Update: Concerns for Colleges Promoting to Students Short-Term Limited Duration Insurance or Other Plans that are Not Compliant with the Affordable Care Act

ABSTRACT
The U.S. Department of Health and Human Services recently issued regulations for short-term limited duration insurance (STLDI), and these regulations make it clear that colleges cannot offer STLDI as student health insurance coverage.

Furthermore, colleges should exercise caution in tangentially promoting to students STLDI or any other health insurance that is not compliant with the Affordable Care Act, based on four concerns:

- severe coverage limits that appear common for STLDI and other non-ACA-compliant forms of health insurance;
- potential compliance issues with federal civil rights laws (e.g., Title IX);
- implications for possible application of the Section 1557 nondiscrimination provision of the ACA; and
- potential for conflict with a college’s internal nondiscrimination policies (specifically for gender, disability, and age).

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QUESTIONS OR COMMENTS

ACHA welcomes questions or comments in response to this Update. These will be referred to the ACHA Student Health Insurance/Benefits Plans (SHIBP) Coalition for response. Please contact the SHIBP Coalition by email at InsuranceCoalition@acha.org.

The information in this document is for informational purposes only and is not legal advice. No responsibility is assumed for the accuracy or timeliness of any information in this document. The information in this document is not intended as a substitute for legal counsel, and is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. The impact of the law for any particular situation depends on a variety of factors; therefore, colleges and universities should not act upon any information in this document without seeking legal counsel.

A Word About Student Health Insurance/Benefit Programs (SHIBPs)

Recognizing the importance of health insurance coverage as a critical factor in academic retention and completion, colleges are to be commended for offering highly effective student health insurance/benefit programs (SHIBPs). This is particularly true for colleges that have adopted health insurance requirements as a condition of enrollment and fully comply with other requirements specified in ACHA’s standards (refer to Appendix A).

Thus, it is important to understand that concerns for adequacy of coverage and regulatory compliance addressed in this Update do not apply to ACA-compliant SHIBPs.
SUMMARY

The American College Health Association (ACHA) has recently received inquiries on whether offering students the recently authorized short-term limited duration insurance (STLDI) could be a viable option for colleges. ACHA recommends three actions for recipients of this document (see Recommendations below).

The inquiries referenced above seem to be based on one or more of the following circumstances:

- the college is unable to provide a student health insurance/benefits program (SHIBP), and its students and other stakeholders want to explore providing some form of health insurance to students;
- part-time students, distance learners, and certain other classes of students are ineligible for the SHIBP, and stakeholders want to provide an insurance option;
- there is a desire to allow students as many insurance choices as possible; and/or
- the SHIBP and other forms of individual insurance available in the marketplace are perceived as being unaffordable for many students (compounded by the absence of expanded Medicaid eligibility in some states).

ACHA appreciates that the interest in offering STLDI to students is well-intended, and the primary intention is to offer options for students who do not have access to affordable health insurance. While STLDI and other forms of health insurance that are not compliant with the Affordable Care Act (ACA) could be appropriate in limited circumstances (e.g., the coverage is used only for short-term gap insurance), it is important to recognize the severe limits that are common for this coverage (see Overview for STLDI), and that certain plan provisions or limits are potentially incompatible with a college’s responsibility to comply with the federal civil rights laws explained in this Update. It is also possible that a college will be required to meet the nondiscrimination requirements of Section 1557 of the ACA for health plans that the college provides or promotes to its students, depending on the extent of the college’s involvement and whether that particular program or activity receives funding from the U.S. Department of Health and Human Services (HHS).

Four concerns are important to consider, as STLDI will soon be available to consumers in certain states. Further, colleges may be providing and/or potentially interested in providing other forms of health insurance that are not ACA-compliant.

1. Colleges should use caution in offering students STLDI or other forms of health insurance that are not fully compliant with the scope of coverage required by the ACA. This recommendation is based upon ACHA's long-standing commitment to meeting the health care access and insurance needs of students and the severely limited benefits that can exist for STLDI and other forms of health insurance that are not regulated under the ACA.

2. Potential compliance issues relative to federal civil rights laws should be considered by a college “endorsing,” “administering,” or “participating in”* (hereinafter collecting referred to as “promoting”) an STLDI for students. Importantly, this also applies to other forms of insurance that are not fully compliant with the ACA (e.g., off-shore domiciled insurance plans intended for international students).

3. An additional compliance concern arises because the non-discrimination requirements specified in Section 1557 of the ACA could be extended to STLDI or other forms of health insurance that are not compliant with the ACA if the college sponsors or administers the plan and is a covered entity.
4. Regardless of the compliance concerns addressed in this Update, the nondiscrimination policies that are common for colleges should be considered relative to offering STLDI or other forms of health insurance that are not compliant with the ACA.

IMMEDIATE RECOMMENDATIONS

ACHA recommends the following actions to its member institutions and other entities interested in the operation of SHIBPs.

- **Senior leadership for the college should survey all departments/organizations to determine if they are promoting or considering a health insurance plan for currently enrolled students that is not certified as being fully compliant with the ACA.** This survey would not apply to ACA-compliant SHIBPs such as fully insured programs or self-funded programs that have a certification for Minimum Essential Coverage.

- **The college’s legal counsel should be contacted if the survey results identify a program(s) that is/are not compliant with the ACA.** This also applies to a college that is considering offering an STLDI or other health insurance program that may not comply with the ACA. It is important to note there may be other forms of health insurance that will be compliant with the ACA.

Potential federal civil rights compliance issues discussed below arise when a particular plan or product could be considered a program or service of the college.

These are fact-specific determinations. For example, allowing a local insurance agent to set up a booth at a health fair is unlikely to be construed as an endorsement by the college of a plan or product and unlikely to result in any liability for the product being offered. Conversely, using university resources to promote a specific plan or endorse a specific agent may be problematic.

- **Colleges should recognize that well-conceived SHIBPs are not difficult to develop and manage.** This requires careful study of the needs of students, assessment of the regulatory environment, and an institutional commitment to compliance with ACHA’s SHIBP standards provided in Appendix A.

OVERVIEW FOR SHORT-TERM LIMITED DURATION INSURANCE

While there are pending lawsuits challenging the legality of the final rule for STLDI (CMS -9924-F), these policies will soon be available to consumers in certain states. There is also a contention that the provision in the ACA for nondiscrimination (Section 1557) may preclude many health insurance carriers from offering STLDI because they receive federal health funding. The following was noted in an article in *Health Affairs*:

A number of stakeholders noted that Section 1557 appears to apply to short-term policies. Section 1557 is the ACA’s chief nondiscrimination provision and prohibits discrimination on the basis of race, color, national origin, sex, age, and disability in certain health programs and activities. Section 1557 applies to insurers that receive federal health funding. Thus, an insurer that receives marketplace subsidies, offers Medicare Advantage coverage, or operates Medicaid managed care plans would have to comply with Section 1557 across their lines of business.
Despite the requirement for prominent notice to consumers regarding the limitations of STLDI, there is widespread concern these policies could be injurious to consumers. The required notice and other “buyer beware” communications are simply insufficient for consumers to understand the potential risks of this coverage, regarding both access to care and financial liability.

Entities that have commented on the proposed rule include consumer advocate organizations, health care organizations such as the American Medical Association, state insurance regulatory agencies, and the National Association of Insurance Commissioners. ACHA also submitted a comment in response to the proposed rule in April 2018 and stated the following regarding scope of coverage for STLDI:

Historically, these plans provide minimal coverage and benefits to their consumers. In the ‘costs and transfers’ section of the rule solicitation, the agencies’ admit that these plans are unlikely to include all of the elements of Affordable Care Act-compliant plans including pre-existing condition prohibitions, coverage of essential benefits with annual or lifetime dollar limits, preventative care, maternity, and prescription drug coverage. Estimated cost savings indicated in the solicitation fail to factor in potential additional costs. Contrary to popular belief, young adults are coming onto campus with a variety of unique medical needs and robust coverage is necessary to secure timely treatment and encourage academic success. Comprehensive preventative care and continuity of coverage are essential to students to tackle potentially chronic issues early in their life. Early intervention helps to prevent the higher costs of care often seen later in life by unmanaged chronic conditions at an earlier age.

The American Medical Association and other organizations have submitted filings in support of a lawsuit contesting the legality of STLDI and have noted the following:

A STLDI plan’s meager menu of benefits presents little risk if the plan is truly confined to a short gap between periods when an individual would have more comprehensive insurance . . . but if this coverage is used as a substitute for ACA-compliant insurance, the results could be medically or financially catastrophic. Because issuers of STLDI plans can engage in post-claims underwriting, they can rescind coverage or deny claims for services that may be associated with a pre-existing condition.

The Kaiser Family Foundation reviewed existing STLDI plans and concluded the following regarding the scope of coverage:

The KFF research team reviewed short-term plan benefits and cost-sharing features within 24 health plan products (in 45 states) and found that 43 percent of the plans do not cover mental health services and 71 percent don’t cover outpatient prescription drugs. Additionally, 62 percent of short-term health plans do not cover substance-abuse treatment and all observed plans did not cover maternity care.

STUDENT HEALTH INSURANCE/BENEFIT PROGRAMS RELATIVE TO STLDI

The final regulations for STLDI make clear that this coverage cannot be used as a form of student health insurance. This was confirmed in the review of the regulations in an article previously cited from Health Affairs:
...short-term, limited duration insurance cannot be sold as student health insurance coverage. This is because student health insurance coverage is, by definition, individual health insurance coverage that must thus comply with most of the ACA’s individual market standards. Insurers can market short-term coverage to individual students, but short-term coverage cannot be used as a substitute for student health insurance coverage.\textsuperscript{x1}

Refer also to the final regulations for the exclusion of student health insurance from STLDI in “Definitions” below.

**ACHA’S PERSPECTIVE**

In addition to the regulatory compliance concerns addressed in this Update, ACHA’s position remains unchanged. The Standards for Student Health Insurance/Benefit Coverage (see Appendix A) are clear regarding access to health insurance and the scope of coverage that is required.

Standard I specifies that colleges as a condition of enrollment, require students to provide evidence that they have health insurance coverage.

Standard II states that institutions must provide an appropriate scope of coverage, consistent with the requirements of the ACA.

ACHA contends that its standards for SHIBPs should be viewed as applying to all forms of health insurance that a college offers to its students, as expressed in numerous historical documents and discussions for the insurance standards dating back to 1987.

Finally, Standard X aligns with the nondiscrimination policies that are common for all components of college operations. Medical underwriting for STLDI, which would preclude eligibility for the health insurance plan based on the existence of a disabling condition, would be contrary to the requirement not to discriminate based on a disability for a student. Similarly, coverage exclusions that are so severe that they are tantamount to denial of access to the program (e.g., mental health care is not covered) may also raise concerns for compliance with the college’s nondiscrimination policy.

**COMPLIANCE WITH FEDERAL CIVIL RIGHTS LAW**

Following the passage of the Civil Rights Restoration Act of 1987, all colleges that are recipients of federal funding are subject to a number of federal civil rights laws that apply to all of their programs and services, including:

- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendments of 1972
- Section 504 of the Rehabilitation Act of 1973
- Age Discrimination Act of 1975
Colleges are also covered by the Americans with Disabilities Act of 1990 (ADA); public colleges are covered under Title II and private colleges under Title III. Many colleges are also subject to state or local nondiscrimination laws that are interpreted consistently with federal law. It is the responsibility of each college to ensure that its programs and services are accessible, including those offered through third parties, including commercial insurance companies or health plans.

ACHA, in an Update issued in March 1989, provided a detailed explanation of the potential compliance issues in the operation of SHIBPs, especially under Section 504 and Title IX (see Appendix B).

**Title IX Concerns**

The regulations implementing Title IX expressly require that colleges not discriminate on the basis of sex “. . . in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students.” 34 C.F. R. §106.39. Pregnancy and pregnancy-related conditions must be treated the same as any other temporary disability. 34 C.F. R. §106.40(b)(4). These regulations apply to any form of health insurance offered by a college (not just SHIBPs), but there is a process to obtain religious exemptions from some provisions of Title IX. Another concern that has been raised is the likelihood that STLDI will have premium rates based on gender and age. To illustrate, premium quotes obtained just prior to the release of this Update priced an STLDI policy at $181.92 per month for a 20-year-old nonsmoking female compared to a monthly cost of $156.22 for a nonsmoking male with the same birth date and city residence. The coverage was for a plan with a $1,000 deductible and a $1 million plan maximum. A plan offered or administered by a college that has higher premium rates for women than for men could be challenged under Title IX. While insurers may justify such differences based upon statistics that younger women tend to use more health services than do younger men, that is still facially discriminatory.1

ACHA’s March 1989 update (provided in Appendix B), described the informal guidance received from the U.S. Department of Education Office for Civil Rights (OCR) for the “low threshold for determining whether an insurance plan constitutes a part of an institution’s educational program or activity,” which depends on the extent to which the college is involved in administering, operating, offering, or participating in the insurance plan. In contrast, it is unlikely that either a federal court or the OCR would determine that these civil rights laws apply to a situation in which an insurance agent or broker offers short-term medical coverage to an individual who is graduating and will no longer have student status. In this instance, the coverage is being offered by an entity other than the college, and the college is not directly or indirectly endorsing or administering the plan.

It is uncertain how an agency might interpret its regulations 29 years later, and this can change from one presidential administration to another. But types of factors used to determine whether a product, service, or benefit is a covered “program or service” have not changed. If the college’s involvement or sponsorship of a particular plan might be deemed a program or service, the college must consider the implications of Title IX.

**Section 504 and ADA Concerns**

The impact of federal disability rights laws on SHIBPs or other health insurance plans has always been more complicated. If a plan is deemed a “program or service” under Title IX, it will also be a program or service under Section 504 or ADA Title II or III. Section 504 regulations include “health insurance” among a long list of areas in which colleges cannot deny participation or benefits or discriminate on the basis of disability. 34 C.F.R.

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1 While similar concerns exist with higher premiums based upon age, the Age Discrimination Act has provisions that permit actions based upon reasonable factors other than age. This might allow the use of actuarial statistics that are not based solely on age. See Appendix B.
§104.43. OCR explained in the guidance to the Section 504 regulations that the absence of an express insurance section was “no change in the obligation of recipients to provide nondiscriminatory health and insurance plans.” However, schools could limit the services they provide. OCR uses the example of limiting the services of a student health center to minor illnesses and injuries. 34 C.F.R. Pt. 104, App. A, #33. However, as ACHA noted in its 1989 update (provided in Appendix B), OCR refused to investigate claims of Section 504 violations based upon exclusion of types of services or benefits.

The enactment of the ADA shifted attention away from Section 504, except when complaints were filed with OCR. Congress included in Section 501 of the ADA a broad provision that allows covered entities to establish, sponsor, observe, or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law (see Appendix C for details). Based upon this broad exemption, covered entities, including colleges, cannot be found to have violated the ADA by offering to their employees or students bona fide insurance plans that comply with applicable state law. The courts have broadly interpreted this provision.

There is nothing in Section 504 or OCR regulations similar to the exclusions in ADA Section 501. As a general rule, federal courts attempt to construe the requirements of the ADA and Section 504 in a similar manner. It is not uncommon for a court to rule on an ADA claim based upon a particular ADA regulation, then to apply the same conclusion to the Section 504 claim. Since Section 504 specifically applies to SHIBPs or other health insurance plans that are considered to be a program or service of the college, and there are no OCR regulations as to how those non-discrimination principles apply to such plans, there is uncertainty over whether Section 504 can be used to challenge plan provisions that would be exempt under ADA Sec. 501.

SECTION 1557 OF THE AFFORDABLE CARE ACT

The final federal law that needs to be considered is Section 1557 of the ACA. This non-discrimination provision is enforced by the U.S Department of Health and Human Services Office for Civil Rights (HHS OCR). The following statement is provided at www.HHS.gov:

Section 1557 is the nondiscrimination provision of the Affordable Care Act (ACA). The law prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in certain health programs or activities. Section 1557 builds on long-standing and familiar Federal civil rights laws: Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Section 1557 extends nondiscrimination protections to individuals participating in:

- Any health program or activity any part of which received funding from HHS
- Any health program or activity that HHS itself administers
- Health Insurance Marketplaces and all plans offered by issuers that participate in those Marketplaces.

In addition to assuring that none of the health insurance protections of existing federal civil rights laws would be eliminated or reduced under the ACA, Section 1557 requires that all health plans that are subject to regulation under the ACA must comply with the nondiscrimination requirements. This includes self-funded health benefit for employees. SHIBPs may also be subject to Section 1557 requirements as noted in an article at the Verywell Health website:
Section 1557 applies to any organization that provides health care services or health insurance (including organizations that have self-insured health plans for their employees) if they receive any sort of federal financial assistance for the health insurance or health activities.

That includes hospitals and other medical facilities, Medicaid, Medicare (with the exception of Medicare Part B), student health plans, Children’s Health Insurance Program, and private insurers that receive federal funding (including subsidies in the exchanges for their individual market enrollees; in that case, all of the insurer’s plans must be compliant with Section 1557, not just their individual exchange plans). Organizations that must comply with Section 1557 are referred to as “covered entities.”

There are many open questions regarding Section 1557. Coverage is limited to health care programs or services that receive federal health financing through HHS. Is there an obligation if there is direct or indirect federal financial health assistance to a college “health program or activity” but not involved in student health benefits? And what level of involvement in STLDI and other forms of health insurance that are not compliant with the ACA would trigger Section 1557 requirements? Given this uncertainty, ACHA recommends that colleges assume Section 1557 nondiscrimination requirements could attach to any STLDI or other ACA non-compliant health insurance that a college promotes or provides to its students.²

**RECOMMENDATION: PROMOTE ONLY SHIBPS AND OTHER INSURANCE THAT COMPLY WITH FEDERAL CIVIL RIGHTS LAWS**

Except for Title IX requirements, the impact of federal civil rights laws and Section 1557 of the ACA is unclear. Accordingly, ACHA recommends colleges promote to students only those health insurance plans (either SHIBP coverage or any other form of health insurance) that have been historically viewed to comply with federal civil rights laws and that include the following:

- Access to the health insurance/benefit plan is not contingent on completing a medical underwriting process whereby students must attest that they do not have a disqualifying health condition.
- Pregnancy benefits are provided on the same basis as any other temporary disability and there are no other provisions that would be impermissible under Title IX (e.g., different premium rates for males versus females).
- There are no exclusions in the plan that are so injury or illness specific that they could be found to be tantamount to denial of access based on a disability as defined under Section 504.
- If an age rating system is used for determining premium rates, the cost scheme must have an actuarial basis (see Appendix B).

² The enforcement of prohibitions of discrimination on the basis of gender identity and pregnancy have been enjoined. [https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html](https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html)
DEFINITIONS

*Endorsing, Administering, or Participating In:

In regard to when federal civil rights laws attach to health insurance or benefits provided by colleges to students, previous positions from the US Department of Education may be helpful. Refer to this quote provided on page four of Appendix B:

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

It is possible that either federal courts and/or the U.S. Department of Education’s Office for Civil Rights could take a differing position than outlined above. They could, for example, determine that federal civil rights laws only attach to insurance plans offered to students when a policy is issued directly to the college or the college operates a self-funded student health benefits plan.

As stated in the Summary, ACHA advises that colleges should use caution until there is more clarity on when federal civil rights attach insurance coverage offered by colleges to their students. More specifically, colleges should assume that “participating in” could constitute, for example, any expenditure of institutional resources to promote enrollment in a specific STLDI or other form of insurance and/or the college endorses a specific insurance agent/agency, and the college is aware that this individual or agency will be offering STLDI or other forms of coverage that discriminate on account of gender or disability.

Another question pertains to colleges that require health insurance as a condition of enrollment and have a process whereby students can submit personal health insurance for evaluation to see if it qualifies for waiving enrollment in the college’s SHIBP. The question that has been raised is whether this waiver process, in and of itself, constitutes the college “endorsing,” “administering,” or “participating in” the student’s personal health insurance, therefore requiring the college to make certain the student’s personal insurance does not have any provisions that are contrary to federal civil rights laws or Section 1557 of the ACA. Recognizing the uncertainty of judicial review previously discussed, in our view it is unlikely that a college would be found to be liable for a student’s personal health insurance coverage that is used to waive a college’s SHIBP requirement because the college has not performed any ministerial duties directly related to the function of the student’s personal
insurance (e.g., collect premium, provide claim forms, submit claims, etc.), nor has the college used any resources to promote this coverage.

†Recognition of SHIBPs in STLDI Regulations: The final federal regulations for STLDI specifies the following regarding SHIBPs:

“Student health insurance coverage” is defined in HHS regulations at 45 CFR 147.145(a), which provides that “student health insurance coverage” is a type of individual health insurance coverage. Thus, “student health insurance coverage” under the definition of “student health insurance coverage” must satisfy the PHS Act requirements for individual health insurance coverage, except for those specified in 45 CFR 147.145(b). Accordingly, short-term, limited-duration insurance cannot be “student health insurance coverage” because it is by definition not individual health insurance coverage. However, to the extent permitted by state law, an issuer may sell short-term, limited duration insurance to individual students in institutions of higher education (or to individual students in boarding or other pre-higher-education institutions). Some higher education institutions may require their students to either purchase “student health insurance coverage,” or a type of coverage other than short-term, limited duration insurance or a type of coverage other than short-term, limited duration insurance.xiv

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REFERENCES


vii Ibid.


Appendix A
The American College Health Association has instituted these standards to guide institutions of higher education in the establishment of an appropriate, credible student health insurance program. The standards apply to both fully insured and self-funded student health plans.

**Standard I.**
The institution, as a condition of enrollment, requires students to provide evidence that they have health insurance coverage.

**Standard II.**
The institution recognizes that students enrolled in its sponsored health plan rely on it as if it is their primary source of coverage.

Adequate and appropriate scope of coverage is provided, including, but not limited to:

- Coverage for immunizations, screenings, and other preventive services consistent with ACHA recommendations and state and federal mandates.
- Coverage for illness and injury.
- Coverage for prescription medications.
- Coverage for pre-existing conditions.
- Continuity of coverage up to plan limits for students requiring a medically-necessary leave-of-absence.

Additionally,

- The program encourages use of campus health and counseling services, when doing so provides optimal access to high quality and cost-effective care for students.
- Plan benefits, limitations, exclusions, special provisions, and definitions are reviewed to assure they are consistent with common practices of the student health insurance market and the Affordable Care Act.

**Standard III.**
The institution acknowledges it has a fiduciary responsibility to manage student health insurance programs in the best interest of students covered by the programs.

**Standard IV.**
The student health insurance program is annually reviewed to assure it is in full compliance with all applicable federal and state statutes and regulations.

**Standard V.**
Student consumers, student health program staff, and other internal or external experts, as appropriate, are involved with the selection, monitoring, and evaluation of the student health insurance program.

**Standard VI.**
The student health insurance program is reviewed annually to ensure the program:

- meets the needs of covered individuals,
- provides desired benefits at the least possible cost, and
- returns as much of the premium or fund contributions as possible to covered individuals in the form of benefits.

Reserve funds may also be maintained to assure short- and long-term financial viability for the program and are for the sole use by and for the plan.
Standard VII.
Commercial insurance carriers, agents, brokers, and all others providing services to the student health insurance program are required to provide a full description of estimated claims, reserve estimates, administrative expenses, and all other fees.

The student health insurance program is audited periodically and the results are provided to appropriate institutional officials and student consumers. Each year, a summary financial report for the program is published and made available to student consumers and campus officials responsible for management of the student insurance program.

Standard VIII.
The selection of vendors for the student health insurance program adheres to institutional and/or applicable governmental requirements relative to competitive vendor selection processes.

Standard IX.
Agents, brokers, consultants, and program managers do not have relationships that could be construed to be a real or potential conflict of interest. Agreements with consultants or brokers are fully disclosed and clearly define the services to be performed and the compensation to be received.

Standard X.
The student health insurance program is available to all eligible students regardless of age; gender identity; gender expression; marital status; physical size; psychological, physical, or learning ability; race/ethnicity; religious, spiritual, or cultural identity; sex; sexual orientation; socioeconomic status; or veteran status.
Appendix B
UPDATE: Implications of the Civil Rights Restoration Act of 1987
Upon Student Health Insurance Plans:

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

Executive Summary

The recommendations stated in this advisory are summarized as follows:

1) Recipients of federal funds should assume a very low threshold of involvement with a student health insurance plan for Title IX to be applicable (see page four). Most student health insurance plans, even some that are not specifically endorsed by the university or college, are likely to be subject to Title IX requirements.

2) Due to the private right of action established under Title IX by the Supreme Court ruling in Cannon v. University of Chicago, 441 U.S. 677 (1979), ACHA recommends that universities and colleges (that did not treat pregnancy benefits as any other temporary disability in their student health insurance plans for the 1988-1989 plan year) initiate negotiations with their insurance carrier to retroactively provide pregnancy benefits as prescribed by Title IX (see page five).

3) Title IX requires pregnancy benefits to be treated on the same basis as any other temporary disability for spousal dependents (see page five).

4) Recommendations for student health insurance plans for international students are as follows: (a) universities and colleges should not accept any student health insurance plan that does not comply with Title IX as meeting an institutional requirement for health insurance; (b) all school personnel should cease any involvement with health insurance plans that do not comply with Title IX; and (c) all student health insurance brochures or other marketing material should be removed from the university or college if the plans do not comply with Title IX (see page six).
Executive Summary (Continued)

5) The United States Department of Education, Office for Civil Rights (OCR) is probably correct in determining that Section 504 does not allow OCR to examine individual student health insurance policy provisions in response to complaints. Nonetheless, ACHA recommends universities and colleges carefully examine all student health insurance plan limitations and exclusions to make sure they are not tantamount to exclusion of handicapped persons from the policy. Exclusions or limitations for specific illnesses (e.g., exclusion of sexually transmitted diseases) should not be part of a student health insurance plan since: (1) Section 504 disputes may be resolved through civil actions (regardless of OCR determinations); and (2) ACHA positions regarding sexually transmitted diseases, or other position statements regarding treatment or diagnosis of specific illnesses or injuries, should be construed to also apply to student health insurance plans (see page nine).

6) Student health insurance plan exclusions or limitations for mental health care or chemical dependency should also be evaluated for conformity with Section 504. ACHA recommends that its institutional members provide mental health care and chemical dependency benefits at a level that will adequately meet the needs of each school’s insured student populace, in consideration of all other university sponsored programs. Exclusions for medical expenses resulting self-inflicted injury or suicide should not be allowed in student health insurance plans (see page nine and 10).

7) Universities and colleges should adopt reasonable pre-existing condition exclusions, even though it appears OCR will not evaluate individual policy provisions in response to Section 504 complaints (see page 10).

8) Universities and colleges should terminate any association with or endorsement of health insurance plans that include questions in an application process regarding a student’s health, or could otherwise discriminate on the basis of a handicap. This includes recommendations to see local agents for specific additional coverages (see page 10).

9) Universities and colleges should carefully monitor their student health insurance carrier to make sure that the actual administration of the plan does not violate Section 504 (see page 10).

10) OCR has not yet reached determinations on the specific issues relating to Age Discrimination Act (ADA) complaints. Universities and colleges should eliminate any areas of discrimination in their student health insurance plans that are not excepted by the ADA as explained in this advisory (see page 11 and 12).
Introduction

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

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

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

Sec. 2. The Congress finds that --

1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964; and

2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

1) Overview of the Applicability of Title IX:

Based upon the statement from OCR on this page, all universities and colleges that receive federal funds must comply with the
requirements of Title IX (except as noted in the religious exemption discussed herein) if a school either endorses a student health insurance plan, or has any administrative interaction with a student health insurance plan.

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

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

2) Right of Private Action:

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

3) Pregnancy Benefits for Dependents:

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

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

5
Update for Title IX Recommendations (Continued)

4) International Student Plans:

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

a) Do not accept any international student health insurance plan, that does not treat pregnancy benefits as any other temporary disability as prescribed by Title IX, as meeting an institutional requirement for international students to have health insurance.

b) Instruct all university or college personnel to cease any involvement with international student health insurance plans that do not treat pregnancy benefits as any other temporary disability pursuant to Title IX.

c) Remove all brochures or other material regarding international student health insurance plans from the university or college if such plans do not comply with Title IX.

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

5) Religious Exemption:

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

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

Recommendations for Section 504 Compliance

1) Applicability of Section 504 to Student Health Insurance:

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

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

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

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

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

"A recipient to which this subpart applies that considers participation by students in education programs or activities not operated wholly by the recipient as part of, or equivalent to, an education program or activity operated by the recipient shall assure itself that the other education program or activity, as a whole, provide an equal opportunity for the participation of handicapped persons."
Recommendations for Section 504 Compliance (Continued)

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

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

2) Recommendations:

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations for Age Discrimination Act Compliance

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

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

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

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

1) reasonably takes into account age as a factor necessary to the normal operation or achievement of any statutory objective of such activity (the statute must be passed by a federal; state; or local elected, general purpose legislative body); or

2) the differentiation caused by such action is based upon reasonable factors other than age.

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

1) Age limits for dependent eligibility may have some statutory basis since, according to several major insurance carriers that we recently contacted, the age of majority (established by the various states) was used in large part to determine that it would be "reasonable" to limit dependent eligibility to children aged 18 or younger. In addition, some jurisdictions may have specific statutes as explained in point three above, that mandate age limits for dependent eligibility.

2) One of the expressed purposes of most student health insurance plans is to provide adequate benefits at an affordable cost. Thus, the "differentiation caused by age" may be justifiable as being a "reasonable factor" that is directly in line with the objective of the
Recommendations for Age Discrimination Act Compliance (Continued)

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

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

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

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

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

SPECIAL NOTICE REGARDING THIS ADVISORY

THIS CLIENT ADVISORY IS NOT A LEGAL OPINION FROM EITHER THE AMERICAN
COLLEGE HEALTH ASSOCIATION OR BYERLY & COMPANY. RECIPIENTS OF THIS
ADVISORY SHOULD CONTACT THEIR UNIVERSITY OR COLLEGE LEGAL COUNSEL FOR
ADVICE REGARDING COMPLIANCE WITH THE CIVIL RIGHTS RESTORATION ACT OF 1987.
Appendix C
Appendix C

This provision in the ADA allow covered entities to provide a bona fide benefit plan.

Section 501

(c) Insurance—Title I through IV of the Act shall not be construed to prohibit or restrict –

(1) An insurer, hospital or medical service company, health maintenance organization, or any agent, or entity that administers benefit plans, or similar organizations from underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(2) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law; or

(3) A person or organization covered by this part from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

Paragraphs (1), (2), and (3) shall not be used as a subterfuge to evade the purposes of title I and III.

42 U.S.C. 12201(c). The U.S. Department of Justice explained that

Section 501(c) (1) of the Act was intended to emphasize that “insurers may continue to sell to and underwrite individuals applying for life, health, or other insurance on an individually underwritten basis, or to service such insurance products, so long as the standards used are based on sound actuarial data and not on speculation” (Judiciary report at 70 (emphasis added); See also Senate report at 85; Education and Labor report at 137).

* * *

The committee reports provide some guidance on how nondiscrimination principles in the disability rights area relate to insurance practices. For example, a person who is blind may not be denied coverage based on blindness independent of actuarial risk classification. With respect to group health insurance coverage, an individual with a pre-existing condition may be denied coverage for that condition for the period specified in the policy, but cannot be denied coverage for illness or injuries unrelated to the pre-existing condition. Also, a public accommodation may offer insurance policies that limit coverage for certain procedures or treatments, but may not entirely deny coverage to a person with a disability.

28 C.F.R Pt. 36, App. A.