CASE NO. 18-1725

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

J.D., by his father and next friend, Brian Doherty,

Plaintiff-Appellant

v.

COLONIAL WILLIAMSBURG FOUNDATION,

Defendant-Appellee

On Appeal From The United States District Court
For The Eastern District Of Virginia
At Newport News

BRIEF OF PLAINTIFF-APPELLANT

Mary C. Vargas
STEIN & VARGAS, LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Tel: (240)793-3185
Mary.Vargas@SteinVargas.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The following is a complete list of the trial judge, all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held companies that own 10 percent or more of the party's stock, and other identifiable legal entities related of a party:

1. J.D., Plaintiff-Appellant
2. Brian Doherty
3. Kristin Doherty
4. Mary Caroline Vargas, Co-Counsel for Plaintiff-Appellant
5. Michael Steven Stein, Co-Counsel for Plaintiff-Appellant
6. Martha M. Lafferty, Co-Counsel for Plaintiff-Appellant
7. Robert McFarland, Co-Counsel for Defendant-Appellee
8. Dana Rust, Co-Counsel for Defendant-Appellee
9. Micah Schwartz, Co-Counsel for Defendant-Appellee
10. E. Rebecca Gantt, Co-Counsel for Defendant-Appellee
11. Honorable Rebecca Beach Smith, United States District Court Judge
12. Honorable Robert J. Krask, United States Magistrate Judge

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

STATEMENT OF JURISDICTION

Plaintiff-Appellant, J.D., an individual with a disability, alleges that Colonial Williamsburg Foundation violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, Title III of the Americans with Disabilities Act, 42 U.S.C. §§ 12181 *et seq*., and the Virginians with Disabilities Act, Va. Code § 51.5-1, *et seq*., by excluding him on the basis of his disability from full and equal enjoyment of the program it offered to his school tour group. The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 over the federal civil rights claims and pursuant to 28 U.S.C. § 1367 over the state civil rights claim.

Plaintiff-Appellant appeals from the District Court's final order on June 1, 2018, granting summary judgment, as amended by the District Court on June 21, 2018. [Docs. No. 80, 81, 83]. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

J.D. is an eleven-year-old boy who must, by medical necessity, eat strictly gluten-free meals or face a myriad of significant health symptoms including loss of consciousness, neuropathy, liver damage, and cognitive impairment. Because gluten is pervasive and cannot be detected by sight, smell, or taste, it is imperative that J.D. know for certain prior to eating that his food does not contain any gluten. In the past, when J.D. and his family ate in restaurants and he was served purportedly gluten-free meals, he was ill for months afterwards.

For this reason, J.D. brought guaranteed-to-be-gluten-free meals from home on his school trip to Colonial Williamsburg. Colonial Williamsburg, however, refused to let J.D. eat his medically safe meal alongside his classmates at a replica of a colonial-era tavern and instead escorted him out back into the rain.

This case presents the following issues:

1. Whether there are genuine issues whether it was necessary to allow a child with a gluten sensitivity disability to bring guaranteed-to-be-gluten-free meals in order to have a full and equal opportunity to participate on an educational trip to Colonial Williamsburg, when he must adhere to a strict gluten-free diet and has a history of becoming gravely ill after eating purportedly gluten-free meals in restaurants.

2. Whether the District Court erred in granting summary judgment notwithstanding genuine issues of material fact whether it was a reasonable modification to allow a child with a gluten sensitivity disability to eat at Colonial Williamsburg a guaranteed-to-be-gluten-free meal that he had brought for a school trip without advance notice.

3. Whether the District Court erred in holding that a child with a gluten sensitivity disability must accept "some level of risk" in eating food prepared at Colonial Williamsburg rather than eating a guaranteed-to-be-gluten-free meal.

4. Whether the District Court erred in awarding costs to Colonial Williamsburg despite the existence of genuine issues of material fact.

STATEMENT OF THE CASE

1. Statement of Facts

Background on Gluten and Risk of Commercial Kitchens

1. Gluten is a protein found in wheat, rye, barley, and a hybrid grain called triticale. JA163 at ¶ 10. Gluten is found in all foods derived from these grains and is present in many foods that people may not associate with gluten including soups, dressings, marinades, and sauces. JA174. Gluten is also commonly used as a thickener, binder, and anti-caking agent. JA174. Because gluten is so pervasive, it is challenging to maintain a strict gluten-free diet.

2. Foods that do not themselves contain gluten can become sources of gluten due to even incidental contact with gluten-containing food or ingredients. JA174-179. Cross-contact occurs when trace gluten is present in food as the result of food coming into contact with equipment or utensils that are not dedicated for gluten-free use or as the result of preparation of gluten-containing foods in the same kitchen area or prior to preparation of gluten-free foods. JA174-175, JA177-179.

3. Cross-contact occurs in the manufacturing process when a production line is used to manufacture gluten-containing ingredients and then is switched over to make supposedly gluten-free food. JA179.

4. Current labeling laws do not require products to state on the label whether the product contains gluten or is free of cross-contact. JA180.

5. Even products that voluntarily state on the label that the product is "gluten-free" can contain as much as 20 ppm of gluten. In other words, as people who are severely sensitive to gluten and their doctors know, "gluten-free" does not mean 100% gluten-free. JA178-179.

6. People with Celiac Disease and Non-Celiac Gluten Sensitivity (NCGS) have different levels of sensitivity such that some people with these diagnoses can eat a food with 20 ppm of gluten and not become ill, while other people, like J.D. must eat foods that are actually 100% gluten-free. JA178-179; JA164-165 at ¶¶ 13-19.

7. Due to the pervasiveness of gluten and the lack of labeling requirements, chefs and staff in commercial kitchens may not even know how to obtain ingredients that are truly gluten-free. As a result, chefs may unknowingly stock items that contain gluten either as an undisclosed ingredient or as the result of the food being produced on a manufacturing line shared with gluten-containing foods. JA178-180.

8. Commercial kitchens also pose a significant risk of inadvertently introducing gluten into a meal through cross-contact, particularly when staff is not certified in preparation of gluten-free food and when a facility and all of its

equipment is not dedicated for gluten-free use such that it is never used to prepare foods containing gluten. JA174-180.

9. One of the most common culprits for cross-contact in food preparation is the use of common pans and utensils. Gluten can persist on utensils and cooking equipment even after cleaning and sterilization such that a food that does not normally contain gluten such as chicken or potatoes, when cooked using utensils or pans that are not dedicated to gluten-free food preparation, can have sufficient cross-contact to sicken a person who is extremely sensitive to gluten such as J.D. JA174-175.

10. Cross-contact with gluten can happen in other ways in a busy restaurant kitchen despite the best of intentions. For example, gluten-containing flour is a "very light substance and easily becomes airborne and can settle on surfaces and ingredients being used to prepare gluten-free food." JA174.

11. Boiled water and heated oil used to prepare a dish with gluten and reused for preparing a gluten-free dish may result in cross-contact. JA175. Surfaces, utensils, pots, and pans, and other equipment used for regular meals may inadvertently transfer gluten onto a dish that is supposed to be gluten-free. JA175. Even the clothing worn when preparing food may transfer gluten. JA175.

12. For these reasons, eating food prepared by a commercial kitchen that does not specialize in gluten-free preparation is a risky endeavor for individuals who react severely to even the minutest amounts of gluten. JA176-177.

J.D.'s Disability

13. In Spring 2015, J.D. was diagnosed with Celiac Disease or NCGS by Dr. Anthony Guerrerio, his pediatric gastroenterologist at John Hopkins. JA162-165 at ¶¶ 1, 5, 10, 13-17.

14. Celiac Disease is a serious, genetic, autoimmune disorder where the ingestion of gluten, even in trace amounts, causes damage to the small intestine and can cause significant short and long-term impairment. JA163-164 at ¶ 11. Ingesting even small amounts of gluten, like crumbs from a cutting board or toaster or trace amounts of gluten from pans or utensils that are not dedicated for gluten-free use can trigger damage to small intestines that can persist and cause long-term damage. *See* JA163-164 at ¶¶ 11-12. NCGS is a disorder with symptomology similar to Celiac Disease. JA164 at ¶ 12. Like with Celiac Disease, ingestion of even trace amounts of gluten can cause significant medical harm. JA164 at ¶ 12.

15. Since the pediatric specialists at John Hopkins concluded that J.D.'s physical impairment is either Celiac Disease or NCGS, the treatment for both of which is a strictly gluten-free diet, Dr. Guerrerio prescribed a strictly gluten-free

diet for J.D. JA165 at ¶¶ 15-19; JA597.

16. On a strictly gluten-free diet, J.D.'s improvement has been miraculous. JA111 at ¶ 6; JA165 at ¶ 14. However, on those occasions when J.D. has accidentally ingested even trace amounts of gluten his symptoms have come screaming back, including loss of consciousness, neuropathy, cognitive impairment, elevation of liver enzymes (AST/ALT), pain, and gastrointestinal malfunction.[1] JA111 at ¶¶ 4, 6-7; JA164-65 at ¶ 13. These symptoms have lasted for many months after accidental exposure to even trace amounts of gluten. JA293; JA596; JA598-601.

17. When J.D. ingests gluten, he has significant health issues that impact multiple body systems and that significantly affect his functioning. JA163-165 ¶¶ 10, 13; JA111 at ¶ 4.

18. J.D. experiences substantial impairment in the operation of his digestive system, nervous system, respiratory system, hepatic system, and

[1] According to the Food and Drug Administration, ingestion of food with as little as 0.015 mg/day of gluten can cause a person who is extremely sensitive to gluten to exhibit symptoms. Food Labeling; Gluten-Free Labeling of Foods, Fed. 76 Fed. Reg. 46,671, 46,673 (Aug. 3, 2011) (citing Office of Food Safety, Health Hazard Assessment for Gluten Exposure in Individuals with Celiac Disease, at 33, 41, 91 (May 2011), *at* https://www.fda.gov/downloads/Food/ScienceResearch/ResearchAreas/RiskAssessmentSafetyAssessment/UCM264152.pdf.

integumentary system when he ingests gluten. JA163-165 at ¶¶ 9, 10, 13; JA283-288; JA111 at ¶¶ 4, 6.

J.D.'s History of Exposure to Gluten When Dining Out

19. When J.D. was first diagnosed with a physical impairment requiring a strict gluten-free diet, his parents attempted to bring him to restaurants that offered "gluten-free" menu items prepared in mainstream commercial kitchens and they asked many questions of the restaurant. Despite these conversations with restaurant staff and chefs, on multiple occasions the purportedly "gluten-free" meals did in fact contain enough gluten to make J.D. ill. JA289-292; JA451-452.

20. For example, in 2016, J.D.'s family went to Disney World. While there, the family spoke with a restaurant manager about J.D.'s medically necessary dietary needs. The manager went through an "exhaustive list of the protocols" that would be implemented to protect J.D. from cross-contact including ensuring that only the manager touched the food, labeling the gluten-free meal with special stickers, and putting it on a special tray used only for gluten-free food. JA289-290. After this careful review of the protections in place to ensure a gluten-free meal, J.D. ate the purportedly gluten-free pizza he was served. However, after J.D. began experiencing symptoms a few days later, his family contacted the restaurant and learned that the chef had mistakenly used gluten crust instead of gluten-free crust. JA290-293. Two Comprehensive Metabolic Panels showed that J.D.'s liver

enzymes (AST and ALT) remained elevated signifying damage to liver cells six months after the incident. JA546; JA549-552.

21. Also, on multiple occasions, J.D. went with his family to a restaurant that represented it could prepare gluten-free pasta. JA451-452. After each occasion, his family noticed J.D. "wasn't feeling well, was exhibiting the symptoms of being glutened." They attributed the symptoms to other factors because they had been assured the restaurant had protocols in place to prepare gluten-free food. JA451-452. Then, on their last visit to this restaurant, they actually found a gluten noodle mixed in J.D.'s meal of purportedly gluten-free pasta despite having received assurances from the restaurant staff that the food would be gluten-free. JA451-452.

22. Given these repeated incidents when J.D. was served food containing gluten despite the family having consulted with the restaurant and the restaurant having promised it would take the necessary steps to ensure that the food would be gluten-free, J.D. and his family in consultation with his specialists concluded that they needed to bring medically safe food with them when eating out to maintain J.D.'s health. JA289-293; JA451-452; JA112 at ¶ 9.

23. There are no labeling laws requiring food labels to state whether a product contains gluten. JA180.

24. While many people who eat gluten-free diets by choice or who have

less severe reactions to gluten can safely tolerate trace exposure that results from cross-contact in a restaurant, J.D. is not one of those fortunate people. *See generally* JA162-166.

J.D.'s Class Trip to Colonial Williamsburg

25. In fifth grade, J.D.'s class engaged in a year-long project on colonial America, culminating in a trip to Colonial Williamsburg. JA112.

26. A visit to Colonial Williamsburg is not about the food; it is about the colonial experience. This is the reason schools visit – because of the educational and experiential value kids derive from living history. JA200-201; JA112-113; JA219-220.

27. J.D.'s father was a chaperone on the Williamsburg trip that included 57 paying guests - children, parents, and teachers from J.D.'s school. JA207.

28. The school bus trip to Colonial Williamsburg followed a tight schedule set by Colonial Williamsburg with back-to-back activities in the morning, afternoon, and evening for the students to learn about colonial America with no time for children to deviate from the set schedule. JA207; JA361.

29. There was no time for J.D. and his father to go somewhere else to eat, and even if they had had their own transportation which they did not, there was no place guaranteed to be safe for J.D. to eat. JA361.

30. Like the rest of Colonial Williamsburg which functions as a living

history museum, Shields Tavern is an historic venue owned and operated by Colonial Williamsburg that is designed to give the school children who visit a traditional experience in a historically accurate setting. Shields Tavern is a window into the past where the children were expected to enjoy the comradery and experience social life in colonial America. Costumed staff and volunteers circulate and teach guests about the tavern and colonial life. Entertainment, décor, and design add to the atmosphere. JA 200-201; JA203-204; JA260. Eating at the tavern is both an educational and a social experience.

31. Colonial Williamsburg was paid approximately $13,156.30 to allow J.D. and his classmates to travel back in time and experience all aspects of our country's colonial history, including tavern life. This fee included meals at Colonial Williamsburg. Specifically, of this amount, Colonial Williamsburg was paid $1,710 or $30 per person for J.D. and his classmates to experience turn of the century tavern life on the evening of May 11, 2017 at Shields Tavern. JA196; JA200-201; JA204-205; JA207; JA219-220. Even though J.D. was not able to eat the food at Shields Tavern, Colonial Williamsburg was paid $30 for him to be in the tavern, to experience the colonial atmosphere, to learn about the social life of early America by actually experiencing it with his classmates, and to pretend for a while that he was back with his ancestors in the days leading up to the Revolutionary War. JA112-113 at ¶ 14.

32. After the group arrived at Shields Tavern and was seated, J.D.'s father let a costumed staff member know that J.D. was not able to eat the food because of his disability and that she did not need to go to the trouble of serving J.D. a meal. JA364-365; JA368.

33. J.D. was hungry after a full day of touring and his father got his safe chicken breast and gluten-free buns from J.D.'s thermal lunchbox so J.D. could begin eating with the rest of his classmates. JA365.

34. In front of J.D.'s entire school group, the venue manager rushed to their table and informed J.D. and his father that J.D. could not eat in the tavern and would have to leave. JA366.

35. Despite his father's explanation that J.D. could not eat the restaurant food because of his medical diagnosis, the manager insisted he would have to leave if he wanted to eat his safe food. JA365-366, 368.

36. J.D. was humiliated by the manager's conduct towards him, conduct another Colonial Williamsburg employee described as "cruel." JA380-381; *see also* JA383 (stating this was a "big deal" for the child); JA385 ("I wouldn't want my child treated like that.").

37. J.D. struggled to hold back tears in front of his classmates, their parents, and his teachers, as staff made a spectacle of his inability to eat what the other children could. JA366-367; JA379.

38. At this point, the manager returned with a chef who said he would cook a meal for J.D. JA367.

39. Given the instructions of J.D.'s specialists, the severity of J.D.'s disability, and J.D.'s past experience of being ill for months after eating purportedly gluten-free meals prepared by commercial kitchens, J.D.'s father declined the chef's offer of a meal that he could not be sure would in fact be gluten-free. JA367.

40. J.D. and his father were thereafter escorted from the venue and required to eat away from his classmates despite Colonial Williamsburg having been paid full price for J.D.'s admission to Shields Tavern. JA207; JA367-369.

41. Although a costumed performer who witnessed J.D.'s humiliation went outside to try and cheer him up, hearing stories about pirates while crying openly and shivering in the cold outside was not the same experience that his classmates without a disability had. JA219-220; JA369.

Plaintiff's Expert Report

42. To assist the jury in evaluating the safety and health risks that individuals with gluten sensitivity disability face when eating out, J.D. retained as an expert Jules Rasmussen, a nationally recognized consultant on gluten-free food preparation both in restaurants and manufacturing. JA168-69.

43. Rasmussen helped develop Allertrain, the leading American National

Standards Institute accredited food allergy and gluten-free training program for the food service industry. JA169-172. The restaurant industry consults with Rasmussen on how to safely prepare gluten-free meals. JA172. She works with restaurants to identify protocols for ordering gluten-free ingredients, set up safe, fully dedicated areas in the kitchen for gluten-free preparation, and employ safe practices for guarding against cross-contamination and cross-contact. JA171-72. Rasmussen has trained hundreds of food service professionals. JA387-388 at ¶ 4. Rasmussen has also published articles for restaurant publications highlighting for chefs safety issues in gluten-free meal preparation and does a yearly training for medical students. JA388 at ¶ 6; JA398.

44. Rasmussen reviewed the way meals are prepared at Colonial Williamsburg and concluded that J.D. was at significant risk for inadvertent exposure to gluten if he ate a meal prepared there. *See generally* JA168-184.

45. Colonial Williamsburg's chef did not have the knowledge necessary to safely prepare gluten-free meals. For instance, the chef did not know that even foods that would not ordinarily contain gluten may contain additional ingredients with hidden gluten. The chef incorrectly thought that gluten was merely the "byproduct of the process of wheat," a critically incomplete understanding given that gluten is also found in rye, barley and triticale and in other foods as a result of cross-contact. JA177.

46. Rasmussen reported that the chef incorrectly believed that an ingredient is gluten-free if the label does not state it contains gluten. JA179. There are no federal laws that require food labels to indicate whether the food contains gluten. JA180.

47. The chef was also ignorant of the fact that cross-contact regularly occurs in the manufacturing process, for instance, when a production line is used to manufacture gluten-containing ingredients and then is switched over to make supposedly gluten-free food with the result that a food that is not labeled as containing gluten could sicken a child such as J.D. JA179.

48. Rasmussen reported that the chef did not know that there are certified gluten-free products or that diners who are extremely sensitive to gluten should only eat food purchased from certified manufacturers who actually test food for the presence of gluten. JA178-179.

49. Rasmussen opined that Colonial Williamsburg's lack of knowledge about foods that contain gluten resulted in "insufficient vetting of ingredients used in the kitchen." As a result of the chef's clear lack of knowledge and the lack of dedicated gluten-free space and equipment, there was a significant risk that any supposedly gluten-free meal would have contained enough gluten to make J.D. ill. There was a risk of cross-contact simply because he used food products with gluten-containing ingredients or which were produced on the same manufacturing

lines as gluten-containing foods. JA175, JA179-181.

50. Further, the chef's deposition testimony highlighted risks that he takes in preparing a supposedly gluten-free meal, including preparing the meal in the same space he admits using to prepare regular meals, and using the same pots, pans, utensils, and ovens as for food containing gluten. JA179.

51. The chef also erred in thinking that hot oil might be able to kill gluten, when gluten is a protein that cannot be "killed, boiled away or sanitized as one would to eliminate food-borne bacteria." JA178.

52. Rasmussen explained that the chef would have imposed unnecessarily dangerous risks on J.D. by preparing the meal for him *just after* having prepared fried chicken for dozens of people using flour, which easily becomes airborne and spreads everywhere. JA179-181. Under such circumstances, "it was reasonable to be concerned that gluten cross-contact could have occurred in preparing a gluten-free meal." JA180-181.

53. Rasmussen explained that "[w]hen there is no way to be certain that a kitchen or chef is able to prepare a completely gluten-free meal, it is too risky for someone with celiac or another health condition complicated by gluten exposure to eat food from that restaurant." JA181.

54. Rasmussen stated that from experience, "it is common for restaurants to allow people with celiac disease or food allergy to bring in their own food in

order to enjoy the company of other customers who are able to enjoy the food prepared by the restaurant." JA181.

55. Colonial Williamsburg has not identified any experts or submitted any expert reports.

Colonial Williamsburg's Policy of Allowing Outside Food

56. Colonial Williamsburg regularly allows guests at Shields Tavern to bring and consume outside food, including without advance notice. JA210-212, JA216-218; JA373-376; JA402, JA403, JA405.

57. Colonial Williamsburg's own witnesses testified that it was "common practice" for children to bring outside food into the tavern. JA189-91, JA197; JA210-213; JA217-218.

58. Colonial Williamsburg allows people to bring in cakes and wine. JA 210; JA225; JA253.

59. At Shields Tavern, Colonial Williamsburg admits that the manager has the discretion to allow other outside food. JA188-189; JA228.

60. Colonial Williamsburg also admits that it permitted an adult to bring in an outside meal for her child with food allergies. That family did not pay Colonial Williamsburg for an entrée for the child with allergies. JA 217-218.

61. J.D.'s school paid full-price for him to sit in and experience the tavern even though he brought his own food. JA200-201; JA207; JA219-220. Colonial

Williamsburg would not have earned any additional money or otherwise benefitted financially in any way if J.D. had eaten its food.

2. Procedural History

On July 19, 2017, J.D. filed this lawsuit. Compl. JA9-21. On January 19, 2018, Colonial Williamsburg filed a motion for summary judgment. Def.'s Motion for Summary Judgment [Doc. No. 19]. Colonial Williamsburg contended, *inter alia*, that J.D. is not an individual with a disability and that it was not necessary for him to eat the medically safe meal that he had brought. Def.'s Mem. [Doc. No. 20]. J.D. filed an opposition brief explaining how he is an individual with a disability and why it was necessary for him to bring and eat a safe meal. Pl.'s Mem. [Doc. No. 27].

On March 28, 2018, the Magistrate Judge issued a report and recommendation. The Magistrate Judge held that J.D. could demonstrate that he is an individual with a disability. JA331. The Magistrate Judge explained that the ADA Amendments Act of 2008 ("ADAAA") "broadened the scope of what may be considered a disability." JA322. The Magistrate Judge took notice of the "ADAAA's commands that (1) courts should not consider the 'ameliorative effects of mitigating measures' in deciding whether an impairment substantially limits a major life activity; and (2) an episodic impairment is still a disability if it substantially limits a major life activity 'when active.'" JA323-324 (quoting 42

U.S.C. § 12102(4)(D), (E)(i)-(ii)). The Magistrate Judge noted that Congress cautioned that "the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations" and that "the question of whether an individual's impairment is a disability . . . should not demand extensive analysis." JA329 (quoting 122 Stat. 3553, § 2(b)(5)).

In light of the ADAAA's commandments, the Magistrate Judge held that J.D. could establish that he has a disability given the symptoms that his doctors and parents have stated result from ingestion of gluten. JA330. The Magistrate Judge credited the affidavit of Dr. Guerrerio, J.D.'s pediatric gastroenterologist at Johns Hopkins, regarding the nature and extent of J.D.'s symptoms and treatment. Dr. Guerrerio stated that consumption of gluten stunted J.D.'s growth and caused syncope, foot pain, abdominal pain, bowel problems, and fatigue among other significant symptoms. JA330-331. The Magistrate Judge noted that celiac disease is associated with an increased risk of developing cancer. JA330. The Magistrate Judge also noted Dr. Guerrerio's medical opinion that it is necessary for J.D. to adhere to a gluten-free diet. JA330. For these reasons, the Magistrate Judge held that J.D. can establish that he is an individual with a disability. JA331.

The Magistrate Judge held, however, that Colonial Williamsburg did not discriminate against J.D. when it refused to allow him to eat the medically safe

meal that he had brought. The Magistrate Judge acknowledged the existence of factual disputes regarding whether Colonial Williamsburg's chef could have safely prepared a gluten-free meal for J.D. JA335. The Magistrate Judge nonetheless asserted that the meal probably would have been safe because the proposed meal would have been baked chicken and fingerling potatoes which "ordinarily would not contain" gluten. JA337. The Magistrate Judge downplayed the chef's lack of knowledge about how to determine whether ingredients are in fact gluten-free. JA336-337. The Magistrate Judge then credited Colonial Williamsburg's chef's self-serving claims during deposition that had he prepared a meal for J.D. (which he did not in fact do), it would have been gluten-free. JA338-339.

The Magistrate Judge acknowledged that "there is often some level of risk associated with most human endeavors." JA340. The Magistrate stated that a person "with or without celiac disease who eats at a restaurant, exposes themselves to a risk that a meal might contain harmful pathogens" but did not consider J.D.'s history of repeated exposure to gluten when eating out even when promised gluten-free meals. JA340. The Magistrate Judge also faulted J.D. and his father for not having conducted a thorough inquiry into the chef's methods before deciding they wanted to eat the safe meal that they had brought, even though past efforts by J.D. and his family to conduct such investigations prior to eating out did not prevent accidental exposure. JA341-342.

Finally, the Magistrate Judge stated that if J.D. wanted to have full and equal enjoyment of the educational experience that the tavern offered his classmates, J.D. could have "postponed consumption" of his safe meal "until a later time." JA342. The Magistrate Judge did not explain how J.D.'s going hungry while watching his classmates eat would have resulted in full and equal access or identify when he would have had time later to eat given the school's packed itinerary for the day.

J.D. timely filed objections to the Magistrate Judge's report and recommendation. On June 1, 2018, the District Court adopted in full the Magistrate Judge's report and recommendation. On June 22, 2018, the District Court amended its order to correct a typographical issue. On June 26, 2018, J.D. filed the instant appeal. On July 25, 2018, the District Court awarded costs to the Colonial Williamsburg in the amount of $5,145.40.

SUMMARY OF THE ARGUMENT

This is a case about a child who must eat strictly gluten-free meals and for whom cross-contact with even minute amounts of gluten will result in prolonged symptomology including liver damage. For this reason, J.D.'s disability requires that he eat food guaranteed to be gluten-free. If a mistake is made on the preparation of a meal for J.D., he will not know until he starts experiencing

debilitating symptoms including but not limited to pain, mental confusion, loss of consciousness, and elevated liver enzymes signaling damage to his liver.

There are no standards or regulations governing the use of the term "gluten-free" in restaurants or restrictions on how food must be prepared to be called "gluten-free." The closest comparable guidelines apply to pre-packaged foods and permit labeling of food as "gluten-free" even if it contains 20 parts per million (ppm) of gluten. 21 C.F.R. § 101.91(a)(3)(ii). Therefore, "gluten free" does not mean 100% gluten-free and gluten-free labeling does not mean that the food is safe for individuals who are extremely sensitive to gluten. *See id.*

In the past, J.D.'s family has eaten at restaurants and was promised gluten-free meals. However, on several occasions despite assurances from chef's and restaurant staff, the meals that were promised to be gluten-free in fact contained gluten and J.D. was sick for months afterwards. In the wake of these painful experiences and on the advice of the medical experts who prescribed a strictly gluten-free diet, J.D. is not able to eat food prepared in general commercial kitchens.

The question presented in this case is whether, taking the facts in the light most favorable to J.D., he has demonstrated that it was necessary for him to eat his safe food from home in order to participate in all aspects of his class trip to Colonial Williamsburg. The Magistrate Judge erred in concluding that despite

J.D.'s disability and history of past exposure to gluten when eating purported gluten-free meals at restaurants, he nonetheless should have risked eating the food at Colonial Williamsburg rather than eat a guaranteed safe meal that he had brought from home so that he could enjoy the historic venue. Likewise, the Magistrate Judge erred in concluding that Colonial Williamsburg did not discriminate against this child because he was given the choice of risking his health by eating a meal that he could not be sure was in fact gluten-free, sitting out back alone in the rain, or simply watching while all his classmates ate. None of these choices, however, provided J.D. with an opportunity equal to that of his classmates to participate fully and equally in the educational experience of eating, socializing, and being entertained in the atmosphere of a replica of a colonial-era tavern.

The Magistrate Judge should have asked how Colonial Williamsburg is enjoyed by individuals without disabilities and determined what was necessary for a person with a disability to have a like experience. J.D.'s extreme sensitivity to gluten and past history of reactions when eating purportedly gluten-free meals when eating out make it necessary for him to bring guaranteed-to-be-gluten-free meals in order to participate fully and equally in educational activities such as a school trip to Colonial Williamsburg. His disability precluded him from eating any food prepared at Colonial Williamsburg because he could not know with 100% certainty that any such food would in fact be gluten-free. Colonial Williamsburg

refused to let him eat his medically safe meal with his classmates, forcing him to eat that meal outside in the rain while his classmates enjoyed the environment of a colonial-era tavern. Colonial Williamsburg discriminated against J.D. on the basis of disability when it excluded him from the tavern.

STANDARD OF REVIEW

This Court reviews *de novo* a District Court's grant of summary judgment. *See, e.g.*, *Am. Entertainers, LLC v. City of Rocky Mount*, 888 F.3d 707, 713 (4th Cir. 2018).

On a motion for summary judgment, all factual inferences must be drawn against the moving party and in favor of the non-moving party. *Reyazuddin v. Montgomery Cnty.*, 789 F.3d 407, 413 (4th Cir. 2015) (citation omitted). "The court therefore cannot weigh the evidence or make credibility determinations." *Id.* (citation omitted). If, after drawing all inferences in favor of the non-moving party, there are genuine issues of material fact, then the motion for summary judgment must be denied. *See id.*

ARGUMENT

The Americans with Disabilities Act ("ADA") was enacted to end exclusion and segregation by integrating individuals with disabilities into all facets of society. *See generally* 42 U.S.C. § 12101.[2] Title III of the ADA accordingly prohibits unequal or separate treatment of individuals with disabilities. 42 U.S.C. § 12182(b)(1)(A)(ii), (iii) (defining as discrimination offering service that is "not equal to" or "that is different or separate from that provided to other individuals"); 28 C.F.R. § 36.202(b), (c) (same); 28 C.F.R. § 36.203(b) (stating that a public accommodation cannot require an individual with a disability to accept a service that is "separate or different").

Title III defines discrimination to include the failure to make reasonable modifications to policies, practices, or procedures when necessary to ensure that all services and experiences that a place of public accommodation has to offer are fully and equally accessible to the individual with a disability. 42 U.S.C. § 12182(b)(2)(A)(ii) (reasonable modification mandate); *id.* § 12182(a) ("full and equal enjoyment" mandate). Accordingly, Title III covered entities, such as

[2] For purposes of this appeal only, Plaintiff analyzes together the claims brought under the Americans with Disabilities Act, 42 U.S.C. § 12181, *et seq.*, Rehabilitation Act, 29 U.S.C. § 794, and Virginians with Disabilities Act, Va. Code § 51.5-1, *et seq*. *See e.g.*, *Hoye v. Clarke*, Civ. A. No. 7:14cv00124, 2015 U.S. Dist. LEXIS 68237, at *25 (W.D. Va. May 27, 2015) (analyzing claims together).

Colonial Williamsburg, must make reasonable modifications to policies, practices, and procedures when necessary to ensure that an individual with a disability has full and equal access to all services and experiences that Colonial Williamsburg has to offer. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a). Courts read the term "necessary" in conjunction with the ADA's guarantee of "full and equal enjoyment" which means "more than mere access to public facilities." *Baughman v. Walt Disney World Co.*, 685 F.3d 1131, 1135 (9th Cir. 2012) (quoting 42 U.S.C. § 12182(a)). Accordingly, covered entities "must start by considering how their facilities are used by non-disabled guests and then take reasonable steps to provide disabled guests with a like experience." *Id.*; *see also A.L. v. Walt Disney Parks & Resorts US, Inc.*, -- F.3d --, 2018 U.S. App. LEXIS 22990, at *78 (11th Cir. Aug. 17, 2018) (quoting *Baughman*, 685 F.3d at 1135); *Argenyi v. Creighton Univ.*, 703 F.3d 441, 449 (8th Cir. 2013) (same).

Courts have accordingly rejected the argument that "necessary" means merely "can't do without" since under such a narrow interpretation,

> the ADA would require very few accommodations indeed. After all, a paraplegic *can* enter a courthouse by dragging himself up the front steps, *see Tennessee v. Lane*, 541 U.S. 509, 513-14, 124 S. Ct. 1978, 158 L. Ed. 2d 820 (2004), so lifts and ramps would not be "necessary" under [such] reading of the term. And no facility would be required to provide

> wheelchair-accessible doors or bathrooms, because disabled individuals could be carried in litters or on the backs of their friends.

Baughman, 685 F.3d at 1134-35 (emphasis in original). Rather, the covered entity must provide modifications in such a way as to ensure that the individual has the comfort and dignity to have "full and equal enjoyment" of all the services and experiences that the covered entity has to offer. *See id.* at 1135.

In *Baughman v. Walt Disney World Co.*, the Ninth Circuit rejected Disneyland's argument that an individual with a mobility impairment had to use one of the park's wheelchairs rather than her own Segway. The court credited the plaintiff's assertion that the Segway allowed her "to be at eye-level with other guests and staff, rather than having everyone look down on her" and would make her "feel more comfortable and dignified." *Id.* at 1136. The court explicitly rejected Disney's argument that it is "too darn bad" if using Disneyland's wheelchairs are somehow "uncomfortable or difficult." *Id.* The test was not whether the plaintiff could do without the Segway but whether the Segway was necessary for her full and equal enjoyment of the park. *See id.*; *see also, e.g.*, *Oregon Paralyzed Veterans of America v. Regal Cinemas, Inc.*, 339 F.3d 1126, 1133 (9th Cir. 2003) (holding "simply inconceivable" that requiring wheelchair users to sit in the front rows of a theater "could constitute 'full and equal enjoyment' of movie theaters by disabled patrons" when they had "to crane their

necks and twist their bodies in order to see the screen, while non-disabled patrons [had] a wide range of comfortable viewing locations from which to choose").

In *Lentini v. Cal. Ctr. for the Arts*, 370 F. 3d 837 (9th Cir. 2004), a theater refused to allow an individual with a disability to bring a service animal that had barked at a performance. The theater argued, *inter alia*, that it was not necessary to allow the service dog because the theater had "special ushers available to assist" the plaintiff. *Id.* at 844. The court rejected this argument, noting the bond between the plaintiff and her service dog meant that excluding the dog would result in excluding the plaintiff as well. *Id.* at 845. The court also noted that the "specially-trained ushers" could not provide the same assistance that the dog did. *Id.*

These cases, taken together, show that a plaintiff's reliance on a specific form of accommodation can render that modification necessary for full and equal enjoyment, as with the *Baughman* plaintiff's need to use her Segway instead of the park's wheelchairs and the *Lentini* plaintiff's need to bring her service dog instead of relying on the theater's "specially-trained ushers." Even if a covered entity proffers an alternative modification that might provide access, such modification still fails if it does not accord the plaintiff the comfort and dignity necessary for that plaintiff to have "full and equal enjoyment" of all that the entity has to offer. *Baughman*, 685 F.3d at 1135 (quoting 42 U.S.C. § 12182(a)).

Whether an entity subject to the Americans with Disabilities Act has taken the necessary steps to ensure full and equal access is a fact-specific inquiry. For instance, in the just-decided case *A.L. v. Walt Disney World Co.*, the Eleventh Circuit held that the determination of "what is 'necessary' requires multiple fact findings regarding . . . disputed . . . characteristics of plaintiff's disabilities. Until those fact findings are made [at] trial, it cannot be determined what is or is not necessary under the ADA." *Id.* at *83-84. *See also, e.g., Liese v. Indian River Cnty. Hosp. Dist.*, 701 F.3d 334, 342-43 (11th Cir. 2012) (stating "the obvious" that whether necessary accommodations have been provided is "inherently fact-intensive") (collecting cases)*; cf. Feldman v. Pro Football, Inc.*, 419 F. App'x 381, 391 (4th Cir. 2011) (what is necessary for full and equal access is context-specific).

In this case, the District Court held that J.D. could prove that he is an individual with a disability.[3] However, for the reasons described below, the District Court erred in (1) ignoring the necessity for J.D. to bring his own safe food based on the risks of eating out and J.D.'s past exposure to gluten at restaurants that had promised him gluten-free meals; and (2) drawing all inferences in favor of Colonial Williamsburg in asserting that J.D. could have eaten a hypothetical meal the chef might have prepared despite acknowledging that this would impose on J.D. "some level of risk." For the reasons described below, the District Court erred

[3] Colonial Williamsburg did not file a cross-appeal challenging the District Court's holding regarding J.D.'s disability.

in granting summary judgment when there were genuine issues of material fact on these issues.

A. The District Court Erred in Holding that It Was Not Necessary for Plaintiff to Eat His Medically Safe Meal

J.D. and his family learned the hard way that even restaurant meals that are purportedly gluten-free may in fact contain sufficient gluten to make him seriously ill. The consequences J.D. suffered as a result of ingesting gluten at restaurants in the past were severe. J.D. was ill for months with a rise in liver enzymes documented six months after the incident. These exposures to gluten stunted his growth, ravaged his digestive system, and left him with long-term, debilitating symptoms.

Given the special nature of severe food sensitivity disabilities like J.D.'s, a necessary accommodation is having control over the food that one eats, from preparation to consumption. Only when individuals with severe food sensitivity disabilities take such steps can they truly trust the food that they eat. To expect otherwise is to ask such individuals to take a chance by relying on other people to prepare medically safe foods for them – people who may not be fully knowledgeable about an individual's degree of disability or gluten-free meal preparation and who may or may not take necessary precautions to prepare gluten-free meals such as buying ingredients that are truly gluten-free and taking steps to

avoid cross-contact. It is a daunting challenge navigating an environment where there are no regulations ensuring that chefs know how to prepare medically gluten-free meals.

Given these risks, J.D.'s family prepared a safe meal for him to bring to Colonial Williamsburg. J.D. asked only to be allowed to eat with his classmates at Colonial Williamsburg, having paid full price to be there. J.D. and his family did not ask Colonial Williamsburg to do anything except allow him to have an experience equal to that of his peers. Colonial Williamsburg nonetheless discriminated by refusing to let him eat in the tavern his guaranteed-to-be-gluten-free meal, telling him that he had to assume risk in eating food prepared in the tavern's commercial kitchen, not eat, or eat out back in the rain.

This case is not about whether a chef in theory could have prepared a gluten-free meal; this case is about whether J.D. must accept "some level of risk" in eating a chef's meal rather than his own safe meal that was guaranteed to be gluten-free. With so much at stake with respect to J.D.'s health, the presence of "some level of risk" was an unacceptable risk for him. Just as it would not be safe for a person to play Russian roulette despite knowing that most chambers are empty and that he will "probably" survive, it is not safe for a person with a gluten sensitivity disability like J.D.'s to rely on a chef that could hypothetically prepare a gluten-free meal. J.D. already lost this game of chance on multiple occasions

when he ordered purportedly gluten-free meals, was exposed to gluten, and was sick for months afterwards. Given that it is too dangerous for J.D. to play these games of probability, it is necessary for him to eat medically safe meals that he brings.

It was discriminatory for Colonial Williamsburg to insist that J.D. give up his guaranteed-to-be-gluten-free meal in favor of eating an uncertain meal that would be stress-inducing and potentially result in severe health consequences. *See, e.g.*, *Baughman*, 685 F.3d at 1135-36 (theme park could not insist that an individual with a disability use a different modification that might result in loss of dignity); *Lentini*, 370 F. 3d at 845 (theater could not insist that the individual with a disability forego a service dog that provides emotional support). Accordingly, it is necessary J.D. to eat his medically safe meal so that he can participate fully and equally in the educational experience that is Colonial Williamsburg without placing his health at risk. 42 U.S.C. § 12182(b)(2)(A)(ii) (reasonable modification mandate); 28 C.F.R. § 36.302(a) (same).

The District Court erred in nonetheless asserting that J.D. should have taken such risk in eating the tavern's food in lieu of his guaranteed-to-be-gluten-free meal. The District Court erred in relying on a series of unreported cases engaging in cursory analysis whether an individual was entitled to his or her preferred modification.

For instance, the District Court relied on the unreported and since-overruled decision of *J.T.I. and K.J.I. v. Walt Disney Parks and Resorts U.S.*, No. 6:14cv1931-Orl-22GJK, 2016 U.S. Dist. LEXIS 194403 (M.D. Fla. Sept. 26, 2016) for the proposition that J.D. sought a modification that was not necessary. In that case, the district court had held that individuals with autism could wait for amusement rides despite evidence that they lacked such mental capacity. *Id.* at *17-18. The Eleventh Circuit reversed, holding that there were genuine issues of material fact. *A.L.*, -- F.3d --, 2018 U.S. App. LEXIS 22990, at *78-84. Similarly, there are genuine issues of material fact in this case whether J.D. needs the certainty of the guaranteed-to-be-gluten-free meal that he had brought with him in order to be able to eat at Colonial Williamsburg.

The Magistrate Judge also erred in relying on *Coleman v. Phoenix Art Museum*, No. cv08-1833-PHX-JAT, 2009 U.S. Dist. LEXIS 38905 (D. Ariz. April 22, 2009), *aff'd*, 372 F. App'x 793 (9th Cir. 2010). In that case, the plaintiff wanted to use a special wheelchair that would have endangered others and the paintings in the museum and the plaintiff had failed to offer any explanation why the wheelchair was necessary. *Id.* at *6-7. In this case, J.D. has offered medical evidence explaining the need for gluten-free meals and Colonial Williamsburg has not produced any objective evidence that allowing him to eat his own food would threaten anyone else's safety.

In two other unreported cases that the Magistrate Judge relied on, the plaintiff either admitted that the requested modification was not necessary or the plaintiff's expert did not state that such modification was necessary. *See Murphy v. Bridger Bowl*, 150 F. App'x 661, 663 (9th Cir. 2005) (plaintiff's own expert did not state that the requested modification was necessary); *Logan v. Am. Contract Bridge League*, 173 F. App'x 113, 117 (3d Cir. 2006) (plaintiff admitted that the requested modification was not necessary). In this case, however, J.D's doctor has stated that it is medically necessary for him to have gluten-free meals and J.D. has a history of debilitating symptoms following exposure to gluten when eating purportedly gluten-free meals in restaurants.

Moreover, in the cases that the Magistrate Judge relied upon involving auxiliary aids and services, the person with a disability knows during use whether the aid/service is effective for them and has the opportunity to request a substitute without threat to their own health. For instance, at a restaurant a person who is blind and given a Braille menu but who cannot read Braille can request that staff instead read aloud the menu to provide access to the content. In contrast, J.D. has no way to determine whether a purported gluten-free meal is in fact safe to eat until it is too late. Even food that is often marketed as gluten-free may not in fact be gluten-free. Indeed the only regulation of the term "gluten-free" that exists in the context of manufactured food provides that a product containing 20 ppm of gluten

can be labeled as gluten-free, even though it actually contains gluten. Chefs are also human and can make mistakes and make promises they may not realize they are unqualified to make. Plaintiff learned this the hard way when he and his family ate purportedly gluten-free meals out only to later learn that the meals in fact contained gluten. When such error occurs, J.D. suffers debilitating symptoms for months.

The Magistrate Judge erred in suggesting that J.D. and his father should have investigated the kitchen's facilities and asked more questions of the chef about how any allegedly gluten-free meal would have been prepared or otherwise provided advance notice of some kind. However, J.D. and his father were not asking Colonial Williamsburg to do anything except allow J.D. to enjoy the tavern atmosphere with his classmates. Further, as J.D.'s own experience shows, conducting such an investigation does not reduce the risk of gluten exposure. On past occasions, J.D.'s family made such inquiries and then ordered purportedly gluten-free meals that in fact contained gluten. J.D.'s medical history and past exposure to gluten at well-meaning restaurants made it necessary for him to bring his own guaranteed-to-be-gluten-free meals in order for him to have that certainty that the food he eats is truly gluten-free. *See, e.g.*, *Baughman*, 685 F.3d at 1135 (holding that covered entities must ensure that modifications provide the comfort

and dignity necessary for the individual with a disability to have "full and equal enjoyment").

Moreover, the record establishes multiple respects in which food prepared in Colonial Williamsburg's kitchen was unsafe for J.D. Plaintiff's expert confirms that while Shields Tavern might be safe for fad dieters and for those with lesser degrees of sensitivity, the use of ingredients with hidden gluten, shared pans, utensils, and equipment and the lack of knowledge of the chef rendered it unsafe for J.D. regardless of what the chef might have said or promised. Colonial Williamsburg has offered no rebuttal expert report. At minimum, Plaintiff's uncontested expert report creates genuine issues of material fact for the jury to resolve.

The Magistrate Judge further erred in holding that J.D. could have gone hungry and eaten at a later time rather than take a chance with Colonial Williamsburg's food. Unlike restaurants where people go for the purpose of eating, Colonial Williamsburg is an educational experience and J.D. was there on a school trip to learn about and live American history. Any food that anyone ate at Colonial Williamsburg was incidental to that educational experience. J.D. and his classmates were there for a full day of activities and their time at Shields Tavern was the time allotted for them to experience what social life was like in early America together when gathered around a meal. Colonial Williamsburg singled

out J.D. by forcing him to eat apart from his classmates, depriving him of a similar experience to non-disabled guests, in violation of the ADA. *E.g.*, 28 C.F.R. § 36.203(b) (stating that a public accommodation cannot require an individual with a disability to accept a service that is "separate or different").[4]

In sum, a jury could find that Colonial Williamsburg cannot force J.D. to substitute his medically safe meal with a different meal that in J.D's past similar experiences turned out to contain gluten. Since eating such guaranteed-to-be-gluten-free meals was safer than assuming "some level of risk" in eating food prepared in a general commercial kitchen, it was necessary for J.D. to eat his own food in order to have that same level of access to Shields Tavern as his classmates.

B. The District Court Erred in Drawing Factual Inferences in Favor of Colonial Williamsburg, the Non-Moving Party

The District Court, in adopting the Magistrate Judge's report and recommendation, erred in drawing numerous factual inferences in favor of Colonial Williamsburg, the moving party, and holding that J.D. should have eaten the food at Colonial Williamsburg despite the severity of his gluten sensitivity disability.

The Magistrate Judge erred in asserting that any meal that the chef might have prepared for J.D. was likely to be gluten-free even though the chef never

[4] Taking the Magistrate Judge's reasoning to its logical conclusion, Colonial Williamsburg could in the future force individuals such as J.D. to leave Colonial Williamsburg entirely in order to eat a medically safe meal.

actually prepared any such meal. The Magistrate Judge erred in focusing instead on all the ways in which the chef might have prepared a gluten-free meal while downplaying or ignoring the ways that the meal could have contained gluten, including specific details offered by an expert in gluten-free food preparation. Such a fact-intensive question is for the jury to decide.

At the outset, the Magistrate Judge ignored J.D.'s history of repeatedly getting sick when eating purportedly gluten-free meals prepared by general commercial kitchens. J.D.'s multiple experiences demonstrate that he is at significant risk when he eats such food. Restaurants are busy and chefs are human. They make occasional mistakes. For most people who eat out, this is not an issue. They can spot the wrong order and send it back. For J.D., however, gluten is something invisible that he cannot see or otherwise perceive until is too late.

J.D. and his family have been traumatized by these experiences and need that certainty in knowing that any food J.D. eats is truly gluten-free in order to allow him to participate in events such as the school trip to Colonial Williamsburg. J.D.'s history alone raises genuine issues of material fact whether he should have been forced to assume "some level of risk" in eating any food that Colonial Williamsburg prepared for him. Whether the chef would have in fact prepared a gluten-free meal was uncertain and forcing J.D. to eat that food would have placed him in considerable distress with respect to his health. The Magistrate Judge erred

in ignoring the discriminatory impact of imposing such uncertainty or discomfort on J.D. *See, e.g.*, *Baughman*, 685 F.3d at 1135-36 (same); *Lentini*, 370 F.3d at 845 (same).

The Magistrate Judge further erred in downplaying J.D.'s expert's report and conclusions that J.D. was at considerable risk if he ate food at Colonial Williamsburg. Colonial Williamsburg offered no rebuttal expert report. J.D.'s expert report describes in detail the ways in which any meal prepared at Colonial Williamsburg would have placed J.D. at significant risk. The Magistrate Judge should have credited the wealth of evidence about J.D.'s disability, the history of his reactions when eating out, and his expert report. *See, e.g.*, *A.L.*, -- F.3d --, 2018 U.S. App. LEXIS 22990, at *80-84 (holding that testimony of autistic plaintiffs' parents and expert reports created genuine issues of material fact regarding a modification's necessity under the ADA).

Instead, the Magistrate Judge engaged in lay speculation in concluding that J.D. should have disregarded his medically safe meal in favor of eating whatever Colonial Williamsburg offered him. For instance, the Magistrate Judge erred in speculating that any meal the chef at Colonial Williamsburg would have prepared would likely have been gluten-free because it would have been chicken and potatoes. Gluten is ubiquitous, however, and can be found in many foods that one might not initially suspect would contain gluten. Gluten "is used as a thickener, a

binder and an anti-caking agent" and is present in many foods that people might not think contain gluten such as dressings, marinades, "natural flavorings" and spices. JA174. Consequently, even if chicken and potatoes do not ordinarily contain gluten, the manufacture and processing of those foods for purchase could have resulted in gluten being added as an ingredient. JA174. Moreover, food may be prepared on production lines that were also used for gluten-containing foods resulting in cross-contamination. Or, cross-contact could have occurred in the tavern's own kitchen which admittedly does not use dedicated equipment and utensils.

Given the severity of J.D.'s disability, it was essential for the chef to be familiar with labels regarding gluten-free foods before cooking anything for a person as sensitive to gluten as J.D. Here, the chef's knowledge was not only lacking but downright concerning. The chef would not have known whether any of the ingredients he used were truly gluten-free because he thought that all he needed to do was check to see if the label said the product contained gluten when no laws require food labels to indicate whether the food contains of gluten.

Further, even if the chicken and potatoes were in fact gluten-free when purchased, the chef's methods of preparation were highly questionable. He testified that he would have prepared any purportedly gluten-free meal *after* having prepared fried chicken for dozens of people using flour containing gluten. As

Plaintiff's expert explained, best practices require preparing gluten-free meals *before* other meals in order to minimize the risk of flour floating around in the kitchen and landing on a plate, pan, or utensil and finding its way into food meant for a person with a gluten sensitivity disability. Colonial Williamsburg also admitted that it did not have a dedicated gluten-free preparation area or dedicated pans or spatulas – the equipment the chef would have used to prepare this mythical meal for J.D. would have been ones that were contaminated by gluten.

The Magistrate Judge erred in crediting the chef's self-serving testimony during litigation about the precautions he theorized he might have taken prior to preparing any meal for J.D. It is highly questionable whether the chef would have taken these precautions that he mused about post-litigation, much less all of the necessary precautions that Plaintiff's expert described in her report.

The Magistrate Judge also erred in relying on the chef's having previously prepared purportedly gluten-free meals for other individuals. The other individuals who requested the meals may have done so despite the lack of any medical necessity. They may also be able to tolerate higher levels of gluten than J.D. who cannot tolerate even minute amounts of gluten. Moreover, since there is typically a delay in manifestation of symptoms after gluten ingestion, even individuals who got sick as a result of eating the chef's food might not have traced the cause to Colonial Williamsburg.

As described, the Magistrate Judge's assertion that J.D. should have accepted "some level of risk" in eating the chef's prepared gluten-free meal would have required J.D. to depart from his medically prescribed diet and take the unacceptable risk that the meal would in fact contain gluten – no one should be required to play Russian roulette where they "probably" survive the encounter with the loaded gun. The Magistrate Judge erred in disregarding the psychological harm from potential gluten exposure that Colonial Williamsburg would have imposed on J.D.

In sum, the Magistrate Judge erred in disregarding J.D.'s history of severe reactions after eating purportedly gluten-free meals at restaurants, disregarding Plaintiff's unrebutted expert report, and engaging in improper lay speculation that any meal prepared for J.D. would have likely been gluten-free and that he should have eaten that meal despite uncertainty about whether it was in fact gluten-free. These genuine issues of material fact about whether J.D. should have eaten that food instead of the guaranteed-to-be-gluten-free meal that he brought from home are questions for the jury. *Reyazuddin*, 789 F.3d at 413 (stating that the district court "cannot weigh the evidence or make credibility determinations").

C. Colonial Williamsburg Denied J.D. a Reasonable Modification by Refusing to Allow Him to Eat His Medically Safe Meal

The District Court did not reach the issue whether it would have been a reasonable modification to allow J.D. to eat the medically safe meal that he had brought. *See* JA343 (declining to reach the issue).

Title III requires places of public accommodation, such as Colonial Williamsburg, to make reasonable modifications to policies, practices, and procedures when necessary to ensure that an individual with a disability has full and equal access to all that the Colonial Williamsburg has to offer. 42 U.S.C. § 12182(b)(2)(A)(ii); 28 C.F.R. § 36.302(a). What constitutes a reasonable modification is a fact-specific inquiry. *E.g.*, *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (2nd Cir. 1995).

In this case, Colonial Williamsburg is akin to an amusement park. Any food that Colonial Williamsburg provides is incidental to its mission of educating people about colonial America. Permitting J.D. to bring a medically safe meal would have enabled him to participate fully and equally in that educational experience without interfering with others' enjoyment of that experience. As Plaintiff's expert explained, businesses, including restaurants, routinely allow people with severe food sensitivities or allergies to bring in outside meals.

Moreover, Colonial Williamsburg itself regularly allows outside food. Colonial Williamsburg's employees testified in deposition that the manager has

discretion to allow outside food. Colonial Williamsburg admits that it has allowed people with food allergies to bring in entire meals, including a plain chicken breast, exactly the food J.D. brought in. Colonial Williamsburg also admits that it allows outside cakes and wine and food for children. They also allow anyone to bring in outside foods such as mints.

Further, J.D.'s school had already paid for the meal that Colonial Williamsburg would have prepared for him. Colonial Williamsburg stood to gain no additional profit from forcing him to eat food that its own chef prepared. Colonial Williamsburg has also allowed other individuals with food sensitivities to bring their own foods. Since J.D.'s meal would not have cost Colonial Williamsburg anything and it has previously allowed other individuals to bring in their own foods, a jury could find that his requested modification was reasonable. *See, e.g.*, *Brooks v. Colo. Dept. of Corrections*, 715 F. App'x 814, 818-19 (10th Cir. 2017) (holding that a prison could violate the ADA by failing to allow prisoner with ulcerative colitis to eat special meals as had been previously allowed); *Herbert v. CEC Entertainment, Inc.*, Civ. A. No. 6:16-cv-00385, 2016 U.S. Dist. LEXIS 126756, at *15-16 (W.D. La. July 6, 2016) *report and recommendation adopted*, 2016 U.S. Dist. LEXIS 126763 (W.D. La. Sept. 16, 2016) (holding that allowing outside food was a reasonable modification given the defendant had allowed such modification in the past).

For the foregoing reasons, a jury could find that allowing J.D. to eat his medically safe meal was both necessary and reasonable.

D. The District Court Erred in Awarding Costs to Colonial Williamsburg

Since the District Court erred in granting summary judgment despite the existence of genuine issues of material fact, this Court should vacate the award of costs to Colonial Williamsburg. *See, e.g.*, *Argenyi*, 703 F.3d at 451 (reversing grant of summary judgment for defendant and holding that the defendant was not entitled to costs because it was not a prevailing party).[5]

CONCLUSION

Fundamentally, this is not a case about whether a person with a severe food sensitivity disability can just bring whatever food that person wants to any restaurant. This is a case where J.D. and his father found themselves between a rock and a hard place. They were at Colonial Williamsburg on a school field trip. The purpose of the trip was educational and the food was incidental. The District Court erred in concluding that J.D. should have assumed "some level of risk" in eating Colonial Williamsburg's food instead of his own guaranteed gluten-free meal or else gone hungry and eaten later, an option that would have required J.D. to miss substantive educational content on a tightly scheduled visit and which

[5] The District Court awarded costs *after* J.D. filed the instant appeal that divested that court of any further jurisdiction in the case.

would still have separated him from his classmates. Such unpalatable choices do not result in the full and equal access that the ADA requires. For the foregoing reasons, the District Court erred in granting summary judgment and awarding costs to Colonial Williamsburg.

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fourth Circuit Rule 34(a)(1), Appellant requests that this Court schedule oral argument in this matter. This case raises a difficult question of first impression and oral argument will assist the Court in deciding this appeal.

/s/ Mary C. Vargas
Mary C. Vargas
STEIN & VARGAS, LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Tel: (240)793-3185
Mary.Vargas@SteinVargas.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 10,413 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman, font size 14.

/s/ Mary C. Vargas
Mary C. Vargas
STEIN & VARGAS, LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Tel: (240)793-3185
Mary.Vargas@SteinVargas.com

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that on September 19, 2018, I electronically filed the foregoing Brief with the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system, thereby serving all persons required to be served, listed below. Any counsel not ECF registered will be served via Federal Express (FedEx):

Emily Rebecca Gantt
Robert W. McFarland
MCGUIREWOODS, LLP
Suite 9000
9000 World Trade Center
101 West Main Street
Norfolk, VA 23510-1655
757-640-3731

Dana Lewis Rust
Micah Block Schwartz
MCGUIREWOODS, LLP
800 East Canal Street
P. O. Box 3916
Richmond, VA 23219
804-775-1082

/s/ Mary C. Vargas
Mary C. Vargas
STEIN & VARGAS, LLP
10 G Street NE, Suite 600
Washington, D.C. 20002
Tel: (240)793-3185
Mary.Vargas@SteinVargas.com

Counsel for Plaintiff-Appellant