
**UPDATE: Implications of the Civil Rights Restoration Act of 1987
Upon Student Health Insurance Plans:**

**Title IX of the Education Amendments of 1972
Section 504 of the Rehabilitation Act of 1973
The Age Discrimination Act of 1975**

Executive Summary

The recommendations stated in this advisory are summarized as follows:

- 1) Recipients of federal funds should assume a very low threshold of involvement with a student health insurance plan for Title IX to be applicable (see page four). Most student health insurance plans, even some that are not specifically endorsed by the university or college, are likely to be subject to Title IX requirements.
- 2) Due to the private right of action established under Title IX by the Supreme Court ruling in Cannon v. University of Chicago, 441 U.S. 677 (1979), ACHA recommends that universities and colleges (that did not treat pregnancy benefits as any other temporary disability in their student health insurance plans for the 1988-1989 plan year) initiate negotiations with their insurance carrier to retroactively provide pregnancy benefits as prescribed by Title IX (see page five).
- 3) Title IX requires pregnancy benefits to be treated on the same basis as any other temporary disability for spousal dependents (see page five).
- 4) Recommendations for student health insurance plans for international students are as follows: (a) universities and colleges should not accept any student health insurance plan that does not comply with Title IX as meeting an institutional requirement for health insurance; (b) all school personnel should cease any involvement with health insurance plans that do not comply with Title IX; and (c) all student health insurance brochures or other marketing material should be removed from the university or college if the plans do not comply with Title IX (see page six).

Executive Summary (Continued)

- 5) The United States Department of Education, Office for Civil Rights (OCR) is probably correct in determining that Section 504 does not allow OCR to examine individual student health insurance policy provisions in response to complaints. Nonetheless, ACHA recommends universities and colleges carefully examine all student health insurance plan limitations and exclusions to make sure they are not tantamount to exclusion of handicapped persons from the policy. Exclusions or limitations for specific illnesses (e.g. exclusion of sexually transmitted diseases) should not be part of a student health insurance plan since: (1) Section 504 disputes may be resolved through civil actions (regardless of OCR determinations); and (2) ACHA positions regarding sexually transmitted diseases, or other position statements regarding treatment or diagnosis of specific illnesses or injuries, should be construed to also apply to student health insurance plans (see page nine).
- 6) Student health insurance plan exclusions or limitations for mental health care or chemical dependency should also be evaluated for conformity with Section 504. ACHA recommends that its institutional members provide mental health care and chemical dependency benefits at a level that will adequately meet the needs of each school's insured student populace, in consideration of all other university sponsored programs. Exclusions for medical expenses resulting self-inflicted injury or suicide should not be allowed in student health insurance plans (see page nine and 10).
- 7) Universities and colleges should adopt reasonable pre-existing condition exclusions, even though it appears OCR will not evaluate individual policy provisions in response to Section 504 complaints (see page 10).
- 8) Universities and colleges should terminate any association with or endorsement of health insurance plans that include questions in an application process regarding a student's health, or could otherwise discriminate on the basis of a handicap. This includes recommendations to see local agents for specific additional coverages (see page 10).
- 9) Universities and colleges should carefully monitor their student health insurance carrier to make sure that the actual administration of the plan does not violate Section 504 (see page 10).
- 10) OCR has not yet reached determinations on the specific issues relating to Age Discrimination Act (ADA) complaints. Universities and colleges should eliminate any areas of discrimination in their student health insurance plans that are not excepted by the ADA as explained in this advisory (see page 11 and 12).

Introduction

On Tuesday, March 22, 1988, the United States Senate and House of Representatives overturned President Reagan's veto of the "Civil Rights Restoration Act of 1987" (CRRRA). The effect of this legislation (Pub. L. No. 100-259) for student health insurance was explained in detail through an ACHA Update issued in April of 1988, outlining the requirements of Title IX of the Education Amendments of 1972, as amended by the CRRRA.

As of September of this year, the United States Department of Education, Office for Civil Rights (OCR) had received approximately 1,800 complaints alleging that university and college student health insurance plans do not comply with the requirements of Title IX. OCR corresponded with all university and college presidents on September 21, 1988, to make sure that all recipients of federal funds were aware of the applicability of Title IX in regard to student health insurance.

A large number of complaints have also been received by OCR alleging that college and university student health insurance plans are in violation of either Section 504 of the Rehabilitation Act of 1973, or the Age Discrimination Act of 1975 (as both laws were amended by the CRRRA). The CRRRA amended Section 504, Title IX, Title VII, the Age Discrimination Act of 1975, and The Civil Rights Act of 1964. The intent of the CRRRA was to "restore the broad scope of coverage and to clarify the application" of these laws. More specifically, the purpose of the CRRRA was to reverse a Supreme Court decision (*Grove City College v. Bell*, 104 S. Ct. 1211, 465 U.S. 555, 1984) that restricted the applicability of the above noted statutes only to those specific institutional programs that received direct federal aid. The Congressional finding in the CRRRA is shown below:

Sec. 2. The Congress finds that --

- 1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964; and
- 2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

1) Overview of the Applicability of Title IX:

Based upon the statement from OCR on this page, all universities and colleges that receive federal funds must comply with the

Update for Title IX Recommendations (Continued)

requirements of Title IX (except as noted in the religious exemption discussed herein) if a school either endorses a student health insurance plan, or has any administrative interaction with a student health insurance plan.

OCR has firmly stated the requirements of Title IX in a number of individual responses to specific inquiries from university and college administrators, insurance carriers, consultants, and other interested parties. Some schools have been advised by insurance company representatives, or other persons, that they do not have to comply with Title IX if they do not have an institutional requirement for health insurance, or collect premiums, or if they have a disclaimer indicating that the school does not endorse the policy. This is not the case. **The scope of Title IX means that most universities and colleges must treat pregnancy benefits on the same basis as any other temporary disability pursuant to Title IX if a school "administers, operates, offers, or participates in with respect to students admitted to the recipient's educational institution (34 C.F.R. Sec. 106.40 (b) (4) — Title IX of the Education Amendments of 1972)." LeGree S. Daniels, Assistant Secretary for Civil Rights, explained the scope of these words in recent correspondence as follows:**

"It is impossible to definitely state a rule that would encompass all the myriad degrees of involvement which might occur between a federally funded institution and a student health insurance plan. The number and variety of verbs employed in the regulation to describe the possible manners of involvement indicate a low threshold for determining whether an insurance plan constitutes a part of an institution's educational program or activity. The determination as to whether an institution is a provider will hinge upon the extent to which the institution is involved in administering, operating, offering, or participating in the insurance plan. For example, if an institution collects premium and pays benefits, it is administering and operating the plan; if an institution selects a plan and informs students about it by means of registration materials, pamphlets, or posters, it is participating in the plan; and if the institution selects a plan, is holder of the master policy and provides application forms to students, the institution is offering the plan or policy. However, the lack of involvement in collecting premium or accounting for the premium does not necessarily mean that the institution is not participating in the plan."

Update for Title IX Recommendations (Continued)

2) Right of Private Action:

Steve Blom and Steve Beckley attended a conference on September 22, 1988, at the OCR Offices in Washington D.C. The purpose of this meeting was to clarify a number of issues relating to Title IX compliance. During the course of this meeting, OCR meeting attendees explained that regardless of the status of the student health plan with OCR, individual students may bring a civil suit under Title IX on an individual basis. The ability to sue, as an individual, under Title IX was confirmed by the Supreme Court in Cannon v. University of Chicago, 441 U.S. 677, (1979). Thus, ACHA recommends that universities and colleges that are not in compliance for the 1988-1989 plan year initiate negotiations with their insurance carriers to retroactively treat pregnancy benefits on the same basis as any other temporary disability as prescribed by Title IX, regardless of any agreement by OCR to allow compliance beginning with the 1989-1990 plan year.

3) Pregnancy Benefits for Dependents:

If a student health insurance plan covers spousal dependents, the plan must treat pregnancy benefits on the same basis as any other temporary disability for both students and spousal dependents. Title IX does not require that dependent children receive pregnancy benefits. LeGree S. Daniels has explained the requirement for dependent insurance as follows:

"This question must be viewed in two parts: pregnancy coverage for dependent spouses, and pregnancy coverage for dependents. If illness and temporary disability coverage is extended to spouses, pregnancy coverage must be provided equally with coverage for other temporary disabilities. The position taken by OCR in this regard is based upon the regulatory requirement at 34 C.F.R. Sec. 106.40 (b) (4). The fact that the sex of the student is directly related to the sex of the spouse (one is the inverse of the other) leads us to conclude that discrimination on the basis of pregnancy of spouses is discrimination based on the sex of the insured. If coverage is extended to dependents other than spouses, it would not be a violation to exclude pregnancy coverage because the sex of the dependents other than spouses does not directly relate to the sex of the student insured. Male or female students may have daughters, and thus discrimination on the basis of the sex of the insured is not present."

Update for Title IX Recommendations (Continued)

4) International Student Plans:

As noted in point one, the applicability of Title IX is very wide in scope. This presents a number of problems for universities and colleges in regard to international student health insurance plans that school personnel may be tangentially involved with from an administrative standpoint (e.g. assistance in submission of premium, assistance in completing claim forms, providing explanations of policy benefits, etc.). Such involvement may establish that the university or college is ". . . administering, offering, or participating . . ." in the policy. Accordingly, a university or college may be liable if international student health insurance plans do not treat pregnancy benefits as any other temporary disability as prescribed by Title IX (see Private Right of Action herein). **Universities and colleges are advised to take the following actions:**

- a) Do not accept any international student health insurance plan, that does not treat pregnancy benefits as any other temporary disability as prescribed by Title IX, as meeting an institutional requirement for international students to have health insurance.
- b) Instruct all university or college personnel to cease any involvement with international student health insurance plans that do not treat pregnancy benefits as any other temporary disability pursuant to Title IX.
- c) Remove all brochures or other material regarding international student health insurance plans from the university or college if such plans do not comply with Title IX.

The above recommendations may be particularly difficult to implement since, as of the time of the printing of this advisory, many student health insurance plans designed for international students do not comply fully with Title IX.

5) Religious Exemption:

OCR officials explained during a meeting in September of this year (referenced in point number two) that universities and colleges may apply for a religious exemption under Title IX. Institutions "controlled" by a religious organization may seek exemption from particular Title IX regulations that are in conflict with the school's religious tenets. Please note that controlled is not the same as "affiliated" in regard to the religious exemption. Controlled means ownership, or the same level of control that

Update for Title IX Recommendations (Continued)

would exist under ownership circumstances.

The institution could request exemption from the Title IX regulation requiring pregnancy benefits be treated like any other temporary disability for purposes of student health insurance plans; the religious institution may not want to provide pregnancy benefits for persons that are not legally married. If the exemption is granted, OCR has held that those institutions are not required to provide pregnancy benefits in student health insurance plans for unmarried students, but must do so for married students.

Recommendations for Section 504 Compliance

1) Applicability of Section 504 to Student Health Insurance:

The intent of Section 504 of the Rehabilitation Act of 1973 (hereinafter Section 504) is to preclude recipients of federal funds from discriminating against handicapped persons, either individually or collectively.

The parts of Section 504 (Federal Register, Part II, Department of Education, Establishment of Title 34) that have specific applicability to student health insurance are shown below:

Subpart E -- Post Secondary Education, Section 104.43 (a)

"No qualified handicapped student shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subject to discrimination under any academic, research, occupational training, housing, health insurance, counseling, financial aid, physical education, athletics, recreation, transportation, other extracurricular or other post secondary education program or activity to which this subpart applies."

Subpart E -- Post Secondary Education, Section 104.43 (b)

"A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provide an equal opportunity for the participation of handicapped persons."

Recommendations for Section 504 Compliance (Continued)

Appendix A -- Analysis of Final Regulation, Section 104.43, #33 Health and Insurance.

"A proposed section, providing that recipients may not discriminate on the basis of handicap in the provision of health related services, has been deleted as duplicative of the general provisions of Section 104.43. This decision represents no change in the obligation of recipients to provide nondiscriminatory health and insurance plans. The Department will continue to require that nondiscriminatory health services be provided to handicapped students. Recipients are not required, however, to provide specialized services and aids to handicapped persons in health programs. If, for example, a college infirmary treats only simple disorders such as cuts, bruises, and colds, its obligation to handicapped persons is to treat such disorders for them."

2) Recommendations:

A large number of complaints have been filed with OCR alleging that school endorsed student health insurance plans violate Section 504 because: (1) the plan includes an exclusion for medical expenses resulting from attempted suicide; (2) the plan does not provide mental health care benefits on the same basis as any other temporary disability; or (3) the plan does not provide treatment for alcoholism and chemical dependency on the same basis as any other temporary disability.

OCR has now acted on a number of these complaints. The quote shown below from an OCR determination letter clearly establishes that such plans (as described above) do not violate Section 504:

"We have examined the allegations with regard to Section 504 and have determined that the allegations, even if true, do not constitute a violation of Section 504. Section 504 does not extend to examining the individual provisions of student health insurance policies. Accordingly, Section 504 issues raised in your complaint will not be investigated."

Even though the above statement significantly narrows the scope of Section 504, ACHA nonetheless recommends that mental health care and chemical dependency benefits be provided in student health insurance plans at a level that will "adequately" meet the needs of a university's or college's specific insured student populace. Such benefits should be provided in consideration of all other university sponsored programs (e.g. counseling center benefits, student health service benefits, or other university sponsored or endorsed programs).

Recommendations for Section 504 Compliance (Continued)

Although the finding from OCR, as stated on the previous page, probably means that it is legally permissible to exclude sexually transmitted diseases, and other specific conditions, as long as handicapped persons are not denied entry into the student health insurance plan, ACHA recommends that such exclusions not be included in a student health insurance plan. It is important to remember that: (1) Section 504 disputes may be resolved through civil actions (regardless of OCR determinations); and (2) ACHA positions regarding sexually transmitted diseases, or other position statements regarding treatment or diagnosis of specific illnesses or injuries, should be construed to also apply to student health insurance plans sponsored by ACHA institutional members.

In regard to exclusions for attempted suicide, ACHA recommends that such exclusions be removed from student health insurance plans since they would normally be deemed to be inconsistent with point number XIX of the standards for student health insurance adopted by ACHA.

OCR has endorsed a document published by the National Association of College and University Business Officers (NACUBO) that specifically addresses student health insurance plan compliance with Section 504. The following paragraph from the NACUBO document pertains to student health insurance:

"It is also important in the health and insurance area to make certain that "outside" providers do not discriminate on the basis of handicap with regard to the school's students. This rule may be particularly difficult in the insurance area, where companies frequently have clauses in the policies that discriminate against certain classes of handicapped persons (e.g. exclusions for pre-existing conditions)."

OCR has not yet received any complaints alleging that student health insurance plans violate Section 504 because the plans include an exclusion for pre-existing conditions. We have written to OCR requesting a determination on this issue, and we expect they will remain consistent with their position that individual policy provisions are not covered under Section 504. More specifically, it appears that OCR will only be concerned that handicapped persons not be denied entry into the plan. OCR's narrow interpretation as to the scope of Section 504 is understandable; however, it is likely that a wider application of Section 504 may be correct in regard to insurance plan limitations or exclusions that deny benefits for specific illness or injuries that constitute a "handicap."

Recommendations for Section 504 Compliance (Continued)

As previously stated, ACHA recommends that student health insurance plans have appropriate benefits based upon the needs of the insured student populace in consideration of other benefits and services provided by the university or college outside the student health insurance plan. **ACHA recommends that universities and colleges adopt reasonable pre-existing condition exclusions as expressed in point number III and XIX of the standards for student health insurance adopted by ACHA.**

We are not aware of any student health insurance plans that have medical underwriting tests as part of an application process for obtaining coverage, however, many universities and colleges have arrangements with local agents to write special coverages for their students (e.g. catastrophic health insurance coverage) that include an application that establishes medical insurability. As noted above, any test (i.e. medical underwriting) that would deny a person the ability to purchase a student health insurance plan based upon a handicap (as defined within Section 504), would clearly violate Section 504. **ACHA recommends that universities and colleges terminate any association or endorsement of health insurance plans that include questions in an application process regarding the student's health, or could otherwise discriminate on the basis of handicap.**

ACHA also recommends that universities and colleges carefully monitor their student health insurance carrier to make sure that the actual administration of the plan does not violate Section 504. For example, some student health insurance carriers have declined medical expenses resulting from a learning disability as an "ineligible expense" since, in the opinion of these insurance carriers, learning disabilities are something other than an illness or injury. All major health insurance carriers that we have contacted consider medical expenses resulting from a learning disability to be an eligible expense under their standard definitions of either illness or injury.

Recommendations for Age Discrimination Act Compliance

The Age Discrimination Act of 1975 (hereinafter ADA), as amended by the CRRRA, contains a general prohibition on age discrimination for recipients of federal funds. Many ADA complaints filed with OCR to date allege that student health insurance plans that limit eligibility for dependent children to age 19 violate the ADA. We are aware of other complaints alleging that student health insurance plans violate the ADA because the plans exclude spouses over the age of 65, or because the plans charge a higher premium rate for students and dependents over the age of 35.

Recommendations for Age Discrimination Act Compliance (Continued)

The Age Discrimination Act of 1975 (ADA) prohibits discrimination based on age in any programs or activities operated by recipients of federal funds. The ADA, like Section 504, does not mandate prescriptive amounts of benefits to be provided through student health insurance plans. The ADA only bars discrimination on the basis of age which is unreasonable, and does not make all acts which negatively impact older persons illegal.

There is no case law regarding the ADA and student health insurance. Furthermore, there is very little case law relating specifically to the ADA in general. It may be appropriate, as explained later, to rely on case law from the Age Discrimination and Employment Act of 1967 for guidance in management of some aspects of student health insurance plan compliance with the ADA.

The law itself contains two exceptions to its seemingly blanket rule stated in the first sentence of paragraph one. Section 6103 states that a program or activity will not be in violation of the law if such program or activity:

- 1) reasonably takes into account age as a factor necessary to the normal operation or achievement of any statutory objective of such activity (the statute must be passed by a federal; state; or local elected, general purpose legislative body); or
- 2) the differentiation caused by such action is based upon reasonable factors other than age.

Student health insurance plans may not be found to be in violation of the ADA for the following reasons:

- 1) Age limits for dependent eligibility may have some statutory basis since, according to several major insurance carriers that we recently contacted, the age of majority (established by the various states) was used in large part to determine that it would be "reasonable" to limit dependent eligibility to children aged 18 or younger. In addition, some jurisdictions may have specific statutes as explained in point three above, that mandate age limits for dependent eligibility.
- 2) One of the expressed purposes of most student health insurance plans is to provide adequate benefits at an affordable cost. Thus, the "differentiation caused by age" may be justifiable as being a "reasonable factor" that is directly in line with the objective of the

Recommendations for Age Discrimination Act Compliance (Continued)

program. It may be noteworthy that the Age Discrimination in Employment Act of 1967 allows charging different premium rates based upon age to the extent the rates are "actuarially justifiable."

We expect that OCR will rule on some of the ADA complaints in the near future. Recipients of this advisory are welcome to contact Byerly & Company to obtain the most current status of OCR actions. The OCR regional offices may also be of assistance in providing advice regarding the status of OCR determinations for compliance with the ADA.

ACHA recommends that universities and colleges respond to all OCR written requests for information pursuant to ADA complaints. It is our understanding that OCR cannot act on these complaints until they have been attempted to be resolved by the Federal Mediation and Conciliation Service (FMCS), however, there is some question as to what action a school can take if the FMCS does not proceed with the attempt to mediate the complaint within the 60 day time period allowed by statute. Accordingly, universities and colleges receiving ADA complaints should take no action to amend or modify their student health insurance plans until the FMCS has completed their part of the complaint process.

We were recently informed that OCR has ruled that state laws in South Carolina and New Hampshire show "that an elected, general purpose legislative body has enacted insurance legislation which specifically addresses the issue of the inception and termination of dependent coverage. OCR has concluded that these statutes are not superceded by the Age Discrimination Act. The institution, therefore, did not violate the ADA as it pertains" to limitation of dependent coverage to children under the age of 19. We expect that many other states will have similar statutes that will allow student health insurance plans to limit dependent coverage eligibility without violating the Age Discrimination Act.

ACHA recommends that universities and colleges remove any clear violations of the ADA in the operation of their student health insurance plan, except for those provisions which are exempted from the ADA as explained on the previous page of this advisory.

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