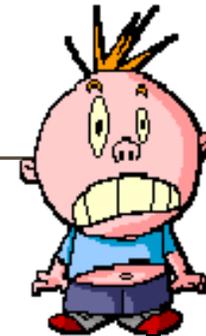
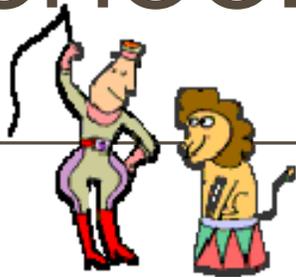




Measures have been taken, by the Utah
Department of Health, Bureau of Health
Promotions, to ensure no conflict of interest
in this activity

504 AND IDEA AND THE ROLE OF THE SCHOOL NURSE



HIPAA and FERPA and Bears – OH MY!

Health Plans and 504 Plans and IDEA IEPs - OH MY!

AND Service Animals – My Head Hurts Now

Lisa Arbogast, M.Ed., J.D. USOE Special Education Services

Jennifer Slade, Equity USOE

HIPAA

- A medical privacy law that applies to health information created or maintained by a health care providers who engage in certain electronic transactions, health plans, and health care clearinghouses.
- OCR is responsible for implementing and enforcing HIPAA
- LEAs may be subject to HIPAA

FERPA

- The Family Educational Rights and Privacy ACT of 1974
 - Gives parents the right to inspect, review, and amend their child's educational records, and protects those records from nonconsensual disclosure to third parties.
 - Whether a particular item of information is protected by FERPA depends on whether or not it meets the statute's definition of an "education record."
 - FERPA is enforced by the Family Policy Compliance Office

What is an Education Record protected by FERPA

- Education Records are records directly related to a student
- Maintained by an educational agency or institution - or
- By a party acting for the agency or institution but not within the five exceptions set forth in the regulations. 34 CFR 300.611 implementing Part B of the IDEA adopts the definition set forth in 34 CFR Part 99.

HIPAA vs. FERPA

- HIPAA final rule – 45 CFR Parts 160 and 164 (“Standards for Privacy of Individually Identifiable Health Information”) -- confirms that records subject to FERPA are not subject to HIPAA.
- The regulation provides that the privacy rule “expressly excluded from the definition of “protected health information” only educational and other records that are covered by the Family Education Rights and Privacy Act of 1974, as amended. 20 USC Sec. 1232g.

HIPAA vs FERPA

- Student medical records and related education records under FERPA are not subject to HIPAA.
- When a school provides health care to student, such as through its health clinic, it is also a “health care provider” as defined by HIPAA.
- If a school also conducts any covered transactions electronically in connection with that health care, it is then a covered entity under HIPAA.
- As a covered entity, the school must comply with the HIPAA Administrative Simplification Rules for Transactions and Code Sets and Identifiers with respect to its transactions.

HOWEVER !!!!

- Many LEAs – including those that are HIPAA covered entities, are not required to comply with the HIPAA privacy Rule because the only health records maintained by the school are “education records” or “treatment records” of eligible students under FERPA.
- Both student medical records and student treatment records of eligible students under FERPA are excluded from coverage under the HIPAA Privacy Rule. See *Joint Guidance on the Application of FERPA and HIPAA to Student Health Records.*

Examples

- Student Health Records – in circumstances where the records do not have the status of education records under FERPA, and if transmitted electronically, the LEAs school nurses and health department should follow HIPPA rules. *Joint Guidance on the Application of FERPA and HIPAA to Student Health Records.*
- If a student's electronic health records are connected to an IEP, such records are protected under FERPA. If a student's electronic health records are connected to services not covered under an IEP, they are protected under HIPAA, provided they are also not deemed to be education records under FERPA.

Examples

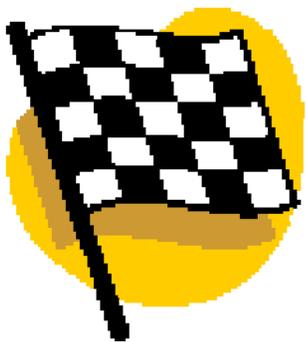
- School-based health clinics
 - If run by district staff, not involving the electronic transmission of health information, they are not covered by HIPAA. However, if the clinics are run by outside entities who handle all billing and maintain the records, they would likely fall under HIPAA. *Joint Guidance on the Application of FERPA and HIPAA to Student Health Records.*
- Medicaid
 - An LEA that files Medicaid claims electronically, including billing and eligibility information, must abide by HIPAA regulations for all transmissions not covered by FERPA. Paper claims are not covered by HIPAA. *Joint Guidance on the Application of FERPA and HIPAA to Student Health Records.*

Practically Speaking

Once HIPAA protected information becomes part of the student's educational record - FERPA controls

- Health Care providers will need HIPAA release to communicate with school staff
- School staff will need FERPA release to communicate with health care providers

Moving Right Along



Health Plan vs. Section 504 Plan

- Even if you think a child just needs a health plan to meet their needs, a Section 504 evaluation should be considered.
- If they qualify for section 504 and health plan complete them separately.
- OCR determined that a district's practice of providing health care plans to student with diabetes, instead of determining their eligibility for a 504 plan, was a violation of Section 504 child find requirements.
Districts must evaluate a student's eligibility for a section 504 and related aids and services, rather than automatically writing a health care plan.

Tyler (TX) Indep. Sch. Dist., 56 IDELR 24 (OCR 2010)

Health Plan vs. Section 504 Plan

- A district in Tennessee was found lax in not evaluating students with health plans for further special services such as Section 504 and IDEA.
- It was found that a district may not forgo evaluating a student with Asthma, food allergies, diabetes, or other health issues.
- If there is reason to suspect and student might need special education or related services, a determination must be made for Section 504 services and provided procedural safeguards.

Health Plan vs. Section 504 Plan

Agreed upon corrective action:

- Have a policy to send pertinent information to the school nurse when student registers.
- The nurse immediately determines if the student needs more services than a health plan.
- If the **nurse** does determine an evaluation occur, **she/he** meets with other appropriate school or district staff, and parent (best practice) to determine if a Section 504 or IDEA evaluation are needed.

Service Animal is defined as:

- Any dog that has been individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual or other mental disability. Note that other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of the regulatory definition.
- See also – miniature horse

2010 ADA, Title II regulations at 28 CFR 35.104

Work or Task of a Service Animal

Work or task performed by the service animal must be directly related to the individual's disability.

- Examples of task include but are not limited to:
- Assist individuals who are blind or have low vision, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing nonviolent protection or rescue, pulling a wheel chair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities to prevent or assist in impulsive or destructive behaviors. *28 CFR 35.104*

Can a student have an animal at school for support?

- "A pet or support animal may be able to discern that the handler is in distress, but it is what the animal is trained to do in response to this awareness that distinguishes a service animal from an observant pet or support animal." *75 Fed. Reg. 56, 193 (2010)*
- However, in 2010 the Department of Justice has stated, "support animals may be permitted as a reasonable accommodation under other laws, including the Fair Housing Act and the Air Carrier Act." *75 Fed. Reg. 56, 166 (2010)*
This would suggest that an emotional support animal might be under certain circumstances, qualify as a reasonable accommodation if necessary for the students receive FAPE. Even if the animal does not fit the definition of a service animal under Title II.

What questions you can ask upon parent request for service animal for their child?

1. Is the animal required because of a disability?
2. What work or task has the animal been trained to perform? 28 CFR 36.302(C)(6)
3. Parent or Adult student provision of written acknowledgement of and agreement to maintain compliance with licensing and vaccination requirements of their particular locality.

When can a service animal be excluded from the school?

- The animal is not with in the handlers control.
- The animal is not house broken.
- The presence of the animal would create a fundamental altercation in the nature of the program. *28 CFR 35.136(b)*

A service animal may fundamentally alter a program if another student in the classroom is allergic to dogs. However, you should take steps to work around that issue. For example moving one of the students to another classroom.

There may be times when the service dog is disruptive. For example the student may want to play football and their service animal jumps on other students when he/she gets tackled.

Utah State Law regarding Service Animals

Title 62 A

- **§ 62A-5b-104. Right to be accompanied by service animal-- Security deposits--Discrimination--Liability--Identification**

(1)(a) A person with a disability has the right to be accompanied by a service animal, unless the service animal is a danger or nuisance to others as interpreted under the Americans with Disabilities Act of 1990, 42 U.S.C. Sec. 12102:

- (i) in any of the places specified in Section 62A-5b-103; and
- (ii) without additional charge for the service animal.
- (b) This section does not prohibit an owner or lessor of private housing accommodations from charging a person, including a person with a disability, a reasonable deposit as security for any damage or wear and tear that might be caused by a service animal if the owner or lessor would charge a similar deposit to other persons for potential wear and tear.
- (c) An owner or lessor of private housing accommodations may not, in any manner, discriminate against a person with a disability on the basis of the person's possession of a service animal.

Utah State Law regarding Service Animals continued

- (2) A person who is not a person with a disability has the right to be accompanied by an animal that is in training to become a service animal or a police service canine, as defined in Section 53-16-102:
 - (a) in any of the places specified in Section 62A-5b-103; and
 - (b) without additional charge for the animal.
- (3) A person with a disability is liable for any loss or damage caused or inflicted to the premises by the person's service animal.
- (4) A person accompanied by a service animal is encouraged to identify the animal by exhibiting one or more of the following:
 - (a) the animal's laminated identification card;
 - (b) the animal's service vest; or
 - (c) another form of identification.
- Laws 2007, c. 22, § 5, eff. April 30, 2007; Laws 2009, c. 110, § 2, eff. May 12, 2009; Laws 2012, c. 389, § 1, eff. May 8, 2012.

IDEA Eligible Students

- Heightened level of entitlement under IDEA
- Protections of the IDEA's Procedural Safeguards
- Beware of IDEA Child Find implications for students with HCP or 504
 - Evaluation must be sufficiently comprehensive to identify all of the student's special education and related needs, whether or not commonly linked to the disability category in which the student has been classified. USBE SER Section II(F)(1)(e)(5)
 - Nurse might become a required member of the eligibility team. USBE SER III(E)(5) requires an individual who can interpret the instructional implications of evaluation results.

PLAAFPs and IEPs

- Present Levels of Academic Achievement and Functional Performance
PLAAFP
- Health care information or needs or recognition of a HCP should be reflected here
- Statement of measureable annual goals, including academic and functional goals designed to:
 - Meet the students needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and
 - Meet each of the student's other educational needs that result from the student's disability.
 - Nurse may not be legally required member of IEP team but input needed

Utah Institute on Special Education Law

- Wednesday August 6 & Thursday August 7
- Ogden Eccles Conference Center
- Flyer and Link to Registration on the USOE website
- Also <http://www.cvent.com/d/44qshb/1Q>

Thank you and Have a Wonderful Summer

- For additional assistance please contact us.
- Lisa Arbogast – lisa.arbogast@schools.utah.gov
- Jennifer Slade – jennifer.slade@schools.utah.gov

