

MANAGING STUDENTS WITH HEALTH ISSUES: SECTION 504 PLANS, DNR ORDERS, AND CONTAGIOUS DISEASES

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I. INTRODUCTION

From the growing number of students who qualify for Section 504 plans, to the increase in medically fragile students in school who may have do-not-resuscitate (“DNR”) orders, to the recent outbreak of contagious diseases, such as the measles, school districts are constantly managing student health issues. To address these issues, school districts must continuously review and update their policies and procedures to ensure that they are in compliance with both federal and state laws. This paper addresses three distinctive health issues currently affecting school districts across the country: (1) developing Section 504 plans to support the growing number of students with health issues; (2) honoring student DNR orders in schools; and (3) managing contagious disease outbreaks in schools.

II. SECTION 504

A. AN OVERVIEW OF SECTION 504

Section 504 of the Rehabilitation Act of 1973¹ (“Section 504”) protects the rights of individuals with disabilities in public school districts. Section 504 is a non-discrimination statute that requires public school districts to meet the educational needs of disabled students as adequately as the educational needs of non-disabled students.² Under Section 504, school districts must: (1) identify students with disabilities; (2) evaluate these students; (3) provide these students

¹ 29 U.S.C. § 701 *et seq.*; 34 C.F.R. Part 104.

² 29 U.S.C. § 794.

with a free appropriate public education (“FAPE”) in the least restrictive environment (“LRE”); and (4) provide parents with procedural safeguards.³

Unlike the Individuals with Disabilities Education Act (“IDEA”), Section 504 is not limited to 13 specific categories of disability.⁴ Generally, students who qualify for Section 504 plans have disabilities that are less impactful on their daily educational needs than those of students who qualify for special education and related services under IDEA. A student may be disabled within the meaning of Section 504 and entitled to the rights and protections of Section 504 even though the student may not be eligible for special education under IDEA.

Section 504 adopts the definition of “disability” from the Americans with Disabilities Act of 1990 (“ADA”). This definition was broadened by the American with Disabilities Act Amendments Act of 2008 (“ADAAA”) to be more inclusive of what qualifies as a “disability,” while also limiting a school district’s ability to consider the ameliorative effects of mitigating measures in determining whether a student is “disabled.”⁵

To qualify as an individual with a disability within the school setting, a person must have a physical or mental impairment that substantially limits one or more major life activities.⁶ A “major life activity” extends beyond learning and includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, reading, concentrating, thinking, communicating, and working as well as major bodily functions, including functions of the immune system, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.⁷ Moreover, the

³ 34 C.F.R. §§ 104.31-104.39.

⁴ 34 C.F.R. § 104.3, *cf.* 34 C.F.R § 300.8.

⁵ 29 U.S.C. § 705(9) (B); 42 U.S.C. § 12102(1), (4)(E).

⁶ 42 U.S.C. § 12102(1).

⁷ 42 U.S.C. § 12102(2).

U.S. Department of Education Office for Civil Rights (“OCR”) considers allergies to be a “hidden disability” under Section 504 and requires schools to provide accommodations for allergies.⁸

An impairment is “substantially limiting” if it prohibits or significantly restricts an individual’s ability to perform a major life activity as compared to the ability of the average person in the general population to perform the same activity. Importantly, “substantially limits” is to be construed broadly in favor of expansive coverage to the maximum extent permitted by law.⁹ A school district’s determination of whether an impairment substantially limits a major life activity requires an individualized assessment; however, a school district may not consider mitigating measures (e.g., medication, hearing aids, medical supplies, prosthetics, learned behavioral or adaptive neurological modifications), with the exception of eyeglasses or contact lenses, when determining whether an impairment substantially limits a major life activity of a student.¹⁰ Moreover, a major life activity may be substantially limiting even if the impairment is episodic or in remission if it would substantially limit a major life activity when active.¹¹

1. ASSESSMENT AND EVALUATION OF STUDENTS UNDER SECTION 504

Section 504 requires schools to evaluate a student before “any action,” including a denial, is taken with respect to either the initial placement of a disabled child in a general or special education program or a subsequent significant change in placement.¹² Evaluations must occur prior to qualifying a student as eligible for a 504 plan. Although the regulations do not specifically require parental consent for initial or subsequent evaluations, OCR has determined that parental

⁸ *The Civil Rights of Students with Hidden Disabilities Under Section 504 of the Rehabilitation Act of 1973*, U.S. Dep’t of Educ. Office for Civil Rights, <http://www2.ed.gov/about/offices/list/ocr/docs/hq5269.html>.

⁹ 42 U.S.C. § 12102(4).

¹⁰ 42 U.S.C. § 12102(4)(E).

¹¹ 42 U.S.C. § 12102(4)(D).

¹² 34 C.F.R. § 104.35(a).

consent is required prior to an initial evaluation.¹³ In addition, comprehensive re-evaluations are required periodically for each eligible student.¹⁴

An evaluation is not necessarily a “test.” Rather, the evaluation refers to a gathering of data or information from a variety of sources so that the Section 504 team can make the required determinations. Common sources for the evaluation include the student’s grades, disciplinary referrals, health information, language surveys, parent information, standardized test scores, aptitude test scores, physical conditions, adaptive behavior, and teacher comments.¹⁵ Depending on the disability, it also may be necessary to communicate with and gather data directly from the student’s doctor to fully understand the severity of the student’s disability and potential appropriate accommodations. A school district also may find it useful to retain a consulting physician to advise it periodically and assist in understanding medical issues relating to students’ disabilities.

2. PROVIDING ACCOMMODATIONS TO THE EDUCATIONAL PROGRAM

a. DEVELOPING A SECTION 504 PLAN

A Section 504 plan modifies the regular classroom and/or extracurricular activity so that a student has equal access to the educational benefits of the school’s program. Section 504 does not require modification of the essential elements of the service, program, or activity, such as the content of the curriculum.¹⁶ Rather, Section 504 requires school districts to provide accommodations to students for their disabilities so they have an equal chance to participate in class and in extracurricular activities. Although school districts no longer may consider the ameliorative effects of mitigating measures when making a disability determination, a student’s

¹³ *Letter to Durham*, 27 IDELR 380 (OCR 1997).

¹⁴ 34 C.F.R. § 104.35(d). School districts are considered to be in compliance if they complete re-evaluations every three (3) years (as they do with IDEA students). *Id.*

¹⁵ 34 C.F.R. § 104.35(c)(1).

¹⁶ 28 C.F.R. § 35.130(b)(7); *McPherson v. Mich. High Sch. Athletic Ass’n, Inc.*, 119 F.3d 453 (6th Cir. 1997).

use of mitigating measures is often relevant in determining his/her needs and how to address them as the Section 504 plan is developed. Parents must be invited to participate in the development of the Section 504 plan.¹⁷

A Section 504 plan should contain sufficient detail to allow both the parents and school staff to understand exactly what is being provided and in which settings. For students with a medical disability that requires emergency medication (e.g., an inhaler or epi-pen), the Section 504 plan should address who administers the medication, how to handle situations when the person responsible for administering the medication is not available (e.g., when the student is on a field trip), accommodations needed for each setting (e.g., the classroom, recess, cafeteria, field trips), and, for students with allergies, the protocol to be followed in case an allergic reaction occurs or is suspected. For students with seizure disorders or other medical needs that may require emergency medical attention, an emergency response plan also should be included in the Section 504 plan.

b. FAPE & LRE

Under Section 504, school districts must provide qualifying students FAPE in the LRE, i.e., the setting that allows the disabled student the maximum exposure to non-disabled peers while still allowing the student to receive an appropriate education.¹⁸ Because the disabilities encountered in Section 504 students are typically less impactful on a student's learning than those under IDEA, Section 504 presumes a regular education placement for the child. Typically, alternative settings are only appropriate because of immunity or allergen trigger exposure concerns.¹⁹

¹⁷ See 34 C.F.R. § 104.35.

¹⁸ 34 C.F.R § 104.34(a)(1).

¹⁹ See, e.g., *Zandi v. JVB Fort Wayne Cmty. Sch.*, 2012 WL 4472006 (N.D. Ind. 2012), appeal dismissed (Jan. 14, 2013).

A parent cannot refuse to accept IDEA services but then require a school district to essentially develop an IEP under Section 504.²⁰ Likewise, a school district cannot choose to provide services and accommodations under Section 504 when the student is IDEA-eligible.²¹

3. DISAGREEING WITH A SECTION 504 PLAN

To resolve Section 504 disputes, school districts must establish a due process hearing system with an impartial hearing officer and have a grievance procedure. To comply with Section 504, a school district must provide a system of procedural safeguards that includes: (1) notice; (2) an opportunity for the parent of the student to examine the relevant records; (3) an impartial hearing with opportunity for participation by the student's parent and representation by counsel; and (4) a review procedure. While compliance with IDEA procedures is not necessary, it is one means of meeting the procedural safeguards requirement under Section 504.²²

To prove that a school district violated Section 504, the parents must establish that the school district denied the student reasonable accommodations by showing that (1) the student required disability-specific services to enjoy meaningful access to the benefits of a public education, (2) the school district was on notice that the student needed those specific services, but did not provide those services, and (3) the specific services were available as reasonable accommodations.²³

²⁰ *Letter to McKethan*, 25 IDELR 295 (OCR 1996) (standing for the premise that a rejection of services offered under IDEA amounts to a rejection of similar services offered under Section 504).

²¹ See *Chicago Sch. Dist. 99*, 54 IDELR 304 (OCR 2010).

²² 34 C.F.R. § 104.36.

²³ *Duvall v. County Kitsap*, 260 F.3d 1124, 1135 (9th Cir. 2001); see also *Mark H. v. Hamamoto*, 620 F.3d 1090, 1097-98 (9th Cir. 2010).

B. A “REASONABLE ACCOMMODATION” UNDER SECTION 504

1. MEANINGFUL ACCESS

Section 504 prohibits the exclusion of a qualified student with a disability from the participation in, or the denial of benefits of, services, programs, or activities of a public entity.²⁴ In general, to assure “meaningful access” to its services, a school district must provide reasonable accommodations for students with disabilities.²⁵ When an individual already enjoys meaningful access to a benefit to which he or she is entitled, “no additional accommodation, ‘reasonable’ or not, need be provided.”²⁶

For example, in *R.K. v. Board of Education of Scott County*,²⁷ the district court held that the school district had no obligation to provide the parents’ requested accommodation, which was training nonmedical personnel at the neighborhood school or allowing a nurse to travel to the neighborhood school at lunchtime to administer the student’s insulin injection, when the student already had meaningful access to its programs and services. The district court further explained that Section 504 only entitles students with disabilities to reasonable accommodations, and not the best accommodations. Here, a student was diagnosed with Type I diabetes, which required insulin injections once a day at school. Because his neighborhood school did not have a full-time nurse on site, the school district offered the parents placement at two other schools that had a full-time nurse available on campus. Thus, while a school district must make efforts to accommodate a child who is otherwise unable to access its programs, it does not have to modify an existing program

²⁴ 29 U.S.C. § 794.

²⁵ *Trebatoski v. Ashland Sch. Dist.*, 743 F.3d 524, 530 (7th Cir. 2014); *see* 42 U.S.C. § 12131(2); 34 C.F.R. § 104.33(a).

²⁶ *A.M. v. NYC Dep’t of Educ.*, 840 F.Supp.2d 660, 680 (E.D.N.Y. 2012) (citing *Alexander v. Choate*, 469 U.S. 287, 300 n. 19 (1985)); *Moody v. NYC Dep’t of Educ.*, 60 IDELR 211 (2d Cir. 2013) (holding that the school district only had to ensure that the student had meaningful access to school district programs).

²⁷ *R.K. v. Bd. of Educ. of Scott County*, 64 IDELR 5 (E.D.Ky. 2014).

which offers the student comparable educational opportunities solely to allow the student to attend his neighborhood school.

2. IS THE REQUESTED ACCOMMODATION REASONABLE?

Section 504 does not define what types of accommodations are “reasonable,” instead leaving that determination to the school district on a case-by-case basis. In determining whether an accommodation is reasonable, the school district should assess whether the requested accommodation is necessary for the student to safely access or participate in school or extracurricular activities.²⁸ Reasonable accommodations must be made when necessary to avoid discrimination on the basis of disability *unless* the school district can demonstrate that the modifications would (1) cause a fundamental alteration in the service, program, or activity, (2) impose an undue financial or administrative burden on the school district; or (3) pose a threat to personal or public safety.²⁹

In the extracurricular context, school districts should ensure that students with disabilities have an equal opportunity for participation in such activities. School districts need not alter the general qualifications for participation. However, school districts should make individualized, reasonable modifications or provide aids and services, unless a school district can show that doing so would be a fundamental alteration to the program either by: (1) giving the student with a disability an unfair advantage, or (2) creating an unacceptable change to the activity, even if the modification was applied to all students.³⁰

²⁸ See *Cascade Sch. Dist.*, 37 IDELR 300 (OSEA 2002); see also *Irvine Unified Sch. Dist.*, 19 IDELR 883 (OCR 1993).

²⁹ 28 C.F.R. § 35.130(b)(7); *McPherson v. Mich. High Sch. Athletic Ass’n, Inc.*, 119 F.3d 453 (6th Cir. 1997); *Sch. Bd. of Nassau County v. Airline*, 480 U.S. 273 (1987).

³⁰ *Dear Colleague Letter*, U.S. Dep’t of Educ. Office for Civil Rights (Jan. 25, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.pdf>; *Letter to Nat’l Sch. Bds. Ass’n*, U.S. Dep’t of Educ. Office for Civil Rights (Dec. 16, 2013), <https://www.nsba.org/sites/default/files/reports/OCR%20Dec.%2016%20Letter%20-%20RE%20-%20NSBA%20May%202013%20Letter.pdf>.

a. GENERAL ACCOMMODATIONS

In *Mystic Valley Regional Charter School*,³¹ the hearing officer found that a classroom ban on peanuts and tree nuts would not fundamentally alter the charter school's programs. In this case, the parents of a first-grade student with a life-threatening allergy to peanut and tree nut products claimed that the charter school failed to accommodate their son because it did not ban all peanut/tree nut products in the student's classroom. The school argued that it offered reasonable accommodations under the student's Section 504 plan—asking other parents to refrain from sending contaminated products to school, requiring staff and students to wash their hands before and after eating, training staff on symptoms of anaphylactic reaction and how to administer medicine, stopping the use of peanut butter as an alternative lunch, requiring the student to eat at a peanut/tree nut free table with a chosen friend, and washing all tables and desks after meals—and that a classroom ban would fundamentally alter the nature of the class and be an undue burden on staff.

The hearing officer concluded that, given the severe nature of the student's disability as well as the student's young age, a classroom ban on peanuts and tree nuts was reasonable. The hearing officer specifically noted that the ban did not affect the education of other students so it did not fundamentally alter the educational program. Additionally, since the school already banned other foods (pizza, gum, candy, fast food) in the classroom, including peanuts and tree nuts in the ban would not pose an undue hardship.

Compare that case with *Zandi v. JVB Fort Wayne Community School*,³² where a district court ruled that the school district did not have to develop a written policy banning the spraying of perfumes in school to reasonably accommodate a high school student with an allergy to certain

³¹ *Mystic Valley Reg'l Charter Sch.*, 40 IDELR 275 (MSEA 2004).

³² *Zandi v. JVB Fort Wayne Cmty. Sch.*, 2012 WL 4472006 (N.D. Ind. 2012), appeal dismissed (Jan. 14, 2013).

fragrances. The district court found that the school took multiple steps to protect the student, such as issuing regular morning announcements, running a school newspaper article stating that students should not spray fragrances in common areas, requiring teachers to be on the lookout for spraying, and allowing the student to leave class early to avoid the rush between classes. The school also offered to put up posters about the issue. And, after the student had a severe reaction, the school offered to provide homebound instruction for the remainder of the year to the student. The district court noted that without a medical or other expert opinion establishing that perfume sprayed in the school building elicited a different reaction than perfume already sprayed on a person who enters the building, the student could not show that a written policy would have prevented his reactions from occurring.

Similarly, in *Upper Dublin School District*,³³ a hearing officer determined that requiring the school district to wash playground and art equipment prior to use or to purchase duplicate equipment goes beyond accommodations necessary to protect adequately a student with peanut and tree nut allergies. The hearing officer emphasized that the student had not had an allergic reaction to peanuts or tree nuts at any time while participating in school-related activities. In addition, the washing would still provide no guarantee that the student would not come into contact with allergens at school due to cross contamination. Therefore, the school district was not required to provide such accommodations to comply with Section 504.

In *Wilson County (TN) School District*,³⁴ OCR rejected a school district's argument that allowing students with Section 504 plan accommodations for extra time to complete class work, homework, and routine tests in honors classes would fundamentally alter those classes. Here, a 10th grade student diagnosed with ADHD and Obsessive Compulsive Disorder enrolled in honors

³³ *Upper Dublin Sch. Dist.*, 110 LRP 37073 (PSEA 2010).

³⁴ *Wilson County (TN) Sch. Dist.*, 50 IDELR 230 (OCR 2008).

classes during the 2006-2007 school year. Shortly thereafter, his Section 504 plan was amended to exclude his Section 504 academic accommodations (e.g., extra time for class work, homework, and routine classroom tests) in his honors classes despite those accommodations being provided in his regular classes. OCR found that the school district violated Section 504 and Title II by failing to provide appropriate accommodations in the student's honor classes. In finding against the school district, OCR stated that the school district was required to provide the related aids and services that the student needed to participate in the honors classes because those classes are part of the general education curriculum.

b. EXTRACURRICULAR ACCOMMODATIONS

In *Wooster City (OH) School District*,³⁵ OCR rejected a school district's (and state athletic association's) argument that allowing a middle school student who used a wheelchair to participate in track and field with non-disabled peers would fundamentally alter the sport or place the footed student-athletes at risk. Here, the Ohio High School State Athletic Association ruled that allowing the student to race with non-disabled peers would constitute an unacceptable alteration of the sport. The school district, which was a member district of the athletic association, decided to let the student participate on the team, but required that he participate in a separate "heat race" or exhibition race during competitions, so he competed alone and received no points for his performance.

OCR determined that both the school district and the athletic association discriminated against the student in violation of Section 504. Specifically, OCR rejected the athletic association's and school district's argument that allowing wheelchair bound and footed student-athletes to race together would fundamentally alter the sport because the paralympic track rules and the general

³⁵ *Wooster City (OH) Sch. Dist., Ohio High Sch. Athletic Ass'n.*, 64 IDELR 154 (OCR 2014).

track rules were nearly identical and would not be any different than allowing both genders to run in the same race (which the athletic association allowed). Moreover, OCR disagreed with the athletic association's assertion that footed student-athletes may be inadvertently injured if wheelchair bound students competed at the same time. OCR noted that staff and student interviews as well as personal observations of track practice clearly showed that there were no valid concerns about injuries and that the athletic association and school district would have realized this had they done a specific individual inquiry into the requested accommodations, as required by law.

c. SERVICE ANIMALS

In *Gates-Chili Central School District*,³⁶ the Department of Justice ("DOJ") found that requiring staff to assist a student in a few verbal commands to "handle" a service dog was reasonable and would not fundamentally alter the nature of the educational program. Here, the school district argued that the ADA does not require it to act as a handler for a service dog and, therefore, refused to allow a non-verbal Kindergarten student with multiple disabilities to bring a service dog to school unless the student's mother provided a full-time handler for the animal. Over the next four years, the parent paid a private handler more than \$40,000 to accompany the service animal to school. The parent argued that, with minimal assistance from the student's one-to-one aide, the student could handle the service dog. The services provided by the handler included tethering and untethering the service dog from the student and issuing, at most, five commands to the dog during the school day. The private handler testified that she primarily used only two of the

³⁶ *Gates-Chili Central Sch. Dist.*, 65 IDELR 152 (DOJ 2015). This decision is consistent with an FAQ issued by the Department of Justice, Civil Rights Division, on July 20, 2015, in which the DOJ noted that in the school (K-12) context, the school may need to provide some assistance to enable a particular student to handle his or her service animal. The DOJ clarified that "care and supervision" (e.g., proper veterinary care, feeding, walking, and grooming) is a distinct responsibility and different from handling. *FAQ: Service Animals and the ADA*, U.S. Dep't of Justice (Jul. 20, 2015), http://www.ada.gov/regs2010/service_animal_qa.pdf [hereinafter *Service Animals FAQ*].

five commands during the day and that the dog is tethered and untethered about 15 times per day, taking approximately three seconds each time.

Under the ADA, school districts may exclude a service animal if (1) it is out of control and the handler does not take effective action to control the animal or (2) the service animal is not housebroken. Here, there was no evidence of either of these issues. In ruling against the school district, the DOJ noted staff assistance with issuing the few verbal commands necessary for the student to control the dog involved only minimal effort by the school staff while substantially furthering the student's ability to use the service dog. The DOJ found that making reasonable modifications (using a case-by-case analysis) such as providing assistance to a student in tethering and untethering a service animal, escorting the student through school as the student is accompanied by the service animal, and assisting a student with a communication disability in issuing commands to the service animal should be made by the school district and do not fundamentally alter the nature of the service. The DOJ also found that the school district was to pay compensatory damages to the parent for failure to comply with the ADA.

Likewise, in *Alboniga v. School Board of Broward County*,³⁷ a district court held that the school district's failure to provide an employee to assist a six-year-old student diagnosed with cerebral palsy, spastic quadraparesis, and a seizure disorder with his service dog's routine care amounted to a failure to accommodate under the ADA.³⁸ The school district maintained that, under Title II and Section 504, it was not responsible for the care and supervision of service animals and, thus, it was not required to provide an employee to help the student walk the dog. Disagreeing with the school district, the district court noted that the requested assistance was akin to an employee assisting a student with diabetes with an insulin pump or a blind student to deploy a white cane.

³⁷ *Alboniga v. Sch. Bd. of Broward County*, 65 IDELR 7 (S.D. Fla. 2015).

³⁸ *Service Animals FAQ*, *supra* note 36.

Alboniga and *Gates-Chili* illustrate a trend to require school districts to do more than accommodate for the presence of the service animal and actually make accommodations to facilitate the animal in the school.³⁹

III. DO NOT RESUSCITATE ORDERS

In addition to the increase in students who are eligible for Section 504 plans, advances in pediatric medicine and medical technology have made it possible for medically fragile children to attend school more frequently than in the past.⁴⁰ As a result, school districts may receive a do-not-resuscitate (“DNR”) order⁴¹ from parents who wish to forego life-sustaining medical treatment for their child. The legal and practical considerations for school districts associated with this highly emotional area are complex. Unfortunately, the law is unsettled with very few states having statutes or binding legal decisions addressing a parent’s right to have a child’s DNR order honored in school and the multifaceted interests of school districts in navigating how, or if, they should honor a student’s DNR order.

A. WHAT IS A “DNR ORDER”?

A DNR order is implicated only where natural cardiac and respiratory functions have ceased, so that measures such as CPR are necessary to resuscitate a patient from what might otherwise be a clinical death. A DNR order does not, in and of itself, authorize the withholding of medical treatment from a patient whose cardiac, respiratory, and other functions are continuing

³⁹ *Id.*

⁴⁰ *Do Not Attempt Resuscitation (DNR) – The Role of the School Nurse*, NAT’L ASS’N SCH. NURSES (Jan. 2014), <http://www.nasn.org/Portals/0/positions/2014psdnr.pdf>.

⁴¹ A do-not-resuscitate (“DNR”) order also can be referred to as a do-not-attempt-resuscitation (“DNAR”) order, an allow natural death (“AND”) order, or a medical order for life sustaining care (“MOLST”) order. Usually, a DNR or similar order is often part of a broader, palliative care plan and are written for the hospital setting. But, “out-of-hospital” DNR (“OOH DNR”) orders are increasing among patients with terminal illnesses, especially children. Jessica Adelman, *The School-Based Do-Not-Resuscitate-Order*, 13 DEPAUL J. HEALTH CARE L. 197 (2010). Throughout this paper, the term “DNR order” is used.

naturally. Typically, DNR orders are written for use by medical personnel in a medical setting, such as a hospital, nursing home, or hospice care, and not for use by school personnel in an educational environment.⁴² As a result, the implementation of a DNR order in the educational setting is even more complicated because of the general lack of medical committees to weigh in on the process of implementation, which are available in the medical setting.

B. LEGAL AUTHORITY REGARDING DNR ORDERS

With respect to honoring DNR orders, the issues facing school districts are as multifaceted as the implications are profound. Courts have consistently recognized a parent's right to make medical decisions on behalf of a minor child. That right, however, must be balanced against the State's interest in the preservation of life. In the school context, the potential impact of a death-defining incident upon teachers, students, and the school environment also is an important interest. Unfortunately, the vast majority of states do not have laws governing how DNR orders should or can be implemented in schools. Rather, a school district's ability to honor a DNR order may be influenced by a variety of factors, including state statutes or regulations, agency decisions, judicial decisions, state attorney general opinions, and local school district policy or procedures.

1. OCR DECISION ON DISTRICT'S STUDENT DNR ORDER POLICY

In *Lewiston, Maine, Public Schools*,⁴³ OCR issued a decision upholding a school district's policy prohibiting staff from complying with requests from parents or others to not resuscitate a student. The policy did not distinguish between students with and without disabilities; however, the policy allowed for the development of individually designed medical resuscitation plans by multidisciplinary school-based teams for students whose individual needs required such plans. An individualized plan had been developed for the student at issue in the case. The parent's complaint

⁴² Adelman, *supra* note 41.

⁴³ *Lewiston, Maine, Pub. Sch.*, 21 IDELR 83 (OCR 1994).

alleged that the school district discriminated against the student with a disability by adopting a policy that denied the student the same life-sustaining emergency care that was provided to other students.

OCR evaluated the school district's policy under Section 504 and Title II and found that the policy did not discriminate on the basis of disability. OCR noted that the individual plan developed in this case: (1) was designed by a multidisciplinary team of persons knowledgeable about the student; (2) described in positive terms the specific steps that school personnel should take if the student requires life-sustaining emergency medical care while under the school's supervision or control; (3) required the student's mother to obtain a second medical opinion on the appropriateness of the plan by a physician mutually agreeable to the mother and the school district; (4) required that the plan be developed annually, sun-setting on December 31 each year; and (5) specified that a second medical opinion may be obtained for each year's plan.

OCR found that the school district's approach to develop this student's individualized plan generally comported with the approach approved by OCR in developing programs for students with disabilities. OCR said it would not substitute its judgment for the school team's judgment with regard to the merits of the plan since appropriate procedures were followed in its development. OCR also noted with approval the school district's plan to invite a representative of Maine Advocacy Services to join the team responsible for developing the plan to be an independent advocate for the student in the process.

Though this decision focuses on issues of discrimination, the approach it highlights is beneficial. Case-by-case determinations regarding whether DNR orders will be honored allow for full consideration of the facts of each case, including the nature of the student's condition, whether

school staff may need to make medical determinations as to why a student has entered cardiac or respiratory arrest, and the potential impact upon the educational environment.

2. STATE LEGAL AUTHORITY REGARDING DNR ORDERS AND SCHOOLS

In 1994, the Maryland Attorney General weighed in on the issue of whether schools should honor a DNR order, concluding that if a student's physician has entered a DNR order on the authorization of the child's parents, school officials must act in accordance with that order.⁴⁴ The opinion stated that school officials should provide comfort and reassurance to the child in an emergency, but they are not to perform procedures which the child's parents and physician have ruled out. In fact, the Attorney General opined that an employee who performs CPR contrary to a DNR order may be liable for battery and other torts.

Nevertheless, the Maryland Attorney General opinion recognized several concerns of schools. The first related to the imposition of medical judgments on school districts in applying a DNR order when, for instance, school employees must determine whether a student is going into cardiac arrest or merely choking on a piece of food. The Attorney General stated that physicians and parents have a duty to delineate carefully in the DNR order the medical treatments that are to be given. To alleviate the possibility that school staff who are unaware of the order will subject the school to liability by performing CPR, the Attorney General noted that state regulations require all personnel who will be working with the child to be aware of the order's provisions. Finally, the Attorney General stated that calling 911 or emergency medical services does not constitute providing medical treatment in violation of a DNR order.

In addition to the Maryland Attorney General opinion, at least one state court has addressed the issue of honoring a DNR order in school. In *ABC and DEF School v. Mr. and Mrs. M.*, a

⁴⁴ 79 Md. Op. Atty. Gen. 244 (Md.A.G.), 1994 WL 199662 (Opinion No. 94-028, 1994).

Massachusetts trial court held that a public school must honor a student’s DNR order.⁴⁵ The DNR order at issue prohibited the school from taking certain measures such as CPR or cardiac medications, both of which could be harmful to the medically fragile student, in the event of cardiorespiratory arrest. Because the DNR order required inaction (not active steps), the court found that honoring the DNR order would violate neither the school’s preservation of life policy nor the line of cases holding that health care professionals cannot be compelled to take active measures contrary to their view of their ethical duty toward their patient. Citing a Massachusetts Supreme Court decision holding that the right to refuse medical treatment stems from the constitutional right to privacy,⁴⁶ the trial court determined that the parents had the right to refuse unwanted medical treatment on behalf of their minor child.

Besides a potential constitutional right to privacy issue, DNR orders also may implicate a person’s right to due process before being deprived of “liberty.” For instance, in *Cruzan v. Director*, the United States Supreme Court held that the freedom of a competent person to refuse medical treatment rises to the level of a constitutionally-protected liberty interest.⁴⁷ While this holding does not mean that a person’s right to refuse medical treatment is absolute, it does mean that a person must be afforded due process before that right is taken away. In *Cruzan*, the Supreme Court upheld the Missouri Supreme Court’s decision requiring “clear and convincing” evidence before giving effect to a competent person’s desire to discontinue life sustaining care should the person’s condition deteriorate into a persistent vegetative state. While it remains un-tested if the *Cruzan* standard applies in an educational setting, determining the amount of process that is required in a school environment requires a balancing of interests—the individual’s liberty interest,

⁴⁵ *ABC Sch. v. Mr. & Mrs. M. ex rel. Minor M.*, 1997 WL 34594167 (Mass. Super. 1997).

⁴⁶ *See Supt. of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977).

⁴⁷ *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261 (1990).

the State's interest in preserving life, and the interest of protecting the educational environment. An "educationally-based process" that may satisfy the requirements of due process is to use the Section 504 or IEP process to make an individualized decision regarding whether to honor a student's DNR order in school.

C. SCHOOL DISTRICT CONSIDERATIONS

Due to the lack of legal guidance and clarity regarding honoring DNR orders in schools, it is no surprise that few state educational agencies or school districts have policies and procedures address this issue. A study conducted in 2005 revealed that "80% of the nation's 50 largest school districts and districts in 31 additional state capitals did not have a policy, regulation, or protocol supporting a student's DNR."⁴⁸ While the legal authorities discussed above recognize a variety of legitimate and well-recognized interests which must be weighed against one another when a school district decides whether to honor a student DNR order, a court's decision in any such case would largely be dictated by the specific facts at hand.

School districts can, however, reduce uncertainty by proactively developing and implementing policies and procedures for addressing student DNR orders. A school district in a state with binding legal authority, whether by state statute, regulation, judicial decision, or state attorney general opinion, should ensure that any policies and procedures regarding student DNR orders are consistent with those requirements. But, for the majority of school districts in states that do not have clear or binding legal authority addressing student DNR orders in schools, the *Lewiston, Maine*, OCR decision is instructive.

The *Lewiston, Maine*, OCR decision suggests that a practice of using a multidisciplinary team to develop individually designed interventions, such as individual emergency medical

⁴⁸ Policy Statement: Honoring Do-Not-Attempt-Resuscitation Requests in Schools, 125 AM. ACAD. PEDIATRICS 1073 (2010), <http://pediatrics.aappublications.org/content/125/5/1073.full.pdf>.

treatment plans, complies with federal law.⁴⁹ The commentators on this subject appear to agree that the subject of life sustaining treatment should be addressed in advance of an emergency through a team decision-making process that involves school district staff, parents, any necessary medical experts, and, at the option of the family, religious advisors.⁵⁰ In this regard, a school district should develop an individualized plan upon the inclusion of a student with a DNR order and, as part of that process, the school district's policy should be applied in a flexible manner, taking into account individual circumstances.

In determining how to respond to DNR orders, school districts also must consider the potential liability of school staff who may or may not follow a student's DNR order. This issue was highlighted in *ABC School*, where the state court mandated that the school comply with a student's DNR order, and simultaneously denied the school district's request that any teacher or staff member who failed to comply with the DNR order be shielded from liability.⁵¹

The available legal guidance on liability is scarce. In most states, there are not any express measures to protect school personnel who follow a student DNR order.⁵² The common law doctrine of *in loco parentis*, which "puts the teacher in the parent's shoes," also is limited in its protections with regard to medical decisions. Courts have held that *in loco parentis* does not give schools the authority to exercise judgment regarding medical decisions for students in school, except in emergency circumstances.⁵³ Thus, if a school acts contrary to a parent's request that is

⁴⁹ *Lewiston, Maine, Pub. Sch.*, 21 IDELR 83 (OCR 1994).

⁵⁰ Eric R. Herlan, *Is There A Right To Die On School Grounds? How To Respond To DNR Orders In School*, Inquiry and Analysis 4 (Jan. 1995); Susan Kubert Sapp, *Compliance with "Do Not Resuscitate" Orders in School*, 31 NOLPE Notes No. 8 (Sept. 1996).

⁵¹ *ABC Sch. v. Mr. & Mrs. M. ex rel. Minor M.*, 1997 WL 34594167 (Mass. Super. 1997).

⁵² As of 2010, only 16 states and Washington D.C. had laws that shield school personnel who follow DNR orders in school from liability. Adelman, *supra* note 41.

⁵³ Adelman, *supra* note 41.

explicitly listed in a student DNR order and administers CPR, the school district and staff member could be liable.⁵⁴

For instance, the Illinois Supreme Court indicated that teachers are not privileged to do everything that a parent may do concerning the medical treatment of a child. In *O'Brien v. Township High School District 214*,⁵⁵ a student injured his knee outside of school. The injury began to bleed again during football practice. Rather than just stopping the bleeding, a student assistant trainer opened the wound to treat it, from which complications arose. Because this was non-emergency treatment of an existing injury, and because the trainer and coaches acted outside their competence in treating the injury, the court ruled that their activities were not connected with the school program. Therefore, neither the *in loco parentis* doctrine nor the Illinois Tort Immunity Act applied, leaving the school and staff open to liability. This case suggests that a parent's right to dictate medical treatment for his/her child may result in liability for the school district and school staff when they act contrary to the parent's direction.

In sum, the legal authority discussed above indicates a variety of legitimate and well-recognized interests which must be weighed against one another when parents provide a school with a DNR order for their child. While in most states there is no clear or binding legal authority requiring school districts to honor DNR orders for students, school districts may find such a bright line position to be unpalatable and instead address student DNR orders on a case-by-case basis as suggested by OCR.

⁵⁴ *Id.*

⁵⁵ *O'Brien v. Township High Sch. Dist. 214*, 83 Ill.2d 462, 415 N.E.2d 1015, 1018 (1980).

IV. CONTAGIOUS DISEASES & IMMUNIZATION

In recent years, school districts nationwide have had to respond quickly to outbreaks of contagious diseases. The three most prominent outbreaks in the past half dozen years were the H1N1 flu outbreak in 2009-2010 and the Ebola virus and measles outbreaks in 2014-2015.⁵⁶ These outbreaks prompted the publication of federal and state guidance to assist school districts as they review and implement their policies and procedures when responding to outbreaks.

In addition to dealing with the outbreaks and possible exclusion of students from school, school districts also have to be prepared to deal with public perceptions about a contagious disease, the perceived risk of students contracting the contagious disease (in addition to the actual risk), and inquiries from school staff, parents, and the community. Some contagious diseases, like the Ebola virus, carry more of a perceived risk than an actual risk. A measles outbreak, on the other hand, presents a very real risk of significantly affecting schools and students.

A. MANAGING CONTAGIOUS DISEASE OUTBREAKS IN SCHOOLS

The legal and practical guidance discussed in this section for school districts on managing contagious disease outbreaks use the H1N1 flu, Ebola virus, and measles outbreaks as working examples, but most of the guidance is applicable to all contagious diseases.

1. IMMUNIZATION, EXEMPTION, & EXCLUSION REQUIREMENTS

The recent outbreaks of contagious diseases and concerns about outbreaks have caused school districts nationwide to review more closely immunization and exemption requirements for students, especially in light of the increasing number of parents who are opting to not vaccinate

⁵⁶ *The 2009 H1N1 Pandemic: Summary Highlights, April 2009-April 2010*, CDC, <http://www.cdc.gov/h1n1flu/cdcresponse.htm>; *Addressing Ebola Virus Infection Concerns in K-12 Schools: Interim Guidance for District and School Administrators*, CDC (June 17, 2015), <http://www.cdc.gov/vhf/ebola/children/k-12-school-guidance.html>; *Measles Cases and Outbreaks*, CDC (Aug. 24, 2015), <http://www.cdc.gov/measles/cases-outbreaks.html>.

their children. It is essential that school districts are knowledgeable about and are enforcing their respective state's immunization and exemption requirements and any exclusion requirements if students are not in compliance with those requirements.

While there are no federal vaccination laws, the United States Supreme Court held in *Jacobson v. Commonwealth of Massachusetts* that a state statute empowering local authorities to require everyone to be vaccinated was constitutional.⁵⁷ This case set the precedent for states to require children to be vaccinated before attending school.⁵⁸ Currently, all 50 states have vaccination requirements for children.⁵⁹

All 50 states also recognize some type of exemption to their respective immunization requirements.⁶⁰ The three main types of exemptions are medical, religious, and philosophical. A medical exemption is recognized by all 50 states. The requirements for a medical exemption vary by state and usually are set by statute and/or regulations promulgated by a state's department of public health. Generally, the parent of a child must obtain a signed statement from the child's health care provider that states that administering the vaccine would cause harmful and detrimental effects to the child.⁶¹

Another common exemption is the religious exemption, which is recognized by 47 states.⁶² Only Mississippi, West Virginia, and California prohibit religious exemptions to vaccinations.⁶³ This exemption can be controversial, particularly because the extent of the exemption, the

⁵⁷ *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11, 39 (1905).

⁵⁸ Charles J. Russo and Ralph D. Mawdsley, *Student Vaccinations: A Brief Pain That's Worth the Gain?*, 241 ED. LAW REP. 519 (2009).

⁵⁹ *State School Immunization Requirements and Vaccine Exemption Laws*, CDC (Feb./Mar. 2015), <http://www.cdc.gov/phlp/docs/school-vaccinations.pdf> [hereinafter *State School Immunization Requirements*].

⁶⁰ *Id.*

⁶¹ *FAQ: Vaccine Exemption Information*, Nat'l Vaccine Info. Center, <http://www.nvic.org/faqs/vaccine-exemptions.aspx>.

⁶² *Id.*

⁶³ *Id.*

requirements for the exemption, and who gets to determine approval or rejection of the exemption vary by state. Proponents of the exemption argue that it embodies parental rights, while opponents argue that the exemption places other children at risk of contracting a deadly disease.

The least common and most controversial of the three main types of exemptions is the philosophical exemption. In states that recognize this type of exemption, an individual often must object to all vaccinations in order to fall under the exemption.⁶⁴ Some states, including Delaware, Iowa, and New Jersey, specifically exclude philosophical exemptions in law.⁶⁵

In some states, as part of the process to obtain a religious or philosophical exemption, education regarding immunizations is required. For example, Illinois now requires an educational component as part of its religious exemption. As a result of a recent amendment to Illinois' health examinations and immunizations statute, a Certificate of Religious Exemption must be signed by a student's health care provider. The Certificate, in addition to setting forth the parent's grounds for his/her objection to the specific immunization (or health examination or screening test), also must reflect that the child's health care provider informed the parent of the benefits of immunization and the health risks to the student and the community of the communicable diseases for which immunization is required. The law makes clear, however, that the health care provider's signature reflects only that the education was provided. The determination of whether the objection constitutes a valid religious objection still rests with the school district.⁶⁶ Arizona, Utah, and Vermont are examples of other states that require education as part of the exemption process.⁶⁷

Another important consideration regarding immunization exemptions is how often a parent must submit the exemption request. This varies by state, and sometimes by type of exemption.

⁶⁴ *Id.*

⁶⁵ *State School Immunization Requirements*, *supra* note 59.

⁶⁶ P.A. 99-0249 (eff. Aug. 3, 2015), amending 105 ILCS 5/27-8.1.

⁶⁷ *State School Immunization Requirements*, *supra* note 59.

Some states require medical exemption applications to be resubmitted annually, or even more frequently. For example, Georgia and Kansas require medical exemptions to be submitted annually, and New Mexico law states a student is exempt from immunization requirements for a period not to exceed nine months.⁶⁸

Finally, in the case of an outbreak, epidemic, or emergency, state laws also differ as to whether students with exemptions from immunizations must be excluded from school. In addition, some state laws require school districts to notify parents or parents to acknowledge during the exemption process that students can be excluded during an outbreak, epidemic, or emergency.⁶⁹ Accordingly, it is important that school districts are knowledgeable about state law requirements and state and local health department protocols for exclusion during an outbreak, and what policies and procedures the school district may need to have in place.

2. SERVICES FOR STUDENTS EXCLUDED FROM SCHOOL DUE TO CONTAGIOUS DISEASE OUTBREAK

When there is an outbreak of a contagious disease and state law requires excluding students from school who are unvaccinated or who have not presented proof of immunity or vaccination, school districts must consider what services, if any, must be provided to general education and special education students who are excluded from school.

In December 2014, following the Ebola virus outbreak, OCR issued a Fact Sheet addressing how school officials can implement the CDC recommendations and resources for protecting students from Ebola without discriminating on the basis of disability under Section 504 and Title II.⁷⁰ OCR issued a similar Fact Sheet in March 2015 following outbreaks of the measles

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Fact Sheet: Implementing CDC's Ebola Guidance for Schools while Protecting the Civil Rights of Students and Others*, U.S. Dep't of Educ. (Dec. 2014), http://rems.ed.gov/Docs/Implementing_CDC_Ebola_Guidance_For_Schools_Protecting.pdf [hereinafter *OCR Ebola Fact Sheet*].

in states across the country, including California and Illinois.⁷¹ The measles Fact Sheet also specifically addressed situations involving students who are medically unable to receive a vaccine because of a disability. Taken together, these Fact Sheets provide guidance to school officials regarding providing continuity of learning if a student is excluded from school due to exclusion requirements when there is a contagious disease outbreak.

The Fact Sheets acknowledge that schools should comply with state laws and protocols for excluding non-vaccinated students, including those who are medically unable to be vaccinated, when there is an outbreak or potential outbreak of a vaccine-preventable disease such as the measles. OCR also reminds school officials that under Section 504 and Title II, school districts “must maintain continuity of learning by providing educational services” to a student who is excluded from school because he/she is medically unable to receive the vaccine for the particular contagious disease because of a disability, as well as for a student who is excluded from school because he/she has or is regarded as having, or potentially having, the particular contagious disease.

OCR encourages school districts to think creatively about how to provide continuity of educational services to a student during a prolonged absence due to illness or exclusion and how to provide academic support upon a student’s return to school. Some suggested strategies include providing copies of assignments for a student to work on at home and web-based distance learning coursework. The provision of direct services to a student at home should be done in consultation with local public health officials to assess and address any risk of transmission of the contagious disease. And, for a student with disabilities who has an IEP or Section 504 plan and who is

⁷¹ *Fact Sheet: Addressing the Risk of Measles while Protecting the Civil Rights of Students with Disabilities*, U.S. Dep’t of Educ. Office of Civil Rights (Mar. 2015), http://rems.ed.gov/docs/ED_Measles_OCR_fact_sheet_2015-3-6_Clean_508.pdf [hereinafter *OCR Measles Fact Sheet*].

excluded from school for an extended period of time, the student’s IEP or Section 504 team may need to convene in order to determine how the school district will ensure the student continues to receive FAPE.

3. MAINTAINING THE PRIVACY OF STUDENT INFORMATION

School districts also must consider their obligations to protect the privacy of student information when confronted with an outbreak of a contagious disease and may be required to exclude students from school. Under the Family Educational Rights and Privacy Act (“FERPA”), schools are generally not permitted to disclose education records or personally identifiable information from education records without the written, signed consent of a student’s parent (or student who has reached 18 years old).⁷² Immunization and other health records that are directly related to the student and are maintained by the school are considered “education records” under FERPA.⁷³

Schools may, however, disclose otherwise protected information, without consent, when knowledge of the protected information is necessary to protect the health or safety of students or other individuals within the school. This “health or safety exception” is limited to the timeframe of the emergency and mandates that only essential information is distributed to the appropriate parties.⁷⁴ Public health officials, trained medical personnel, law enforcement, and parents (including parents of a student who has reached 18 years old) are generally considered “appropriate parties” because their knowledge of student immunization and health information is necessary to protect the health or safety of students or other individuals in the school community when there is

⁷² 20 U.S.C. § 1232g; 34 C.F.R. Part 99.

⁷³ 34 C.F.R. § 99.30.

⁷⁴ 34 C.F.R. §§ 99.31(a)(10), 99.32(a)(5), 99.36. See *Family Educational Rights and Privacy Act (FERPA) and H1N1*, U.S. Dep’t of Educ. (Oct. 2009), <https://www2.ed.gov/policy/gen/guid/fpco/pdf/ferpa-h1n1.pdf> [hereinafter *FERPA and H1N1*].

a contagious disease outbreak. But, generally, the disclosure of personally identifiable information to the media is prohibited. As the Family Policy Compliance Office (“FPCO”) explained in guidance issued regarding student privacy during the H1N1 flu outbreak:

“[w]hile the media may have a role in alerting the community of an outbreak, they are not ‘appropriate parties’ under FERPA’s health or safety emergency provision because they generally do not have a role in protecting individual students or other individuals at the school. ‘Appropriate parties’ in this context are normally parties that could provide specific medical or safety attention, such as public health and law enforcement officials.”⁷⁵

Under the health or safety exception, the school district is responsible for deciding whether to disclose a student’s personally identifiable information.⁷⁶ Such decisions should be made “on a case-by-case basis, taking into account the totality of the circumstances pertaining to the threat” and include a determination from the school district that there is “articulable and significant threat to the health or safety of a student or other individuals.”⁷⁷ This is a flexible standard which gives deference to school districts. The U.S. Department of Education will not second guess a school district’s decision about the nature of the emergency and the appropriate parties to whom information should be disclosed so long as there is “a rational basis” for the school district’s decision.⁷⁸

Sometimes threats to health or safety can be addressed by sharing information with the necessary parties in a way that does not identify particular students. For example, sending a letter or e-mail to parents, and posting information on doors where parents do school drop-off and pick-up, notifying them of the situation (e.g., H1N1 flu virus reported) without releasing personal information can be an effective way to communicate the message without triggering privacy

⁷⁵ *FERPA and H1N1*, *supra* note 74.

⁷⁶ *Id.*

⁷⁷ *Id.*; 34 C.F.R. § 99.36(c).

⁷⁸ *FERPA and H1N1*, *supra* note 74.

concerns. But, in the event the situation warrants the sharing of individual student information (for example, when an activated contagious disease exclusion protocol requires individual students to be identified for the purpose of excluding them from school), the school district must analyze the situation under the requirements of the health or safety exception.

In making this determination, school districts can take into consideration a public health emergency declared by the state or local departments of public health, and even a Public Health Emergency declared by the Secretary of Health and Human Services, as was the case during the H1N1 flu outbreak. However, this type of declaration can only serve as a “rational basis” if there is a current outbreak of the contagious disease in the particular school district. Under FERPA’s health or safety exception, an emergency does not include the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown, such as general emergency preparedness activities.⁷⁹ Local departments of public health often contact school districts directly to notify them that a public health emergency has been declared or that the exclusion protocol for a contagious disease is being implemented in the area and whether the school must comply with the exclusion protocol. It is under these circumstances that school districts must evaluate whether the health or safety exception applies because contagious disease exclusion protocols may require providing student immunization information to local public health department officials.

If protected information is disclosed, school districts also need to remember any notification and/or recordkeeping obligations under federal and state laws. FERPA requires that within a reasonable period of time after a disclosure is made under the health or safety exception, the school district must record in the student’s education records the articulable and significant threat that formed the basis for the disclosure and the parties to whom information was disclosed.⁸⁰

⁷⁹ *Id.*

⁸⁰ 34 CFR § 99.32(a)(5).

Related to the protection of student information, is whether school districts have the right to obtain student information if it is not provided by the student's parent. Germane to the topic at hand is whether school districts can acquire student immunization information from a student's health care provider. While school districts typically ensure compliance with state immunization requirements by requiring parents to submit documentation showing proof of immunity (or an exception under state law), the *Health Insurance Portability and Accountability Act* ("HIPAA") Privacy Rule⁸¹ permits a covered health care provider to disclose proof of immunizations directly to a school nurse or other person designated by the school to receive immunization records if the school is required by state or other law to have such proof prior to admitting the student, and a parent, guardian, or other person acting *in loco parentis* has agreed orally or in writing to the disclosure.⁸² The rationale for this is to ensure that schools have the necessary documentation of immunization in a timely manner so children can be enrolled in school without undue delay.⁸³ In states where proof of immunization is not required for a student to enroll in school, a student's health care provider is not permitted under the HIPAA Privacy Rule to disclose proof of immunization to a school, absent written authorization from the student's parent to provide the requested information directly to the school.⁸⁴

In sum, in the event of an outbreak or possible outbreak of a contagious disease, school districts should work with state and local departments of public health to provide information to students, parents, staff, and the greater school community, while keeping in mind their legal obligations regarding the privacy of student information.

⁸¹ OCR enforces the HIPAA Privacy Rule, which protects the privacy of individually identifiable health information. Health Information Privacy, U.S. Dep't of Health & Human Services, <http://www.hhs.gov/ocr/privacy/>.

⁸² See 45 CFR § 164.512(b)(1)(vi); Student Immunizations, U.S. Dep't of Health & Human Services, (Sept. 19, 2013), <http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveridentities/studentimmunizations.html>.

⁸³ *Id.*

⁸⁴ *Health Information Privacy FAQ*, U.S. Dep't of Health & Human Services, http://www.hhs.gov/ocr/privacy/hipaa/faq/student_immunizations/1512.html.

4. AVOIDING DISCRIMINATORY TREATMENT

In addition to protecting a student's right to privacy, school districts need to take steps to prevent discriminatory treatment of students who are exempt from immunization requirements and students who are wrongly perceived to have contracted a contagious disease.⁸⁵ Using measles as an illustration, under normal circumstances (i.e., non-outbreak conditions) school districts need to ensure that students who are legally exempt from the measles vaccination (due to a medical reason or other exemption recognized by the state) are treated the same as students who received the vaccination. To do so, schools must make reasonable modifications to policies, practices, and procedures that otherwise require vaccinations, so that these exempted students can still attend school.⁸⁶

Additionally, school districts should educate teachers and staff on the signs and symptoms of a specific contagious disease when concerns about a possible outbreak are reported or an outbreak has occurred.⁸⁷ As a result, school staff will be more likely to base their decisions on medical guidance as opposed to other unfounded rationales. This also is an important consideration for communication with families and the school community. Public perception, not fact, often drives people's responses, especially in times of crisis and when little information is available. This was particularly salient during the recent Ebola virus outbreak, when public opinion was often based on perceived risks and irrational fears as opposed to well-established medical data about and proper responses to the outbreak.

⁸⁵ *OCR Ebola Fact Sheet*, *supra* note 70; *OCR Measles Fact Sheet*, *supra* note 71.

⁸⁶ *Id.*

⁸⁷ Addressing Ebola Virus Infection Concerns in K-12 Schools: Interim Guidance for District and School Administrators, CDC (June 17, 2015), <http://www.cdc.gov/vhf/ebola/children/k-12-school-guidance.html>; Measles Cases and Outbreaks, CDC (Aug. 24, 2015), <http://www.cdc.gov/measles/cases-outbreaks.html>.

In *Opayemi v. Milford Public Schools*,⁸⁸ for example, a student filed a federal lawsuit against her elementary school after she was excluded from school based on fears that she had contracted Ebola while traveling in Nigeria. A city health official, while acknowledging that the risk of the student spreading the disease was minor, recommended that the student be quarantined because of rumors, panic, and the climate of the school. The elementary school, in reaction to concerns of parents and staff that the student might transmit Ebola to students and staff at school, excluded the student from school for 21 days. As an alternative, the school sent a school instructor to her home to tutor her for 90 minutes every school day. In the end, the parties agreed to a monetary settlement.

School districts also must ensure that they take appropriate action in response to bullying or harassment of a student based on actual or perceived race, color, national origin, or disability. This issue often comes to light in the context of contagious diseases when there is an outbreak of a disease that originated in, or is more prevalent in, a foreign country.

Both Title VI of the Civil Rights Act of 1964 (“Title VI”) and Section 504 require that any school that receives federal funds must take immediate action to investigate any report of bullying or harassment of a student based on race, color, national origin, or disability. Title II prohibits disability-based discrimination in public schools regardless of whether they receive federal funds. OCR, in its Fact Sheet implementing the CDC’s Ebola guidance, warned that students may be bullied or harassed because of a student’s perceived national origin or because the student’s

⁸⁸ *Opayemi v. Milford Pub. Sch.*, Case No. 3:14-cv-1597 (D. Conn. 2014); Rachele Blidner, *Connecticut Father Sues Daughter’s School Over Ebola Quarantine*, N.Y. DAILY NEWS (Oct. 29, 2014), <http://www.nydailynews.com/news/national/father-sues-daughter-school-ebola-quarantine-article-1.1992162>.; David Ingram & Richard Weizel, *Connecticut Father Sues After Ebola Fears Keep Daughter From School*, REUTERS (Oct. 28, 2014), <http://www.reuters.com/article/2014/10/28/health-ebola-usa-education-idUSL1N0SN2FG20141028>; Randall Beach, *Connecticut District Settles Federal Lawsuit With Family of Student Barred From School Over Fears of Ebola Transmission*, NAT’L. SCH. BOARD ASS’N. (June 16, 2015), <http://legalclips.nsba.org/2015/06/16/connecticut-district-settles-federal-lawsuit-with-family-of-student-barred-from-school-over-fears-of-ebola-transmission/>. [Hereinafter Ebola News Reports].

perceived status as a carrier of the Ebola virus, and that such conduct constitutes illegal bullying or harassment regardless of whether the bully or harasser correctly identified the national origin or disability-status (Ebola) of the student.⁸⁹

For example, in *Opayemi*, the student was quarantined from the school for 21 days, even though she did not display any symptoms. Rather, the school elected to quarantine her based on the fact that she had visited Nigeria to attend a wedding for a family member during the Ebola virus epidemic in 2014, which affected multiple West African countries.⁹⁰ If the student was bullied or harassed based on the fact that she went to Nigeria, the school district could have been found to be in violation of Title VI or Section 504 if it failed to take prompt and effective steps to eliminate the bullying and remedy its effects.

While the OCR Fact Sheet specifically addresses the Ebola virus, it is applicable to any contagious disease where a student is bullied or harassed based the student's actual or perceived status as part of a protected category. Accordingly, school districts should be on alert for and promptly investigate any bullying and harassing conduct during the outbreak, or the concern of an outbreak, of a contagious disease. If the school district's investigation reveals that the bullying or harassment created a hostile environment, whether or not the bully or harasser correctly identified the national origin or disability-status of the student, the school district must "take prompt and effective steps reasonably calculated to end the bullying or harassment, eliminate any hostile environment, prevent the bullying or harassment from recurring, and, as appropriate, remedy its effects."⁹¹

⁸⁹ *OCR Ebola Fact Sheet*, *supra* note 70.

⁹⁰ Ebola News Reports, *supra* note 88.

⁹¹ *OCR Ebola Fact Sheet*, *supra* note 70.

V. CONCLUSION

Dealing with students with a variety of health and medical needs is simply the reality for school districts today. This paper reviewed the legal standards and implications for school districts regarding developing Section 504 plans to support students with health issues, crafting policies and procedures to handle the presence of students with DNR orders in schools, and managing contagious disease outbreaks in schools. To navigate successfully through these and other complex health issues, school districts must be proactive and prepared for any health issue that may arise.