

7-1-1999

College Students Be Aware: Problems and Pitfalls in Student Health Insurance

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Recommended Citation

Kelly L. Wright, *College Students Be Aware: Problems and Pitfalls in Student Health Insurance*, 7 U. Miami Bus. L. Rev. 531 (1999)

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**COLLEGE STUDENTS BE AWARE:
PROBLEMS AND PITFALLS IN STUDENT
HEALTH INSURANCE**

KELLY L. WRIGHT*

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I. INTRODUCTION

America has increasingly become a nation of transient people. For those people who change jobs, or lose their jobs, or want to change their jobs, one of the largest considerations facing them is whether or not they will lose their health insurance.¹ This dilemma has, to some extent, been alleviated by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA").²

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¹ Frequently, employees [sic] will require that new employees go through a pre-existing condition waiting period when they become eligible for an employers [sic] group health plan. The fear that many have of losing coverage during a preexisting waiting period because of the health status of the worker or one of their dependents, results in "job-lock" for many Americans. They simply cannot afford to lose health insurance coverage for even a short time, and thus are not able to consider changes in employment.

S. REP. NO. 105-5 (1997).

² Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936. "The Health Insurance Portability and Accountability Act of 1996, also known as the Kassebaum-

The purpose of the Act was to "improve portability and continuity of health insurance coverage in the group and individual markets."³ While this Act has provided some relief for employees, there is another significantly large transient population in America that is still unprotected — college and university students.⁴

Student health care through college health insurance plans is generally not an issue for most healthy students. They either stay on their parents' plans or they purchase the relatively inexpensive college plan. But the issue of health care becomes a lot more complicated when a student suffers from a preexisting condition,⁵ especially if the college student would like to go to graduate school, or an employee would like to return to school to get a degree.

This Comment will focus on the problems that transient students with preexisting conditions face when dealing with student health insurance. Section II will describe how students generally obtain health insurance and why preexisting conditions present a problem. Section III will look at state regulation of college health insurance plans and whether the federal enactment of HIPAA affects college plans. Section IV will propose possible solutions for the student health insurance dilemma. And Section V will address the questions that students and individuals returning to college should consider when deciding on how to meet their health insurance needs. For the purposes of this Comment, references to state law will primarily be to insurance law in the State of Florida, unless otherwise noted.

II. OBTAINING HEALTH INSURANCE COVERAGE

For many undergraduate college students, obtaining health insurance coverage is not an issue, and most of them probably do not think of it. After all, if the student is healthy, he probably will not need medical services and will not need insurance to pay for those services. The decision to carry health

Kennedy bill, is designed to reduce current barriers to obtaining health coverage by making it easier for people who change jobs or lose their jobs to maintain adequate coverage. It guarantees the availability and renewability of health insurance coverage for certain employees and individuals, and it limits the use of preexisting condition restrictions." S. REP. NO. 105-5 (1997).

³ Preamble, HIPAA, Pub. L. No. 104-191, *supra* note 2.

⁴ In 1997, according to a bill sponsored by Rep. Jerry Costello, D-III, there were 14.3 million college students covered by a college or university sponsored health insurance plan. Student Health Insurance Portability Protection Bill of 1997, H.R. 1281, 105th Cong. (1997). Rep. Costello recently reintroduced this bill as the Student Health Insurance Portability Protection Act of 1999, H.R. 991, 106th Cong. (1999).

⁵ Preexisting conditions are treated differently depending on state law or federal law as will be discussed more fully in Section II(B) of this Comment. The general definition followed by most states is cited at note 18.

insurance, however, is often forced, because most colleges and universities require full-time students, and some part-time students, to carry some form of health insurance.⁶ In fact, student health insurance is state-mandated in New Jersey and Massachusetts.⁷

For other students, however, the existence of health insurance is of personal importance, because they suffer from medical conditions that put them at risk of substantial medical expenses. These medical conditions can range from simple problems (such as asthma) to more severe problems (such as diabetes) which all would require continuing and regular treatment. If the student did not have health insurance, he would have to carry the cost of treatment on his own.

Whether students have such a medical condition, or merely seek to satisfy college, university, or state requirements, their first choice for coverage is usually to stay on their parents' insurance plans as long as they are eligible. A student's eligibility to be insured under a parent's plan will depend on which type of insurance plan a parent has and the terms of that plan.

A. *Insurance Through a Parent's Plan*

Health insurance is a contract and binds the parties to its terms just as in other contracts.⁸ Insurance has been defined as "an undertaking by one party to protect another party from loss arising from named risks, for the consideration and upon the terms and under the conditions recited."⁹ The policy contract itself is then subject to regulation by state statutes and enforced by the

⁶ See, e.g., UNIV. OF MIAMI SCH. OF LAW, LAW SCHOOL HANDBOOK AND HONOR CODE FOR THE 1999-2000 ACADEMIC YEAR 32. See also Univ. of Cal. Davis, *Graduate Student Health Insurance Plan 1998-1999* (visited March 18, 1999) <<http://hr.ucdavis.edu/inscontr/gobook/htm>>; Univ. of Minnesota, Crookston, *Student Health Services* (visited March 18, 1999) <http://www.crk.umn.edu/people/services/Health_Services/>.

⁷ New Jersey requires all full-time students in a public or private institution of higher education to maintain health insurance coverage including basic hospital benefits, and to provide proof of such insurance annually. N.J. STAT. ANN. § 18A:62-18 (West Supp. 1998). Massachusetts requires that all full-time and part-time students in public or independent institutions of higher learning participate in a "qualifying student health insurance program." The institution can allow the student to waive participation but only upon written certification that they have other comparable coverage. MASS. GEN. LAWS ANN. ch. 15A, § 17 (West 1994) (emphasis added).

⁸ See 1 LEE R. RUSS & THOMAS F. SEGALLA, COUCH ON INSURANCE § 1:10 (3rd ed. 1997) [hereinafter COUCH].

⁹ *Id.* § 1:7.

state insurance commission,¹⁰ with some exceptions which will be discussed later.

In individual policies, the person insured is the one who purchases the insurance policy and who is subject to the terms of the policy.¹¹ If a student's parent is insured through an individual policy, then the terms of the policy relating to eligibility control, subject to the minimum established by state law.

Eligibility under the policy and under state law is usually defined in terms of a child being a dependent under a certain age and/or under a certain age and a full-time student.¹² The age of dependency will differ from state to state, and policy to policy. Thus, for example, if the parent is insured under a policy issued in Florida, a student will be considered a dependent under Florida law until he is 25 years of age;¹³ however, the policy itself could define a dependent as being any age the insurer chooses, so long as the age is at least the state minimum.

Individual policy rules do not apply, though, when a parent is insured under a group insurance policy through an employer. In this situation, the parent/employee is insured under a policy purchased by a third party, typically the employer.¹⁴ Such group employee benefit plans are subject to federal law under the Employee Retirement and Income Security Act of 1974 ("ERISA")¹⁵ and are of two types - insured and self-insured. To what extent ERISA preempts state law depends on which plan the parent is insured under.

If the plan is an "insured" plan, that is to say, it utilizes insurance purchased from an insurer, then eligibility will depend on the terms of the policy and state law. If the plan is "self-insured," that is to say, coverage is offered directly by the plan with the risk of loss being borne by the plan, state

¹⁰ States have traditionally regulated the business of insurance under a Supreme Court decision in *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869), that held insurance was not commerce within the meaning of the Commerce Clause. Julia M. Melendez, *The McCarran-Ferguson Act: Has It Outlived Its Intent?*, 42 FED'N OF INS. & CORP. COUNS. Q. 283, 285 (1992). See also 1 COUCH, *supra* note 8, §§ 2:7, 2:8.

¹¹ See 1 COUCH, *supra* note 8, § 1:2.

¹² See e.g., GA. CODE ANN. § 33-29-2 (1996) (financially dependent on insured and under the age of 19, or until 25 years of age so long as full-time student); 215 ILL. COMP. STAT. ANN. 105/2 (West supp. 1998) (dependent means a resident unmarried child under age of 19, or unmarried child who also is a full-time student under age of 23 and financially dependent on the insured); CONN. GEN. STAT. ANN. § 38a-497 (West supp. 1999) (child is covered until the date on which the child marries, ceases to be a dependent of the policyholder, attains the age of 19, or attains the age of 23 and is a full-time student).

¹³ In Florida, a dependent child qualifies for dependent coverage until the end of the calendar year that the child turns 25 so long as he or she is a full-time or part-time student. FLA. STAT. § 627.6562 (1997).

¹⁴ See 1 COUCH, *supra* note 8, § 1:2.

¹⁵ 29 U.S.C. §§ 1001-1461.

law will not apply, and eligibility will depend solely on the plan's terms.¹⁶ Because of this confusing contradiction, it is essential for the student to know, first of all, which type of plan the parent is insured under, and secondly the definition of dependent employed by the terms of the plan and the definition under state law. As mentioned previously, in note 12, a child could become ineligible under state law upon marriage, no longer being financially dependent on the parent, obtaining the age of nineteen, having been a full-time student and obtaining the age of twenty-five, or any other combination of factors or age.

B. *Insurance Through a College Plan*

Once the student "ages-out" or otherwise becomes ineligible for coverage under a parent's plan, he or she must then face the decision of purchasing the college plan, continuing coverage, or purchasing individual coverage. Most healthy students who only need insurance for a limited time will choose the relatively inexpensive college plan.¹⁷ As long as the student does not have a preexisting condition which would make him or her ineligible for benefits, this is often the best choice because of the cost of the plan, which assumes a very healthy population of young people.

¹⁶ See generally Daniel W. Sherrick, *ERISA Preemption: An Introduction*, 1985 MICH. BAR. J. 1074. Under the McCarran-Ferguson Act of 1945, Pub. L. 79-15, 15 U.S.C.S. §§ 1011 et seq., Congress intended to grant the states "broad regulatory authority over the business of insurance." However, under 15 U.S.C.S. § 1012(b), any specific effort by Congress to overcome state laws regulating insurance could work a preemption, as in the case of ERISA and HIPAA. But while Congress specifically intended ERISA to preempt state laws governing group benefit plans, ERISA contains a "savings" clause that limits this preemption. See 1 COUCH, *supra* note 8, § 2:4. The preemption and savings clauses of ERISA have therefore been interpreted to work state law preemption in the case of a self-insured plan, but not in the case of an insured plan, unless the state law directly conflicts with the application of the federal law. See Sherrick, *supra*. See also Note, *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607, 620-21 (1989). For a more comprehensive discussion of the McCarran-Ferguson Act, see Melendez, *supra* note 10.

¹⁷ A one-year premium for students at the University of Miami is \$590. UNIV. OF MIAMI, STUDENT ACCIDENT AND SICKNESS HEALTH INSURANCE PLAN (1999). At the University of Delaware, a one-year premium ranges from \$221 to \$624 depending on which plan is chosen. Univ. of Delaware, *Student Health Service Student Medical Insurance Plan 1998-1999* (visited March 18, 1999) <http://www.udel.edu/shs/gen_sect/Insuranc/GUIDE_SH.html>. This is inexpensive compared to a quarterly payment ranging from \$630 to \$2,000 for an individual plan through the American Bar Association for a non-student. AMERICAN BAR INSURANCE PLANS CONSULTANTS, INC., ABA-ENDORSED MAJOR MEDICAL PLAN (1999) (original on file with author). The American Bar Association Law Student Division does offer student insurance ranging from \$598 to \$1330 annually, depending on the plan and the age of the insured. ABA-LSD MEMBER BENEFIT HEALTH INSURANCE PROGRAM 1999-2000 (1999) (original on file with author).

In contrast, the student with a preexisting condition¹⁸ will find the typical college plan unattractive, because such plans usually limit coverage of expenses associated with preexisting conditions for a substantial period of time, known as the "exclusion period."¹⁹ The exclusion period is subject to state law.²⁰ In most circumstances, college plans will typically have a preexisting condition exclusion period of twelve months.²¹ This means that any expenses incurred due to a preexisting condition during this period will not be paid by the insurance carrier.

In addition to an exclusion period, the plan will also often use the restrictive "prudent person" standard to determine whether a preexisting condition exclusion applies. This means that if the condition had manifested itself "in such a manner as would cause an ordinarily prudent person to seek medical advice, diagnosis, care, or treatment . . ." ²² prior to the date of coverage, then all claims for that condition could be, and most likely would be excluded. This general definition would encompass conditions that the student had received treatment for, such as asthma, as well as conditions that the student did not receive treatment for but should have under the prudent

¹⁸ A preexisting condition includes any condition that "was present before the first day of coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before that day." 29 C.F.R. § 2590.701-2 (1998). See also 215 ILL. COMP. STAT. ANN. 105/8 (West supp. 1998) (any condition that manifested itself within the 6 month period immediately preceding the effective date of coverage in such a manner as would cause an ordinarily prudent person to seek diagnosis, care or treatment, or medical advice, care or treatment was recommended or received within the 6 month period); CONN. GEN. STAT. ANN. § 38a-564 (West supp. 1999) (a condition which, during a specified period immediately preceding the effective date of coverage, had manifested itself in such a manner as would cause an ordinary prudent person to seek diagnosis care or treatment or for which medical advise, diagnosis, care or treatment was recommended or received).

¹⁹ This encompasses "any limitation or exclusion of benefits based on the fact the condition was present before the first day of coverage, whether or not any medical advice, diagnosis, care, or treatment was recommended or received before that day." Interim Rules for Health Ins. Portability for Group Health Plans, 62 Fed. Reg. 16,894, 16,896 (1997) codified at 26 C.F.R. § 54.9801-3, 29 C.F.R. § 2590.71-3, 45 C.F.R. § 146.11. See also CCH Editorial Staff, Health Insurance Portability and Accountability Act Interim Rules, ¶ 2000, at 71 (1997) [hereinafter Interim Rules].

²⁰ In Florida, individual policies are allowed to exclude claims for preexisting conditions for up to 24 months. FLA. STAT. § 627.6045(1) (1997). Group policies can exclude claims for up to twelve months. FLA. STAT. § 627.6561(2)(b) (1997). It is unclear what the applicable exclusion period is for blanket policies, which are what college plans are written as. FLA. STAT. § 627.659(3) (1997).

²¹ See, e.g., University of Texas System, 1998-1999 Student Health Insurance Insured's Guide (visited March 18, 1999) <<http://www.efg.net/Utexas/>>; ABA-LSD, *supra* note 17; Univ. of Delaware, *supra* note 17. The University of Miami recently changed its plan to require a six-month exclusion period. UNIV. OF MIAMI, *supra* note 17.

²² FLA. STAT. §627.6045 (1998). See also 215 ILL. COMP. STAT. ANN. 105/8 (West supp. 1998); CONN. GEN. STAT. ANN. § 38a-564.

person standard, such as pain in the wrist that could be associated with carpal tunnel syndrome.²³

The determination of whether a condition was preexisting is often made based on when the condition "manifested" itself. While recovery is often not precluded because the condition was present prior to the effective date of coverage, an illness will have been deemed manifested when there is "a distinct symptom or condition from which one learned in medicine can with reasonable accuracy diagnose the disease."²⁴ Thus, if an insured was aware of symptoms of a condition, but was not aware of having an actual illness, nor had seen a doctor for it, the coverage could be denied on preexistence grounds.²⁵

Once it has been determined that the student's condition is a preexisting condition, the student will have no recourse for coverage for the specified exclusion period unless the college or university health service provides services for that condition. Thus, for example, if a student was injured in a car accident while under his parent's policy but needed to continue physical therapy after he became ineligible and went on the college plan, this exclusion could be quite expensive.

If a student can realistically forego treatment for the requisite exclusion period, or can afford to pay for treatment himself, then college plans will sometimes allow a preexisting condition waiver for subsequent years so long as the student has maintained continuous coverage under that college plan.²⁶ But the student must be extremely careful to promptly repurchase the policy within a certain time period of the expiration of the old policy and the beginning date of the period of coverage purchased.²⁷ If he misses this deadline, he will be subject to another preexisting condition exclusion period. And in most cases, it is the responsibility of the student to know when the policy expires. Renewal notices are typically not sent out because college plans are usually written as non-renewable one-year policies.²⁸ This places a heavy burden on the student who requires continuing coverage due to a preexisting condition to maintain his coverage.

²³ In deciding whether a condition qualifies for exclusion, insurance companies are entitled to look at doctor's notes, prior insurance records, and other medical documentation. See 2 COUCH, *supra* note 8, § 180:1.

²⁴ WILLIAM F. MEYER, LIFE AND HEALTH INSURANCE LAW § 17:5 (1972).

²⁵ See *id.* § 17:6.

²⁶ See UNIV. OF MIAMI, *supra* note 17; Univ. of Delaware, *supra* note 17; Univ. of Texas, *supra* note 21.

²⁷ This could be as few as 15 days. UNIV. OF MIAMI, *supra* note 17. In order for coverage to be continuous, the premium payment must be received by the Administrator within a designated number of days of the beginning date of the period of coverage purchased (Fall, Spring/Summer, Annual). *Id.*

²⁸ See *id.*

C. Insurance Through COBRA

If purchasing the college plan is not feasible due to the preexisting condition exclusion period, a better choice for the student might be to elect for continuing coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), if available.²⁹ This option in and of itself would also be expensive³⁰ and would need to be weighed against the cost of paying for medical services out-of-pocket.

COBRA was enacted in 1986 and was intended to provide continuing coverage for insured employees and their dependents under a group plan when a "qualifying event" has occurred.³¹ The availability of continuing coverage under COBRA depends on whether the employer is subject to COBRA. Employers with twenty or more employees are required under most circumstances to make available to departing employees and covered dependents continuing coverage under the employer's group plan, at the employee's expense, for a period of eighteen to thirty-six months.³² Such a qualifying event includes a student who ceases to be a dependent child as defined by the plan.³³

Where COBRA is not available because the parent's employer employs fewer than twenty employees, the student might be able to obtain continuing coverage under a state program designed for the protection of employees and dependents of small employers.³⁴ Under these plans, continuing coverage is available for at least eighteen months.³⁵

Regardless of whether the student elects continuing coverage under COBRA or under a state statute, the student (or his parent) will be responsible for paying the entire premium, plus an administrative fee. Under COBRA, insurers are allowed to charge up to 102 percent of the premium,³⁶ and under state programs, up to 115 percent of the premium.³⁷

²⁹ Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272. Upon the loss of "dependent child" status, the student will be eligible for 36 months of continuing coverage. U.S. Dept. of Labor, Health Benefits Under the Consolidated Omnibus Reconciliation Act (COBRA) (visited Feb. 7, 2000) <<http://www.dol.gov/dol/pwba/public/pubs/COBRA/cobra95.htm>> (original on file with author).

³⁰ "Beneficiaries may be required to pay the entire premium for coverage." U.S. Dept. of Labor, *supra* note 29. This could range from a relatively small amount to several hundreds of dollars depending on the plan.

³¹ PAUL M. HAMBURGER, WHAT YOU NEED TO KNOW ABOUT COBRA HEALTH CARE - CONTINUATION COVERAGE 5 (rev. ed. 1987).

³² See 29 U.S.C. §§ 1161-68 (1996). See also HAMBURGER, *supra* note 31, at 7.

³³ See HAMBURGER, *supra* note 31, at 7.

³⁴ See, e.g., Florida Health Insurance Coverage Continuation Act, FLA. STAT. § 627.6692 (1998).

³⁵ See *id.* § 627.6692(5)(b)(1).

³⁶ See HAMBURGER, *supra* note 31, at 7.

³⁷ See FLA. STAT. § 627.6692(5)(f) (1998).

D. Individual Insurance

If the student ultimately decides that continuing coverage is too expensive and the college plan is too restrictive, the only other option at this writing is for the student to attempt to obtain an individual policy. Initially, it must be recognized that such an attempt may be futile. As mentioned above, the insurer would in most situations be inclined to refuse coverage to a high-risk individual.³⁸ Secondly, the insurer would almost certainly impose a preexisting condition exclusion, which is generally allowed under state law.³⁹ Thirdly, even if a policy could be obtained, it could easily cost twice as much as the college plan.⁴⁰

Still, the individual plan might be viable, because some states require individual market insurers to give credit for the time the person was covered under previous comparable coverage toward the preexisting condition exclusion period, so long as there is no more than a sixty-two day break in coverage.⁴¹ Moreover, under the new HIPAA regulations modifying individual markets, if the person qualifies as an "eligible individual," the insurer cannot deny the person a policy, nor can the insurer impose any preexisting condition exclusion.⁴²

In order to qualify as an eligible individual, the student must have had eighteen months of creditable coverage;⁴³ the most recent prior coverage being under a group plan;⁴⁴ must not be eligible for another group health plan, Medicaid, or Medicare; does not have other health insurance coverage; the most recent coverage was not terminated due to nonpayment of premiums; and if the student has been offered COBRA continuation or a similar state program, it must have been elected and exhausted.⁴⁵ In the case of a student

³⁸ See generally John V. Jacobi, *The Ends of Health Insurance*, 30 U.C. DAVIS L. REV. 311, 376-379 (1997).

³⁹ As noted *supra* note 20, this could be upwards of two years.

⁴⁰ A college plan may charge approximately \$50 a month while an individual policy may charge anywhere from \$100 to \$250 for the same student depending on the extent of coverage required. Telephone Interview with Dan Hill, III, CLU, Hill, Chesson & Assocs. (Dec. 18, 1998).

⁴¹ See FLA. STAT. § 627.6045(2) (1998).

⁴² See 45 C.F.R. § 148.120 (1997). See also *Indiv. Market Health Ins. Reform*, 62 Fed. Reg. 16,985, 16,986 (1997) (codified at 45 C.F.R. pt. 148); *Interim Rules*, *supra* note 19, ¶ 2500, at 214.

⁴³ Creditable coverage includes health insurance coverage defined as benefits consisting of medical care under any hospital or medical service policy or certificate, hospital or medical service plan contract, or HMO contract offered by a health insurance issuer, regardless of whether the coverage is offered in the group market, the individual market, or otherwise. 45 C.F.R. §§ 144.103 and 146.113(a) (1997).

⁴⁴ A group plan is defined as an employee welfare benefit plan to the extent that the plan provides medical care to employees or their dependents directly or through insurance, reimbursement, or otherwise. 45 C.F.R. § 144.103 (1997).

⁴⁵ See *id.* § 148.102.

becoming ineligible under his parent's policy, this means he would have to exhaust thirty-six months of COBRA. And in the case of an individual leaving a job and returning to school, it means he would have to exhaust at least eighteen months of COBRA.⁴⁶ As mentioned earlier, due to the high cost of continuation coverage, the benefits of taking this route may not be worth it depending on the extent of the individual's preexisting conditions.

E. *Employee Returning to School*

The preceding discussion has primarily focused on the options available to a student who has preexisting conditions and is ineligible under a parent's policy, but it is equally applicable to an employee who leaves a job to return to school for a degree, either in an undergraduate or graduate program. The employee returning to school would, however, only have to exhaust eighteen months of continuing coverage to be eligible for an individual policy with no restrictions under HIPAA. Additionally, the returning student may have one other option available to him or her - obtaining coverage under a spouse's plan, assuming of course that the student is married.

F. *Transfer or Graduate Student*

One last category of student that would be affected by the restrictive provisions of college health plans is the student who transfers schools while insured under a college plan, or the student who goes from undergraduate school to graduate school at a different university. Part of the restrictive continuous coverage and preexisting condition exclusion clauses is that continuous coverage and a waiver of the exclusion are only possible if the coverage has been maintained at the same school, and only while attending that school.⁴⁷

III. STATE REGULATION VS. FEDERAL REGULATION

As discussed above, the insurance market looks bleak for students with preexisting conditions, and leads one to question why HIPAA's portability provisions do not apply to them. An argument can be made, however, that some of HIPAA's provisions could and maybe should apply to college plans. At this point, one may ask why college health insurance is so restrictive as to preexisting conditions and continuous coverage, and why are such restrictions

⁴⁶ See *supra* notes 29 and 32 and accompanying text.

⁴⁷ See UNIV. OF MIAMI, *supra* note 17.

allowed. College health insurance plans are usually state-regulated as blanket policies in order to avoid some of the more complicated provisions for individual policies and group policies.⁴⁸ States allow college plans to be written as blanket policies because of the low premiums charged for coverage versus the risk of having to insure any eligible student who pays the premium.⁴⁹ Because preexisting conditions can be costly without an exclusion period, especially in the case of someone needing reconstructive knee surgery and physical therapy, it is essential from the insurer's standpoint to be able to limit the risk of insuring unhealthy students.⁵⁰ Additionally, for small college insurance plans, there must be enough healthy students paying for the plan to offset the cost of insuring unhealthy students in order to keep the premium affordable.⁵¹ Because college insurance plans cannot segment their risk by denying some students coverage entirely, but have to pool the risk,⁵² the insurers argue that it is essential to not only have enough healthy students to spread the risk but also to be able to limit their risk in order to avoid the costs of adverse selection.⁵³

As discussed previously, while states continue to play the primary role in insurance regulation,⁵⁴ federal law has recently made inroads into insurance regulation with HIPAA.⁵⁵ HIPAA not only imposes changes in the group health plan market, but also in the individual market.⁵⁶ Section 111 of HIPAA amended sections 2741 through 2763 and 2791 of the Public Health Service Act as it relates to individual market insurance.⁵⁷ The preemption provisions in the Act specify "[s]tate laws regarding health insurance issuers are not preempted unless they prevent the application of a requirement of the

⁴⁸ See Dan Hill, *supra* note 40.

⁴⁹ See *id.* Here, "eligible student" refers to a student who is taking the requisite number of hours of classes in order to qualify for the plan. UNIV. OF MIAMI, *supra* note 17.

⁵⁰ See Dan Hill, *supra* at note 40.

⁵¹ See *id.*

⁵² See generally Jacobi, *supra* note 38, at 366-85.

⁵³ See Dan Hill, *supra* at note 40. Adverse selection is the tendency of inaccurate pricing to lead to a skewing of enrollment toward high-risk people. See Jacobi, *supra* note 38, at 371-72.

⁵⁴ See Indiv. Market Health Ins. Reform, 62 Fed. Reg. 16,985, 16,986 (1997) (codified at 45 C.F.R. pt. 148).

⁵⁵ Federal authority to regulate insurance in the context of HIPAA comes from the federal right to regulate commerce. Since preexisting condition exclusions impact the ability of employees to seek employment in interstate commerce, such exclusions impede commerce. Additionally, health insurance coverage is commercial in nature and is in and affects interstate commerce. See HIPAA, Pub. L. No. 104-191, § 195 (1996).

⁵⁶ See HIPAA, Pub. L. No. 104-191, §§ 101 and 111 (1996).

⁵⁷ See Indiv. Market Health Ins. Reform, 62 Fed. Reg. 16,985, 16,986 (1997) (codified at 45 C.F.R. pt. 148); Interim Rules, *supra* note 19, ¶ 2500, at 214.

individual market rules.”⁵⁸ This federal overlay on state insurance regulation has created considerable confusion as to whether the federal regulations apply to state law, when they apply, and how they apply.⁵⁹

State law typically divides health insurance into at least two broad categories. One encompasses group, blanket, and franchise policies,⁶⁰ and the other encompasses individual policies.⁶¹ Group health insurance policies are defined as applying to employee benefit plans offered by an employer.⁶² Blanket health insurance is “that form of health insurance which covers special groups of individuals.”⁶³ Franchise health insurance is a form of insurance issued to professional associations, partnerships, trade associations or labor unions.⁶⁴ Individual health insurance policies encompass the individual market.

The friction between federal law and state law occurs because HIPAA divides health insurance into two categories with one encompassing group health plans,⁶⁵ and the other encompassing individual market plans.⁶⁶ In the Preamble to the Internal Revenue Service, Department Of Labor, and Health and Human Services Regulations, this issue is specifically addressed. “Section 146 of the Public Health Services Act regulations applies the group market provisions only to insurance sold to group health plans (which are generally plans sponsored by employers or employee organizations or both), regardless of whether State law provides otherwise.”⁶⁷ Additionally, the

⁵⁸ Indiv. Market Health Ins. Reform, 62 Fed. Reg. 16,985, 16,991 (1997) (codified at 45 C.F.R. pt. 148); Interim Rules, *supra* note 19, ¶ 2500, at 222.

⁵⁹ See Telephone conversation with Ann Branan, Attorney, Broad & Cassell, Ft. Lauderdale, (Dec. 18, 1998).

⁶⁰ See Title 37, Chapter 627, Part VII of FLA. STAT. (1998).

⁶¹ See Title 37, Chapter 627, Part VI, FLA. STAT. (1998).

⁶² See FLA. STAT. §§ 627.652-656 (1998).

⁶³ Includes policies issued to a common carrier to cover passengers, certain policies issued to an employer covering a group of employees, a college or university to cover students, a volunteer fire department to cover firemen, an organization to cover counselors or instructors, a newspaper to cover delivery persons, a health care provider to cover patients. FLA. STAT. § 627.659 (1998).

⁶⁴ See FLA. STAT. § 627.663 (1998).

⁶⁵ Group market means the market for health insurance coverage offered in connection with a group plan. Group health plan means an employee welfare benefit plan to the extent that the plan provides medical care to employees or their dependents directly or through insurance, reimbursement, or otherwise. 45 C.F.R. § 144.103 (1997) (definitions).

⁶⁶ Individual market means the market for health insurance coverage offered to individuals other than in connection with a group health plan (*see* discussion *supra* note 65). Individual health insurance coverage means health insurance coverage offered to individuals in the individual market, but does not include short-term, limited-duration insurance. *Id.*

⁶⁷ Interim Rules for Health Ins. Portability for Group Health Plans, 62 Fed. Reg. 16,894, 16,896 (1997); Interim Rules, *supra* note 19, ¶ 2000, at 70. Additionally, coverage provided to associations but not in connection with employment (group health plan) is considered coverage in the individual market

Health and Human Services Regulations specifically state that “[i]ndividual health insurance coverage includes all health insurance coverage that is neither health insurance coverage sold in connection with an employment-related group health plan, nor short-term, limited duration coverage . . . In some cases, coverage that may be considered group coverage under State law is considered individual coverage.”⁶⁸ This seems to suggest then, that the individual market portability provisions would apply not only to individual plans under state law, but also blanket policies issued to colleges and universities.

Indeed, the Preamble to the Health and Human Services Regulations relating to the Public Health Services Act as amended by HIPAA comments specifically on college plans which provide association group coverage for students. “[A]n association policy that is not offered in connection with an employment-related group health plan falls under the individual market provisions of HIPAA, even if a State otherwise regulates it as ‘association group’ coverage.”⁶⁹ This means that students moving from a group health plan to a college plan or individual policy should qualify for guaranteed availability of a policy and protection against preexisting condition exclusions as long as they meet the eligible individual requirements, as discussed in Section II(D) of this Comment.⁷⁰

An insurance issuer is afforded some protection from the individual market rules if an issuer offers student coverage through a “bona fide association.”⁷¹ In that case, the issuer does not have to make coverage available in the individual market to eligible individuals. This allows the insurer to tailor the insurance plan to the particular association, allowing it to restrict its exposure to risk from the larger unhealthy population of the

under the Public Health Service Act, “regardless of whether it is considered group coverage under State law.” *Id.*

⁶⁸ 45 C.F.R. § 148.102 (a) (1997). See also Interim Rules, *supra* note 19, ¶ 2600, at 229.

⁶⁹ See Indiv. Market Health Ins. Reform, 62 Fed. Reg. 16,985, 16,992 (1997) (codified at 45 C.F.R. pt. 148); Interim Rules, *supra* note 19, ¶ 2500, at 223; 45 C.F.R. §144.102(C) (1997) (coverage provided to associations but not related to employment, is not considered group coverage).

⁷⁰ See 45 C.F.R. § 148.101 (1997) (purpose of Act is to improve access to individual health insurance coverage for eligible individuals, and guarantee renewability of coverage). See also 45 C.F.R. § 148.103 (1997) (requirements for eligibility).

⁷¹ To be “bona fide,” an association offering insurance to its members must meet six requirements: 1) Has been actively in existence for at least 5 years; 2) Has been formed and maintained in good faith for purposes other than obtaining insurance; 3) Does not condition membership in the association on any health status-related factor relating to an individual; 4) Makes health insurance coverage offered through the association available to all members regardless of any health status-related factor relating to the members; 5) Does not make health insurance coverage offered through the association available other than in connection with a member of the association; and 6) Meets any additional requirements that may be imposed under State law. 45 C.F.R. § 144.103 (1997).

individual market. The insurer also does not have to renew coverage for a student who leaves the association as it would otherwise be required to do under the individual market rules, again allowing the insurer to reduce its continued risk of loss. The insurer is not entirely off the hook, however, because coverage must be made available to all association members regardless of any health status-related factors.⁷²

Although many college plans seem to operate in this way, college plans are not considered bona fide association plans because a college or university is not an association. Plans meeting the association requirements would instead be offered through student associations, such as the American Bar Association Law Student Division.⁷³ However, this seems to be the only exemption from the individual market rules, which would mean that college plans would still have to allow protection from preexisting condition exclusions for eligible individuals.⁷⁴ Federal law would seem to directly preempt state law in this regard because the state law allowing college plans to have preexisting condition exclusions with no consideration for eligible individual status prevents the application of a requirement of the individual market rules.⁷⁵

Unfortunately for students, however, there has not been a definitive ruling on this issue at present.⁷⁶ Currently, the general consensus among insurers and state insurance commissions is that the HIPAA individual market rules relating to portability do not apply because college plans are written as blanket policies - they do not fall in the group health plan area nor the individual plan area.⁷⁷ And because states are generally responsible for enforcing the HIPAA requirements,⁷⁸ this issue may not be satisfactorily resolved except through federal enforcement via the Health Care Finance Administration (HCFA).⁷⁹

⁷² See *Indiv. Market Health Ins. Reform*, 62 Fed. Reg. 16,985, 16,992 (1997) (codified at 45 C.F.R. pt. 148); *Interim Rules*, *supra* note 19, ¶ 2500, at 223.

⁷³ See *ABA/LSD*, *supra* note 17.

⁷⁴ See *Indiv. Market Health Ins. Reform*, 62 Fed. Reg. 16,985, 16,992 (1997) (codified at 45 C.F.R. pt. 148) ("If the college plan is not a bona fide association, however, it does have to guarantee coverage to all eligible individuals in the individual market and must renew the coverage indefinitely at the option of the former students."); *Interim Rules*, *supra* note 19, ¶ 2500, at 223.

⁷⁵ See 27 P.H.S. § 2746 as amended by Pub. L. No. 104-191.

⁷⁶ See *Dan Hill*, *supra* note 40.

⁷⁷ See *id.*; Telephone Interview with Mr. Janson, Attorney, Connecticut General Life Ins. Co., August 31, 1998 (as underwriters for University of Miami Health Plan); Telephone call to State of Florida Insurance Commission Helpline, August 31, 1998.

⁷⁸ See 45 C.F.R. § 148.200(a) (1997).

⁷⁹ See 45 C.F.R. § 148.200(b) (1997). The HCFA is required to enforce the provisions of HIPAA if a state chooses not to or fails to enforce the federal requirements.

IV. IS THERE A SOLUTION?

Amidst all this confusion between state insurance regulation and federal preemption, there are some possible future solutions. First, the HCFA could issue a ruling that all plans not issued in relation to employment are individual plans and must abide by the federal individual market regulations. Second, HIPAA could be amended to specifically address college plans through passage of the Student Health Insurance Portability Protection Act of 1999. And third, students could pressure their schools to deal with an insurance broker/administrator who has negotiated a more portability friendly policy with insurers offering college plans.

A. HCFA Ruling

Turning first to an HCFA ruling imposing individual market regulations on state college plans, one must consider the impact such a ruling would have both on insurers and students. First, insurers would have to determine who is an eligible individual for purposes of waiving the preexisting condition exclusion.⁸⁰ This would increase the administrative cost to the insurer. Second, the insurer would have to guarantee renewability of the policy to those individuals,⁸¹ possibly losing the "out" of excluding claims for preexisting conditions presently available if the student does not renew within a certain period. And third, the insurer would be required to pool the risk of insuring both healthy and unhealthy students.⁸² This would require the insurer to raise premiums to off-set this added risk, and because federal law does not place a limit on the premiums an insurer can charge,⁸³ this could make the plan so costly that it would defeat the purpose of providing low cost insurance to students.

As far as the student is concerned, imposition of individual market rules on college plans could end up being more costly than having to pay for his own claims for a year. As mentioned previously, the student must exhaust COBRA continuation coverage, or similar coverage, in order to be considered an eligible individual under the federal regulations. This would mean, hypothetically, that the student would have to pay \$1,200 a year (assuming a very low monthly premium of \$100) or more for one and a half to three years before switching to a college plan that has possibly raised its premiums due

⁸⁰ See 45 C.F.R. § 148.126 (1997).

⁸¹ See 45 C.F.R. § 148.122 (1997).

⁸² See Jacobi, *supra* note 38.

⁸³ See 45 C.F.R. § 148.120(g)(4) (1997).

to added risk. If the student's preexisting condition claims for one year do not exceed \$1,200, and either an individual policy or the college plan is a lesser premium than COBRA, then the cost/benefit analysis would seem to shift away from favoring individual market rules.⁸⁴

B. Student Health Insurance Portability Protection Act

Because the individual market rules would only apply to eligible individuals and not all transient students, and because this option could end up being quite costly for the student, enactment of the Student Health Insurance Portability Protection Act of 1999⁸⁵ is a more attractive solution. This bill proposed an amendment to HIPAA that would designate college health plans in the same category as group health plans, and subject them to the same regulations.⁸⁶ The purpose of the amendment was to recognize the 14.3 million college students that were insured under a college-sponsored plan and ensure portability of insurance from school to work and school to school, in the same manner as an employee under a group plan.⁸⁷

The Interim Rules for HIPAA have since clarified that college plans qualify as creditable coverage because they meet the definition of "health insurance coverage."⁸⁸ This means that when a student becomes eligible for a group health plan, immediately preceding creditable coverage through a college plan will have to be counted toward a reduction of the preexisting condition exclusion period.⁸⁹ Therefore, the first goal of providing portability protection from school to work is not an issue.

⁸⁴ An individual plan for an eligible individual under HIPAA portability requirements could cost approximately \$450 per month, while an individual plan subject to an exclusion period could cost \$100 to \$250 per month depending on coverage. College plans typically charge approximately \$50 per month, and if portability provisions are adopted, the premiums would have to be raised at least by ten percent (assuming the school is large enough to spread the risk over enough healthy students to reduce the affect of adverse selection). Dan Hill, *supra* note 40.

⁸⁵ See H.R. 991, 106th Cong. (1999). This bill was originally presented as H.R. 1281, 105th Cong. (1997), on April 10, 1997, to the House of Representatives by Jerry Costello, D-Ill., and was supported by 82 co-sponsors. The bill was recently reintroduced on March 4, 1999.

⁸⁶ See *id.*

⁸⁷ See 145 CONG. REC. 34, E354 (1999) and 143 CONG. REC. 42, E633 (1997) (remarks by Rep. Jerry Costello).

⁸⁸ See discussion *supra* note 43. See also *Indiv. Market Health Ins. Reform*, 62 Fed. Reg. 16,985, 16,992 (1997) (codified at 45 C.F.R. pt. 148); *Interim Rules*, *supra* note 19, ¶ 2500, at 223.

⁸⁹ See *Indiv. Market Health Ins. Reform*, 62 Fed. Reg. 16,985, 16,992 (1997) (codified at 45 C.F.R. pt. 148); *Interim Rules*, *supra* note 19, ¶ 2500, at 223 ("Because HIPAA provides for full portability from individual products to group market coverage, moving from a college plan to a [sic] employer plan presents no problem, since the coverage under the college plan constitutes creditable coverage that reduces any preexisting condition exclusion under the group health plan.").

The second goal of the proposed bill, however, runs along the same lines as the "job-lock" argument used to rally support for passing HIPAA.⁹⁰ Just as employees were afraid to change jobs for fear of losing their health insurance coverage for twelve months,⁹¹ so too, students may be afraid to transfer schools, go on to graduate school, or return to school from a job. The second purpose of this bill, to provide portability protection from school to school,⁹² would be extremely beneficial in protecting students with preexisting conditions. This would cover the undergraduate student aging-out of the parental policy, the undergraduate student with a bad knee who wants to go to graduate school, the transfer student, and the student returning to school from a job. Currently, a student moving from a group plan to a college plan will not qualify for HIPAA protections unless he qualifies as an eligible individual; and a student moving from one individual plan to another is afforded no protection at all.⁹³ Under the proposed Act, the above types of students would be afforded portability protection because the group health plan provisions of HIPAA limit the preexisting condition exclusion period to twelve months,⁹⁴ require that prior creditable coverage be counted toward reducing the exclusion period,⁹⁵ and change the definition of preexisting condition to require medical advice, diagnosis, care, or treatment for a medical condition within six months prior to the person's enrollment date.⁹⁶ And because this would be an amendment to federal law requiring college health plans to be treated as group health plans, there would be no confusion as to whether or when state law would have to comply.⁹⁷

Nonetheless, the Student Health Insurance Portability Protection Act of 1999 has not been approved nor even discussed since its introduction, and appears to have languished since it was originally introduced in 1997.⁹⁸ Until such time as it is passed, students must begin pressuring their schools to contract with insurers who have written some of the portability protections

⁹⁰ See discussion *supra* note 1.

⁹¹ *Id.*

⁹² See 145 CONG. REC. 34, E354 (1999).

⁹³ See *Indiv. Market Health Ins. Reform*, 62 Fed. Reg. 16,985, 16,992 (1997) (codified at 45 C.F.R. pt. 148); *Interim Rules*, *supra* note 19, ¶ 2500, at 223.

⁹⁴ See 45 C.F.R. § 146.11(a)(1)(ii) (1997).

⁹⁵ See 45 C.F.R. § 146.11(a)(1)(iii) (1997).

⁹⁶ See 45 C.F.R. § 146.11(a)(1)(i) (1997). This is in contrast to the general definition of preexisting condition exclusion applicable in the individual market which allows exclusion if the condition was present before the first day of coverage whether or not any medical advice, diagnosis, care, or treatment was recommended or received. See 45 C.F.R. § 144.103 (1997).

⁹⁷ Virtually all states have adopted the federal regulations into their statutes. See, e.g., FLA. STAT. § 627.6561 (1998).

⁹⁸ See 106 Bill Tracking H.R. 991 (1999).

into their policies.

C. Portability Friendly Policies

An example of a success story in the area of portability for students is the policy with Blue Cross/Blue Shield for students in North Carolina which was brokered by Hill, Chesson & Associates ("Hill").⁹⁹ The policy restricts preexisting conditions to twelve months, but similar to the federal definition, it requires that "medical advice, diagnosis, care or treatment was received or recommended" within the twelve months prior to enrollment in order for the claims to be excluded.¹⁰⁰ Additionally, the policy provides credit toward reducing the exclusion period if the student was previously covered under any type of health benefit plan and has not had more than a sixty-three day lapse in coverage between plans.¹⁰¹

Still, implementation was not without drawbacks. When the plan was presented to the insurance commissions in North Carolina for the 1996-1997 academic year, Hill estimated that they would need to raise premiums by ten percent in order to cover the additional loss experience.¹⁰² But because of the numbers of students that would be insured under the plan,¹⁰³ Hill strongly felt the benefit was worth providing. Ultimately, after two renewals, the ten percent premium increase proved to be correct, and the benefit continues to be provided to students at University of North Carolina, Duke, and North Carolina State University.¹⁰⁴

Unfortunately for the students at East Carolina University, another school that Hill brokered a policy for, the cost of providing portability provisions to less than 1,000 students was greater than the projected ten percent premium increase.¹⁰⁵ There simply was not enough participation in the plan by healthy

⁹⁹ See UNC Student Preferred Care Medical Insurance, 1998-1999, (visited Nov. 23, 1998) <<http://www.hillchesson.com/unc98/uncfram.htm>> [hereinafter "UNC"]. See also American College Student Assoc. (visited Nov. 23, 1998) <http://www.acsa.com/studentinsurance/exclusions_and_limitations.htm>.

¹⁰⁰ See UNC, *supra* note 99.

¹⁰¹ See *id.*

¹⁰² See Email from Dan Hill, III, CLU, ChFC, Hill, Chesson & Associates (November 24, 1998) (on file with author).

¹⁰³ There were approximately 5,500 students at University of North Carolina, Chapel Hill, alone. Hill also brokered the policies for Duke, NCSU, and ECU. Dan Hill, *supra* note 40.

¹⁰⁴ See *id.*

¹⁰⁵ See Email, *supra* note 102.

students in order to spread the risk of insuring the ones with preexisting conditions.¹⁰⁶ As such, Hill "reluctantly removed the portability provisions for the 1998-99 school year."¹⁰⁷

V. CONSIDERATIONS WHEN PURCHASING A POLICY

What does this all mean for the student with a preexisting condition? Do your research before you purchase a health insurance policy, but make sure your coverage does not lapse any longer than sixty days.

For the student aging-out of a parental policy or an employee returning to school from a job, you must first determine how much the cost of COBRA continuing coverage will be versus the college plan or an individual policy. Then you must scrutinize the college plan to determine the applicable exclusions as well as the continuous coverage and renewability requirements. If the cost of the college plan, plus the cost of paying your own claims for the applicable exclusion period, is still less than the COBRA premium, you may want to consider it. But you also need to first look at the state law to see if an individual policy is required to credit your prior coverage toward reducing the exclusion period. If so, and your prior coverage serves to waive the exclusion period, and the premium is affordable, this may be the better option because you would not have to then worry about meeting the continuing coverage requirements of a college plan. Additionally, you should consider whether it would be worth it to attempt to qualify for an individual policy as an eligible individual under the HIPAA rules. But keep in mind that this option will require you to pay for COBRA continuation coverage for at least 18 to 36 months. The last part of the equation to factor in is the quality of health care services you would receive under each plan. The old adage applies here - you get what you pay for.

For the student transferring schools, there are fewer options if you were originally insured on a college plan. Here you would have to evaluate the possibilities of obtaining an individual policy against the new college plan. State law may allow credit toward reducing the preexisting condition exclusion period, as well as the particular college plan. It is essential that you scrutinize the possibilities carefully since a failure to do so could lead to expensive out-of-pocket medical claims.

¹⁰⁶ See Dan Hill, *supra* note 40.

¹⁰⁷ See Email, *supra* note 102.

VI. CONCLUSION

Health care reform for employees and their dependents has taken a step forward with the Health Insurance Portability and Accountability Act of 1996.¹⁰⁸ College health care reform is still in a state of confusion, however. Until Congress adopts the Student Health Insurance Portability Protection Act of 1999, students will have to continue to scrutinize the available college plan and weigh it against their other options. They must also voice their displeasure with the current system to their elected representatives both in federal and state government, and pressure their schools to adopt a more progressive insurance policy such as the one offered to the students at University of North Carolina. It is even possible that if colleges and universities were to adopt such policies, they might find in it a valuable admissions recruiting tool, particularly in selling a graduate program to a working professional.

¹⁰⁸ See generally Paul T. Shultz & Jane F. Greenman, *Congress Advances on Health Care Reform: One Step at a Time*, 22 EMPLOYEE RELATIONS L.J. 89 n. 3 (1996).