Demythologizing FERPA, the IDEA and Section 504: A School Nurse's Guide to Understanding FERPA, the IDEA and Section 504

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A Word of Caution

No two cases are exactly alike. This material is designed to provide school nurses with a broad understanding of the Family Educational Rights and Privacy Act (FERPA), the Individuals with Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act (Section 504). This material does not include every aspect of the law. You are strongly encouraged to seek a legal opinion from your school district's legal counsel regarding any specific case.

I. Overview

The purpose of this seminar is to provide the school nurse with information on the laws pertaining to the Family Educational Rights and Privacy Act, the Individuals with Disabilities Act, and Section 504 of the Rehabilitation Act. This material does not include every aspect of the law and you are strongly encouraged to seek an opinion from your school district's attorney regarding a specific case.

II. The Family Educational Rights and Privacy Act (FERPA)

As implied by the title, FERPA addresses the privacy and access rights of parents and adult students in their educational records. Under FERPA, schools are required to protect the privacy rights of parents and adult students through the limitation of disclosure and to further the access rights through the opportunity to inspect, review and seek to amend student records.

The intent of FERPA is to extend privacy and access rights to "education records." The statute defines educational records as: "those records, files, documents, and other materials which:

i. Contain information directly related to a student; and
ii. Are maintained by a school district or by a person acting for a school district.

20 U.S.C. 1232g(a)(4)(A).

FERPA creates a general presumption that a school district may not release the education records, or personally identifiable information contained in educational records, of a student without the prior written consent to the disclosure. This general presumption is ameliorated by two concepts: the concept of directory information and the concept of certain exceptions to the prior written consent rule.

A. Disclosure of Information in Health/Safety Emergencies

One such exception allows districts to disclose personally identifiable information from an education record to appropriate parties, including parents of an eligible student, in connection with an emergency if knowledge of the information is necessary to protect the health or safety of the student or other individuals. 34 C.F.R. 99.31(10); 34 C.F.R. 99.36(a). When making this determination, the district "may take into the totality of the circumstances pertaining to a threat to the health or safety of a student or other individuals." If the district "determines that there is an articulable and significant threat to the health or safety of a student or other individuals, it may disclose information from education records to any person whose knowledge of the information is necessary to protect the health or safety of the student or other individuals. If, based on the information available at the time of the determination, there is a rational basis for the

determination, the Department [of Education, Family Policy Compliance Office] will not substitute its judgment for that of the [district] in evaluating the circumstances and making its determination." 34 C.F.R. 99.36(c).

B. The Intersection Between FERPA and HIPAA

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) (enacted on August 21, 1996) required the Secretary of Health and Human Services to publicize standards for the electronic exchange, privacy and security of health information.

As a general rule, HIPAA's definition of protected health information excludes education records protected by FERPA. See 45 CFR 160.103. This means the use and disclosure of education records, as defined by FERPA is not subject to HIPAA regulations. The Office for Civil Rights has observed that, "While we strongly believe every individual should have the same level of privacy protection for his/her individually identifiable health information, Congress did not provide us with authority to disturb the scheme it had devised for records maintained by educational institutions and agencies under FERPA. We do not believe Congress intended to amend or preempt FERPA when it enacted HIPAA." The term "educational records" includes individually identifiable health information of students under the age of 18 created by a school nurse in a primary or secondary school receiving funds.

However, there are two circumstances in which a school district may become subject as a "covered entity," to HIPAA regulations:

1. A school district must comply with HIPAA if the district provides health insurance protection for its employees through a self-insurance plan.

2. A district may be a "covered entity" under HIPAA if the school district participates in a school based Medicaid program that seeks reimbursement for related services to a special education student who is Medicaid eligible and whose IEP describes the related services. HIPAA describes a 'covered entity' as a health care provider who transmits any health information in electronic form in connection with a transaction covered by 45 CFR 160.103. If the Medicaid reimbursement/billing information is transmitted electronically, the district must comply with the administrative burdens of the HIPAA privacy rule. This includes the responsibility on the part of a district as a covered entity to distribute a notice of privacy rights to the parents of students. One way to do such is to include the privacy rights notice annually in the student handbook.

Often the determination as to whether or not a school district is a "covered entity," can be a factually sensitive matter and therefore, may require advice from your legal counsel.

The HIPAA privacy regulations have the greatest impact on the ability of school districts to access medical care records. Special education administrators are frequently encountering circumstances where health care providers are rejecting a parentally signed release as being non-HIPAA compliant. The end result is that school districts are best advised to alter their release forms in order to ensure that they are HIPAA compliant.

III. The Individuals with Disabilities Education Act (IDEA)

A. The Philosophy Behind the IDEA

The key to understanding the IDEA lies in understanding the philosophy behind the IDEA. When Congress adopted the IDEA, it did such with the intent of ameliorating the systemic inequities that existed with regard to the education of individuals with disabilities. With the 1997 and 2004 reauthorizations of the IDEA, Congress set in law the educational concept of inclusion, by requiring that students with educational disabilities be included, to the maximum extent possible, in the regular education classroom.

1. A "Free Appropriate Education at Public Expense"

The fundamental concept behind the IDEA is that every student is entitled to a **free appropriate education at public expense ("FAPE").** The Act does not require a school to maximize the potential of each disabled child commensurate with the opportunity provided non-disabled children. Rather, Congress sought primarily to identify and evaluate disabled children, and to provide them with access to a free public education. A School District satisfies the requirement to provide a free appropriate public education by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. The "appropriateness" standard is a floor rather than a ceiling.

a. What is a "FAPE?"

According to the definitions contained in the Act, a "free appropriate public education" consists of special education and related services that are provided at public expense, under public supervision and direction, without charge, and which meet the standard of the State Educational Agency, include an appropriate preschool, elementary school, or secondary school education, and are provided in conformity with the individualized educational program required under the Act. 20 U.S.C.A. §1401(9); Ed 1102.01(s). School districts must provide a free, appropriate public education to children with disabilities who are between the ages of 3 and 21, and who have not yet received a regular high school diploma. See e.g. Ed 1102.01(r).

b. What are "Related Services?"

The term Related Services means transportation and such developmental, corrective and other supportive services required to assist a child with a disability to benefit from special education. 20 U.S.C.A. §1401(26); Ed 11002.04(q). Related services include the early identification and assessment of disabling conditions in children, but do not include medical devices that are surgically implanted, or the replacement of such devices. Id. The Act sets forth numerous examples of related services, including, but not limited to, the following: interpreting services, psychological services, recreation, including therapeutic recreation, social work services, **school nurse services designed to enable a child with a disability to receive a FAPE as described in the child's IEP**, and **medical services that are for diagnostic and evaluation purposes only**. Id. (emphasis added).

School health services and school nurse service are defined as "health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person." 34 CFR § 300.34(c)(13).

Medical services are defined as "services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services." 34 CFR § 300.34(c)(5).

c. The Test for Determining Whether You Are Providing a "FAPE"

As a checklist for adequacy under the Act, school districts must ensure that instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's Individualized Educational Program ("IEP").

A court's inquiry in suits brought under the IDEA is twofold. First, has the School District complied with the procedures set forth in the Act? Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? The Court's inquiry is really no different than the inquiry that every service provider should make when working with a student who has been identified as having an educational disability: **Is what I'm doing reasonably calculated to enable this student to make meaningful educational progress?**

B. The Role of the School Nurse on the IEP Team

The school nurse should be involved as a member of the IEP Team whenever a student's IEP Team (or Section 504 Team) is considering adding nursing services as a related service. If school nurse services are added to the student's IEP, then the nurse

will remain an active member of the IEP Team progress, and may be responsible for reporting progress on goals and objectives, ensuring that accommodations are provided, and/or providing direct services to the student. The school nurse would remain a member of the Team in situations where the nurse has a supervisory role in the provision of the health service, such as when a service has been delegated to a LPN.

In addition, in accord with New Hampshire regulations, the school nurse is a qualified examiner for hearing and vision screenings, both of which are required when a team suspects a student of having a specific learning disability. See Ed 1107.04; Table 1100.1.

C. The Provision of Medical Services in the School Setting

The case of Cedar Rapids Community School v. Garret F., 526 US 66 (1999) held that a school district is required to provide those non-physician medical services that may be required to assist a child with a disability to benefit from special education.

Facts: When Garret F. was four years old, his spinal column was severed in a motorcycle accident. He was paralyzed from the neck down, but "his mental capacities were unaffected. He is able to speak, to control his motorized wheelchair through use of a puff and suck straw, and to operate a computer with a device that responds to head movements."

He attended regular classes at the Cedar Rapids Community School District, and his academic performance "has been a success." However, he is ventilator dependent and "requires a responsible individual nearby to attend to certain physical needs while he is in school," such as "urinary bladder catheterization once a day, the suctioning of his tracheotomy tube as needed, but at least once every six hours, with food and drink at lunchtime, in getting into a reclining position for five minutes of each hour, and ambu bagging occasionally as needed when the ventilator is checked for proper functioning."

During his early years at school, his family provided for his physical care during the school day by hiring a licensed practical nurse. Eventually, however, his parents requested that the District fund the health care services that the student required during the school day. The District denied the request, on the basis that it was not required to provide one-on-one nursing services.

Garret's parents requested due process, and prevailed. On appeal, the decision was affirmed by both the District Court and the Court of Appeals. The District also appealed to the United States Supreme Court.

Held: For the parents. The Court noted that the student required one-on-one nursing services if he were to remain in school, and that "services that enable a disabled child to remain in school during the day provide the student with 'the meaningful access to education that Congress envisioned'" when it adopted the IDEA.

Thus, the Court noted that it had previously held that "a specific form of health care (clean intermittent catheterization) that is often, though not always, performed by a nurse is not an excluded medical service." Id. (citing Irving Indep. Sch. Dist. v. Tatro, 468 U.S. 883 (1984)).

In In re: Student with a Disability, 40 IDELR 245 (Wis. SEA Dec. 19, 2003), the hearing officer found that the IDEA's requirement that school districts provide students with school health services does not mean that schools are required to provide students with detailed nursing care plans.

Facts: Student, a 14 year old, 9th grade girl, was eligible for services under the IDEA due to an orthopedic impairment, other health impairment and speech and language impairment. She was diagnosed with athetoid quadriplegia cerebral palsy, was wheelchair bound, had a seizure disorder, dysphagia (a swallowing disorder), GE reflux disorder, orthopedic problems, and was incontinent. She was non-verbal and communicated primarily with head nods. She had an implanted Mic-key button that allowed her to receive all nutrition directly into her stomach via a G-tube. In addition, in the area of her Mic-key button, the skin was fragile and prone to open sores that heal and open again.

During her 3 year reevaluation in March 2003, an evaluation report noted that she was medically stable and recommended that the school health services listed in her IEP be continued.

The Student's IEPs for the 2002-03 and 2003-04 school year indicate that the Student needs related services to benefit from special education, including numerous school health services. The school health services in both IEPs were listed under 13 headings, as follows: 1) G-tube feeding, 2) airway management, 3) seizure management, 4) transferring and mobility, 5) oral fluids, pureed foods, 6) emergency procedures, 7) medical administration, 8) communication, 9) personal hygiene, activities of daily living assistance, 10) nursing care, 11) maintenance of medical records, forms, protocols, procedures and physician orders, 12) ROM/flexibility exercises, and 13) staff in-service and training. All of the health services were provided by the school nurse or her designee.

The nurse developed a nursing care plan for the 2002-03 school year, which she reviewed with the Team at two separate meetings. At the second meeting, she requested updated medical records from the parent, to determine if there were any changes in her medical condition that would warrant changes in the Student's school health services and nursing care plan.

Prior to the 2003-04 school year, the parent provided updated medical information regarding changes to the student's seizure procedures. Otherwise, there were no changes to the student's medical condition and as a result, there were no changes to the health services in the student's IEP. In addition to the school health services set forth in the student's IEP, the school nurse also prepared guidelines and

procedures related to the Student's school health services, such as seizure procedures, G-tube feeding, Mic-key button care, hygiene, swallowing procedures, and more.

Parent filed a request for due process, alleging that the district denied the student a free, appropriate public education by failing to provide a proper and updated plan of nursing care.

Held: For the district. The hearing officer noted that the IDEA does not require that districts develop or provide students with plans of nursing care. Instead, they are required to provide school health services that enable children with disabilities to remain in school and have meaningful access to education. The hearing officer found that there was no evidence that the student "was prevented from remaining in school and having meaningful access to education because of a failure by the District to provide necessary school health services. Moreover, there is no evidence in the record that the Student was prevented from remaining in school and having meaningful access to education because of a failure by the District to provide a proper and updated plan of nursing care."

In addition, the hearing officer rejected the parents' argument that the nurse failed to access and attempt to resolve the student's fragile skin problem; however, the Student's home health nurse stated that the Student had problems with her skin for several years. The hearing officer found that "the manner in which [the school nurse] dealt with this issue is a matter of professional medical judgment and the record shows that it did not deny the child a FAPE." He went on to note that he "lacks the legal authority and qualifications to determine whether [the school nurse] carried out her duties as a nurse appropriately with regard to the Student's fragile skin."

The hearing officer also rejected the parents' argument that the school nurse "has not complied with the standards for registered nurses with regard to evaluation and assessment as it relates to the nursing care plan," noting that the argument essentially challenged the nurses professional competency. The hearing officer found that as a registered nurse, licensed by the State, the school nurse was qualified to provide nursing services under the IDEA.

A school is required to act as a reasonable school would in responding to the medical needs of the student. This duty of care does not make the school responsible for guaranteeing the health of its students or for assuming the role of a physician and diagnosing and treating its students. Individual educators may perhaps be held liable for knowingly disregarding their duty to administer a medical procedure. Schools may be held liable for failing to hire trained staff or failing to properly train staff.

In the case of Los Angeles Unified School District, 48 IDELR 118 (Ca. State Educational Agency, March 26, 2007), the parents alleged that the District failed to provide a free, appropriate public education when it:

1) refused to administer gastrostomy tube feedings at school using the "plunge method," which was used at home; and

2) refused to fund an out-of-district placement that utilized the "plunge method" or to fund a home school program.

As discussed below, the hearing officer found that in the absence of a prescription requiring the use of the methodology required by the parent, the methodology used by the District was appropriate.

Facts: The student, a nine-year old, suffered from multiple disabilities and required tube feedings four times per day, one of which occurred during school hours. Parents fed the student using the "plunge method," whereby a syringe containing a pureed food mixture is inserted into the student's tube, and intermittent pressure is applied to a plunger until the syringe is empty.

The mother asserted that the student's doctor had prescribed the use of the "plunge method," but failed to provide the District with a prescription. Thus, the District argued that the "plunge method" was not required, and that it could feed the student using the "gravity method," the use of which was supported by the State guidelines. The gravity method is similar to the plunge method, but instead of applying pressure to the syringe, the food is allowed to flow slowly through from the syringe through the tube. No plunger is used in that method and the flow of the food is regulated by gravity.

The District offered placement in its day program for students with multiple disabilities, with the student being fed by the gravity method. Parents rejected this placement because the District refused to use the plunge method to feed the student.

Held: The hearing officer held that the District was not required to use the plunge method to feed the student. The hearing officer specifically noted that the parents had not provided a prescription that required the use of the plunge method, and that the evidence established that the "gravity method" was appropriate. The hearing officer also found that the student could attend school if the gravity method was utilized. Because the District could accommodate the student's needs at its placement, the District was not required to place the student in a private school.

Kevin G. v. Cranston Sch. Committee, 130 F.3d 481 (1st Cir. 1997).

Facts: Student required full time nursing services. Student's neighborhood school, school A, did not have a full-time nurse on duty. School B, another school in the district, had a full time nurse on duty. The District proposed to place the student in School B; parents requested due process, alleging that the District was required to place the student in School A, with a full time nurse.

Held: For the District. The IDEA did not require that the District provide a full time nurse for the student at his neighborhood public school. The school with the full

time nurse was located only 3 miles from the student's home, and met all of the student's medical and educational requirements. The court found that the "school district has an obligation to provide a school placement which includes a nurse on duty-full time, but it is not required to change the district's placement of nurses when, as in this case, care is readily available at another easily accessible school."

IV. The Provision of Nursing Services Under Section 504

A. Brief Overview of Section 504

Section 504 provides that "[n]o otherwise qualified person with a disability shall, solely by reason of the disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal assistance." 29 U.S.C. § 794. The protections of Section 504 apply to both students and teachers. In order to provide equality of opportunity to students with disabilities, the District is frequently called upon to provide affirmative aids, services, or benefits known as "accommodations."

Under Section 504, in the context of a public school, a "qualified" person with a disability is a person "of an age during which nonhandicapped persons are provided such [educational] services, of any age during which it is mandatory under state law to provide such services to handicapped persons, or to whom a state is required to provide a free appropriate public education under the" IDEA. 34 C.F.R. 104.3(l)(2).

Section 504 is broader in scope than the IDEA. While the IDEA focuses on an educational disability, Section 504 deals with a more inclusive definition of disability. Simply put, a disability under Section 504 usually consists of a physical or mental impairment which substantially limits one or more of that person's major life activities.

Under Section 504, school districts are required to provide a free, appropriate education at public expense to each qualified student with a disability. 34 CFR 104.33(a). The provision of an appropriate education "is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of §§ 104.34, 104.35, and 104.36." 34 CFR 104.33(b)(1).

Thus, depending on the needs of the individual child, a child may require nursing services as an accommodation under Section 504, if such services would enable the student to access the general curriculum to the same extent as non-disabled students. As with the IDEA, the school nurse will join the Section 504 team when and if the team was considering providing nursing services to the student.

1. The ADA Amendments Act of 2008

The ADA Amendments Act of 2008 was signed by President Bush on September 25, 2008; it took effect on January 1, 2009. The Act amended definitions under both the ADA and Section 504, including:

- "The term 'disability' means, with respect to an individual
    - A physical or mental impairment that substantially limits one or more major life activities of such individual;
    - A record of such an impairment; or
    - Being regarded as having such an impairment (as [defined] in paragraph (3))."

The following terms, relating to the definition of disability, have also been amended:

- Major Life Activities, means:
    - "For purposes of [the definition of disability], major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, **eating, sleeping,** walking, **standing, lifting, bending,** speaking, breathing, learning, **reading, concentrating, thinking, communicating**, and working.
    - . . . for purposes of [the definition of disability], a major life activity also includes the **operation of a major bodily function**, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."
- Regarded as having such an impairment:
    - "An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an **actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity**."
    - For the purposes of defining the term "disability," an individual is **not "regarded as having such an impairment" if the**

> **impairment is ". . . transitory and minor**. A transitory impairment is an impairment with an actual or expected **duration of 6 months or less**."

(emphasis added).

In addition, the ADA Amendments Act contains the following "Rules of Construction Regarding the Definition of Disability," and states that the definition of disability . . . shall be construed in accordance with the following:

- The definition of disability in this Act shall be construed in favor of **broad coverage** of individuals under this Act, to the maximum extent permitted by the terms of this Act.

- The term '**substantially limits**' shall be **interpreted consistently with the findings and purposes** of the ADA Amendments Act of 2008.

- An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

- An impairment that is **episodic or in remission is a disability if** it would **substantially limit a major life activity when active**.

- The determination of **whether an impairment substantially limits a major life activity** shall be made **without regard to the ameliorative effects of mitigating measures** such as –

    - **medication**, medical supplies, equipment, or appliances, **low-vision devices (which do not include ordinary eyeglasses or contact lenses)**, prosthetics including limbs and devices, **hearing aids and cochlear implants or other implantable hearing devices**, mobility devices, or oxygen therapy equipment and supplies;

    - use of assistive technology;

    - reasonable accommodations or auxiliary aids or services; or

    - learned behavioral or adaptive neurological modifications.

    - The regulations recently promulgated by the Equal Employment Opportunity Commission list "psychotherapy,

behavioral therapy, or physical therapy" as additional examples of mitigating measures. See 29 CFR 1630.2(j)(5).

- The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.
    - The term "'ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and
    - the term 'low vision devices' means devices that magnify, enhance, or otherwise augment a visual image."

(emphasis added).

The Act also defines the term "auxiliary aids and services," as "including:

- qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- acquisition or modification of equipment or devices; and
- other similar services and actions.

2. Eligibility Determinations

The determination of whether a student has a disability under Section 504 involves the following inquiries:

- Does the student have:
    - A physical or mental impairment that substantially limits one or more major life activities of such individual; or
    - A record of such an impairment; or
- Has the student been regarded as having such an impairment.

In making the determination as to what constitutes a major life activity, it is important for the Team to remember that the definition includes, but is not limited to, activities such as seeing, hearing, breathing, speaking, walking, thinking, and the

operation of a major bodily function. OCR has opined that "a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504." Dear Colleague Letter, 58 IDELR 79 (OCR 2012).

In addition, neither the Section 504 regulations nor OCR require that a student receive a medical diagnosis as a prerequisite for Section 504 eligibility. See Williamson County (TN) Sch. Dist., 32 IDELR 261 (OCR 2000). If a school district is going to require such a diagnosis as part of the evaluation process, then it must obtain one at no cost to the parent. If the district requests a medical diagnosis or other medical documentation, but the parent fails to provide the requested documentation, then the Section 504 Team should make a determination based on the information that is available to the Team. See Montgomery County (MD) Pub. Schs., 31 IDELR 84 (OCR 1999) (finding that the District did not violate Section 504 when it determined that, based on the information available to the Team, the student was not eligible for services and noting that the "student's parent refused to authorize the district to secure an independent [medical] evaluation").

However, in another case, Gloucester County (VA) Pub. Schs., 49 IDELR 21 (OCR 2007), OCR found that the district violated Section 504 when it determined that a student did not qualify for services. In that case, the parent had provided medical information that diagnosed the student with severe peanut and tree allergies; the District did not request any further medical documentation, but the Section 504 Team had concerns about the diagnosis. OCR noted that the Section 504 Team did not include a physician, or anyone else with "qualifications approaching those of the Student's doctor to diagnose the nature and severity of the Student's" allergy, and that absent medical data to the contrary, the Team could not ignore the diagnosis, simply because it disagreed with it.

In the case of Bethlehem (NY) Central Sch. Dist., 52 IDELR 169 (OCR 2009), a student who was allergic to peanuts, dairy, egg, kiwi, and crab wanted to participate in the culinary arts program. The parent provided information from the student's allergist, who said that the student could participate as long as he wore gloves and did not eat the foods to which he was allergic. The district remained concerned about safety, in particular with regard to airborne allergens and accidental ingestion, and requested additional information about "the extent and nature of the student's allergies." The parent provided a letter from the allergist and signed a release authorizing the school to contact the allergist. The school did such, but the allergist was on vacation when they contacted him. The school did not make any further attempts to contact the allergist, and denied the student's request to enroll in the class. The parent filed a complaint with OCR. OCR found that the district had violated Section 504 because it failed to convene a Section 504 team to review the correspondence from the allergist and determine whether the student qualified under Section 504. In addition, the Team should have determined whether the student could have participated in the culinary arts course with accommodations.

B. Section 504 Plans

A Section 504 plan should be reviewed by the 504 Team on an annual basis and if needed, more frequently. The primary purpose of the review is to add, subtract or modify student accommodations in response to any change in the student's disabling condition or their program.

There is no preset scope for a 504 plan. For example, a student diagnosed with a medical condition may have a Section 504 plan which is no broader in scope than the student's medical protocol. The measuring stick for the scope of a plan is simply that amount of accommodation necessary to provide the student with equal opportunity and equal access. When a medical plan is involved, the school nurse should be a member of the Section 504 Team since he/she would have knowledge about the child's medical condition. See 34 C.F.R. 104.35(c).

The administration of medicine can be a related service under Section 504. See Wayne-Westland (MI) Community Schools, 35 IDELR 14 (Sept. 26, 2000) (parent filed a complaint, alleging that the district discriminated against their daughter by failing to administer insulin as a related services; school district entered into a voluntary corrective action plan in which it agreed to convene a Section 504 Team to review medical information and determine whether the student required insulin during the school day. If the Team made that determination, then the service would be provided by a school nurse or trained staff member).

V. Health Plans

Individual health plans may be provided to students who are not eligible for special education and related services under the IDEA, and who do not have a qualifying disability under Section 504. Health plans generally focus on addressing a specific medical need. Thus, the school nurse will play an important role in the development of a health plan.

Before creating an individual health plan, the student should be evaluated to determine if he/she is a qualified student under Section 504 or the IDEA. If the student meets the eligibility criteria under either statute, then the Team would develop an IEP or the Section 504 plan, rather than an individualized health plan.

A health plan constitutes a "mitigating measure," and therefore, the plan may not be considered by the Section 504 Team when it is making its determination as to whether a student is eligible for Section 504 accommodations. See 58 IDELR 79 (OCR 2012). In certain circumstances, a student with a Section 504 disability may not require any accommodations or services, other than a health plan. In such cases, the Section 504 plan would need to make the determination that the student has a disability under Section 504, and then develop a health plan in accord with the Section 504 procedures.

If the student has not been referred for services under Section 504, and the health plan indicates that the school will be required to administer medication to meet the student's needs, then the District should initiate the Section 504 referral and evaluation process. See Dear Colleague Letter, 58 IDELR 79 (OCR 2012).

VI. Administration of Medication

The administration of medication during the school day is governed by Ed 311.02 (medication during school day). In accord with that rule, when a pupil is required to take prescription medication during the school day, the medication must be administered by the school nurse, or the nurse must assist in the administration of the medication to the student. The nurse may delegate this duty to a RN or LPN under the direction of the school nurse. The nurse may also delegate the administration of medication in accord with RSA 326-B and Nur 404. The rule contains specific requirements pertaining to the provision of medication. In addition, the rules states that all school boards are required to adopt a specific policy and procedures pertaining to the provision of medication in the schools. Such policies are required to be adopted with "the advice of the school nurse and school physician if available."

Recently, the NH Board of Nursing issued an advisory pertaining to the administration of glucagon by unlicensed personnel in the school setting. The Board opined that:

> The administration of glucagon by a trained non-licensed personnel does not come under the delegation rules as written. Delegation of a task to unlicensed personnel require that the nurse can assess the situation before and after the task is completed. In this case, if a student needed the glucagon, it would not be delegated to another person. The nurse would administer the medication to the student.
>
> The board opined that the plan for the administration of glucagon in the absence of a nurse would be part of the student's individual medical care plan and would be a collaborative effort between the provider, the school nurse, the parents and the school administration to identify appropriate personnel for training. The training, ideally, would be provided either by the nurse or by personnel from the American Diabetes Association following a course curriculum that addresses this issue. This reflects the tenets of HB 494 which is currently being reviewed in committee.

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