

**COMMONWEALTH OF MASSACHUSETTS  
SPECIAL EDUCATION APPEALS**

**In Re:** Student v.  
Mystic Valley Regional Charter School

**BSEA # 03-3629**

**DECISION**

This decision is issued pursuant to 20 U.S.C. 1401 et seq. (the "IDEA"), 29 U.S.C.794, M.G.L. chs. 30A, 71B, and the Regulations promulgated under those statutes.

A Hearing in the above-referenced matter was convened on, 2003, November 18, December 4, 9, 2003 and January 6, 2004, at the BSEA, 350 Main St., Malden, MA, before Rosa I. Figueroa, Hearing Officer.

Parents' and Mystic Valley Regional Charter School's (hereinafter, "Mystic Valley") written closing arguments were received on February 9, 2004. The Record closed on the same date.

Those present for all or part of the Hearing were:

Student's Mother	
Student's Father	
Tim Sindelar, Esq.	Attorney for Student/Parents
Jill Updegraph	Attorney for Student/Parent
Mary Joann Reedy, Esq.	Attorney for Mystic Valley
Kathy Kinnon	Special Education/504 Coordinator Mystic Valley
Kathleen Duck	First Grade Teacher Mystic Valley
Gina McKinnon	Professional Development Coordinator- Administrator, Mystic Valley
Janice Beyer	Third Grade Teacher, Mystic Valley
O'Malley-Brockton	Friend
Dr. Anthony Biegler	Superintendent/Principal Mystic Valley
Martin Ostro, M.D.	Allergy Specialist
Martin D. Broff, M.D.	Allergy Specialist (via telephone conference call)
Michael C. Young, M.D.	Allergy Specialist (via telephone conference call)
Sonya Medeiros	Catuogno Court Reporter
Thomas J. Houton	Catuogno Court Reporter
Valerie O'Hara	Catuogno Court Reporter
Susan P. McHugh	BSEA Mediator, Observer

Parents' Exhibits 1 through 32, 34 and 35<sup>1</sup>, and Mystic Valley's Exhibits (hereinafter, "SE") 1 through 12, were admitted in evidence and were considered for the purpose of rendering this decision.

**ISSUE PRESENTED:**

1. Whether Mystic Valley must adopt a policy that establishes a classroom free of peanut and tree nut products as a reasonable accommodation under Section 504 of the Rehabilitation Act of 1973, (hereinafter, "Section 504") for Student in order to address the life threatening nature of his disability?

**POSITION OF THE PARTIES:**

**Parents' Position:**

Student presents with a life-threatening peanut and nut tree allergy and must be in a classroom setting free of these substances in order to be safe. Given the severe nature of Student's disability, it is reasonable and appropriate to establish a policy that prohibits such products from the classroom where Student receives instruction. Parents bring this action to enforce the protections of Section 504 of the Rehabilitation Act of 1973. They request that Mystic Valley accommodate their son's disability by adopting a policy of prohibiting parents of other students in Student's classroom from sending peanut butter and other substances containing peanuts and tree nut products into the classroom. They assert that imposition of this classroom ban does not present a burden or otherwise interfere with Mystic Valley's ability to deliver education to its students. Mystic Valley has also failed to respond to Parents' concerns and requests for policies that assure Student's safety in a timely manner. In addition, Parents wish Mystic Valley to continue to implement other agreed upon accommodations consistently.

**Mystic Valley Regional Charter School's Position:**

Mystic Valley asserts that it has provided Student reasonable accommodations that address his severe peanut and tree nut allergy. It traditionally develops an Individualized Health Care Plan for students who present with food allergies and in keeping with this policy, developed one for Student. Its policies are in keeping with the Massachusetts Department of Education Guidelines regarding Managing Life Threatening Food Allergies in Schools (hereinafter, "Guidelines"). Mystic Valley's policies effectively address numerous food allergies and state that there have been no allergic reactions by students in school. According to Mystic Valley, a ban on all peanut and tree nut products in the classroom is unreasonable and unnecessary to assure Student's safety. Such a ban would be so difficult to enforce that it would render the accommodation an undue burden on the school personnel, and would raise a false sense of security. Also, while quite young, Student understands his disability, is able to advocate for himself, is very conscientious and can monitor his medical condition. Therefore, implementing a ban is unreasonable and inappropriate.

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<sup>1</sup> There was a mistake in labeling exhibits and there is no Parents' Exhibit 33.

## FINDINGS OF FACT

- Born on 1/18/1997, Student is a seven-year-old first grader in Mystic Valley who was described as bright, inquisitive, helpful and friendly. (PE-1; Testimony of Ms. Duck) He has been diagnosed with a life-threatening peanut and tree nut allergy as well as mild intermittent asthma of mixed etiology. (PE-11; PE-13; PE-15; PE-16; PE-18; PE-19; Testimony of Dr. Young) His asthma is triggered by cold air, strenuous physical activity, and spring season during which symptoms are worse when he is outdoors whether at night or during the day. (PE-16) Over the past six years Student has had several episodes of mild to severe allergic reactions to peanuts and other nuts including at least one severe anaphylactic reaction. (PE-17; PE-18; Testimony of Dr. Young, Dr. Ostro)
- In the book *The Peanut Allergy Answer Book*, Dr. Michael Young describes anaphylaxis as a “systemic reaction that can lead to cardiovascular collapse and death” which reaction can be graded mild, moderate or severe. (SE-11) The symptoms of mild anaphylaxis include “hives, a sensation of fullness of the mouth and throat, swelling of the eyelids and lips, and nasal congestion.” (*Id.*) Moderate anaphylaxis is accompanied by “... generalized or rapidly worsening hives and itching, swelling, flushing, wheezing and vomiting” while severe anaphylaxis “can cause severe swelling of the tissues of the upper airway, resulting in obstruction of breathing through the throat, blocking airflow in and out of the lungs. When the lower airways of the lungs narrow, shortness of breath, wheezing and asthma can occur, further compromising oxygenation. When the cardiovascular system of the body undergoes anaphylaxis, massive fluid leakage from blood vessels into tissue results in decreased blood pressure and shock... Seizures can result from lack of oxygen. The combination of obstructed breathing and lack of oxygen with loss of heart function and blood pressure is often fatal.” (SE-11) Severe anaphylaxis “is explosive in onset, usually occurring within minutes after exposure.” It is considered a “life-threatening reaction.” (*Id.*) There is no cure for peanut allergy and therefore, strict avoidance is essential. (SE-11)
- According to Dr. Young, a “history of previous anaphylaxis, peanut and tree nut allergy and a history of asthma result in an increased risk for a severe anaphylaxis reaction in peanut allergic individuals.” (SE-11) Student presents all of these conditions. (*Id.*) Asthma, even if mild or in remission, can increase the severity of an anaphylactic reaction. (SE-11; Testimony of Dr. Ostro)
- An allergic reaction to peanuts can occur from mere skin contact. (Testimony of Dr. Young) Skin contact that involves kissing may however, result in an anaphylaxis reaction in an allergic individual if even a minute amount of peanut or nut product is ingested. (Testimony of Dr. Young, Dr. Ostro, Dr. Broff) In some cases the results can be fatal. (*Id.*) Dr. Ostro stated that a peanut contains approximately 200 milligrams of peanut protein and explained that as little as two milligrams, an amount easily reached by inhaling peanut dust, may cause an observable allergic reaction in

an allergic person. (SE-11; Testimony of Dr. Ostro) Dr. Ostro and Dr. Broff agreed that allergic persons may have an allergic reaction to inhalation of airborne particles of peanut protein such as are produced when large quantities of peanut shells are stepped on or crushed. (Testimony of Dr. Ostro, Dr. Broff) Additionally, allergic reactions can result from indirect contact through cross contamination such as shared utensils or contaminated foods. (PE-21; Testimony of Dr. Ostro, Father, Mother) In general, food allergies account for “30,000 anaphylactic reactions, 2,000 hospitalizations and 200 deaths each year.” (PE-21) Of these, medical research shows that peanut and tree nut allergies are the most commonly associated with anaphylaxis, the most lethal and the least likely to resolve. (SE-11; PE-21)

- Medical research and literature cite schools as high-risk locations for accidental peanut/nut ingestion. (PE-21) “In a review of 6 fatal allergic reaction to foods in children and adolescents, 5 were caused by peanut or tree nuts and 4 of these occurred in school.” (PE-21) Kathleen Kinnon, Section 504 Coordinator in Mystic Valley, acknowledges that schools are a high-risk location for accidental ingestion of peanuts/nuts. (SE-4; Testimony of Ms. Kinnon)
- On or about March 1, 1998, Student experienced his first allergic reaction. (PE-19; SE-9; Testimony of Mother) He was approximately thirteen months old. His Father gave him a bite of a “Funny-Bone”, a commercially baked good with peanuts and shortly thereafter, Student’s face became blotchy and later swelled. Parents contacted Student’s pediatrician who advised them to give Student an antihistamine. While driving Student to the pharmacy, Student “had both his hands gouging at his face. He was screaming...blotchy...one eye was almost completely shut.” (Testimony of Mother) Student was diagnosed with a peanut allergy by his pediatrician who referred Student to Dr. Joel Bleier, M.D., an allergy specialist. He also furnished Parents an injection of epinephrine and instructed them on how and when to administer the medication. (Id.; SE-9)
- The allergy skin test conducted by Dr. Bleier, on or about March 12, 1998, confirmed that Student was allergic to peanuts and instructed Parents to remove all peanut products from their home. (SE-9; Testimony of Mother) Mother testified that Dr. Bleier stated that putting peanut products in her house where Student lived was like putting him “in a room with a loaded gun.” (Testimony of Mother)
- On or about January 23, 1999, when Student was two years old, he had another allergic reaction. (SE-9; PE-17; Testimony of Mother, Dr. Young, Dr. Ostro) Parents had gone away for the weekend and on the last day before returning home, they went to a restaurant where Mother ate a “snickers pie.” Parents arrived home approximately four hours later. Upon arrival, Mother kissed Student on the lips and a short while later Student’s face became blotchy and he began to have difficulty breathing. Parents immediately took Student to the emergency room at Melrose – Wakefield Hospital where he was treated with epinephrine and a nebulizer. (SE-9; Testimony of Mother, Dr. Young, Dr. Ostro) Dr. Ostro and Dr. Young referred to this episode as a severe anaphylaxis reaction. (Testimony of Dr. Young, Dr. Ostro)

Several sources document episodes of severe or life threatening allergic reactions as a result of kissing. (PE-21p.39; Testimony of Dr. Ostro) Student's medical records report additional incidents involving allergic reactions that caused Student to exhibit symptoms such as swollen eye, distressed breathing, blotchy face, etc. (SE-9)

- At approximately four years of age, Student was taken by his Parents to Fenway Park to watch a baseball game. (Testimony of Mother) Within approximately fifteen minutes of arrival, Student told his father that he could not stay, his face was blotchy and he was having difficulty breathing. Student's father noticed that there were peanuts everywhere and took Student home. Dr. Broff testified that if there were peanut shells/peanuts on the ground, dust from them could be airborne when people stepped on the shells, and that the dust could cause the allergic reaction in an allergic individual. (Testimony of Dr. Broff)
- Additional allergy tests were conducted in March 2002 which revealed that Student had developed an allergy to tree nuts including almonds, English walnuts, pecans, Brazil nuts, cashews and hazelnuts in addition to peanuts. (PE-16; PE-18; SE-9)
- In April 2003, Student prepared to enter kindergarten in Mystic Valley in August. (PE-23) Parents submitted medical documentation to Mystic Valley from Dr. Stuart Pergament, Student's pediatrician, dated August 22, 2002 and from Dr. Joel G. Bleier, Student's allergist, dated August 21, 2002, both of whom described Student's allergies as "life-threatening" and stressed the risk of Student's suffering a fatal reaction from ingestion of "minute amounts of peanut products (including airborne particles)." (PE-5; PE-6) Dr. Bleier stressed that "avoidance!" was the key element of treatment and Dr. Pergament stated that Student "should be in an environment that is completely free of peanut containing products." (PE-5; PE-6; SE-6) Student's Epi-Pen Jr. would also need to be available. (PE-5)
- Mystic Valley did not convene a meeting to develop a 504 Accommodation Plan (hereinafter, "504 Plan") or Individual Health Care Plan (hereinafter, "IHCP") for Student upon receiving this information. (Testimony of Father, Ms. Kinnon) In the Fall of 2002, Mystic Valley had a policy in place requiring that IHCP plans be developed for appropriate students by the start of the school year. (Se-3; PE-4; Testimony of Ms. Kinnon)
- Student's parents attempted to contact Mystic Valley to ensure that Student's teachers and service providers be educated regarding his food allergies before the start of school in 2002. Mystic Valley did not respond to Parents' several telephone calls until Chris Finn returned a call and informed Parents that an orientation was scheduled for August 19, 2002 and that the personnel would be informed about Student's food allergies at that time. (Testimony of Father)
- Parents attended the orientation of August 19<sup>th</sup> but Student's food allergies were not mentioned, so Parents approached Student's kindergarten teacher to inform her

personally of Student's allergies. The teacher informed Parents that she was not aware of Student's issues. (Testimony of Father)

- Mystic Valley's 2002-2003 school year started on August 21, 2002. (Testimony of Parent)
- Mystic Valley requested that Parents provide additional information concerning Student's food allergies. Parents produced five letters between August 21, 2002 and January 29, 2003 all confirming Student's life-threatening allergy, stating that avoidance was key and some recommended that the classroom be peanut/tree nut free. (PE-5, PE-6; PE-7; PE-8; PE-9)
- On November 15, 2002, Mystic Valley convened a meeting to determine eligibility and developed a 504 Plan/ IHCP. (Testimony of Father, Ms. Kinnon) The 504 eligibility determination sheet states that Student presents with a physical impairment that substantially limits one or more major life activities because of the "potential for a serious/life threatening reaction if [Student] were to come in contact w[ith] tree nuts or peanuts." (PE-1) The specific physical impairment stated here is Student's tree-nut and peanut allergy which may result in a life threatening anaphylactic reaction. A 504 Plan/ IHCP plan was developed which included the following accommodations:
  - Letter to parent(s) [of other students] regarding the allergy explaining seriousness; requesting parents refrain from sending in peanut products.
  - Review of product ingredients served by Food Service + copy to parents.
  - Tables/desks washed in a.m./ after snacks/ meals. Classroom staff.
  - Children/staff wash hands before/after meals. Classroom staff.
  - Staff awareness. School nurse.
  - Staff Training to recognize reaction (symptoms/ signs) of anaphylactic reaction + how to administer Epi Pen. School nurse.
  - Bus: Folder with picture of S. + information (504 plan/ IHCP) re: life-threatening allergy; Epi Pen; sit in front seat on door side so driver has clear view for symptoms/ reaction; School nurse.
  - Field Trip: copy 504 plan/ IHCP; Epi Pen; parent invited or S paired with trained staff member (knowledge of symptoms/ we Epi Pen). Classroom staff. (PE-1)

Mystic Valley further required Parents to submit documentation regarding the degree of allergy suffered by Student and complete list of allergens and also requested permission to contact doctor(s). Said paperwork was provided at the meeting. (PE-1) On or about February 13, 2003, Parents rejected the accommodation plan proposed by

Mystic Valley but requested that the accommodations listed therein be implemented pending appeal. (PE-1) The plan would run through November 14, 2003. (Id.)

- Additionally, an IHCP Peanut and tree nut Allergy Plan was developed to keep Student safe by avoiding contact with the allergen substances for Student's Kindergarten which listed Student's diagnosis, the signs and symptoms to recognize, (PE-1) Should Student experience any symptom of anaphylactic reaction in school, he is to be given two tablespoons of Benadryl and Epi Pen Jr. (Epinephrine injection), and the emergency procedure guidelines are to be implemented. (Id.) The plan provided for the teachers and the specialty staff to be trained in the use of the Epi Pen every six months and they would also be trained on how to recognize and respond to an anaphylactic reaction. The class would review emergency procedures and would participate in periodic drills. (PE-1) A copy of the IHCP and Allergy Action Plan (AAP) would be given to the teachers to leave in an accessible place for substitute and specialty staff. A letter would be sent to the parents of Student's classmates indicating that a child in the class had a life-threatening allergy and requesting that no peanut or nut products be brought into the classroom. Desks would be wiped down after each meal and in the morning if an activity had taken place in the classroom the night before and the staff will ensure that children use proper hand washing techniques before and after meals. Food allergy education to other students to prevent harassment, isolation or endangerment of Student would be provided. The teachers and staff will carry a copy of the AAP with Epi Pen to all specials and functions held outside the classroom. (PE-1) The Parents will be informed and invited to attend functions and fieldtrips and the staff will have means to contact the nurse at all times. All training and follow up would be conducted by the school nurse who will also be responsible to forward to the fire department a picture of Student and an explanation of allergy. The bus driver will also have a picture of Student and a copy of the AAP and if symptoms of anaphylaxis manifest while in the bus, the driver will use the two-way radio to contact 911. (PE-1) This plan was rejected by Parents. (Id.)
- Paulette Gephard, M.D., wrote to Mystic Valley on December 9, 2002, restating Student's documented life-threatening allergy and stating that since he required a peanut free environment, if students ate lunch in the classroom, then the classroom had to be peanut free. (PE-7; PE-8) She wrote again restating her recommendations on January 29, 2003. (PE-9)
- In the fall of 2002, Parents learned that Student's bus driver handed out candy to the children in the bus every Friday, in contravention of the Mystic Valley's general policies. (Testimony of Parents) Among the candy distributed, students were given M&Ms. M&Ms contain a warning on the label that they are manufactured in a plant where peanuts are processed (peanut M&Ms) and may contain peanuts. (Id.) When Student arrived home with the M&Ms in his pocket and explained what had happened, the Parent confronted the bus driver who stated that she was unaware of any student with a peanut allergy in her bus. The Parents spoke with Ms. Kinnon and a folder with Student's information was given to the bus driver the following day. (Testimony of Mother) A few months later, one April afternoon, another bus driver

handed candy to the students and when confronted by Parent the driver denied having any information concerning Student's food allergies. (Testimony of Mother)

- On January 29, 2003 Dr. Gephard wrote again excusing Student from an activity taking place on January 31<sup>st</sup> where Asian food would be served because of the possibility that peanut oil or some other peanut or nut product would be used. (PE-10) According to her letter Student would miss out "on an educational experience because of a potential health problem." (Id.)
- On February 26, 2003, Kristen Ribeiro, RNBSN in Mystic Valley sent a letter alerting those concerned that Student had a "life-threatening allergy to peanut and tree nuts" and that coming in contact with those substances would cause Student to have an anaphylactic reaction. (PE-3) It further advised on what procedures to follow including administration of the Epi Pen, Benadryl and contacting 911. (PE-3)
- On March 3, 2003, Kelly Abel, classroom teacher in Mystic Valley, wrote to Parents suggesting that a non-peanut/tree nut products treat box containing Student's favorite treats be kept in the classroom for Student. (PE-28) She explained that all classroom activities are not planned and that Student could take a treat from this box when other parents sent in treats for the class that were not labeled or which contained peanut/tree nut products. (PE-28)
- On May 2, 2003, Parents' request for hearing in this matter was received.
- Mystic Valley's Food Allergy Policy & Procedure, dated May 16, 2003 provides that:

Once an offending food has been identified, the most effective treatment is for the student to avoid the food allergen in any form. This risk of accidental exposure to foods can be reduced in the school setting if schools work with students, parents, physicians, bus/transportation personnel, and staff to minimize risks and provide a safe educational environment for food-allergic students. (PE-4; SE-3)

The policy called for the school nurse to oversee the development of the IHCPs for students diagnosed with a serious allergy, for training of school staff and monitoring implementation of emergency responses and protection protocols in the school building, including after school activities and during field trips. (PE-4; SE-3) A multi-disciplinary team inclusive of the school nurse, the school director or designee parents/guardians, physician, food service director/staff, bus driver, local EMS, teachers, school counselor, coaches, custodian, must be created to discuss prevention and management of the food allergy and the role each individual will have in addressing any issues. (PE-4; SE-3)

- Throughout the 2002-2003 school year, peanut butter sandwiches was one of the alternate lunches offered by Mystic Valley to students who did not bring in lunch. (Testimony of Ms. Kinnon)

- In a letter of June 9, 2003, Jennifer Stinson, RD, LDN, Community Dietician, informed Mystic Valley that food allergy was the leading cause of anaphylaxis outside hospital settings, “accounting for an estimated 30,000 emergency room visits and 200 deaths each year.” (PE-20) She recommended banning all peanut products from being served or brought into school, and that the allergic child be in a peanut and tree nut free environment during lunch. She also made recommendations regarding alternative school lunches and recommended that all “incentives, rewards, challenges and celebrations” avoid products containing peanut or tree nuts. (PE-20) Ms. Stinson offered the example of Hadley Elementary School in Swampscott, MA, which banned all peanut products from entering their facility, as an appropriate example of an initiative that protected allergic students, (PE-20)
- Student began the 2003-2004 school year without an IHCP or a 504 plan. (Testimony of Parent) Mystic Valley had available to the staff the plan developed the previous school year, which it was treating as a rejected plan even when Parents rejected only the omission of certain provisions. (Testimony of Mother, Ms. Kinnon)
- As part of its staff development program, and following an option discussed during the pre-hearing conference of May 23, 2003, Mystic Valley had Melissa Ledbetter, R.N., B.S., make a presentation regarding food allergies to the Mystic Valley staff. (SE-5) This presentation took place on August 15, 2003. (*Id.*) The documents included in presentation contain a checklist of what Section 504 mandates. This checklist identifies students with life-threatening allergies as disabled and protected under federal law and states that eligible students “cannot be excluded from field trips, eating in the cafeteria, or class projects because of their food allergy.” (SE-5)
- On August 23, 2003 Mystic Valley sent a letter to Student’s classmates’ parents informing them that a child in the classroom had a “severe” peanut and nut product allergy and stating that avoidance was the key to preventing an allergic reaction. (PE-2) The letter further requested that parents send a note in when they included any item that contained peanuts or tree nuts in their children’s snack or lunches. (*Id.*) This letter described Student’s allergy as “severe”, not “life threatening”, as had been described in the letter sent in by Kristen Ribeiro, RN in February 2003. (PE-2; PE-3) According to Dr. Biegler, the other parents responded to this request positively and have generally complied. (Testimony of Dr. Biegler)
- On August 28, 2003, the Parents were notified that a Health Care Plan meeting would be convened on September 4, 2003 to discuss continuation of the Allergy Action Plan. (SE-1)
- Dr. Gephardt wrote a medication order for an Epi Pen Jr. on August 30, 2003. In it she further instructed that if Student suffered a reaction the Epi Pen should be administered and that 911 should be contacted and that he should be transported via ambulance to the nearest emergency room as the Epinephrine would wear out after 15

minutes. (PE-12) On September 8, 2003 she also wrote a prescription for an Albuterol inhaler in case Student presented wheezing or had an asthma flare-up. (PE-13)

- A Health Care Plan meeting took place on September 4, 2003 in Mystic Valley. (SE-1) In attendance were Parents, Attorney Updegraph, Attorney Sindelar, Attorney Reedy, and from Mystic Valley, Kathy Kinnon, Coordinator, Val Doherty, school nurse, Katie Duck, first grade classroom teacher, Anthony Biegler, director, Gina McKinnon, PDC K-U, and Chris Finn, business manager/food services. (SE-1)
- On September 15, 2003 Ms. Duck e-mailed Mother acknowledging receipt of Student's safe snacks. (SE-7p.6) In addition to the teacher maintaining safe snacks for Student in the room, on occasion, Mother was also asked to supply cookies or other items that would be used for experiments and/or consumption in the class as was the case in the lesson on digestion. (SE-7 p.9, 11; Testimony of Mother, Ms. Duck)
- The procedure for checking whether students have snacks or lunches containing peanut products at present was described by Ms. Kathleen Duck, Student's first grade teacher in Mystic Valley. Students place all of their snacks and lunches on the right hand corner of the desk. The teacher then checks it to see if their food contains peanut or tree nut products before the students consume it. (SE-4; Testimony of Ms. Duck) Student goes to a peanut/tree nut free table for each 30-minute lunch period and for the two 10 minute snack breaks. During this time he is allowed to have one classmate join him at his table. While peanut/tree nut products are not restricted in Mystic Valley, parents are asked to alert Student's teacher if their child will bring in a product containing a peanut/tree nut product. (Testimony of Ms. Duck, Ms. Kinnon)
- On Friday October 3, 2003, students in Ms. Duck's class were getting ready for reading time and had finished their take-home assignment, when Ms. Duck announced that they could have their morning snacks. (SE-7 p.4) The student who sits next to Student raised her hand as Ms. Butler walked by and informed her that she had peanut butter crackers, which she had already opened and started eating while sitting at her desk. (Id.; Testimony of Mother) Her snack had not been checked that morning nor had her mother labeled the snack as containing peanuts. (Testimony of Ms. Duck, Mother) Since Student had not finished his assignment he remained beside the girl for a few more minutes while she was eating the crackers. (Testimony of Mother) Ms. Butler walked over to Ms. Duck and informed her that the student had peanut crackers. Ms. Duck then directed Student verbally to go to the peanut/tree nut free table. (SE-7p.4) Student moved to the peanut/tree nut table a few minutes after the girl informed him and the teacher and had his snack with a friend there. According to Ms. Kinnon and Ms. Duck, Student was sitting next to his classmate for about five minutes though Student told his mother that he had been sitting next to the girl eating the peanut butter crackers for longer than five minutes. (Testimony of Ms. Kinnon, Ms. Duck, Mother) When the other child finished her crackers, and cleaned her desk and hands, Student returned to his desk. (PE-29; SE-7) Shortly thereafter Student's eye became bloodshot and red. The teacher noticed it approximately 30 minutes after Student had been sitting next to the girl eating the peanut butter crackers

and asked Student if he had poked his eye and inquired if it hurt. Approximately 15 minutes later the teacher noticed that Student's eye was watering and at that point he stated that it hurt. (PE-29; SE-7; PE-30) Student was taken to the nurse's office, where he was assessed by the nurse for a cough and redness in the left eye. The school nurse raised the question of conjunctivitis. (PE-29; SE-7; PE-30) Student's parents were called to pick him up. (PE-29) Student missed the rest of that school day. That afternoon, Student was examined by Dr. Gebhardt who diagnosed him with allergic conjunctivitis. (PE-14) While unsure as to what caused the allergic reaction, she concluded that it had been something in the school environment. According to her it was likely that peanut butter at the desk next to Student's caused the allergic reaction. (PE-14) Dr. Gebhardt sent another letter to Mystic Valley on November 10<sup>th</sup> reiterating her recommendation that it was necessary for Student to avoid contact with peanuts and nuts, as well as any peanut and nut products, for medical reasons. (PE-15) When he returned to school the following Monday, the teacher did not notice any problems with Student's eye. (Testimony of Ms. Duck) None of Mystic Valley's staff made a connection between Student's proximity to the girl eating the peanut butter crackers and Student's allergic reaction.

- In the fall of 2003, the parents of students in Student's class were advised of a Fall Party that would take place on October 31, 2003. (SE-7) While Student's Parent had requested that the letter notify other parents of her child's life-threatening allergy, Mystic Valley did not approve issuance of a letter containing this term and instead insisted that parents be reminded not to send in items containing peanut/tree nut products "as a student in [the] class has a severe reaction to these items." (SE-7) Similar reminders had been sent before which simply stated that a student in the class was allergic to peanut/tree nuts. (SE-7p.13)
- Student's classroom in Mystic Valley is approximately 20 feet by 30 feet as described by Gina M. McKinnon, Mystic Valley's professional development coordinator. (Testimony of Ms. McKinnon) There are 30 students in this classroom which is taught by Ms. Duck. (Id.) A picture depicting the location of the student's desks (clustered in the middle of the room) and the peanut/tree nut free table (located to the side of the room by the window) was admitted in evidence as PE-35. (PE-35; see also, PE-34) Student spends most of the day in this room (Room 306) except when he attends reading which occurs in a different classroom (Room 307).<sup>2</sup> (PE-35; SE-8) Some of his classmates may also go to different classrooms for math or science. One of Student's snack times occurs when he attends reading class. (Testimony of Ms. McKinnon) At no time will Student be assigned to a class with more than 30 students. (Id.)
- In a letter from Dr. Young to "To Whom It May Concern" dated November 7, 2003, Dr. Young states that Student has a diagnosis of peanut allergy which has the potential for anaphylaxis and that if there are still "inadvertent exposures in the

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<sup>2</sup> For math and reading, students are grouped according to ability. In October 2003, Student was reassigned for reading to another classroom. It is difficult to predict when these changes take place as the changes depend on the progress made by the individual student. (Testimony of Ms. McKinnon)

classroom, resulting in symptoms,” the accommodations in Student’s IHCP may need to be revised to address Student’s exposure to peanuts in the classroom. (SE-12)

- On or about October 2003, Mystic Valley sent the parents of students in its school an invitation to attend a presentation on “Managing Food Allergies in the School Setting”, scheduled for October 20, 2003. (SE-6) The presentation would be made by Elisabeth Stieb, R.N., BSN, who is a pediatric asthma and allergy nurse at Massachusetts General Hospital, who is also the mother of two children with food allergies. (SE-6) The topics discussed during the presentation would include: “common food allergens; statistics on incidence of food allergies; avoidance strategies; signs and symptoms of a food allergy reaction; emergency treatment of a food allergy reaction.” (SE-6) This exhibit contains a reminder letter, which advised parents that a child with a “severe food allergy” was in their child’s class. (SE-6)
- On November 17, 2003, Parents’ attorney wrote to Mystic Valley’s attorney formally rejecting the IHCP plan promulgated by Mystic Valley, and faxed to Parents on November 14, 2003. (PR-32) The rejection was based on the fact that the plan failed to address Student’s asthma which impacted the intensity of Student’s allergic response and because it failed to provide a peanut/tree nut free classroom, thereby compromising Student’s safety. (PE-32) The Parents accepted all other aspects of the proposed IHCP of November 14<sup>th</sup> and requested that the accepted portions be implemented immediately. (PE-32)
- Ms. Duck testified that at the beginning of the 2003-2004 school year, approximately ten students per day brought in peanut butter sandwiches, but this number has reduced to four or five on average as parents of several students have stopped sending them in after parents learned of the allergy situation in the classroom. (Testimony of Ms. Duck)
- Salem Public Schools, Witchcraft Elementary School, Lexington Public Schools, Middleborough Public Schools, Bowman School, Hadley Elementary School in Swampscott, MA, Higgins Middle School in Peabody, MA, Longview Farm, Ethel E. Hammond and East Wareham Elementary Schools, Malden Public Schools Early Learning Center, Avon Nursery School, Clifford Public School, Centre Consolidated School, Van Hoosen Middle School in Michigan, and several other schools throughout the US and Canada have imposed a ban on peanut products, or have adopted peanut free zone policies. (PE-22; Testimony of Dr. Ostro) Janice Beyer, a teacher for 31 years in the Brockton Public Schools testified that she had a student with a peanut allergy in her classroom and requested that parents not send in any peanut product with their children. She had no difficulties implementing the peanut ban during the year that student was in her class. (Testimony of Ms. Beyer) Michelle Moriarty, administrator of the Melrose Preschool and Nursery reported also having no difficulty adopting or implementing a peanut butter prohibition in her school. (Testimony of Ms. Moriarty)

- Mystic Valley has established a Code of Values as part of its policy on Student Conduct, which students sign at the beginning of the school year. (PE-24; PE-26; Testimony of Ms. McKinnon) The Student Conduct policy recognizes that “effective instruction requires an orderly environment focused on learning, and that schools have an important role to play in supporting parents’ efforts to teach basic values to their children.” (Id.) This Code of Values, found in Section II of the students’ handbook, focuses on values such as perseverance, responsibility, generosity, gratitude, honesty, kindness, forgiveness, respect, citizenship, self-discipline, courage, hope and gratitude. (PE-24; PE-26) Behaviors consistent with the code of values are also expected while riding the school bus. All food, drink, toys and games are banned from the bus. Additionally, the student’s handbook places multiple restrictions on students’ uniform, accessories, hair-style and totally bans make-up, facial hair, bandanas, nail-polish and tattoos. (PE-24) Bringing in fast food items for lunch is strictly prohibited. (Id.; PE-27) According to Ms. Kinnon, the ban on fast foods was to limit distractions and the prohibition on wearing hair extensions came as a response to an OCR complaint. (Testimony of Ms Kinnon) Some of the school bans are age/grade specific. (Testimony of Ms. Kinnon) The Student’s handbook also addresses the manner in which violations are addressed. (PE-24) According to Dr. Biegler, one of the reasons there is no ban on peanut products is because Mystic Valley anticipates that there would be violations of the ban. He further testified that other bans have been successful with minor exceptions. (Testimony of Dr. Biegler)
- Mystic Valley maintains a strict policy that does not allow children to share or exchange food for several reasons, including avoidance of potentially life-threatening situations caused by a severe allergic reaction. (PE-27)
- Ms. Kinnon and Dr. Biegler from Mystic Valley testified that Mystic Valley had followed the recommendations of Student’s pediatricians and allergists when developing plans to address Student’s allergies, and had also considered the medical documentation, as well as the rights of other students and those of Student. (Testimony of Ms. Kinnon, Dr. Biegler) Mystic Valley asserts that it has not offered a peanut/tree nut free classroom and according to Dr. Biegler it has done it to avoid liability. (Testimony of Mr. Biegler)
- Ms. Kinnon testified that Student’s peanut/tree nut allergies are a life-threatening condition, and that ingestion of peanuts could pose a risk to Student’s life. (Testimony of Ms. Kinnon) Nevertheless, the communications issued by Mystic Valley to the parents of students in Student’s class and its Food Allergy Policy & Procedures use the word severe instead of the term life threatening. (SE-7; SE-3)
- To date, Mystic Valley has not conducted any specific allergy awareness training for the students in Student’s class as required in the Student’s IHCP. (Testimony of Ms. Kinnon, Ms.Duck)
- Dr. Martin Broff, an allergy specialist, testified on behalf of Mystic Valley. (SE-4) He did not examine Student but reviewed some of the documents in the record. In his

opinion it was highly unlikely that Student would suffer an anaphylactic reaction in school. He also did not believe that Student had suffered an anaphylactic reaction in January 1999. He based his opinion on the hospital records that did not mention that Student showed signs of “hypertension” which in his opinion was necessary for anaphylaxis. (Testimony of Dr. Broff)

- Dr. Young who had an opportunity to examine Student was of the opinion that Student had suffered an anaphylactic reaction in January 1999 and stated that hypertension was not required for a reaction to qualify as anaphylaxis. (Testimony of Dr. Young)
- Martin Ostro, M.D., FRCPC, FAAAA., recommended that Student’s class be peanut free given his high level of sensitivity while Dr. Young declined to offer an opinion on whether the classroom should be peanut free but supported accommodations consistent with the Department Of Education (hereinafter, “DOE”) Guidelines titled Managing Life Threatening Food Allergies in Schools. (SE-10; PE-31; Testimony of Dr. Ostro, Dr. Young) Dr. Young collaborated in the drafting of the guidelines promulgated by the DOE. (SE-10; Testimony of Dr. Young)
- Dr. Biegler testified that Mystic Valley is a recipient of Federal funds. Mystic Valley receives Title 1 funds, special education funds, and school lunch funds. (Testimony of Dr. Biegler)

## **CONCLUSIONS OF LAW:**

There is no dispute between the parties that Student who presents with a peanut/tree nut allergy and asthma is an individual entitled to the protections of Section 504 because his condition impedes several major life activities. The question before me is whether the accommodation requested by Parents, a peanut/tree nut free classroom, is reasonable and necessary because of the life-threatening nature of Student’s condition in light of his age, and will not pose an undue burden on Mystic Valley. The Parents are in agreement with the rest of the accommodations made by Mystic Valley for Student.

### **Section 504:**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against a qualified handicapped individual by any program that receives federal funds. 29 U.S.C. 794, Section 504 of the Rehabilitation Act of 1973 as amended by P.L. 100-259 (the Civil Rights Restoration Act of 1987). It is aimed at eradicating all forms of discrimination against disabled individuals. *Helen L. v. DiDario*, 46 F.3d 325, 3330 (3<sup>rd</sup> Cir.1995), *cert. denied*, 516 U.S. 813, 116 S.Ct. 64, 133 L.Ed.2d 26 (1995); *Allen v. Heckler*, 780 F.2d 64, 66 (D.C.Cir. 1985). Section 504 provides that:

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... 29 U.S.C. § 794(a)

The statute prohibits willful discrimination as much as that which results from apathy, stereotyping or thoughtlessness. *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d. 661 (1985). Similarly, the regulations promulgated by the federal Department of Education require that school districts provide

...a free appropriate public education to each qualified handicapped person who is in [its] jurisdiction, regardless of the nature or severity of the person's handicap. 34 C.F.R. §104.33(a).

An appropriate education is

the provision of regular or special educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met... 34 CFR §104.33(b)(1)(i).

The Supreme Court has given broad interpretation to the language contained in Section 504 requiring that programs receiving federal financial assistance provide “reasonable accommodations” to the handicapped. *Alexander v. Choate*, 469 U.S. 287, 105 S.Ct. 712, 83 L.Ed.2d. 661 (1985) In the education context this means that the handicapped student must be given full access to the general education curriculum that is available to non-disabled students in a manner that meets his needs as adequately as the needs of non-handicapped students. 34 C.F.R. §104.33(a) and (b). To achieve this, the school must make reasonable accommodations, that is changes or modifications to its program, to accommodate the handicapped student. The changes must be made so as to ensure that the educational services offered the student are as effective as those provided to other non-disabled students. 34 C.F. R. §104.4(b)(1)(iii). Additionally, the services must be offered in an integrated manner to the extent appropriate for the handicapped student. 34 C.F. R. §104.4(b)(1)(iv). The changes must not however, cause “undue hardship” on the recipient of federal funds. *Bercovitch v. Baldwin School, Inc.* 133 F3d 141 (1<sup>st</sup> Cir. 1998).<sup>3</sup> Similarly, the modification must not fundamentally alter the nature of the program offered by the school. *Wynne v. Tufts Univ. School of Medicine*, 976 F.2d. 791, 795 (1<sup>st</sup> Cir. 1992); see also, *School Bd. v. Arlene*, 480 U.S. 273, 107 S. Ct. 123, 94 L.Ed. 2d 307 (1987). For instance, an accommodation that caused undue financial or administrative burden on the program would not be found to be reasonable. *School Bd. v. Arlene*, 480 U.S. 273, 107 S. Ct. 123, 94 L.Ed. 2d 307 (1987). Ascertaining whether the particular modification is reasonable depends on the circumstances of the specific case. *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001).

In *Wynne v. Tufts University School of Medicine*, 976 F.2d 791, 795 (1<sup>st</sup> Cir. 1992) the First Circuit Court of Appeals reasoned that

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<sup>3</sup> While *Bercovitch* was decided under the Americans with Disabilities Act (ADA), the court stated that ADA and Section 504 are basically interpreted in the same manner. *Berkovitch* at 151, n.13.

Reasonableness is not a constant. To the contrary what is reasonable in a particular situation may not be reasonable in a different situation- even if the situation and differences are relatively slight. [Citations omitted.] Ultimately, what is reasonable depends on a variable mix of factors.

This balancing of the requested accommodation and the burden it places on the institution requires that the latter engage in a sincere effort to consider viable ways to accommodate the handicapped individual. This way, the federal funds recipient can reach a “rationally justifiable conclusion” regarding the reasonableness of implementing the particular accommodation which would pass muster, as a matter of law, before the court.<sup>4</sup> *Wynne v. Tufts University School of Medicine*, 976 F.2d 791, 795 (1<sup>st</sup> Cir. 1992) If however, a reasonable accommodation is feasible but the institution fails to provide it, the institution may be found to have discriminated against the qualifying individual.

The responsibility to fashion the necessary accommodation results from an interactive process between the student and the school conducted in good faith. *Beck v. University of Wisc. Bd. of Regents*, 75 F.3d 1130, 1135 (7<sup>th</sup> Cir. 1996) (quoting 29 C.F.R. §1630.29(o)(3) 1995); see also, *Feliberty v. Kemper Corp.*, 98 F.3d 274, 280 (7<sup>th</sup> Cir. 1996) The initial request for the modification must come from the handicapped individual who must show that the modification is reasonable. *Johnson v. Gambrinus Co.*, 116 F.3d 1052, 1059 (5<sup>th</sup> Cir. 1997) If able to do so, the institution must comply with the requested change unless it can show that it “would fundamentally alter the nature of the public accommodation.” *Johnson*, 116 F. 3d at 1059.

Mystic Valley argues that in regards to the “reasonableness” standard of Section 504, the focus should be on whether the accommodation offered provides Student “access to programs in a non-discriminatory manner.” In *Letter to Zirkel*, 20 IDELR 134 (1993), OCR opined that 34 C.F.R. §104.33 does not incorporate a cost conscious “reasonableness standard into 504 requirements for elementary and secondary students.” OCR stated that while the reasonable accommodation limitation expressly applied to postsecondary and vocational education, covered in Subpart E, said limitation was intentionally excluded from Subpart D, which covers elementary and secondary education. *Letter to Zirkel*, 20 IDELR 134 (1993). It further noted that said regulation does not require “changes beyond those necessary to eliminate discrimination.” Additionally, Mystic Valley argues that the accommodation requested by Parents may not fundamentally alter the nature of the program or cause undue administrative burden as discussed *supra*.

Mystic Valley argues that the total package of accommodations offered to Student eliminates discrimination without imposing a total ban on peanut/ tree nut products in the

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<sup>4</sup> If the federal funds recipient “considered alternative means, their feasibility, cost and effect on the academic program, and came to a rationally justifiable conclusion that the available alternative would result either in lowering academic standards or requiring substantial program alteration, the court could rule as a matter of law that the institution had met its duty of seeking reasonable accommodation.” *Wynne v. Tufts University School of Medicine*, 932 F. 2d 19,26 (1<sup>st</sup> Cir. 1991)

classroom. Furthermore, enforcing the total ban requested by Parents imposes an undue burden on Mystic Valley. Mystic Valley thus concludes, that “here, the total package of accommodations offered in [Student’s] [IHCP] does eliminate discrimination without imposition of a ban on all peanut/tree nut products in his classroom. In addition, the impossibility of truly enforcing such a ban in the School setting renders the requested accommodation an undue burden on the School.” According to the School, the correct legal issue is whether the accommodations proposed are adequate to assure that Student can participate safely in school activities with other non-handicapped students as reasoned by the ALJ in *Cascade School District*, 37 IDELR 300, 102 LRP 34074 (Oregon SEA 2002) Mystic Valley maintains that the appropriate standard is safe access to the school program which it asserts it has provided.

### **BSEA Jurisdiction:**

Disputes arising out of challenges to a school district for denying a handicapped student a free appropriate public education under Section 504 are resolved through a hearing process similar to that of the IDEA. 34 C.F.R. § §104.31-104.39, at 104.33(c)(4). In Massachusetts that authority has been vested in the Bureau of Special Education Appeals. 603 C.M.R. 28.08(3)(a). To prevail, the student must show that he has a disability that qualifies under the act; s/he can otherwise participate in school activities; the school receives federal financial assistance; and s/he has been excluded from participation, has suffered discrimination, or has been denied benefits by the school. *Wynne v. Tufts Univ. School of Medicine [Wynne II]*, 976 F.2d. 791, 795 (1<sup>st</sup> Cir. 1992), *cert. denied*, 507 U.S. 1030, 113 S.Ct. 1845, 123 L.Ed.2d 470 (1993); *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir. 1995) (quoting *Nathanson v. Medical Coll. Of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir. 1991)); *Ridgewood Bd. Of Educ. v. N.E. for M.E.*, 172 F.3d 238, 253 (3d Cir)

### **Is a Peanut/Tree Nut free classroom a reasonable accommodation for Student which does not create undue hardship on Mystic Valley?**

As stated earlier there is no disagreement between the parties that Mystic Valley is a recipient of federal financial assistance and as such subject to Section 504. (Testimony of Dr. Biegler) It therefore, cannot discriminate against Student on the basis of his disability. There is also no dispute that Student is a school age child, entitled to the protections of Section 504 as he suffers from a life threatening peanut/tree nut allergy<sup>5</sup> that substantially limits several major life activities such as eating, breathing, attending public events and school.<sup>6</sup> His handicapping condition has been documented<sup>7</sup> and is amply supported by the

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<sup>5</sup> Student’s life threatening allergy constitutes a “physical impairment”, which affect several body systems such as respiratory, cardiovascular, digestive, and others. See 34 C.F.R. §104.3(2)(i)

<sup>6</sup> 29 U.S.C. §706 (8)(B) defines disability as “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of such an impairment; or being regarded as having such an impairment.”

<sup>7</sup> 34 C.F.R. §104.3(2)(iii) “‘Has a record of such an impairment’ means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.”

evidence. (SE-9; PE-1; PE-3; PE-5; PE-6; PE-7; Testimony of Dr. Young, Dr. Orso, Dr. Biegler, Mother) In order to reach my conclusions, I hereby incorporate by reference all of the facts contained in the Finding of Facts portion of this decision and rely on them in reaching my decision. I note that in deciding Section 504 cases, different fact patterns will call for different accommodations, and it is the particular circumstances of a case that will determine the type of accommodations that is reasonable. To achieve this the school is responsible to gather the necessary information from the parents and the medical experts.<sup>8</sup> There is no doubt that Parents have been very communicative about Student's situation, their knowledge of his condition, and the desired accommodations and that over the past year and a half they have submitted much documentation in support of Student's allergy and the required accommodations.

Parents assert that in order for Student to attend school as safely as his classmates, he must be in a peanut/tree nut free environment. As such they request that other students in Student's class be prohibited from bringing in or using any peanut/tree nut product. Given the fact that Student is in the first grade (he just turned 7 years of age on January 18<sup>th</sup>) the parents of those students would be responsible to oversee that no peanut/tree nut product is sent in. Mystic Valley argues that it has made some accommodations through an IHCP (eg., having all students wash their hands before and after snack time and lunch, wipe down the desks/tables after snacks and lunch, providing Student with a peanut/tree nut free table, and others) in Student's classroom which are sufficient to assure Student's safety. (PE-1; SE-3; Testimony of Dr. Biegler, Ms. Kinnon) Parents argue in rebuttal that daily exposure to peanut/tree nut products denies their son the same opportunity as other students have to a safe and healthy classroom experience, and that the peanut/tree nut free table accommodation segregates him unnecessarily and constitutes a violation to Section 504's mandate to the contrary.

The evidence is convincing that Student, who is seven years of age, has a life-threatening peanut/tree nut allergy, which warrants the additional accommodation sought by Parents. Student's allergy is not serious but rather, *life threatening*, which is the operative term in this matter. (Testimony of Dr. Young, Dr. Ostro) The allergic reaction he suffered on January 23, 1999, was consistent with anaphylaxis as was testified by Dr. Young and Dr. Ostro, who I found to be credible in this respect. Student's allergy tests show without a doubt that Student is allergic to peanut and tree nuts. (PE-18; PE-19) If he comes in contact with even small amounts he *will* have an allergic reaction. (Testimony of Dr. Ostro, Dr. Young) Moreover, if he ingests a tiny amount of peanut he will suffer an anaphylactic reaction that will require medical intervention. Every time Student has come in contact with the allergen substances he has had an allergic reaction and at least once suffered an anaphylactic reaction. Given that he has had this type of reaction in the past it

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<sup>8</sup> The courts have embraced this position in Section 504 cases dealing with employment issues. One such case is *Mantolete v. Bolger*, 767 F.2d at 1423 (1995), where the court stated that "[A]n employer has a duty under the Act to gather sufficient information from the applicant and from qualified experts as needed to determine what accommodations are necessary to enable the applicant to perform his job safely." In the case at bar, Mystic Valley is responsible to gather the necessary information to ensure that Student can fully access the program safely.

is likely that ingestion of even the tiniest amount of a peanut/tree nut product may produce a similar or worse reaction in the future. (Testimony of Dr. Young, Dr. Ostro) All of the experts who testified, as well as many of the documents in the record, stress that avoidance of peanut/tree nut products is essential for Student if one is to prevent an allergic reaction. (PE-6; PE-7; PE-8; PE-9; PE-15; PE-19; Testimony of Dr. Ostro) Dr. Ostro as well as numerous documents, authored by Dr. Stuart Pergament and Dr. Gebhardt, recommend that Student be in a peanut/tree nut free classroom. (*Id.*) Given the life threatening nature of Student's condition, such accommodation is warranted.

Parents have rejected the IHCPs proposed by Mystic Valley because the school failed to create a "zone of minimal risk" for Student by not banning the use and consumption of peanut/tree nut products from his classroom. (PE-32) Parents further argue that the plan does not address Student's intermittent asthma, which intensify Student's allergic response. (PE-32) The Parents accepted all other accommodations mentioned in the plan and requested that the accepted portions be implemented forthwith. (PE-32)

I first explore Student's allergy and the reasonableness of Parents' request. Parents explain that Student's allergic reactions to peanuts and tree nuts have varied from minor discomfort, alleviated when removed from the area where the peanut product was present, to the sudden, severe, multi-systemic anaphylaxis reaction suffered on January 23, 1999, which required medical intervention in the emergency room, and administration of epinephrine. Minor incidents were seen when he had the allergic reaction to peanut dust at Fenway Park when he was four years of age and the October 3, 2003 incident in school that caused him allergic conjunctivitis. (Testimony of Mother, Dr. Ostro, Father)

Peanut related reactions can occur anywhere where the peanut or tree nut product is present, as for example in schools, home or in restaurants. (PE-21) Accidents usually occur as a result of "sharing food, hidden ingredients, cross-contamination, and school craft projects using peanut butter." (PE-21) Accidental ingestion occurs more frequently in school. (PE-21p.1, 5) Unlike other allergies such as allergies to egg, milk or wheat, peanut and tree nut allergies are rarely outgrown. (*Id.*, p.21, 22) Allergies to the latter are often severe and are the ones most frequently associated with fatal and near fatal anaphylaxis reactions. (PE-21p.7) Most allergic symptoms occur immediately in the allergic individual, but a delay of 45 minutes to up to an hour has been evidenced in others. (PE-21p.5) Managing a peanut allergy consists of three things: "teaching patients and their families how to avoid the accidental ingestion of peanuts, how to recognize early symptoms of an allergic reaction and how to manage the early stages of an anaphylactic reaction." (PE-21p.8) Avoidance of accidental ingestion in school stresses the importance of "reducing possible contact by cleaning areas where food is eaten, hand washing, close supervision, and excluding craft/science projects in which causal foods are used." (PE-21p.16) Provision of safe food substitutes, education of staff, in place emergency protocols, and no food sharing are appropriate suggested interventions. (PE-21p.17) Also, an allergic reaction may be triggered by inhalation of airborne food particles in situations such as active cooking, or processing of the food. (PE-21p.16) At least one study found that most children with peanut allergy did not suffer reactions from

“typical room exposure to peanut, but high level exposure (craft projects, cooking) may pose a risk to some.” (Id.)

Because of the possible fatal or near fatal allergic reaction, peanut allergy is a potentially severe allergy worthy of serious intervention in school settings given the great amount of opportunity for accidental ingestion. (PE-21p.17) Avoidance of all peanut and tree nut products is therefore, essential. (PE-21p.34) For this reason, several private schools, public schools and public school districts throughout Canada, Massachusetts and other parts of the United States, have imposed a total ban on students bringing peanut products into schools. (PE-22) According to Janice Breyer and Michelle Moriarty, who worked in schools where such a ban was in place, the parents of non-allergic students were very compliant with this policy, and neither one experienced any violations of the policy. (Testimony of Ms. Breyer, Ms. Moriarty)

The Parents request would require that a letter be sent to the parents of all of the students in Student’s classroom notifying them of the new prohibition that peanut and /tree nut products cannot be sent into the classroom. The letter could be sent at the beginning of the year and a reminder could be sent mid year. This could be done by any of the administrators in Mystic Valley. On August 26, 2003, Mystic Valley sent a similar letter requesting that parents alert the teacher when peanut/tree nut products are sent in. (PE-2) Additionally, students would still be required to place their snacks and lunches in the side of their desk so that the teacher can check them, to wash their hands before and after meals and clean their desks. (PE-2) These procedures are being implemented currently by Mystic Valley. (Testimony of Ms. Duck) Under the present IHCP, the teacher is responsible for ensuring that the classroom modifications, where Student spends most of his day, are implemented consistently. (PE-1) The teacher therefore, plays a central role regarding implementation.<sup>9</sup>

Parents stress the fact that Student and his classmates are between six and seven years of age. Because of their age, these students are more likely to act in manners that are impulsive, careless and sometimes they just forget. Without intending to do so, they may create a situation that poses great risk to Student. The incident of the fall of 2003 is a perfect example. The child sitting next to Student got hungry, had finished her assignment, opened her snack and began to consume it. After she had started eating (while sitting next to Student who had not finished his assignment), she finally raised her hand and informed the teacher that her snack was peanut butter crackers. Student was told to go to the peanut/tree nut free table but approximately 30 minutes later Student’s eye became red, watery and began to hurt him. (PE-29; Testimony of Ms. Duck, Ms. McKinnon, Mother) Student was later diagnosed with allergic conjunctivitis. (PE-14) Since no problems regarding the eye were observed by providers or reported by Student until after the youngster next to him began consuming the peanut crackers, it is

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<sup>9</sup> An article in the April 2001 edition of the Journal of Pediatrics reports that in school, the first adult to become aware of an allergic reaction in a child was the teacher (59%) followed by a parent (32%) picking up the child after school. In 55 % of those instances it was the teacher who took charge of the emergency response. (PE-21p.15)

conceivable that a tiny bit of the peanut in the cracker may have become airborne when she bit on it and landed in Student's eye. Ms. Duck testified that on the date of this incident, October 3, 2003, the parent of the youngster who brought in the peanut butter crackers had not sent in a note as requested by Mystic Valley at the beginning of the school year.

Also, Mother testified that in spite of the school's policy that students not share food, she witnessed children in Student's class doing just this. So long as there are peanut/tree nut substances in the classroom there is an opportunity for Student to come in contact with them and therefore, a life threatening risk to him exists. The evidence supports Parents' argument that the current policy is insufficient to protect Student against inadvertently coming in contact with and possibly ingesting a peanut/tree nut product.

Mystic Valley argues that although Student is only seven years of age, as his birthday was in January 2004, he understands his medical condition and is cognizant of the precautions he must take to avoid coming in contact with peanut products. He also knows how to self-administer the Epi-Pen, which is kept in school and in the bus. Parents testified about his awareness of this allergy and how careful he was not to eat anything without asking for adult approval. He asks his parents numerous times if they read the labels on products and is quite insistent on this before ingesting foods. (Testimony of Mother, Father) He often asks the same of other adults and will advocate for himself stating to teachers or other adults that he cannot consume certain products because they contain peanuts even when the adults may insist that the particular item does not. (Id.) Student has demonstrated the ability to be careful when "trick or treating," (he waits until he gets home and sorts into two piles what he can or not eat) and when he was given M&Ms by staff in the school bus (he put the M&Ms in his pocket and handed them to his mother when he met her). (Testimony of Mother) Mother testified that when in doubt Student absolutely will not eat a food, even a treat, before checking it out.

Having weighed Student's ability to protect and advocate for himself with the risks to his life should ingestion occur, the fact that he is only seven years old cannot be ignored. It is not he who should bear the responsibility to educate the adults but rather the adults who have the responsibility to provide a safe environment for him. While he may be able to control much of what he ingests himself, he cannot prevent incidents like the one involving the girl with the peanut cracker. She acted consistently with how a child would be expected to act. The results in this case could have been ominous if a peanut product had reached Student's mouth.

Furthermore, there is a real question as to whether Mystic Valley's policy regarding Student may have resulted in discrimination at least once. Over the 2002-2003 school year, Dr. Gebhardt excused Student from school on January 31, 2003, a date when Asian food was being served in the classroom. She raised serious concern over the likelihood that Student might come in contact with the substances to which he is allergic as there is a high content of peanut products in Asian food. (PE-10) She stated that Student would be "missing out on an educational experience because of a potential health problem",

namely the risk that he could have an anaphylactic reaction. (PE-10) Excluding Student from educational opportunities is precisely what Section 504 strives to avoid.

The current policy prevents Student from participating in the general curriculum not only in instances like the Asian party described above but also every time he suffers an allergic reaction as a result of coming in contact with the peanut/tree nut substance. Each time, Student loses learning time and is deprived of access to the general curriculum.

Parents also argue that the accommodation sought by them for Student would eliminate unnecessary isolation and segregation. Currently, Student goes to the peanut/tree nut free table at least three times per day while the other students can stay and eat at their desks. Student can bring a friend to the designated table but the potential for stigmatization is still there. The Parties agreed that Student has many friends. (Testimony of Ms. Duck) He is a “good kid” who readily complies with instructions given to him by adults and follows the protocol for snacks and lunch established for him as he is a docile, child who lives in fear of having an allergic reaction. (Testimony of Mother, Ms. Duck) Given that first grade students are expected to spend the day in the classroom, that he spends every lunch and snack time at the designated table, which constitutes approximately 1 hour per day, the table assignment is stigmatizing and isolating. This fact is made even more poignant when one considers the regular set up of the classroom (students desks are clustered in groups of six) which seems to be designed to promote closeness and cooperative learning among these very young children, as depicted in PE-35. (Testimony of Ms. McKinnon) Section 504 mandates equality of access to education and equality of treatment of the handicapped individual vis a vis the non-handicap individual by an institution receiving federal funds. In re: Gabriel C., 3 MSER 29 (1997); 34 C.F.R. 104.34(b). In this regard, “Student must be able to participate with non-handicapped persons in classroom activities, including eating to the maximum extent appropriate to his needs.” 34 C.F.R. 104.34(b) <sup>10</sup>

Mystic Valley argues that it has provided a “safe place” free of food contaminants for Student and that this is a reasonable accommodation. The United States Department of Education (hereinafter, “USDOE”) has declined to treat elementary schools as they would employment situations, restricting modifications to accommodations that are simply “reasonable”. Instead, the USDOE interprets Section 504 as requiring a school district to provide whatever modifications, services or supports may be necessary for the student to receive a free appropriate public education. *Letter to Zirkel*, 20 IDELR 134 (1993) For children as young as Student, socialization skills (learning to take turns in conversation, listening, discussing unfamiliar topics, learning acceptable ways of speaking, table manners, etc.) are an integral part of their education. (Testimony of Ms. McKinnon) Ms. McKinnon testified that Mystic Valley stood for “high standards on values for children,” the reason for its creation, and that it wanted its students to be “well-

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<sup>10</sup> 34 C.F.R. 104.34(b) addressing nondiscrimination in nonacademic settings provides that “In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in Sec. 104.37 (a)(2), a recipient shall ensure that handicapped persons participate with nonhandicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.”

rounded beyond reading and math.” It fosters positive intrinsic values and has set many strict rules to accomplish this goal. (Testimony of Ms. McKinnon) Mystic Valley’s current policy in this regard is contrary to its own purpose and discriminates against Student based on his handicap. *Letter to Zirkel*, 20 IDELR 134 (1993) As such, Student is entitled to equal access to a pool of other students during snacks and lunchtime so that he may learn appropriate social pragmatics in a natural environment, simultaneously with the rest of the age like peers in his class. *Cascade School District*, 37 IDELR 300 (2002)

According to Ms. Duck, since the parents of other students were notified of Student’s allergy, there has been a significant decrease in the amount of peanut butter snacks and lunches brought into the classroom. Only two students bring in peanut butter and jelly sandwiches daily. On average now approximately four peanut butter and jelly sandwiches are brought in at this time. (Testimony of Ms. Duck) In some instances it was the children themselves who made the request to their parents so they could sit with Student at the peanut/tree nut free table. (Testimony of Ms. Duck) This seems to indicate that Student’s classmates wish to share time throughout the whole day with him and are willing to forgo the products that place Student at risk. In his book *The Peanut Allergy Answer Book*, Dr. Young discusses the danger for allergic students to be singled out as different. (SE-11) Massachusetts Department of Education (hereinafter, “MADOE”) Guidelines, promulgated in October 2002, recognize that “school policies and protocols must respect the physical safety and the emotional needs of these students”. (SE-10) It is doubtful that the result of implementing Mystic Valley’s current policy is consistent with the MADOE premise.

On or about May 2003, Mystic Valley developed its Food Allergy Policy and Procedures modeled after the MADOE Guidelines *Managing Life Threatening Food Allergies in the Schools*. (SE-10; Testimony of Dr. Biegler, Ms. Kinnon, Father) In so doing, it also took into account its own school environment, as well as practices used by other schools. (Testimony of Dr. Biegler) Mystic Valley’s policies provide for creation of a “allergen free zone” in each classroom where a student has a food allergy along with implementation of sanitation protocols and emergency response procedures, which Mystic Valley asserts are sufficient to address the needs of students with food allergies in its school, including Student’s. Generally, Mystic Valley’s policies may be appropriate to address the needs of most students with allergies that are not life threatening. That is however, not the case here. The DOE Guidelines represent a middle ground. They have been developed as a *guide* (an indication or outline of policy or conduct) which is meant to offer direction, not to establish the only options available in all cases. The guidelines were intended to be flexible and adaptable. (Testimony of Dr. Young) Dr. Young corroborated that he had been involved in the development of the MADOE guidelines and that the intention was to provide general principles that should be individualized according to the allergic student’s specific needs. (Testimony of Dr. Young) A guide’s suggestions can be exceeded if necessary. This concept is embodied in decisions issued by the 1<sup>st</sup> Circuit Court of Appeals. See *Wynne v. Tufts Univ. Sch. Of Med.* (“Wynne

*II*)<sup>11</sup>, 976 F.2d 791, 795 (1<sup>st</sup> Cir. 1992) Dr. Young advocated for a plan where Student could participate in his school program safely. (*Id.*) According to him, if exposure to peanut products caused a reaction under the plan devised by Mystic Valley the plan should be revised. (*Id.*)

Contrary to Mystic Valley's assertions, the evidence shows that its position is not consistent with all of the medical recommendations. Furthermore, the evidence discussed above does not support a finding that Student has always been safe in school. When questioned, Dr. Young declined to make a statement as to whether the current accommodation is reasonable or whether Student would need a peanut/tree nut free classroom, Dr. Ostro supported a peanut/tree nut free classroom and Dr. Broff rejected the recommendation. (Testimony of Dr. Young, Dr. Ostro, Dr. Broff) Neither Dr. Broff nor Dr. Ostro have examined Student in person and while Dr. Young has, he has never treated Student when he was having an allergic reaction. (Testimony of Dr. Young, Dr. Ostro, Dr. Broff) I rely on the credible written statements by Dr. Stuart Pergament and Dr. Gebhardt, as well as the oral statements by Dr. Ostro, that Student requires a peanut/tree nut free classroom as total avoidance of these products is essential to Student's safety. (PE-6; PE-7; PE-8; PE-9; PE-15; PE-19; Testimony of Dr. Ostro) Mystic Valley is lucky that a particle containing peanut/tree nut product has not landed in Student's mouth and caused an anaphylactic reaction. What is at stake here is the life of a child and that should outweigh the inconvenience that not consuming peanut products may impose on others in the classroom. The evidence is persuasive that the additional safety precaution in the classroom requested by Parents is reasonable and necessary. (Compare to *Cascade School District*, 37 IDELR 300 (2002))

It is troubling that Mystic Valley has waited until it is faced with a complaint or is made part of a hearing before the BSEA to take steps to provide the required accommodations to Student. In 2003, Parents filed a complaint with the United States Department of Education Office of Civil Rights. As a result, a 504 Plan meeting was convened on November 15, 2003 and a 504 and an IHCP were prepared and forwarded to Parents a few days later. (PE-1) Following negotiations, it was agreed that Parents would provide updated medical information regarding Student along with his picture. Additional accommodations were agreed to after the BSEA Pre-hearing conference held in late May 2003. The school eliminated its peanut butter sandwich alternate lunch in 2003; agreed to have the school nurse conduct mandatory training for all staff including substitute teachers regarding recognition of and response to allergy attacks by students with food allergies; agreed to engage an outside consultant to conduct training for staff; and to conduct information sessions regarding food allergies for all parents. As of the day of closure of the Hearing, this last accommodation had not taken place due to scheduling difficulties.

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<sup>11</sup> "reasonableness is not a constant. To the contrary, what is reasonable in a particular situation may not be reasonable in a different situation-even if the situational differences are relatively slight." *Wynne v. Tufts Univ. Sch. Of Med.* ("Wynne *II*")<sup>11</sup>, 976 F.2d 791, 795 (1<sup>st</sup> Cir. 1992)

Having found that the accommodation requested by Parents is reasonable I turn to the question of whether it creates a hardship on Mystic Valley by placing an undue burden on the school administration, finances or results in a fundamental alteration to the nature of the educational program.

It is important to note that Mystic Valley policies and attitudes toward Student minimize the extent and impact of his disability. At the Hearing Ms. Kinnon agreed that Student's peanut/tree nut allergies are a life-threatening condition, and that ingestion of peanuts could pose a risk to Student's life. (Testimony of Ms. Kinnon) Despite acknowledging that Student's allergy was life threatening in the letters of November 15, 2002 and February 26, 2003, Mystic Valley refused to acknowledge the seriousness of Student's peanut/tree nut allergy even after the Parents' request for hearing was received. (Testimony of Ms. Kinnon, Mr. Biegler)

As a way to help include Student in the classroom activities while assuring his safety, Mother has been volunteering as a "room mother." She has helped do the planning and food shopping for classroom activities and parties. (Testimony of Mother) On at least one occasion during 2003 she prepared a letter to be sent to the parents of other students asking them not to send any products containing nuts for a party because there was a student who had a life-threatening allergy. Mystic Valley required her to substitute the word "serious" for the term "life-threatening" before it agreed to send the letter. (Testimony of Mother) Dr. Biegler testified that he considered the term "life-threatening" to be "arbitrary", that it was just a word and he therefore, supported the change in Mystic Valley's Food Allergy Policies and Procedures substituting "serious." for "life-threatening." (PE-4; SE-3; Testimony of Dr. Biegler) Ms. Kinnon opined that the term "life-threatening" had virtually no significance. (Testimony of Ms. Kinnon) They both agreed that Student could in fact die if he ingested peanut products. Ms. Kinnon testified that she recommended the changes to Mystic Valley's Food Allergy Policies and Procedures to the Board of Trustees, which is chaired by her brother-in-law, Neil Kinnon. (Testimony of Ms. McKinnon) Ms. Kinnon further testified that as the parent of five children who attend Mystic Valley she would be concerned if she were told that she could not send peanut-butter products. (Testimony of Ms. Kinnon) She expressed this opinion "as a parent" during Student's 504 meeting in November 2002. (*Id.*) She would comply with a peanut product ban if one existed, but did not see the reason to survey how other parents felt about such a ban.

The position expressed by Mystic Valley's administrators is legally flawed in many respects. First, in reaching their determination as to whether the accommodation requested by Parents is or is not reasonable, they weigh the inconvenience of a total ban on other students. (Testimony of Ms. Kinnon) The impact of a modification on the rights of other students is in regard to *education* and how the modification would effect their education. Nothing under the facts of the case at bar shows that the educational program of other students would be affected by banning peanut/tree nut products from the classroom.

Furthermore, Parents correctly argue that it is not unusual for the rights of an individual to be in conflict with the rights of others. Several courts have addressed this issue with a variety of outcomes resulting in protection of certain individuals. *Heather K. v. Mallard*, 887 F. Supp. 1289 (1995) (injunction issued against a town placing a ban on burning yard waste, even when it might have an economic impact on individual residents, to protect a 32-month old child suffering from severe respiratory and cardiac condition); *Staron v. McDonald's Corp.*, 4 ADA Cases 353, 355, 51 F.3d 353 (2d Cir.1995) (regarding authority to ban smoking in restaurants open to the public); *Kelling v. McKinney*, 509 U.S. 25, 113 S. Ct. 2475, 125 L.Ed. 2d 22 (1993) (approving the power of prison officials to regulate smoking in cells to protect inmates from the dangers of second-hand smoke)

Mystic Valley's argument in favor of protecting the right of other students to bring peanut butter snacks and lunches into the classroom over providing a safe environment for this seven year old Student, is mistaken. It considers the inconvenience to individual parents/students over the needs of the handicapped individual. The hardship discussed in the statute relates to the institution, not other children. More importantly, Mystic Valley failed to provide any evidence that *the program* would in any way be fundamentally altered if peanut/tree nut products were banned. Its actions disregarded the needs of the handicapped student in question and resulted in discrimination regarding access to class activities (ability to participate in the Asian party) and access to education (having to leave the classroom as a result of allergic conjunctivitis). Throughout the 2002-2003 school year, Student's kindergarten year, peanut butter sandwiches were one of the two alternate lunches offered in Student's classroom. (Testimony of Dr. Biegler) The evidence is clear that having a peanut tree/nut ban would not fundamentally alter the nature of the educational program.

Section 504 is concerned with whether the requested accommodation even if reasonable, would cause undue hardship to the institution, the administration, its finances or as stated above, fundamentally alter the nature of the educational program.

As discussed in *In re: Worcester Public Schools*, 6 MSER 194 (2000)

...the school system must engage in a process of considering whether to provide an accommodation, and this process must carefully and conscientiously consider possible accommodations and weigh their likely impact on the school system. The school district may not "simply embrace what was most convenient for faculty and administration" but instead must consider "alternative means, their feasibility, cost and effect on the academic program."<sup>12</sup> ...Rather, whether the accommodation is so substantial a modification as to impose an undue hardship must be determined on the basis of facts regarding the particular student and school. *Wynne v. Tufts University School of Medicine*, 976, F.2d 791, 795 (1<sup>st</sup> Cir. 1992). *In re: Worcester Public Schools*, at 206.

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<sup>12</sup> *Wynne v. Tufts University School of Medicine*, 932, F.2d 19,26 and 28 (1<sup>st</sup> Cir. 1991)

Mystic Valley argues that it has children with a variety of food allergies, which they must accommodate. Ms. Kinnon testified that at present 16 students in Mystic Valley present with food allergies. Of these, six are between kindergarten and the third grade. (Testimony of Ms. Kinnon) The specific allergies suffered by these students were not discussed nor did Mystic Valley state whether any of the students with allergies presented with a life-threatening condition. Not all food allergies are life-threatening. Therefore, accommodations for other students may not require a ban of the offending product. In the instant case, Student's condition is life-threatening and warrants a ban of the allergens in his classroom.

The evidence shows that Mystic Valley already has a variety of food-related bans including a prohibition regarding fast food, including hamburgers, fries, hot pizza and sub sandwiches made at a commercial establishment, as well as chewing gum and candy. (PE-24; Testimony of Ms. Kinnon) Given the high risk involved here, the ages of Student and the children in his class, the set-up of the classroom, and the number of students in his class, the opportunity for contamination is high. At least one breach in its policy resulted in a Student having an allergic reaction in October 2003. Common sense would dictate that if the peanut/tree nut products were banned from the class while continuing to implement the rest of the accepted modifications, this would add another layer of protection and would minimize the opportunities for contamination.

Mystic Valley further argues that even with the ban it could not assure 100% compliance. This is true, but the result would be implementation of the same policy that is already in place for students who forget their lunches or bring in a forbidden item. Here, if a student is found to have brought in a lunch or snack containing a peanut/tree nut product, it would be taken away and s/he would be offered the alternate lunch/snack instead. (PE-24; Testimony of Ms. Kinnon) No teacher or administrator in Student's class would have any more responsibility than the one s/he already has.

Ms McKinnon testified that due to scheduling issues, if Student required a peanut free classroom it might be necessary to make the whole school peanut free. She was unsure that Mystic Valley wanted to "go down that road", although she acknowledged that Parents were not requesting this accommodation. (Testimony of Ms. McKinnon) Under the particular facts of this case, this argument is not persuasive. The evidence shows that Student receives most of his instruction, and has lunch and snacks, in the same classroom. He only leaves this room for reading. So long as no food is consumed in the other classroom while Student is there, and assuming that Mystic Valley continues to implement the rest of the accepted accommodations for Student in that classroom, it will be able to maintain Student's safety.

Furthermore, numerous schools and school districts in Massachusetts and elsewhere in the United States and Canada have successfully implemented bans on peanut/tree nut products. (SE-11) Specifically in Massachusetts, while some school districts have banned peanut products altogether from classrooms and cafeterias, others have addressed this issue by offering a compromise solution, such as providing a peanut free table in the classroom and/or the cafeteria. These decisions depended on the number of allergic

students in the particular school/district, the age of the student, etc. (SE-11; Testimony of Ms. Beyer, Ms. Moriarty, Mother) Dr. Ostro recommended adopting a policy prohibiting peanuts/tree nut products in Student's classroom as he stated that said accommodation was reasonable given Student's sensitivity to these products, and because such a policy has proven to be effective and workable in schools that have implemented them. (Testimony of Dr. Ostro) The evidence supports this finding.

Dr. Biegler testified that Mystic Valley feared an increase in liability by imposing a ban. (Testimony of Dr. Biegler) He explained that if said policy were in place the staff would have a false sense of security and would fail to act as diligently as they would without the ban. This argument is not persuasive first, because the Parents never argued that this ban should be implemented to the exclusion of any other accommodation which is already in place (eg., teacher checking students' lunches and snacks daily, sanitation protocols). Those accommodations should stay in place. Second, this charter school imposes numerous other additional bans regarding food, dress code, make-up, hair style, personal appearance, body piercing, jewelry, weapons, drugs, smoking, etc. For an infraction on each of these, the student's handbook states a consequence. (PE-24; Testimony of Ms. Kinnon, Mr. Biegler) Dr. Biegler testified that for the most part, parents and students comply with the school rules and that the most common infraction has to do with food. Dr. Biegler stated that "if you have a ban there will be violations" (Testimony of Dr. Biegler) While infractions may occur, Mystic Valley's own experience shows that having a policy in place is a deterrent and that more often than not students and parents follow its strict policies. Also, as is the case now, if a student brings a forbidden food item it is taken away and the student is offered the alternate lunch.

The evidence shows that personal agendas may have gotten in the way of Mystic Valley's administration's better judgment. (See testimony of Ms. Kinnon, Ms. McKinnon, Dr. Biegler) Mystic Valley does not have the best track record in avoiding accidents that could have had a tragic outcome; incidents like the distribution of M&Ms in the bus, not checking a child's snack containing a peanut product before the child began to eat it in the classroom are some examples. Mystic Valley has been fortunate in avoiding having to address a life-threatening situation involving Student, but a child's life cannot depend on fortuitous events when the inconvenience of the alternative could significantly decrease the life-threatening risks to a student.

Since Mystic Valley failed to introduce substantial evidence with respect to the costs or other burden of implementing the peanut/tree nut free classroom for Student, there is no basis to conclude that the accommodation sought by Parents imposes an undue hardship on Mystic Valley. Moreover, Student did show that he requires the aforementioned accommodation and that it can be provided. I find that Student met his burden but Mystic Valley did not meet its burden to show that the accommodation would cause it undue hardship. See *Garcia-Ayala v. Lederle Perenterals, Inc.*, No. 98-2291 (1<sup>st</sup> Cir. 5/18/00) cited in *In re: Worcester*, at 26, 27.

Lastly, in its numerous correspondences and in their Food Allergy Policy & Procedures, Mystic Valley changed the term "life-threatening allergy" to "severe allergy." (SE-6; SE-

7; SE-3; PE-4) In the minds of both Ms. Kinnon and Dr. Biegler, the wording was only semantics. (Testimony of Dr. Biegler, Ms. Kinnon) This argument flies in the face of logic, the evidence and the law, especially when Mystic Valley is not disputing Student's entitlement to accommodations under Section 504. The aforementioned federal statute protects children who have a life-threatening food allergy, not children with a severe allergy. Furthermore, the fall of 2002 Massachusetts Department of Education Guidelines regarding this issue, were drafted to address *Life Threatening Food Allergies in School* as mentioned not only in its title but also throughout the body of the document. (SE-10) The Merriam-Webster Dictionary, copyright 1974, defines severe as "...causing distress and especially physical discomfort or pain..." None of the definitions offered under the word severe captures the seriousness of a life-threatening situation in which the risk involved is death. It is the risk involved in loss of life that Section 504 contemplates. (SE-5) Mystic Valley shall immediately change the word "severe" to the term "life-threatening" in its Policy and Procedures and in any correspondence that it issues from here forth.

The information presented at hearing indicates that living in fear of consuming the products that would trigger an allergic reaction has taken a toll on Student. Similarly, the Parents live with a great deal of fear regarding their son's safety, which judging by Father's demeanor during the Hearing, has also taken a toll on them. Should Student and/or his family show increased distress over living/coping with this issue, the Student should be evaluated for counseling.

**Order:**

Mystic Valley Regional Charter School shall implement the following accommodations under Student's 504 Plan:

1. No peanut/tree nut products are allowed in Student's classroom.
2. All other accommodations accepted by Parents shall continue to be implemented.
3. Child must have access to all classroom activities such as the celebration of the Chinese New Year, accommodated accordingly ie., no restaurant prepared food, food preparation not to include peanut oil, etc.
4. Letter to parents of classmates must describe Student as a child that has a "life-threatening allergy" not a "severe reaction" which is misleading. Provide an informational session to Parents and additional training to staff timely.
5. Provide an orientation to Student's classmates regarding Student's life-threatening peanut/tree nut allergy.

So Ordered by the Hearing Officer,

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Rosa I. Figueroa  
Dated: 3/19/2004

I would like to thank the attorneys for the magnificent job they did in presenting this case and for the excellent briefs submitted. It was a privilege to preside over this matter.

**March 19, 2004**

**COMMONWEALTH OF MASSACHUSETTS  
BUREAU OF SPECIAL EDUCATION APPEALS**

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**MYSTIC VALLEY REGIONAL CHARTER SCHOOL**

**BSEA # 03-3629**

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**BEFORE**

**ROSA I. FIGUEROA  
HEARING OFFICER**

**TIM SINDELAR, ATTORNEY FOR THE PARENTS  
MARY JOANN REEDY, ATTORNEY FOR THE SCHOOLS**