpose. R-2.

### **CONCLUSIONS OF LAW**

The parties agree that, under Section 504 of the Rehabilitation Act of 1973, the BOE is required to provide a reasonable accommodation plan relative to bus transportation of J.B., Jr. 29 U.S.C. 794.

This case has not been brought under the Individuals with Disabilities Education Act (IDEA); but reference to the IDEA and New Jersey statutes and regulations implementing the IDEA is useful. See 20 U.S.C.A. § 1412; N.J. Const. Art. VIII, § 4, ¶ 1; N.J.S.A. 18A:46-8, -9; N.J.A.C. 6A:14-1.1 et seq. The IDEA and implementing statutes and regulations require local boards of education to identify and classify children who are domiciled within their districts and who are disabled for Special Education purposes to provide to them with a Free Appropriate Public Education (FAPE), including related services. Among the categories of classification for Special Education and related services is "Other health impaired" and a student subject to severe allergies would seem appropriate for that classification. N.J.A.C. 6A:14-3.5(c)9. Transportation is included among the "related services" to be provided to a student and the school system should ensure that a student is in the "least restrictive environment" practicable to allow the student to mix with non-disabled peers. N.J.A.C. 6A:14-1.1(b)5., -3.9.

The facts can be summarized: J.B., Jr., about six years old, suffers a severe allergy to nuts, particularly peanuts, which can cause him to suffer respiratory problems and extensive hives and his exposure to even a trace of peanut protein can cause him problems that would interfere with, if not prevent, a productive school day. (Although it is hoped that J.B., Jr.'s allergy will decrease, no evidence has been submitted here on which to find that has occurred.) If an allergic reaction begins, expeditious administration of the EpiPen® can control it. Peanuts are a common food and people,

especially children, who have eaten or contacted peanuts do not always wash or otherwise completely remove peanut proteins from themselves and it is almost impossible to make the school environment completely peanut-free. Therefore, it is probable that J.B., Jr., whether on a school bus or in class, will probably have some exposure to peanut proteins in his school day. A school bus driver, driving conscientiously, would not be able also to simultaneously monitor a severely allergic student and, if the student were to begin to experience an allergic reaction, expeditiously administer an EpiPen® and, thereby allow the student to avoid the above-described problems. J.B., Jr., is too young to be responsible to monitor himself and to administer his own EpiPen®. Therefore, a nurse, aide or other trained adult is required for those purposes. The BOE agrees with these conclusions and represents that it has advertised for and is interviewing persons to serve as an aide or other trained person, but it has not yet obtained the services of such an aide or other trained person.

I **CONCLUDE** that the relief requested by petitioners must be **GRANTED**. Consistent with the above-cited laws and circumstances, the BOE must provide J.B., Jr., with transportation to and from school and to and from school-related activities on a regular education school bus and with regular education school children and, on such a bus, the BOE should provide the aide or other person available to administer the EpiPen® (which the BOE has not yet done). See E.M., by F.M. and W.M. v. Manalapan-Englishtown Reg'l Board of Education, U.S.D.C. N.J., No. 3:03cv05305, (December 31, 2003), EDS 6674-03, Decision (March 31, 2004).

### **ORDERS**

I **ORDER** the following: (1) The Section 504 Accommodation Plan is amended to require the BOE to provide J.B., Jr., with regular education bus transportation to and from school and to and from school-related activities with an aide or other adult trained to monitor him and to administer the EpiPen®. (2) After use of the EpiPen®, as soon as practicable, school officials will notify J.B., Jr.'s parents of the circumstances. (3) The BOE will comply with these orders and, as soon as practicable, will comply with the

amended Section 504 Accommodation Plan.

This decision is final pursuant to 20 U.S.C.A. § 1415(i)(1)(A) and 34 C.F.R. § 300.510 (2006) and is appealable by filing a complaint and bringing a civil action either in the Law Division of the Superior Court of New Jersey or in a district court of the United States. 20 U.S.C.A. § 1415(i)(2); 34 C.F.R. § 300.512 (2006). If either party feels that this decision is not being fully implemented, this concern should be communicated in writing to the Director, Office of Special Education Programs.

April 13, 2007

DATE

**JOHN R. TASSINI, ALJ**

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