Ratwik, Roszak & Maloney, P.A.

444 Cedar Street, Suite 2100
Saint Paul, Minnesota 55101

(612) 339-0060
www.ratwiklaw.com

The Doctor Is In? Defining the Role of Medical Providers in Special Education

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Christian R. Shafer
crs@ratwiklaw.com

I. THE ROLE MEDICAL PROVIDERS PLAY IN STUDENTS' EDUCATION

A. Medical Providers' Involvement in the Special Education Process Under IDEA

1. Relevant legal background

a. A school district's obligation under IDEA is to provide eligible students with *special education* and *related services* designed to meet their unique needs. *See* 20 U.S.C. § 1400(d).

b. Medical providers can and do often offer school districts recommendations regarding both the special education and related services that they believe a student should receive.

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c. Because medical providers are clearly not educators, school district or a student's IEP team should always *consider* those recommendations, but the IEP team has no obligation to follow the recommendation. Rather, team members must always make the final decision regarding the content of the student's special education program, based on the information and data available to them, their knowledge of the student's needs and their own educational experience and expertise.

2. **Related Services**

a. **Definition of related services.** "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) ***as may be required to assist a child with a disability to benefit from special education*****,** and includes the early identification and assessment of disabling conditions in children." 20 U.S.C. § 1401(26) (emphasis added).

b. **Services are not "related services" when** *such services are not required in order for a child to receive benefit from special education*.

i. The determination of which related services are educationally necessary under IDEA *is left to the discretion of each student's IEP team.*

ii. If a student purportedly requires mental health or specific medical services in order to receive benefit from his or her special education programming and the district does not have an appropriate provider on staff to provide the team the information it needs to render an independent decision about whether that service is required for FAPE, the district may need to contract with an appropriately knowledgeable

medical provider to serve as a medical consultant to the team.

iii. The student's needs, not the district's resources, must drive an IEP team's decision as to what does and does not constitute an appropriate related service. Accordingly, there are circumstances when a school district may need to contract with a medical provider to provide a student the related services he or she requires to receive FAPE. *Cedar Rapids Cmty. Sch. Dist. v. Garret F.*, 526 U.S. 66 (1999).

a. *Garret F.* involved a student who was paralyzed from the neck down at the age of 4. His mental capacities were unaffected, and he was able to attend regular classes. However, he was ventilator-dependent, and could only breathe with external assistance. This required a responsible individual to be on hand at all times. At first, this role was done by his family, then an LPN hired by the family with the settlement proceeds from the motorcycle accident that paralyzed Garret. Subsequently, however, Garret's mother asked the School District to accept monetary responsibility for the continuous one-on-one nursing services that Garret required. The District refused, believing that this was a "medical service" outside the scope of diagnostic and evaluation purposes.

The ALJ determined, and the Courts all affirmed, that the distinction between "medical services" and other related services is that medical services require that the services must be in the special training, knowledge, and judgment of a physician to carry out. Services that can be provided in the school setting by a nurse or qualified layperson are not "medical services." The School District proposed a multi-factor test that would have considered "cost," but the Supreme Court rejected this, noting that the purpose of IDEA was to open the door of public education to students with disabilities, and Garret needed this service just to get through the schoolhouse door.

b. *Garret F.* was not the first case where the Supreme Court considered this issue. In *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984), the Supreme Court held that clean intermittent catheterization, which is often performed by a nurse, was not a "medical service" exempted from related services.

c. The term "related services" specifically excludes "a medical device that is surgically implanted," or the maintenance, repair, or optimization of such a device. 34 C.F.R. § 300.34(b). This exception, however, does not limit the right of a child with a surgically implanted device to receive other related services, nor does it limit the school district's response to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of a child while being transported to and from school. *Id.* Districts also must ensure that external components of surgically implanted medical devices are functioning properly. 34 C.F.R. § 300.113.

   For example, in *Petit v. U.S. Dep't of Educ.*, 675 F.3d 769 (D.C. Cir. 2012), the Court of Appeals for the D.C. Circuit held that school personnel were responsible for ensuring that a cochlear implant was turned on, that the settings were correct, and that the cable was connected, but had no obligation to pay for cochlear mapping to maximize the effect of the implant. Some states may have laws or administrative rules to the same effect. *See, e.g.*, S.D. Admin. R. 24:05:27:16.

d. Generally schools are not required to purchase devices that a student will require regardless of whether or not the student is attending school. Letter to Anonymous, 24 IDELR 388 (OSEP 1996). Note, however, that regular eyeglasses must be provided when a student's IEP team believes that the glasses are necessary to ensure the provision of FAPE and the IEP specifies that the student needs eyeglasses, if the parents cannot afford them. *See Letter to Bachus*, 22 IDELR 629 (OCR 1995)

e. School health services typically provided under IEPs include catheterization, tracheotomy suctioning and gastrostomy feedings.

3. **Medical Providers and Child Find**

a. Information from medical providers *may* trigger the IDEA child find obligation. *See, e.g., Ind. Sch. Dist. 283 v. E.M.D.H.,* 960 F.3d 1073 (8th Cir. 2020); *see also Independent School District No. 413 v. H.M.J., 66 IDELR 41 (D. Minn. 2015).*

The IDEA requires school districts to identify, locate, and evaluate children with disabilities who reside in their district. This so-called "child find" obligation is triggered where a district has reason to suspect that the child may have a disability and that special education services may be necessary to address that disability." *Sch. Bd. of the City of Norfolk v. Brown*, 769 F. Supp. 2d 928, 942 (E.D. Va. 2010) (emphasis added).

b. Evidence of a medical condition alone, however, does not necessarily result in the need for a special education evaluation.

The mere fact that a student has or may have an identified condition or diagnosis does not trigger a district's child-find obligation. The district must also reasonably suspect that the student needs special education because of the condition. 34 C.F.R. § 300.8(a)(1); Minn. Stat. § 125A.02, subd. 1. The student's performance either with or without accommodations is a good barometer of whether the student needs special education. If a student struggles and fails to respond to interventions, the district should propose an evaluation, even if the student's underlying disability is uncertain.

4. **In some cases, a school district may be required to pay for a medical diagnosis as part of a special education evaluation.** *M.J.C. ex. rel Martin v. Special Sch. Dist. No. 1, Minneapolis*, 2012 WL 1538339 (D. Minn. Mar. 30, 2012). Throughout the student's educational career, there were many proposals to evaluate the student. His mother did not want him labeled as EBD and made her feelings known to the district. The district told her that if she provided a written diagnosis of the student's ADHD (which the District acknowledged the student suffered from), he could be evaluated under OHI and found eligible for special education. The district never received the diagnosis. The District Court found that the district could not point to a lack of documentation to escape its child find obligations. "[W]hen a childlike M.J.C. is so obviously failing, and his disability and need for special education are known, the law requires the District to act." The court found that the law required the school to provide, at no cost to the parent, medical services needed to evaluate the student.

5. **IEP teams make all decisions regarding students' special education programming, including the inclusion of related services IEP teams have an obligation to consider doctors' recommendations.**

The IDEA requires IEP teams to consider all relevant medical information, including doctors' recommendations. The word "*consider*," however, is not synonymous with the words "adopt," "follow," or "incorporate."

IEP teams meet their obligation to *consider* doctors' input when they discuss and truly deliberate upon the medical information at a team meeting. *K.E. v. Independent School District No. 15, St. Francis*, 647 F.3d 795 (8th Cir. 2011). Evidence that an IEP team actually incorporated some, if not all, of a doctor's recommendations is strong evidence that the IEP team appropriately *"considered"* medical information. *Id.*

a. IEP teams are ultimately responsible for making decisions regarding educational programming. Teams cannot delegate this duty to students' medical providers. *See Blackmon v. Springfield R-XII Sch. Dist.*, 198 F.3d 648 (8th Cir. 1999).

b. Ultimately, the school district is responsible for defending the appropriateness of a student's IEP at a due process hearing or in federal court.

c. Providing a student too many related services can render an IEP as inappropriate as not providing the student the services he or she needs to receive FAPE.

6. **Independent Educational Evaluations.**

The IDEA allows parents to obtain an independent educational evaluation ("IEE") at district expense **when they disagree with the results of the school district's most recent evaluation.** 34 C.F.R. § 300.502(b)(1). (emphasis added).

An IEE is not a prescription. Like other medical information, the team must only "consider" the results of an IEE in determining the student's educational programming or IDEA eligibility. 34 C.F.R. § 300.502(c)(1).

a. School districts may set some criteria for independent evaluators; so long as the district applies the same criteria to its own

evaluations and the criteria are consistent with the parent's rights to obtain an IEE. 34 C.F.R. § 300.502(e)(1). For example, if the district requires its evaluators to hold graduate degrees in their respective fields, the district may require that all evaluators selected to participate in the IEE hold similar degrees. *See Id.; See also Letter to Anonymous*, 22 IDELR 637 (OSEP 1995) (identifying cost as an allowable IEE criteria, but only for the purposes of eliminating unreasonable excessive fees—parents must still be able to choose from among the qualified professionals in the area).

b. School districts may also require parents to select independent evaluators from a list prepared by the district. *See Letter to Young*, 39 IDELR 98 (OSEP 2003). In order to impose such a requirement, however, the list must be exhaustive. In other words, it must contain every individual within the geographic area that meets the district criteria to perform such evaluations. *Id.* If a list contains multiple qualified evaluators, the parent must be allowed to select the evaluator from that list. *Letter to Young*, 39 IDELR 98.

    (1) For example, in *Madison School District*, 112 LRP 24612 (S.D. SEA Feb. 15, 2011), the School District limited the cost of the IEE to $750, but, rather than providing the parent with a list of qualified evaluators, gave the parent the name of the one evaluator that the district typically used. The South Dakota Department of Education concluded that this was an IDEA violation.

c. Some parents (and parent attorneys) request an IEE whenever they become angry with a school district, request a local due process hearing or disagree with some aspect of a student's educational program. It is important to remember that IEEs at school district expense are only warranted when a parent disagrees with the results of the student's last evaluation.

    (1) Disagreeing with the manner in which an evaluation report is written or some statement included in a report does not constitute sufficient grounds for obtaining an IEE under IDEA. *See Gwinnett County School District*, 112 LRP 18864 (GA SEA January 23, 2012).

(2) A school district is only required to pay for one IEE per triennial evaluation. 34 C.F.R. § 300.502(b)(5).

(3) The school district must be provided with the same information that the independent evaluator considers when rendering his or her independent conclusions and/or recommendations. Without this background, it will be impossible for the IEP team to truly consider the recommendation that is rendered. Further, in a hearing situation, it will be impossible for the school district's attorney to cross examine the evaluator. *See Letter to Anonymous*, 55 IDELR 106 (OSEP 2010); *see also Maple Lake Sch. Dist. No. 180*, 108 LRP 4483 (MN SEA 2007).

(4) A school district can ask the parents why they are objecting; however, they cannot require the parent to answer, or unreasonably delay either providing the IEE or filing a due process complaint while it waits for the parent to respond. ARSD 24:05:30:03.

d. A district is not required to pay for an IEE if the parent requests an IEE while the District's own evaluation is still pending. *In re Student with a Disability*, 121 LRP 8101 (S.D. SEA Nov. 20, 2020). In that specific scenario, a school district is also not required to file a due process complaint in response to a request for an IEE. *Id.*

e. Untimely IEE requests may run afoul of the IDEA's 2-year statute of limitations. In *N.D.S. by and through de Campos Salles v. Academy for Sci. & Agriculture Charter School*, 2018 WL 6201725 (D. Minn. Nov. 28, 2018), the U.S. District court noted that a claim that an evaluation conducted in December 2015 "was no longer accurate in October 2017" would not be sufficient to entitle the parent to an IEE at public expense. Rather, to "disagree" with the December 2015 evaluation, the parents would have to contend that it was never accurate to begin with. That then raised a question as to when N.D.S.'s parents "knew or should have known" of their disagreement with the evaluation.

7. **Responding to Mental Health "Prescriptions."** Increasingly, it seems, parents request school districts to place their children at day treatment or residential treatment facilities to address their children's mental health needs. Similarly, some psychiatrists prescribe day treatment or residential

treatment services, almost categorically, for students with particular disabilities.

If a student requires mental health services in order to receive FAPE, and if the mental health services are not "medical services" for which the district is not responsible, then mental health services, including placements in mental health related facilities, are considered "related services."

Some IEP teams are quick to agree to requests for alternative placements when such placement has been recommended or prescribed by a doctor. Mental health disorders are, after all, primarily a medical concern. However, doctors often have different priorities than school districts, and may not have any information regarding the student's educational performance. Moreover, an IEP team must, at all times, be focused on the student's education, rather than the student's overall mental health. In addition, school districts are obligated, under IDEA, to place students in the least restrictive environment ("LRE") appropriate, given a student's special education needs. Accordingly, school districts may only agree to place a student in a mental health facility when the student's team believes that such a placement is necessary for the student to receive FAPE.

It is important for districts to always remember that parents always have the option to unilaterally place their child in a mental health facility, pursuant to the recommendations of a student's mental health provider.

B. Medical Providers' Role Under Section 504 of the Rehabilitation Act of 1973

1. Relevant Legal Background.

While IDEA and Section 504 both apply to disabled students and use some of the same terminology, they are very different laws. IDEA guarantees students who meet specific eligibility criteria, the special education and related services they require to receive educational benefit.

In contrast, Section 504 is a civil rights statute that guarantees all students, disabled and nondisabled, the same educational opportunities. It applies to any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. There are no per se categories of disability or handicap under Section 504. Every student who meets the eligibility criteria under IDEA is covered by Section 504.

Like IDEA, a school district meets its obligation under Section 504 by identifying eligible students and providing them with a free appropriate public education or, as it is commonly known, "FAPE." However, "FAPE" under Section 504 has a different meaning than FAPE under IDEA.

a. FAPE under Section 504 is met when a student with a physical or mental impairment that substantially limits a major life activity is provided accommodations that are (1) based on individual needs, (2) provided in the LRE and (3) designed to remove the barriers to education that are created by handicapping conditions.

b. Section 504 does not require that schools provide a greater opportunity for disabled students to participate in academic, nonacademic, or extracurricular activities, but charter schools must take steps to ensure that disabled students have equal access to educational benefits and opportunities.

2. **A medical diagnosis does not automatically entitle a student to accommodations under Section 504.** Neither a medical diagnosis nor an independent educational evaluation provided by a parent suffices as an evaluation or automatically qualifies a student for services under Section 504. A medical diagnosis and other medical information provided by a parent should be considered among other sources of information and testing when evaluating a child.

a. The receipt of some medical diagnoses may trigger a school's obligation to evaluate the student, as should a request for accommodations.

b. Further, when a student is evaluated for, but determined ineligible for, IDEA services, it is prudent for a school district to determine whether the student is eligible for a 504 accommodation plan.

3. **School districts cannot require parents to sign a medical release as part of a Section 504 evaluation.** In general, school districts may not require parents to provide medical information or to sign a release authorizing the school nurse or other school personnel to communicate directly with a student's medical provider. However, school officials may ask the parents to provide such information or to sign such a release voluntarily. In addition, school officials may inform the parents that if the information is not provided, the district will be required to make decisions

without the benefit of the information, which could lead to a conclusion that the student does not require services or accommodations under Section 504.

C. Individualized Health Plans

1. **A health plan does not automatically satisfy Section 504.** An individual health plan ("IHP") generally does not meet the requirements of Section 504. The Office of Civil Rights ("OCR") opined that school districts may not rely merely on an IHP for students with peanut allergies. Instead, the OCR held, severe peanut allergies require an evaluation under Section 504 and development of a Section 504 Plan. *See In re North Royalton (OH) City Sch. Dist.*, 52 IDELR 203 (OCR 2009).

    a. In *North Royalton City Sch. Dist.*, 52 IDELR 203 (2009), the school provided the student with an Individual Health Plan and evaluated the student for Section 504 services, but found him ineligible as he was performing well academically. The OCR ruled that the school district violated Section 504 and the ADA when it based its evaluation only on whether the impairment affected the student's learning. The OCR stated that learning is only one of several major life activities to be considered under the ADA, and noted that the ADAAA expanded the major life activities to include major bodily functions, concentrating, communicating, and thinking. The OCR also instructed the district to notify all parents/guardians of students with Individual Health Plans or Emergency Allergy Plans of the district's Section 504 procedures and of their right to request an evaluation under Section 504 if they believe their child's medical impairment substantially limits one or more major life activities.

    b. In *In re Bryan County (GA) Sch. Dist.*, 53 IDELR 131 (OCR 2009), the parent of a first-grade student with asthma and a severe peanut allergy notified school officials that the student would require medication while at school. The parent requested a Section 504 Plan, but the district did not complete an evaluation. Instead, the district developed a safety plan to accommodate the student's medical conditions. The plan included the creation of a safety sheet detailing the steps to take if the student suffers an allergic reaction, a peanut-free lunch table in the cafeteria, and sanitation of the lunch table every day, classroom training on peanut allergies and hand washing techniques, and school staff were trained on how to administer an EpiPen.

The OCR stated that upon receiving notice that a student has a disability triggering Section 504 protection, the district should determine whether there is reason to believe the child, because of a disability, may need special education or related services and thus would need to be evaluated. If a school district (or charter school) does not believe that the child needs special education or related services, and refuses to evaluate the child, the district must notify parents of their due process rights. When the school district declined to perform an evaluation, it failed to notify the parents of their due process rights in violation of Section 504. Additionally, the OCR found that the district's Section 504 procedures, only referencing accommodations as a means of providing an appropriate education, did not include an explanation that under Section 504 an appropriate education is the provision of regular or special education and related aids and services that are designed to meet the individual needs of disabled students as adequately as the needs of nondisabled students are met.

2. **IHP's May Not Require IEP amendments**. In *Day v. Cedar Rapids Cmty. Sch. Dist.*, a student's IEP referenced a separate IHP that included, among other things, emergency protocols for responding to epileptic seizures. These references, however, were broad, general references stating "Please refer to the IHP/Emergency Protocol." The IEP did identify health services and nursing services as related services. The student's IHP was in place from 2010 to 2018. In 2018, the student changed schools within the district, and the school nurse at her new school. The new IHP provided that, once the student was administered Diastat in response to an epileptic seizure, the student's parents would be notified, and one of them would pick the student up from school and take her home. If neither parent was available, EMS would take over care of the child. Prior to 2018, however, the student had been permitted to return to class after Diastat was administered. This had happed on at least 10 prior occasions. When the student's mother raised this issue, and objected to being told this was "policy," the district's health coordinator discovered that there was no consistent policy for administering Diastat. This was resolved, and the district adopted a uniform policy of requiring students to be sent home after Diastat was administered. The district's concern is that medical literature indicated some risk of respiratory depression after Diastat was administered. The student's physician, however, opined that it was safe for the student to return to class after being administered Diastat.

On the third day of the school year, the student had a seizure and was administered Diastat. The student's mother collected the student from school, but then refused to return her due to concerns that the school nurse was not following the outside physician's guidance, and because the student's seizures had increased to the point that the student was receiving Diastat twice per week. The school convened a meeting, but the parties could not agree on the terms of an IHP.

The student's mother brought a due process complaint, asserting that the amendment of the IHP constituted an amendment of the IEP without prior notice or parental consent. The ALJ and the District Court, however, disagreed, noting that the IDEA does not govern IHP's, and that the related services referenced in the IEP, health and nursing services, were not fundamentally affected by the revision to the emergency seizure protocol in the IHP.

The student's mother also claimed that requiring the student to leave school following the administration of Diastat was a substantive violation, and denied the student a FAPE. The ALJ and the District Court also disagreed with this, noting that, after the third school day, and after the first time that the new protocol was implemented, the student was withdrawn from school and the mother refused to return the student. Any deprivation of FAPE, therefore, was purely speculative. Critically the district expressed a willingness at the September 10, 2018 meeting to reevaluate the protocol if it started to cause the student to miss a significant amount of time.

3. **Failing to Implement an IHP Can Also Result in a Denial of FAPE.** In a contrasting case, an Indiana student's IEP stated that the eligibility reason was the student's strict diet to avoid seizures. Under related services, the IEP stated that multiple adults would be trained to ensure the student had properly scraped bowls after meals, and would monitor him in the bathroom to ensure that he used the appropriate soap and sanitizer. The technical assistance portion also referred to a "specific and extensive health plan that all staff needed to be trained on."

   On August 8, 2019, the student was withdrawn in conjunction with complaints that there were multiple failures to implement the plan on August 6, 2019. The School District did not have any documentation regarding whether or not the procedures were followed on that date, and could only provide documentation that some, not all, of the staff who worked with student had been trained on the IHP. Because the District could not show that it had fully implemented the plan, or even

implemented the plan at all, it was found to have denied the student a FAPE under IDEA. *Vigo County Sch. Corp.*, CP-0008-2021, 77 IDELR 202 (Ind. SEA Sept. 15, 2020).

4. **IHP's Need to be Individualized**. OCR has found that assigning every student with a particular medical condition an IHP violates Section 504. *See Tyler (TX) Indep. Sch. Dist.*, 56 IDELR 24 (OCR 2010) (district could not avoid obligation under 504 by assigning every student with diabetes an IHP). On the other side of the coin, OCR has also found that denying a request for an IHP because other students with similar conditions did not have IHP's also violates Section 504. *See Canyons (UT) School District,* 67 IDELR 20 (OCR 2015) (school district could not claim that, because other students who had IBS and migraines did not have IHP's, student with those same conditions did not require one).

D. Training and Implementation. Once the IEP is written to include related services, schools are responsible for ensuring that staff are trained to provide those services.

1. In a 2019 Order, the Minnesota Department of Education concluded that a school district violated IDEA, in part, because staff were not trained to implement the student's related services. In the student's IEP, the student was to receive paraprofessional support 360 minutes per day, five days per week, including assistance with a health-related task. According to the student's mother, the paraprofessional assigned to the student in the mornings during the beginning part of the school year told the student's parents that she did not feel comfortable assisting the student with the health-related task. The paraprofessional also did not recognize the need to assist with this task as part of her work assignment during the first few days of school. The Minnesota Department of Education found that the school district's failure to ensure that the paraprofessional had sufficient knowledge and skills to meet the student's needs and provide the student's IEP services during those days denied the student a FAPE. *In re: Student with a Disability*, 75 IDELR 169 (Minn. SEA 2019).

2. ***M.F. by Ferrer v. New York City Dep't of Educ.*, 582 F.Supp.3d 49 (E.D.N.Y 2022).** Similarly, the Eastern District of New York granted summary judgment to a class of students with Type 1 and Type 2 diabetes due to the district's failure to ensure that a reliably trained adult would be available on a school bus, including buses for field trips, who could administer glucagon. Some of these students were able to receive glucagon from the school nurse, but other students were identified as

"nurse-dependent," and required a 1:1 paraprofessional to administer glucagon.

The evidence presented to the Court indicated that the school district relied on contract nurses ("trip nurses") to administer glucagon on field trips, but trip nurses were not always available. When they were not available, the school district's written policy was to encourage, and unwritten practice was to pressure, the parents of the diabetic student(s) to attend the field trip themselves. Furthermore, the drivers and attendants of the bus companies the school district contracted with were not trained to provide glucagon in the event of a diabetic emergency. This created two issues. First students who had diabetes, but were not nurse-dependent or supervised, and were not assigned a 1:1 paraprofessional, were sometimes forced to ride a bus with no adult trained to administer glucagon. Second, if a nurse-dependent or supervised student's assigned 1:1 paraprofessional missed work, and no substitute could be found, that student was barred from taking the bus.

The District Court granted the students' motion for partial summary judgment. The Court found that the school district discriminated against students with diabetes under Section 504 by failing to ensure adequate staff trained to administer glucagon. The District Court ordered the school district to assess the estimated shortfall of trip nurses and hire a sufficient "float pool" of nurses to cover all field trips. The District Court further directed the school district to ensure that all bus drivers and bus attendants were trained to administer glucagon.

E. COVID-19, Masking, and Accommodations

1. *Parsipanny Troy Hills Bd. of Educ.*, 122 LRP 13704 (N.J. SEA Feb. 23, 2022). The parents of a student who qualified for a Section 504 plan based on his ADHD and ODD provided a doctor's report explaining that the student could not tolerate a face covering. The parents were seeking a full exemption from the mandatory masking requirement still in effect at the beginning of the 2021-2022 school year per executive orders from the governor of New Jersey. The student's medical provider indicated that this conclusion was based on the student's ADHD, sensory issues, and a history of difficulty with mask wearing. The school district's physician recommended denying the exemption but providing additional mask breaks for the student. The parent provided additional records asserting that the student's sensory processing issues were exacerbated by wearing a mask, but the school district again denied the request.

The ALJ concluded that the need for mask mandates during a health crisis was a valid District concern to be weighted against the student's accommodation needs. The ALJ noted that the student had been provided additional mask breaks, and was allowed to take a break from wearing a mask for 5 to 10 minutes at a time. The School District's physician testified that he had communicated directly with the student's medical provider, and the student's medical provider had agreed that additional mask breaks would be sufficient. No contrary testimony was presented by the parents. There was also substantial evidence that the student improved academically and socially during the time that the 504 plan that provided mask breaks, but not a blanket exemption, was in place. Accordingly, the ALJ found that the school district's refusal to provide a blanket mask exemption did not violate Section 504.

2. ***ARC of Iowa v. Reynolds.*** This is a longstanding case involving a challenge to Iowa state statute that prohibits schools from enforcing mask mandates. Initially, the District Court enjoined the application of Iowa's statute, finding that severely medically impaired students were forced to choose between risking death if they attended school, or receiving online instruction that had previously proven ineffective. Some of the plaintiffs were enrolled in school districts that did not offer remote learning at all. On the other hand, allowing schools to require indoor masking could be a reasonable accommodation for purposes of Section 504. Accordingly, the District Court enjoined the State of Iowa from enforcing its statute prohibiting mask mandates in schools. *ARC of Iowa v. Reynolds*, 559 F.Supp.3d 861 (S.D. Iowa 2021).

   The Eighth Circuit, on appeal, agreed with the District Court's analysis of potential conflicts between Iowa's statute and Section 504, but noted that the Iowa statute contained an exception for facial coverings provided by any other provision of law. Based on this language, the Eighth Circuit narrowed the District Court's injunction, which had blocked enforcement of the statute altogether, and instead only enjoined Iowa from enforcing this statute to the extent that it conflicted with, and was therefore preempted by, Section 504 and the ADA. *Arc of Iowa v. Reynolds*, 24 F.4th 1162 (8th Cir. 2022), *vacated by* 33 F.4th 1042 (8th Cir. 2022)

   In a subsequent opinion, the Eighth Circuit vacated its January 2022 opinion, and also vacated the remainder of the injunction as moot. The Court pointed to the availability of COVID-19 vaccinations for children aged four and up as well as the decline in transmission rates and COVID-19 cases over the preceding four months for the proposition that the students' lawsuit was now moot. The Court wrote "No court could

grant effective relief as sought for the preliminary injunction because enjoining Defendants' enforcement of Section 280.31 has no effect on Plaintiffs' children, whose risk of contracting COVID-19 at school is now low even without mask requirements, as is their risk of serious injury or death." However, the Eighth Circuit reiterated that, to the extent that state law conflicted with Section 504, Section 504 would control. *Arc of Iowa v. Reynolds*, 33 F.4th 1042 (8th Cir. 2022)

II. OTHER COMMON MEDICAL PROVIDER ISSUES WITH STUDENTS

A. Observation Outside the Context of an IEE. The IDEA generally does not "provide a general entitlement for parents of children with disabilities, or their professional representatives, to observe their children in any current classroom or proposed educational placement." *Letter to Mamas*, 42 IDELR 10 (OSEP May 26, 2004). Numerous courts, in interpreting *Letter to Mamas*, have reaffirmed that parents do not have a legal right under the IDEA to observe classes in session. *See John M. & Maureen M. o/b/o J.M. v. Cumberland Pub. Sch.*, *Renee J. v. Houston Indep. Sch. Dist.*, 333 F.Supp.3d 674, 698 (S.D. Tex. 2017) (holding that school district had no obligation to allow third-party evaluators to observe classrooms outside the context of an Independent Educational Evaluation) *see also G.J. v. Muscogee Cnty. Sch. Dist.*, 668 F.3d 1258, 1267 (11th Cir. 2012) (holding that *Letter to Mamas* does not create any mandate for or against classroom access).

The No Child Left Behind Act is also often cited for the proposition that schools have to allow parents to observe students in class. As OSEP noted in *Letter to Mamas*, however, the relevant language only applies to school that receive Title I funds. 42 IDELR 10 (OSEP May 26, 2004). Furthermore, the relevant text of the No Child Left Behind Act, 20 U.S.C. § 6318, only requires schools to adopt a policy that addresses parental visits to the classroom. It does not require schools to offer unlimited access to students during the school day. Schools are permitted to consider factors such as disruption to educational programming, the privacy rights of staff and students, and other educational needs when crafting a visitors policy. Moreover, NCLB is silent as to designees of parents.

B. Student records are generally not covered by the HIPAA. School districts may be subject to the HIPAA if they engage in certain transactions, such as billing health plans electronically for medical services. *See* 45 C.F.R. § 160.102. However, even if the *school district* is subject to the HIPAA, most *student records* are exempt from the HIPAA privacy requirements. The HIPAA specifically exempts records that are subject to the FERPA from its so-called privacy rule. 45 C.F.R. § 160.103(2)(i). Virtually every student record is subject

to the FERPA. *See* 34 C.F.R. § 99.3. Thus, those records are exempt from the HIPAA.

III. TIPS FOR EFFECTIVE INTERACTIONS WITH MEDICAL PROVIDERS

A. Do Not be Intimidated. While medical providers may have a great deal of expertise in medicine, they are not educators. Medical recommendations about school-based programs/accommodations are usually based only on information that a provider receives from a student's parent. As such, they rarely have any firsthand, knowledge about the environment or the student's performance. Finally, medical providers do not necessarily understand a school district's obligation to a student under the law.

B. Obtain Necessary Releases. In general, school districts cannot release information to medical providers without proper, signed, releases. Similarly, medical providers generally cannot release information to districts without signed releases. Because the district will generally want an exchange of information with the medical provider, the district should obtain both releases before initiating any communication with a medical provider.

C. Document all Communication with Medical Providers. This includes unsuccessful attempts to contact medical providers. There have been many cases where a school district's documented attempt to get medical information played a major role in the outcome of the case. Remember to store all documentation in the appropriate file and make sure that the documentation is accessible if needed for litigation or administrative proceedings.

D. Structure your Communication Toward the Provider's Ego. Rather than challenging the provider's conclusion or recommendation, ask for "clarification." Be sure to thank the provider for helping you better understand their concerns and ask about alternatives that may be less restrictive (or intensive) options to the recommendation they originally provided you – options that will still provide the student some support and respond to the provider's concerns.

E. Remember the Medical Provider's Priorities. Medical providers are primarily interested in treating their patients' medical/mental health conditions. At least initially, doctors also have limited information from students and/or parents. Consequently, a medical provider's initial recommendation typically is focused on speeding recovery, and does not necessarily take into account educational needs or the reality of a school setting.

1. It is usually in the district's best interest to get as much detail as possible from the medical provider.

2. Getting detailed information may take multiple conversations or correspondence with the medical provider.

F. Give medical providers any relevant information. Without specific information regarding what interventions are already in place, a medical provider could simply conclude that a student's condition requires a certain service. Alerting medical providers to the specifics of a student's educational programming forces them to take a closer look at what the employee can or cannot do and whether the student needs additional – as opposed to any – supports.

G. Considering Recommendations for Educational Programming. When district staff receive a recommendation for a student's educational programming, the educators should ask themselves the following eleven questions:

1. Is the requested service, on its face, appropriate under the IDEA?

2. Why is the provider/parent asserting that service needs to be incorporated into the student's special education programming?

3. Who is the provider providing the recommendation?

    a. Does he/she have a treatment relationship with the student?

    b. Does the provider appear to be qualified to render the recommendation made?

    c. Does the recommendation appear to have been initiated by the parent or the medical provider?

4. Has the provider observed the student in school or collected information from the student's teachers or service providers?

5. Does the team have sufficient information to determine whether the student needs the service to receive FAPE?

    Does the team believe the student is currently receiving FAPE?

6. Is the information provided by the medical provider new information regarding the student's medical diagnoses or condition?

7. Is the information consistent or inconsistent with the team's current observations or assessments regarding the student's performance and/or behavior at school?

8. Has the team addressed the concerns identified in a different manner?

    a. If so, has/have the intervention(s) employed been successful?

    b. Is there data supporting this conclusion?

    c. Have the parents received this information?

    d. Have they questioned this data?

9. If the school district either does not understand or questions the grounds for the provider's recommendation, what additional information would assist it in making a determination?

10. If the team has not already requested that the parent provide it written consent to contact the medical provider, it must do so immediately by providing them a written consent to release information form for his/her signature. The team must follow up on the form and make the contact with the provider.

11. Are there alternative, less restrictive ways that the team can address the concerns identified?

H. Tips for Communicating with Medical Providers Regarding Programming Recommendations:

1. If the parent refuses to provide you consent to contact the student's medical provider:

    a. Explain that the team wants to provide the student the supports/services/accommodations that he or she needs to receive FAPE, but does not currently have the information it needs to include the supports/services/accommodations that the parent is seeking into the student's plan.

    b. Tell the parent that, without additional information to support the request, the team will need to develop the student's proposed plan based on the limited information it currently has.

c. Offer the parent two additional options:

(1) That the district will provide the parent a list of questions that he or she may provide to the medical provider on the district's behalf. Ask that the provider respond to the questions in writing on his or her letterhead. Offer to compensate the provider for any time he or she spends drafting responses to the questions you have posed.

(2) That the parent may contact the provider, invite the provider to attend the student's IEP or 504 team meeting and determine the provider's availability for the meeting. Tell the parent that, once the parent provides it this information, the district will schedule the meeting based on the provider's availability.

2. If the parent appears hesitant to permit you to contact the provider on your own, invite the provider to participate in an IEP or Section 504 team meeting. This meeting can take place, via telephone. Alternatively, the school district could offer to hold the meeting in a conference room at the medical provider's office.

3. If the parent agrees to your request to contact the medical provider:

a. Offer to pay the medical provider for the time he or she spends answering your questions or providing you information. This shows respect for the provider and decreases his/her tendency to feel angry or defensive.

b. Present information tactfully to the provider, rather than indicating that the team does not agree with the provider's programming recommendation, explain that the school district wants to work cooperatively with the provider, but that the team has questions regarding the provider's recommendations as well as the services that he/she is providing the student.

c. Tell the provider that the school will be providing him/her information regarding the programming the student is currently receiving as well as its observations of the student and the data it has retained on the student's school performance.

If the provider agrees to participate in an IEP or 504 meeting, provide him/her this information prior to the meeting.

d. Give the provider school observations and/or data in an understandable (to doctors) and objective manner.

(1) Collect data on rating forms which directly relate to the medical/psychiatric condition for which the services are supposedly being requested. The use of such forms objectifies the subjective nature of the information being collected and translate the information from "education speak" to medically relevant information.

(2) The rating forms can be developed using resources, such as the DSM IV. Alternatively, the forms may also be developed with the assistance or input of the district's medical consultant.

e. Do not lose sight of the forest for the trees. Remember, that the information collected needs to be educationally relevant, based on the student's individualized special education needs and the goals and objectives contained on his/her IEP.

f. Data provided should reference who collected, how often and in what setting.

g. If the provider refuses to participate in a meeting, tell him/her that you will be sending him a set of questions that the team would like answered in order to make a determination as to the student's special education programming. Tell him/her that you will be providing data that the school has collected with this list of questions.

h. Develop a list of questions to ask the medical provider, either at the team meeting or in a letter.

(1) If the questions will be presented at a meeting, assign different IEP team members the responsibility to pose the question to the provider.

(2) Structure the questions so that they do not appear confrontational – make it clear that you are not questioning the provider's competence, nor are you asking them to prescribe a program of education. You are simply seeking

additional factual information to assist you in rendering an educational decision.

(3) In forming the questions to be asked, you do not want to present the provider with questions that are too obviously seeking to undermine or endorse his/her recommendation. Rather, you want to subtly elicit facts that will permit you to independently decide if the services are required for FAPE.

(4) While the specific questions you pose will depend on the individual student and the nature of the services being sought, they should be directed at obtaining the following information:

(a) what is the student's diagnosis or condition?

(b) How is it being treated?

(c) With what frequency?

(d) If medicine has been prescribed, are there side effects the district should expect or needs to monitor?

(e) What outcome is expected?

(f) How does the provider believe that this condition presents itself in a school setting?

(g) Why does the provider believe that the condition is affecting the student's performance or behavior at school?

i. Do not appear emotionally invested in the team's decision.

j. If, at all possible, convey a positive opinion of the student and/or the student's parent. You want the medical provider to see the school district as an entity that is committed to providing the student a quality educational program.

k. Recognize that there will be disagreements. You and the medical provider are approaching the matter from different perspectives with different objectives in mind. A school district's obligation is

to render a reasoned educational decision based on the information it has been provided.