DESERT / MOUNTAIN
CHARTER SELPA

Chapter 23: Provision of Healthcare Services

Introduction

Children within the Desert/Mountain Charter Special Education Local Plan Area (SELPA) who require health care services during the course of their school day, which are necessary for them to regularly attend and benefit from the instructional program, shall be provided these services by the Charter Local Educational Agency (LEA).

Health and nursing services are considered a *"related service"* if they are necessary in order for the child to benefit from their specialized academic instruction. (See Chapter 22, Supports and Services, for further details regarding related services.) The need for these services is discussed and reviewed during the Individualized Education Program (IEP) meeting. At that time, a health plan for the child is developed and becomes a permanent part of the child's IEP.

Section A – Prohibition of Mandatory Medicine

It shall be the policy of the Charter LEA to prohibit school personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act as a condition of attending school, receiving an evaluation for special education, or receiving special education services.

Section B – Provision of Nursing Services

Federal Law

The Individuals with Disabilities Education Act (IDEA) ensures that all children have available to them a free appropriate public education (FAPE). The law emphasizes special education and related services designed to meet their unique needs, to assure the rights of children with disabilities and their parents or guardians are protected, and to assess and assure the effectiveness of efforts to educate children with disabilities. School health service(s) is a related service.

Federal regulations provide further distinction between "school health services," which are provided by a "qualified school nurse or other qualified person," and "medical services," which are provided by a licensed physician. The Charter LEA must provide school health services, but not medical services, except those "medical services" that are for diagnostic or evaluation purposes (*Title 34 of the Code of Federal Regulations § 300.16(a)(b)(4)*).

Definition

Children who need school health services require special health care procedures for life support or health support during the school day in order to be able to benefit from the educational program.

Procedure for Developing the IEP of a Child with Specialized Health Care Needs

If a child is eligible for special education, the health plan is a part of the IEP process. The IEP team (including a nurse knowledgeable about the child's health care needs) is convened to discuss safe and appropriate classroom placement, as well as necessary services and personnel for the child to attend school in the least restrictive environment (LRE). The issues addressed include:

- Medical diagnosis or concern;
- Child's condition and needs;
- Procedure(s) required;
- How the need is currently being met;
- How the procedure is performed;
- What records are kept;
- What level of personnel is required;
- What supervision is needed;
- What is the educational impact; and
- Where should the educational placement be.

The information from this meeting becomes a health plan that is a part of the IEP of a child who is eligible for special education.

The school nurse is legally responsible for school nursing procedures. He or she can delegate that responsibility by training and certifying other school staff. All staff having contact with the child

should be informed about the child's health care plan needs, be given training to provide the appropriate support. Review of training and care giving should be evaluated regularly as the child's needs change and information and technology is updated.

There may be private nursing services that have been prescribed by a physician. During a transition period, a nurse from a private agency, who is supported by private insurance or other non-school funds, may provide nursing services with parental consent. This transition period allows school personnel to be trained in the procedures that are needed. Private nurses on a school campus follow the same requirements as school volunteers, including providing the Charter School/Charter LEA with current fingerprint clearance, certificate of negative tuberculosis, and emergency information. In addition, the private nurse should provide certification information and the name and address of their employer of record.

Transportation

Each LEA provides transportation as a related service if the child requires this service in order to receive special education.

Transportation issues are addressed on the child's IEP and may become a part of the health plan if school health services are required on the bus.

In addition to health care services, other services may be determined to be necessary for the child to benefit from the instructional program. These services, if determined by the IEP team to be appropriate and necessary, are defined within the child's IEP.

Section C – Administering Medication and Monitoring Health Condition

Other designated school personnel may include any individual employed by the Charter LEA who has consented to administer medication to the child or otherwise assist the student in the administration of medication, and may legally administer the medication to the child or otherwise assist the child in the administration of the medication (*Title 5 of the California Code of Regulations § 601*).

Medication may include not only a substance dispensed in the United States by prescription, but also a substance that does not require a prescription, such as over-the-counter remedies, nutritional supplements, and herbal remedies (*Title 5 of the California Code of Regulations § 601*).

Persons Authorized to Administer Medication at School

The following individuals are *authorized* to administer medication or assist children in the administration of medication in California public schools pursuant to an IEP (*Title 5 of the California Code of Regulations § 604*):

1. School nurses may administer medication to a child or otherwise assist a child in the administration of medication as allowed by law and in keeping with applicable standards of professional practice.

2. Other designated school personnel may administer medication to children or otherwise assist children in the administration of medication as allowed by law and, if they are licensed health care professionals, in keeping with applicable standards of professional practice for their license.

3. The child's parent or legal guardian may administer medication to the child or otherwise assist the child in the administration of medication as allowed by law.

4. An individual designated to do so by the parent or legal guardian may administer medication to the child or otherwise assist the child in the administration of medication as allowed by law. A LEA may establish rules governing the designation of an individual by a parent or legal guardian in order to ensure that:

    a. The individual is clearly identified;

    b. The individual is willing to accept the designation;

    c. The individual being designated is permitted to be present on the school site;

    d. Any limitations on the individual's authority in his or her capacity as designee are clearly established; and

    e. The individual's service as a designee would not be inconsistent or in conflict with his or her employment responsibilities, if the individual being designated is employed by the LEA.

Based on *California Education Code §§ 44871 - 44878, 49400, 49422(a), and 49423; Title 5 of the California Code of Regulations §§ 600, 601(e)(f)(h) and 604*, it is recommended that medication be administered at school by the school nurse; other duly qualified supervisors of health, site administrator or designee as allowed by law; the parent/guardian or their designee as allowed by law or Charter LEA policy, a contracted licensed health care professional whose licensure permits administration of the medication; or by the child under specified conditions.

> ***California Education Code § 49423***. *(a) Notwithstanding Section 49422, any pupil who is required to take, during the regular schoolday, medication prescribed for him or her by a physician and surgeon or ordered for him or her by a physician assistant practicing in compliance with Chapter 7.7 (commencing with Section 3500) of Division 2 of the Business and Professions Code, may be assisted by the school nurse or other designated school personnel or may carry and self-administer prescription auto-injectable epinephrine if the school district receives the appropriate written statements identified in subdivision (b).*
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> *(b) (1) In order for a pupil to be assisted by a school nurse or other designated school personnel pursuant to subdivision (a), the school district shall obtain both a written statement from the physician and surgeon or physician assistant detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken and a written statement from the parent, foster parent, or guardian of the pupil indicating the desire that the school district assist the pupil*

in the matters set forth in the statement of the physician and surgeon or physician assistant.

(2) In order for a pupil to carry and self-administer prescription auto-injectable epinephrine pursuant to subdivision (a), the school district shall obtain both a written statement from the physician and surgeon or physician assistant detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken, and confirming that the pupil is able to self-administer auto-injectable epinephrine, and a written statement from the parent, foster parent, or guardian of the pupil consenting to the self-administration, providing a release for the school nurse or other designated school personnel to consult with the health care provider of the pupil regarding any questions that may arise with regard to the medication, and releasing the school district and school personnel from civil liability if the self-administering pupil suffers an adverse reaction as a result of self-administering medication pursuant to this paragraph.

(3) The written statements specified in this subdivision shall be provided at least annually and more frequently if the medication, dosage, frequency of administration, or reason for administration changes.

(c) A pupil may be subject to disciplinary action pursuant to Section 48900 if that pupil uses auto-injectable epinephrine in a manner other than as prescribed.

Unlicensed school personnel designated by the site administrator *may* administer medication if:

1. The unlicensed staff member is willing to perform medication administration;

2. The unlicensed staff member is trained and determined to be capable and competent to be able to safely and accurately administer the medication by a licensed health care professional, who is legally authorized to provide such training and determine competence;

3. The unlicensed staff member performing medication administration is supervised by the licensed health care professional who provided the training, and the supervision, review, and monitoring of the medication administration is documented;

4. The unlicensed staff member **does not administer** medications that must be administered by injection, medications that have potential for immediate severe adverse reactions, or medications that require a nursing assessment or dosage adjustment before administration, except for emergency medications as allowed by law;

5. The unlicensed staff member designated to administer life-sustaining emergency medication as allowed by law receives documented training and maintains current certification in Cardiopulmonary Resuscitation (CPR) from a recognized source of such training, such as the American Red Cross or the American Heart Association; and

6. If designated school personnel do not volunteer or consent to administer medication, the governing board of the Charter LEA employs appropriately trained or licensed staff to administer medication.

The parent/guardian or designee, who is not employed by the Charter LEA, may administer medication to their child at school, if:

1. The parent/guardian signs an agreement provided by the Charter LEA, identifying who will administer the medication, stating the conditions under which the medication will be administered, and releasing the Charter LEA from the responsibility of administering the medication;

2. Such agreements include procedures for handling the illnesses or absences of the parent, guardian, or a designee, or child; and

3. All the medications administered in school by the parent, guardian, or designee are administered in accordance with Charter LEA policies and procedures regarding safety, the appropriate location for administration, the privacy of the child, and universal precautions.

Notifications to Parents/Guardians

At the beginning of each school year, the Charter LEA shall notify parent/guardian that children who need to take prescribed medication during the school day may be assisted by a school nurse or designated school personnel, or allowed to self-administer certain medication as long as the Charter LEA receives written statements from the child's physician and parent/guardian in accordance with law, Board policy and administrative regulation (*California Education Code §§ 48980, 49423*).

The Charter LEA shall inform the parent/guardian of any child on a continuing medication regimen for a non-episodic condition of the following requirements (*California Education Code § 49480*):

1. The parent/guardian is required to inform the school nurse or other designated employee of the medication being taken, the current dosage, and the name of the supervising physician; and

2. With the parent/guardian's consent, the school nurse or other designated employee may communicate with the child's physician regarding the medication and its effect, and may counsel school personnel regarding the possible effects of the medication on the child's physical, intellectual and social behavior, as well as possible behavioral signs and symptoms of adverse side effects, omission, or overdose.

Parent/Guardian Responsibilities

Before a designated employee administers or assists in the administration of any prescribed medication to any child, or any child is allowed to carry and self-administer prescription auto-injectable epinephrine or prescription inhaled asthma medication during school hours, the Charter LEA shall have a written statement from the child's physician and a written statement from the

child's parent/guardian (*California Education Code §§ 49414.5, 49423, 49423.1; Title 5 of the California Code of Regulations § 600*):

The physician's written statement shall clearly (*California Education Code §§ 49423, 49423.1, 49423.6; Title 5 of the California Code of Regulations § 602*):

1. Identify the child;

2. Identify the medication;

3. Specify the method, amount, and time schedules by which the medication is to be taken;

4. Contain the name, address, telephone number, and signature of the physician; and

5. If a parent/guardian has requested that his/her child be allowed to self-administer prescription auto-injectable epinephrine or prescription inhaled asthma medication, confirm that the child is able to self-administer the medication.

The parent/guardian's written statement shall:

1. Identify the child;

2. Grant permission for the authorized Charter LEA representative to communicate directly with the child's physician, as may be necessary, regarding the physician's written statement or any other questions that may arise with regard to the medication;

3. Contain an acknowledgement that the parent/guardian understands how Charter LEA employees will administer or otherwise assist the child in the administration of medication;

4. Contain an acknowledgement that the parent/guardian understands his/her responsibilities to enable Charter LEA employees to administer or otherwise assist the child in the administration of medication including, but not limited to, the parent/guardian's responsibility to provide a written statement from the physician and to ensure that the medication is delivered to the school in a proper container by an individual legally authorized to be in possession of the medication; and

5. Contain an acknowledgement that the parent/guardian may terminate consent for such administration at any time.

In order for a child to be assisted by a school nurse or other designated school personnel, the school shall obtain both a written statement from the physician or surgeon detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken and a written statement from the parent, foster parent, or guardian of the child requesting that the school district assist the child in the matters set forth in the statement of the physician or surgeon.

If a parent/guardian has requested that his/her child be allowed to carry and self-administer prescription auto-injectable epinephrine or prescription inhaled asthma medication, the parent/guardian's written statement shall also (*Education Code §§ 49423, 49423.1*):

1. Consent to the self-administration;

2. Release for the school nurse or other designated school personnel to consult with the health care provider of the child regarding any questions that may arise with regard to the medication; and

3. Release the Charter LEA and school personnel from civil liability if a child suffers an adverse reaction as a result of self-administering the medication.

The parent/guardian shall annually provide the Charter LEA a new written statement from himself/herself and the child's physician. In addition, the parent/guardian shall provide a new physician statement if the medication, dosage, frequency of administration, or reason for administration changes (*Education Code §§ 49423, 49423.1*).

The parent/guardian shall provide medications in a properly labeled, original container along with the physician's instructions. For prescribed medication, the container shall bear the name and telephone number of the pharmacy, the child's identification, name and phone number of the physician, and physician's instructions. Medications that are not in their original container shall not be accepted or administered. Medications shall be delivered to the school by the parent/guardian, unless the Charter LEA authorizes another method of delivery.

The parent/guardian of a child on a continuing medication regimen for a non-episodic condition shall inform the school nurse or other designated certificated employee of the medication being taken, the current dosage, and the name of the supervising physician (*Education Code § 49480*).

A parent/guardian may designate an individual who is not an employee of the Charter LEA to administer medication to his/her child as long as the individual is clearly identified, willing to accept the designation, permitted to be on the school site, and any limitations on the individual's authority are clearly established. The parent/guardian shall provide a written statement designating the individual and containing the information required above.

Designated Employee/Charter LEA Responsibilities

The school nurse or other designated school personnel shall:

1. Administer or assist in administering the medication in accordance with the physician's written statement;

2. Accept delivery of medication from the child's parent/guardian, including counting and recording the medication upon receipt;

3. Maintain a list of children needing medication during the school day, including the type of medication, times and dosage, as well as a list of children who are authorized to self-administer medication;

4. Maintain a medication log documenting the administration of medication including the child's name; name of medication the child is required to take; dose of medication; method by which the child is required to take the medication; time the medication is to be taken

during the regular school day; date(s) on which the child is required to take the medication; physician's name and contact information; and a space for daily recording of medication administration.

The daily record shall contain the date, time, amount of medication administered, and signature of the individual administering the medication;

5. Maintain a medication record including the physician's written statement, the parent/guardian's written statement, the medication log, and any other written documentation related to the administration of medication to the child;

6. Ensure that student confidentiality is appropriately maintained;

7. Coordinate the administration of medication during field trips and after-school activities;

8. Report any refusal of a child to take his/her medication to the parent/guardian;

9. Keep all medication to be administered by the LEA in a locked drawer or cabinet;

10. Communicate with the physician regarding the medication and its effects;

11. Counsel school personnel regarding the possible effects of the medication on the child's physical, intellectual and social behavior, as well as possible behavioral signs and symptoms of adverse side effects, omission, or overdose; and

12. By the end of the school year, ensure that unused, discontinued, and outdated medication is returned to the child's parent/guardian where possible or, if the medication cannot be returned, is disposed of in accordance with state laws and local ordinances.

APPENDIX A: California Department of Education (CDE) K.C. Settlement Agreement and Legal Advisory

K.C. Settlement Agreement & Legal Advisory

This settlement agreement and legal advisory spell out the legal responsibilities of a school district when a student requires administration of insulin during the school day.

NOTE:

Update as of November 6, 2013

On August 12, 2013, the California Supreme Court issued a decision in American Nurses Association v. Tom Torlakson, 57 Cal.4th 570 (2013). In its decision, the Court stated that the "California law does permit trained, unlicensed school personnel to administer prescription medications, including insulin, in accordance with written statements of individual students' treating physicians, with parental consent *(Ed. Code §§ 49423, 49423.6; tit. 5 §§ 600-611*.)…" *Id. at 591*. The California Supreme Court's decision may be found in *American Nurses Association v. Torlakson 57 Cal. 4th 570* (PDF). The Supreme Court remanded the case back to the Court of Appeals to resolve any outstanding claims. Once the case is complete, CDE will review whether the Legal Advisory needs to be revised to comply with the courts' orders.

On December 26, 2008, the Sacramento County Superior Court held that the portions of the Legal Advisory stating that trained unlicensed school personnel may administer insulin in the absence of a licensed nurse violate state law. The case was heard by the Court of Appeals, which upheld the trial court's decision. 110 Cal. Rptr. 3d 305 (2010). This decision was appealed by the defendants to the California Supreme Court.

EXHIBIT A

LEGAL ADVISORY ON RIGHTS OF STUDENTS WITH DIABETES IN CALIFORNIA'S K-12 PUBLIC SCHOOLS

Pursuant to the recent Settlement Agreement in K.C. et al. v. Jack O'Connell, et al., Case No. C-05-4077 MMC, in the United States District Court for the Northern District of California, the California Department of Education (CDE) has agreed to remind all California school districts and charter schools of the following important legal rights involving students with diabetes who have been determined to be eligible for services under either the Individuals with Disabilities Education Act (IDEA) and related California law or Section 504 of the Rehabilitation Act of 1973 (Section 504) and related California law.

The CDE notes that this is a complex area of the law. Every effort has been made to be clear and concise in providing this advisory.

I. The Applicability of Two Federal Anti-Discrimination Statutes (Section 504 and the ADA) to those Public School Students with Diabetes Who Require Diabetes Health Related Services While Attending K-12 Schools in California

Two federal anti-discrimination statutes, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA), together establish rights for eligible students with diabetes in California's public schools. Together, they serve to protect such students from discrimination based upon their disability including the right to receive a free appropriate public education (FAPE). The two statutory schemes are treated synonymously. (Wong v. Regents of University of California, 192 F.3d 807, 81 6 n. 26.) Hence, in this Legal Advisory, Section 504 will mean both Section 504 as well as the ADA unless otherwise noted.

A. Eligibility

In general, a student will be determined to have a disability under Section 504 if he/she has a mental or physical impairment that substantially limits one or more major life activities, such as eating, breathing, caring for oneself, performing manual tasks, hearing, speaking, walking, and learning. (See *34 CFR sec. 104.4, subds. (j), (k), and (i).*) Accordingly, learning is not the only major life activity that must be considered when determining eligibility under Section 504. (*Rock Hill (OH) Local Schools, 37 IDELR 222 (OCR 2002).*)

The Ninth Circuit Court of Appeals recently determined that diabetes is a "physical impairment" and then addressed whether that impairment substantially limited a major life activity under the

facts of that case. (*Fraser v. Goodale, 342 F.3d 1032 (9th Cir. 2003).*) In finding that the plaintiff had presented evidence that she was substantially limited in eating, the court noted that the plaintiff was required to be vigilant about testing blood glucose levels and adjusting food intake, insulin and physical activity accordingly. *Id. at 1040-1041*.

Fluctuations in blood glucose levels can impact concentration and comprehension, as well as have significant and potentially life-threatening short and long term health implications. See Helping the Student with Diabetes Succeed - A Guide for School Personnel, U.S. Department of Health and Human Services (2003).

To avoid these fluctuations in blood glucose levels, students with diabetes must be vigilant about balancing food consumption, exercise, and administration of medication. For these reasons, the Office for Civil Rights of the United States Department of Education (OCR) has found that students with diabetes to be "disabled" under Section 504. (*See Bement (IL) Community Unit School District #5, 14 EHLR 353:383 (OCR 1989)* (holding that a student with diabetes is disabled under Section 504 when she required close monitoring of her diet, behavior, and activities at all times in order for her to be able to attend school); *Irvine (CA) Unified Sch. Dist., 19 IDELR 883, 884 (OCR 1 993)* (determining that the student with type 1 diabetes was a "disabled person" as defined by the regulation implementing Section 504).

B. 504 Plans

Once a local education agency (LEA) determines that a student is entitled to Section 504 protections, this includes the provision of a free appropriate public education. (*34 CFR sec. 104.35.*) Services, and accommodations are determined through the 504 planning process, and documented in a 504 plan. *Henderson County (NC) Pub. Schs., 34 IDELR 43, 44 (OCR 2000)* (voluntary resolution agreement reached to develop Section 504 plan providing for a broad range of diabetes-related aids and services, including training staff to monitor blood glucose, count carbohydrates, manage student's insulin pump, and establish procedures for the provision of appropriate emergency services); *Prince George's County (MD) Schools, 39 IDELR 103, 104 (OCR 2003)* (district required to develop a Section 504 Plan tailored to the individual needs of a student with type 1 diabetes).

Academic modifications may be necessary whether or not the major life activity of "learning" is affected. A student with diabetes may need to have his/her curriculum adapted in a variety of ways such as changes in physical education instruction, in the regular school day schedule (such as breaks required to test for and treat abnormal blood sugar levels), in additional breaks or other time modifications during tests, and in the regular schedule for eating, drinking and toileting. These accommodations should be documented in the 504 plan. Decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered, usually are based on the treating physician's written orders. (See *Cal. Ed. Code section 49423.*) In rare circumstances, the 504 team will question the doctor's treatment plan as being outside standards of care and will seek a second opinion at school district expense. (See section of this advisory discussing IDEA entitled *Related Services as Including Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI* below.)

C. Individualized Inquiries Required; Blanket Policies Prohibited

An LEA may not have a blanket policy or general practice that insulin or glucagon administration, or other diabetes-related health care services, will only be provided by district personnel at one school in the district or will always require removal from the classroom in order to receive diabetes related health care services. For example, in *Christopher S. v. Stanislaus County Office of Educ., 384 F.3d 1 205, 1212 (9th Cir. 2004),* the Ninth Circuit Court of Appeals noted that OCR has repeatedly held that blanket policies that preclude individual evaluation of a particular child's educational and health related services needs violate Section 504. (See also *Conejo Valley (CA) Unified Sch. Dist., 20 IDELR (LRP) 1276, 1280 (OCR 1993)* (district violated Section 504 by failing to perform an evaluation that was individualized by proposing changes in placement based upon a generalized district policy regarding who could perform injections without regard to student's individual education needs*); Irvine (CA) Unified Sch. Dist., 23 IDELR 1144, 1146 (OCR 1995)* (district's "unwritten policy" prohibiting blood glucose testing in classroom violated *34 CFR sec. 104.35(c)(3)* requiring that a team of persons give careful consideration to all of the information available and makes determinations based upon the individual needs of the disabled student).) See further discussion below in the section of this advisory discussing IDEA entitled *Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI.*

In addition, a school or district may not require the parent or guardian to waive any rights or agree to any particular placement or related services as a condition of administering medications or assisting a student in the administration of medication at school. *(Berlin Brothersvalley (PA.) School Dist., EHLR 353:124 (OCR 1988)* (district policy of giving school officials discretion in whether to administer needed medication and conditioning the provision of services required by Section 504 or IDEA on parents signing a waiver of liability is prohibited). See further discussion below in the section of this advisory discussing IDEA entitled *School Placement Decisions*.

D. FAPE Under Section 504

Pursuant to *34 CFR section 104.33,* school districts must provide a free appropriate public education (FAPE) to all students with disabilities in public elementary and secondary schools. Under Section 504, "appropriate education" means "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of *34 CFR sections 104.34, 104.35, and 104.36." (34 CFR section 104.33 (b)*(emphasis added).)

The OCR has applied the FAPE obligation broadly to ensure nondiscrimination by providing individual accommodations that provide each disabled student with a FAPE. The requirement to provide FAPE under Section 504 has been applied in the context of the administration of medication in general and diabetes-based related services in particular. *(See Conejo Valley (CA) Unified Sch. Dist., supra; Irvine (CA) Unified Sch. Dist.*, supra; and *Prince George's County (MD) Schools*, supra.) See also, Chapter 4 of Compliance With The Americans With Disabilities Act: A

Self-Evaluation Guide for Public Elementary and Secondary Schools (last visited November 17, 2014) Office for Civil Rights Department of Education, United States of America (1995). Unlike the requirement to provide auxiliary aids in contexts other than FAPE ... the obligation to provide related aids and services necessary to the provision of FAPE is not subject to the limitations regarding undue financial and administrative burdens or fundamental alteration of the program." *Id. at 73*.

II. California's Anti-Discrimination Statutes and Students with Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California

California's anti-discrimination statutes prohibit discrimination on the basis of disability under any program or activity funded directly by the State. (*Cal. Gov. Code sec. 11135(a)*.) "Disability" means any mental or physical disability as defined by *Government Code section 12926*. (*Cal. Gov. Code sec. 11135(d)(1)*.) "Physical disability" is defined in *Government Code section 12926(k)(1) and (2)*. It affords broader coverage than Section 504 because it requires a "limitation" rather than a "substantial limitation" of a major life activity. (*Cal. Gov. Code secs. 12926(k)(1)(B); 12926.1(c), (d)(2)*; see generally *Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal.4th 1019, 1022-1032*.)

In addition, whether a physical disability limits a major life activity under California's statutory scheme must "be determined without regard to mitigating measures such as medications...." (*Cal. Gov. Code sec. 12926(k)(1)(B)(i)*.) This provision has made the Supreme Court's holding in *Sutton v. United Airlines, 527 U.S. 471 (1999)*, which required consideration of such mitigating measures inapplicable under California law. Furthermore, section 1 2926(k)(2) of the Government Code provides that all students with diabetes who require special education or related services (i.e., health-related services) are protected by state anti-discrimination laws.

Government Code section 111 35 incorporates the rights under the ADA and thus Section 504. (See *Gov. Code sec. 11135(b) and 42 USC sec. 1 2133; 28 CFR sec. 35.103(a)*). Therefore, the discussion above regarding Section 504 and students with diabetes is applicable under the broad definitions of physical disability in California.

III. The IDEA and Students With Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California

The primary purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living." (*20 USC secs. 1400(d)(1)(A), 1401 (a)*.) California law sets the same standard for educating individuals with exceptional needs as the reauthorized IDEA. (*Cal. Ed. Code secs. 56000, 56363(a)*.)

A. Eligibility

The IDEA requires LEAs to conduct "child find" activities to ensure that children with diabetes are identified, located, and evaluated. (*20 USC sec. 141 2(a)(3)*.) Under the IDEA, a child with diabetes is evaluated for eligibility under one of the 13 categories of disability, including the disability of "other health impaired" (OHI). (*20 USC sec. 1401(3)(A); 34 CFR sec. 300.8; Cal. Ed. Code sec. 56026; Cal. Code Regs., Tit. 5, sec. 3030*.) The reauthorized IDEA defines "child with disability" in the following way:

The term "child with a disability" means a child-

> (i) with ... other health impairments ... and
> (ii) who, by reason thereof, needs special education and related services. (*20 USC sec. 1401(3)(A).)*

The term "other health impairments" (OHI) is further defined in the recently promulgated regulations as follows:

(c) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the education environment, that-

> (i) is due to chronic or acute health problems such as diabetes and
> (ii) adversely affects a child's educational performance.

Hence, an individualized education program (IEP) team can determine that a child with diabetes is eligible under the disability of OHI because high or low blood glucose levels can cause symptoms giving him/her limited strength, limited alertness, and creating chronic or acute health problems that adversely affect the student's educational performance. (See Helping the Student with Diabetes Succeed - A Guide for School Personnel, U.S. Department of Health and Human Services, 2003). Fluctuations in blood glucose levels may have an adverse effect on education in a variety of ways, including the effect on concentration, comprehension, and energy levels. It should be noted that the IEP team "must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services." (*34 CFR sec. 300.101(c)*.)

B. Special Education Defined

The IDEA defines "special education" as meaning "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including-

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education." (*20 USC section 1401 (29)*.)

"Specially designed instruction" means "adapting, as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery or instruction (i) to address the unique needs of the child that result from the child's disability and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." (*34 CFR sec. 300.39(b)(3)*.)

For example, an IEP team could determine that a child who meets the criteria for eligibility under the category of OHI based upon chronic or acute health problems arising from diabetes would need to have his/her curriculum adapted in ways such as changes in the physical education instruction, in the regular school day schedule (such as various breaks required by abnormal blood sugar levels involving medical treatment), in allowed time for taking tests, in the regular schedule for eating, drinking and toileting, in assignment due dates, and in various other academic adaptations.

C. Individualized Education Program

Determinations about eligibility, special education and related services under the IDEA and relevant state statutes are made generally by the child's Individualized Education Program (IEP) team. (See generally *Cal. Ed. Code secs. 56340-56347*.) Such determinations are always based upon the unique needs of the individual child.

The term "individualized education program" (IEP) means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with *20 USC section 141 4(d)*. As a part of each IEP, there must be "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child..." (*20 USC sec. 1414(d)(1)(A)(i)(IV)*) in school and in extracurricular and other nonacademic activities. The 2006 implementing regulations are located at *34 CFR sections 300.320* through *300.328*.

D. Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI

In general, the reauthorized IDEA includes "school nurse services" as a "related service." (*20 USC sec. 1401 (26)*.) The statutory definition was expanded in the regulations to include school health services. (*34 CFR sec. 300.34*.) California's definition of designated instruction and services/related services is located in *Education Code section 56363* and is synonymous with related services in the reauthorized IDEA in *20 USC section 1401 (26)*. California's designated instruction services thus do not deviate from the federal related services.

If a child needs both special education and health services, then, as determined by the child's IEP team, school nurse/health services should be made available to a child with the eligible disability of OHI as documented in the student's IEP. Services related to an OHI-eligible child's diabetes health care needs at school, including those involving the management and administration of insulin, are covered under the IDEA as nursing and health services rather than excluded from coverage as medical services requiring a physician to provide them. (See *Clovis Unified School Dist. v. Office of Administrative Hearings, 903 F.3d 635, 641-643 (9th cir. 1990)* discussing and applying *Irving Independent School District v. Tatro, 468 u.s. 883 (1984)*.)

In California, by statute both a written statement from the child's physician as well as a written statement from the child's parent are required before either a school nurse or other designated school personnel may assist the child with the administration of medication. (*Cal. Ed. Code sec. 49423*.) Hence, decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered usually are based on the treating physician's written orders. (See *Cal. Ed. Code sec. 49423*.) In rare circumstances the IEP team will question the doctor's treatment plan as being outside the standard of care and then request clarification from the treating physician or a second opinion with the consent of the parent, at the district's expense. (See *34 CFR sec. 300.300; Shelby S. ex rel. Kathleen T. v Conroe Independent School Dist., 454 F.3d 450, 454-455 (5th Cir. 2006)* (school district authorized to compel medical examination over parent objection and necessity demonstrated).) In addition, the IEP team is responsible for determining educational modifications. (See, Special Education Defined, above).

E. Individualized Inquiries Required; Blanket Policies Prohibited

As with Section 504 determinations discussed above in Part l.C., decisions by IEP teams must be based upon individualized inquiries. The IDEA and its implementing regulations are premised upon the fact that each child is "unique" (*20 USC sec. 1400(d)(1)(A)*) and must receive an "individualized education program" (*20 USC sec. 1401(14)*; see generally *Porter v. Board of Trustees of Manhattan Beach Unified School Dist., 307 F.3d 1064, 1066 (9th Cir. 2002)* quoting *Bd. of Educ. v. Rowley, 458 U.S. 176, 188-189 (1982)* ("right to public education for students with disabilities 'consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction".) As a consequence, decisions about a specific child's eligibility for services under the IDEA must not be based upon the generalized or "blanket" policies of a local education agency rather than the unique needs of the individual child. (See Part l.C., supra.) Therefore, policies that restrict the availability of health related services across-the-board would be out of compliance with the mandate to individualize decisions about special education and related services needs.

F. School Placement Decisions

School placement decisions may not be based upon the unwillingness of a district to provide needed related services to a child with OHI-diabetes disability at the school that the child would otherwise attend. A district may not require the parent to waive any rights, hold the district harmless, or agree to any particular placement or related services as a condition of administering medication or assisting a student in the administration of medication at school. (See Comment to IDEA regulations at p. 46587 (federal register) involving *34 CFR sec. 300.116(c)*: "Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled Public agencies must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff;" see also *Berlin Brothers Valley (PA.) School Dist., EHLR 353:124 (OCR 1988)* (blanket waiver of liability as condition to provision of medical services prohibited). For example, a district may not have a blanket policy or general practice that insulin or glucagon administration or other diabetes-related health care service are only going to be provided by district personnel at one school in the district, or that a child will always need to be removed from the classroom in order to receive diabetes related health care services. An IEP developed in the legally-required manner, which takes into account all of the relevant medical and education factors under the IDEA for each disabled child, is the only way to ensure that such a student receives an individualized determination of what constitutes FAPE under the IDEA and relevant state statutes.

G. Administrative Procedures; Financial Burden Not a Defense

A parent of a child with the disability of OHI or an organization can file an administrative complaint with the CDE alleging that a school district is violating the IDEA or relevant state statutes by failing to identify, evaluate, or provide a FAPE to a student with diabetes or a group of students with diabetes, including challenging a district policy or practice that restricts the provision of related health services to students eligible for such services under the IDEA. (*34 CFR secs. 300.151-300.153; Calif. Code Regs., Tit. 5, secs. 4600-4671*.)

In the alternative, a parent who disagrees with the IEP decision regarding identification, evaluation, or the provision of FAPE and related services can file for an impartial due process hearing with the Office of Administrative Hearings. (*20 USC sec. 1415 (e)-(i)*.) An OAH judge can order that the applicable required related school health services be provided by the district, including the administration of insulin during the school day. (*20 USC sec. 1415(f)(3)(E)*.) Financial burden is not a valid defense available to the LEA under the *Garret F*. case. (*Cedar Rapids v. Garret F., 526 U.S. 66, 75, fn. 6, 78-79 (1999)* (district required to fund related school health services under *34 CFR sec. 300.13(a)* where necessary in order to provide student with meaningful access to public school).)

IV. Who May Administer Insulin in California to Students with Diabetes As a Related Service Under Section 504 and the IDEA

A. California Law

It is the position of the CDE that the *Business and Professions Code Section 2725(b)(2)* and the *California Code of Regulations, Title 5, Section 604* authorize the following types of persons to administer insulin in California's public schools pursuant to a Section 504 Plan or an IEP:

1. Self-administration, with authorization of the student's licensed health care provide and parent/guardian;[1]

2. School nurse or school physician employed by the LEA;

3. Appropriately licensed school employee (i.e., a registered nurse or a licensed vocational nurse) who is supervised by a school physician, school nurse, or other appropriate individual;

4. Contracted registered nurse or licensed vocational nurse from a private agency or registry, or by contract with a public health nurse employed by the local county health department;

5. Parent/guardian who so elects;

6. Parent/guardian designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of the LEA; and

7. Unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by *Section 2727(d) of the Business and Professions Code* (epidemics or public disasters).[2]

B. Federal Law

As noted above in Parts I and III, federal law under Section 504 and the IDEA provides that the administration of insulin can be determined to be a related service that must be provided to a student pursuant to a Section 504 Plan or an IEP in order to ensure FAPE. CDE has recognized in the regulations which implement Education Code section 49423 regarding the administration of medication to students during the school day that they did not affect "in any way" either the content or implementation of a student's Section 504 Plan or IEP. (*Calif. Code Regs., Tit. 5, section 610(d)*.) Further, CDE's Program Advisory on Medication Administration (PDF) (required by Section 611 of the regulations) recognized that students' rights under Section 504 and the IDEA are distinct from state legal requirements.

C. Reconciliation of State and Federal Law

The difficult issue in this area is reconciling state and federal requirements. Clearly the first set of personnel who are authorized to administer insulin pursuant to a Section 504 Plan or an IEP are those persons who are expressly so authorized under California law, as set forth in Part IV.A, supra. The question is what should occur when no expressly authorized school personnel are available.

In CDE's view, the list cannot be taken as exhaustive because LEAs must also meet federal requirements - even if the personnel expressly authorized by California are not available. In practical terms, this means that the methodology followed by some LEAs of training unlicensed school employees to administer insulin during the school day to a student whose Section 504 Plan or IEP so requires it is a valid practice pursuant to federal law. If the LEA determines that insulin administration by the types of persons listed in categories 2-4 are not available or feasible, then unlicensed school employees with appropriate training would be authorized under federal law to administer insulin in accordance with the student's Section 504 Plan or IEP. What is not valid is for an LEA to adopt a general policy or practice that a Section 504 Plan or IEP need not be developed or followed because the LEA is not able to comply with the student's federal rights based upon the express provisions of state law.

When federal and state laws are reconciled, it is clear that it is unlawful for an LEA to have a general practice or policy that asserts that it need not comply with the IDEA or Section 504 rights of a student to have insulin administered at school simply because a licensed professional is unavailable. In such situations, federal rights take precedence over strict adherence to state law so that the educational and health needs of the student protected by the Section 504 Plan or IEP are met.

V. Monitoring and Compliance by CDE

A. IDEA

Under the IDEA, the CDE monitors compliance with federal and state special education statutes and regulations with its Quality Assurance Process (QAP). That process is characterized by the gathering and evaluating of data in order to identify districts and areas within districts to aid in the inquiry, evaluation, and review of compliance issues. This enables the LEA and the CDE to develop corrective action plans, program improvement goals, and provide technical assistance to improve services to special education students throughout California.

Pursuant to the K.C. Settlement Agreement, the CDE has agreed to modify its QAP monitoring instruments and process to include special evaluation items related to students with the disability of OHI with chronic or acute health problems arising from diabetes.

The CDE also assures compliance under the IDEA by maintaining an administrative complaints system as required by federal regulation. (See *34 CFR sections 300.151-300.153*.) *Under 34 CFR section 300.153(a),* a complainant can be either an organization or an individual who files a signed

written complaint alleging any violation concerning identification, evaluation, placement, or the provision of a FAPE in the least restrictive environment including the provision related services. For example, a complaint may allege policies and/or practices that violated the child's right to receive an individualized assessment or eligibility and/or the provision of diabetes related health care services pursuant to the IEP process and/or any dispute arising out of the IEP process.

The required elements of a complaint are set forth in *34 CFR section 300.153(b)*. Of particular note is the requirement that a complaint alleging child-specific issues must contain the name and address of the residence of the child (*34 CFR sec. 300.153(b)(4)(a)*.) Complaints of a systemic nature under the IDEA do not need to identify the individual student by name, although they still must provide facts of the alleged violation that are sufficient for the CDE or the district to conduct an effective investigation, and they must be signed.

B. Section 504/State Statutes

As required by the Uniform Complaints Procedure, CDE's Office of Equal Opportunity will continue to accept and investigate complaints pursuant to Section 504 and Government Code Section 111 35 which are filed by an organization or a student with a disability that alleges individual or systemic discrimination arising from an alleged non-compliant policy or practice or the failure to provide diabetes-related health services, reasonable accommodations or modifications to the student's educational program. (See Chapter 5.1, the Uniform Complaint Procedures (sections 4600-4670) and Chapter 5.3, involving Nondiscrimination and Educational Equity, sections 4900-4965.)

VI. Impartial Due Process Hearings

Parents who disagree with a school district's decisions regarding their child's eligibility and/or placement under the IDEA also have a federal right to request a due process mediation and/or hearing. (*20 USC sec. 1415*.) Procedural rights to an impartial hearing provided by the local district if a parent disagrees with a Section 504 team decision are also required by federal law. (*34 CFR sec. 04.36*.)

VII. Resources

CDE recommends that local education agencies and special education local plan areas (SELPAs) use the following documents as guidelines for compliance:

- Program Advisory on Medication Administration (PDF) (California State Board of Education, 2005)
- Sample Section 504 Plan and Diabetes Medical Management Plan
- Helping the Student with Diabetes Succeed - A Guide for School Personnel (U.S. Department of Health and Human Services, 2003)

Checklist: Who May Administer Insulin in California's Schools Pursuant to An IEP or a Section 504 Plan

Business and Professions Code Section 2725(b)(2) and the *California Code of Regulations, Title 5, Section 604* authorize the following types of persons to administer insulin in California's public schools pursuant to a Section 504 Plan or an IEP:

1. Self-administration, with authorization of the student's licensed health care provide and parent/guardian;

2. School nurse or school physician employed by the LEA;

3. Appropriately licensed school employee (i.e., a registered nurse or a licensed vocational nurse) who is supervised by a school physician, school nurse, or other appropriate individual;

4. Contracted registered nurse or licensed vocational nurse from a private agency or registry, or by contract with a public health nurse employed by the local county health department;

5. Parent/guardian who so elect;

6. Parent/guardian designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of the LEA; and

7. Unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727(d) of the Business and Professions Code (epidemics or public disasters).[3]

   When no expressly authorized person is available under categories 2-4, supra, federal law - the Section 504 Plan or the IEP - must still be honored and implemented. Thus, a category #8 is available under federal law:

8. Voluntary school employee who is unlicensed but who has been adequately trained to administer insulin pursuant to the student's treating physician's orders as required by the Section 504 Plan or the IEP.

[1]Unlicensed school personnel are authorized under state law to assist students as needed with insulin self-administration. *Cal. Ed. Code sec. 49423* provides that unlicensed school personnel may assist with medication administration.

[2]In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled "Diabetes Care Tasks At School: What Key Personnel Need to know: Insulin Administration" (Attachment A). Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of

competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

[3]In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled Diabetes Care Tasks At School: What Key Personnel Need to Know. Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

Questions: Procedural Safeguards Referral Service, Special Education Division: 800-926-0648

Office of Equal Opportunity: 916-445-9174

Last Reviewed: Thursday, December 21, 2017

Filed 8/12/13

IN THE SUPREME COURT OF CALIFORNIA

AMERICAN NURSES ASSOCIATION et al.,	)	
Plaintiffs and Respondents,	)	S184583
v.	)	Ct.App. 3 C061150
TOM TORLAKSON, as Superintendent, etc., et al.,	)	Sacramento County Super. Ct. No. 07AS04631
Defendants and Appellants;	)	
AMERICAN DIABETES ASSOCIATION,	)	
Intervener and Appellant.	)	

Public school students with diabetes who cannot self-administer insulin are normally entitled under federal law to have it administered to them during the school day. This case presents a dispute over whom state law permits to administer that insulin. The dispute arises against the background of a long-standing shortage of school nurses and a class action in federal court alleging the state's schools have failed to ensure diabetic students actually receive legally required health care services. Pursuant to an agreement settling that litigation, the State Department of Education (Department) in 2007 advised local education agencies that trained school personnel who are not licensed health care providers may, when no nurse is available, administer insulin pursuant to the medical orders of students' treating physicians. (State Dept. of Ed., Legal Advisory on Rights of Students with Diabetes in California's K-12 Public Schools (2007) pt. IV.C < http://www.cde.ca.gov/ls/he/hn/legaladvisory.asp > [as of Aug. 12, 2013] (2007 Legal Advisory).) In the case now before us, the American Nurses Association and other

trade organizations representing registered and school nurses (collectively Nurses) challenge the Department's advice as condoning the unauthorized practice of nursing. The American Diabetes Association (Association), which is a party to the federal settlement agreement, defends the Department's advice as intervener.

In fact, California law expressly permits trained, unlicensed school personnel to administer prescription medications such as insulin in accordance with the written statements of a student's treating physician and parents (Ed. Code, §§ 49423, 49423.6; Cal. Code Regs., tit. 5, §§ 600, 604, subd. (b)) and expressly exempts persons who thus carry out physicians' medical orders from laws prohibiting the unauthorized practice of nursing (Bus. & Prof. Code, § 2727, subd. (e)). Through these provisions, state law in effect leaves to each student's physician, with parental consent, the question whether insulin may safely and appropriately be administered by unlicensed school personnel, and reflects the practical reality that most insulin administered outside of hospitals and other clinical settings is in fact administered by laypersons. The Nurses" arguments to the contrary lack merit.

I. BACKGROUND

The question whether California law permits unlicensed school personnel to administer medications is, like all questions of law, subject to de novo review. (See *Bruns v. E-Commerce Exchange, Inc. (2011) 51 Cal.4th 717, 724*.) We thus draw freely from the undisputed evidence in setting out the facts of the case before us.

Diabetes is a chronic, incurable disease that prevents the human body from properly using food to produce energy. Insulin, a hormone produced in the pancreas, transports glucose (a sugar derived from food) through the bloodstream to the cells. In a person with diabetes, the body either does not produce insulin, or enough insulin (type 1 diabetes), or cannot use insulin

properly (type 2 diabetes). All persons with type 1 diabetes and some with type 2 must take insulin to avoid serious short- and long-term health problems. (See generally U.S. Dept. of Health & Human Services, Helping the Student with Diabetes Succeed: A Guide for School Personnel (2010) p. 1 < http://www.ndep.nih.gov/media/youth_ schoolguide.pdf > [as of Aug. 12, 2013] (DHHS Guide).) State law requires that nurses administer all medications, including insulin, in hospitals and other licensed health care facilities. (Bus. & Prof. Code, § 2725.3.) Outside of such facilities, however, insulin is normally administered by laypersons according to a physician's directions, most often by the diabetic persons themselves or by friends or family members.

Public school students with diabetes who cannot self-administer insulin are normally entitled to have it administered to them at no cost. This is a result of section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) (Section 504), title II of the Americans with Disabilities Act (42 U.S.C. § 12131 et seq.), and the Individuals with Disabilities Education Act (20 U.S.C. § 1400 et seq.) (IDEA). (See 28 C.F.R. § 35.104 (2013); 34 C.F.R. § 300.8(c)(9)(i) (2013) [defining diabetes as a disability].) Public schools must offer to students covered by these laws a free and appropriate public education that includes related aids and services, such as medical services, designed to meet their individual educational needs. (See 20 U.S.C. § 1400(d)(1)(a), 34 C.F.R. § 104.33(a), (b)(1) (2012) .) Under these laws, diabetic students pay for insulin, supplies and equipment but not the cost of administering insulin. (See 34 C.F.R. 104.33(c)(1) ["the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian"]; *Cedar Rapids Community School Dist. v. Garret F. (1999) 526 U.S. 66, 79* [school district must pay for

required services].) A school's obligations to a particular diabetic student are normally set out in a "Section 504 plan" or an "individualized education program" (IEP).

Approximately one in 400 school-age children nationwide has diabetes, including about 14,000 in California. The goal of diabetes management for children is to avoid both hyperglycemia (high blood glucose) and hypoglycemia (low blood glucose) by tightly maintaining blood glucose levels within target ranges determined by their physicians, through frequent monitoring and multiple daily insulin injections. (DHHS Guide, p. 15.) Accordingly, diabetic students who depend on insulin injections typically need them during the schoolday, both at regularly scheduled times and unpredictably to correct for fluctuations in blood glucose. The need for insulin can arise anytime and anywhere — in the classroom, on field trips or during school-sponsored activities. To serve this and other student health needs, California has about 2,800 school nurses, averaging one for every 2,200 of the state's approximately 6 million public school students. While 5 percent of schools have a full-time school nurse, 69 percent have only a part-time nurse, and 26 percent have no nurse at all. Although some schools allow unlicensed school personnel to administer insulin, others do not. Some of those that do not appear to have taken the position, possibly in reliance on 2005 and 2006 advisory statements by the Department (see post, at p. 21 et seq.), that the Nursing Practice Act (Bus. & Prof. Code, § 2700 et seq.) permits only licensed health care providers to administer insulin in schools. Moreover, some nurses have refused to train unlicensed school personnel to administer insulin out of concern for possible disciplinary action by the Board of Registered Nursing. As a result, diabetic students have encountered difficulty in receiving insulin during the schoolday.

In October 2005, the parents of four diabetic students in California public schools, together with the Association, filed a class action in federal court alleging that schools in the

Fremont Unified School District and the San Ramon Valley Unified School District had failed to meet their obligations to diabetic students under federal law. (*K.C. et al. v. O'Connell (N.D.Cal., C-05-4077MMC)*.) The defendants included the Department, the State Superintendent of Public Instruction (Superintendent), the members of the State Board of Education (Board), and officials of the two named school districts. Plaintiffs alleged the districts' schools had refused to prepare Section 504 plans for diabetic students, refused to include provisions for diabetes care in students' IEPs, refused to permit unlicensed school personnel to administer insulin when no nurse was available, and improperly required that parents or parental designees come to school to administer insulin. Because of these asserted violations of federal law, plaintiffs further alleged, some parents were required to forego employment and some students had to adopt insulin regimens that entailed less frequent injections, less effective control of blood glucose levels, and greater risks to their health.

In July 2007, the plaintiffs in the federal litigation entered into a settlement agreement with the Department, the Superintendent and the Board. The agreement required the Department, among other things, to fulfill its legal obligations to monitor local education agencies' compliance with Section 504 and the IDEA and to resolve complaints of noncompliance. In addition, and more importantly for present purposes, the Department agreed to issue the 2007 Legal Advisory (see ante, p. 2) summarizing the rights of diabetic students under federal and state law. The Department issued that document in August 2007, and the federal court dismissed the action.

In the 2007 Legal Advisory, as relevant here, the Department articulates eight categories of persons authorized to administer insulin to students in the state's public schools. The Department describes the first seven categories as specifically authorized in statutory exceptions

to the Nursing Practice Act (Bus. & Prof. Code, §§ 2725, subd. (b)(2), 2727, subd. (d)) and in a regulation concerning the administration of medication adopted by the Board (Cal. Code Regs., tit. 5, § 604). Briefly, those seven categories include: (1) students who are able to self-administer, (2) nurses and physicians employed by local education agencies, (3) other school employees who are appropriately licensed health care providers, (4) licensed nurses working pursuant to contracts with schools, (5) parents and guardians, (6) persons designated by parents or guardians who are volunteers but not school employees, and (7) trained, unlicensed school employees acting in emergencies. (2007 Legal Advisory, pt. IV.A.)

The 2007 Legal Advisory also recognizes that some students cannot self-administer insulin, that licensed health care providers are not always available when needed, and that federal law does not permit schools to impose the cost of administering insulin on parents. On that basis, the Department concludes as follows: "When federal and state laws are reconciled, it is clear that it is unlawful for [a local education agency] to have a general practice or policy that asserts it need not comply with the IDEA or Section 504 rights of a student to have insulin administered at school simply because a licensed professional is unavailable. In such situations, federal rights take precedence over strict adherence to state law so that the educational and health needs of the student protected by the Section 504 Plan or IEP are met." (2007 Legal Advisory, par. IV.C.) So concluding, the Department adds an eighth category of authorized persons, permitting insulin to be administered by a "voluntary school employee who is unlicensed but who has been adequately trained to administer insulin pursuant to the student's treating physician's orders as required by the Section 504 Plan or the IEP." (2007 Legal Advisory, Checklist.) The validity of the 2007 Legal Advisory's "category 8" is the crux of the present dispute.

Two months after the Department issued the 2007 Legal Advisory, the Nurses challenged that document by filing the present action in the superior court seeking declaratory relief and a writ of mandate. The Association responded with a complaint in intervention asking the court to dismiss the Nurses‟ action. Ultimately the court entered judgment for the Nurses. Accepting their argument that state law does not authorize unlicensed school personnel to administer insulin, the court declared the 2007 Legal Advisory invalid to that extent and directed the issuance of a writ of mandate ordering the Superintendent and the Department not to enforce it. The court also declared the same portion of the 2007 Legal Advisory invalid as a regulation adopted in violation of the Administrative Procedure Act (Gov. Code, § 11340 et seq.) (APA). Finally, the court rejected the Association's argument that state law, if interpreted as forbidding unlicensed personnel to administer insulin, is preempted by Section 504 and the IDEA.

The Association appealed. The appeal automatically stayed the superior court's decision, leaving the 2007 Legal Advisory provisionally in effect pending the final outcome of these proceedings. (Code Civ. Proc., § 916, subd. (a).) The Court of Appeal affirmed the judgment and writ of mandate without reaching the APA issue. We granted the Association's petition for review. The Superintendent and District, who did not petition for review, support the Association's position as amici curiae.

II. DISCUSSION

The main question before us is whether California law permits unlicensed school personnel to administer insulin. Our affirmative answer to that question leaves no need to decide whether federal law would preempt a contrary rule of state law or whether the Department violated the APA in promulgating the 2007 Legal Advisory.

A. California Law.

To determine whether unlicensed school personnel may administer prescription medications such as insulin, we first consult the body of law that expressly purports to answer the question: Education Code section 49423 and its implementing regulations. (All further undesignated citations to statutes are to this code.) The statute declares the basic law: "[A]ny pupil who is required to take, during the regular schoolday, medication prescribed for him or her by a physician and surgeon . . . may be assisted by the school nurse *or other designated school personnel* . . . ." (§ 49423, subd. (a), italics added.) The same statute ensures that medications are administered only in accordance with medical orders and parental consent: "In order for a pupil to be assisted by a school nurse *or other designated school personnel* pursuant to subdivision (a), the school district shall obtain both a written statement from the physician . . . detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken and a written statement from the parent, foster parent or guardian of the pupil indicating the desire that the school district assist the pupil in the matters set forth in the statement of the physician . . . ." (Id., subd. (b), italics added.) Section 49423 expressly applies "[n]otwithstanding section 49422," which provides more generally that only licensed health care providers may be "permitted to supervise the health and physical development of pupils" (§ 49422, subd. (a)).

In adopting section 49423, the Legislature repealed and reenacted former section 11753.1. (Stats. 1968, ch. 681, § 1, p. 1378, repealed and reenacted as § 49423 by Stats. 1976, ch. 1010, § 2, p. 3615.) The Legislature's reason for authorizing school personnel to administer medications, according to the original statutes legislative history, was to avoid requiring children "to leave school during the day for necessary medication" or compelling their parents "to pay

extra sums for a school visit by the physician." (Assem. Ed. Com., Analysis of Assem. Bill No. 1066 (1968 Reg. Sess.) p. 1.)

Section 49423, like its statutory predecessor, did not require implementing regulations and was thus self-executing. In the ensuing decades, however, some schools refused to administer prescribed medication to students. Noting this, the Superintendent in a 1997 letter to school superintendents reminded local school administrators that federal law permitted students to receive medication during the schoolday, and that medication could properly be administered by unlicensed "personnel who have been appropriately trained by a credentialed school nurse, public health nurse, or physician." (Superintendent Eastin, letter to superintendents of schools (Sept. 5, 1997) p. 2.) Three years later, the same problem came to the attention of the Legislature. A Senate floor analysis, recognizing that "federal case law requires districts to accept responsibility to administer necessary medications," reported complaints that "some districts „have required parents to sign illegitimate blanket waivers that sign away their children's right to medical treatment at school as a condition of enrollment or attendance. In these instances, parents have been forced to take time off work to go to school and deliver the medications.‟ " (Sen. Rules Com., Analysis of Sen. Bill No. 1549 (1999-2000 Reg. Sess.) Aug. 14, 2000, p. 3.) To provide additional clarity, the Legislature directed the Department to develop and recommend, and the Board to adopt, regulations "regarding the administration of medication in the public schools pursuant to section 49423." (§ 49423.6, subd. (a), added by Stats. 2000, ch. 281, § 2, p. 2477.)

Obeying the Legislature's command, the Board in 2003 adopted sections 600 to 611 of title 5 of the California Code of Regulations. (All further references to title 5 are to that code.) These regulations expressly declare that unlicensed school personnel may administer

medications. Section 604 provides: "(a) A school nurse may administer medication to a pupil or otherwise assist a pupil in the administration of medication as allowed by law and in keeping with applicable standards of professional practice. [¶] (b) *Other designated school personnel may administer medication to pupils* or otherwise assist pupils in the administration of medication as allowed by law and, if they are licensed health care professionals, in keeping with applicable standards of professional practice for their license." (Tit. 5, § 604, subd. (b), italics added.) Section 601 defines the " '[o]ther designated school personnel' " who are thus authorized to act as "includ[ing] *any individual employed by the local education agency who*: [¶] (1) *Has consented to administer the medication to the pupil* or otherwise assist the pupil in the administration of the medication; and [¶] (2) May legally administer the medication to the pupil or otherwise assist the pupil in the administration of the medication." (*Id*., § 601, subd. (e), italics added.) Other sections of title 5 provide for such related matters as medication logs and records, the contents of the physicians" and parents" required written statements, and the delivery, storage and disposal of medications. (*Id*., §§ 601-609.)

Thus, section 49423 and its implementing regulations plainly establish, as the Legislature, the Board and the Department intended, that unlicensed school personnel may administer prescription medications. The Nurses do not contend the Board's regulations are invalid, but they do offer a variety of arguments for interpreting them other than according to their plain meaning. None is persuasive.

1. "[A]s allowed by law."

In permitting school personnel other than licensed health care providers to administer medication, sections 601 and 604 of title 5 qualify that permission with language deferring to other laws governing the subject. Specifically, section 604 provides that "[o]ther designated

school personnel may administer medication to pupils . . . *as allowed by law*." (*Id*., subd. (a), italics added.) Similarly, section 601 limits such " '[o]ther designated school personnel' " to those who "[*m*]*ay legally administer the medication to the pupil* . . . ." (*Id*., subd. (e)(2), italics added.) The Nurses contend the italicized language means that only those school personnel who are licensed health care providers, such as registered nurses, may administer medications, and that unlicensed personnel may assist but not actually administer medications. By way of illustration, the Nurses assert that unlicensed school personnel "are permitted to open a bottle of cough syrup and pour the prescribed dose but cannot pour it down the student's throat," or they may monitor a diabetic student's glucose levels and determine the correct dosage of insulin but may not administer the drug by giving the injection or pushing the button on an insulin pump.

The Nurses have misinterpreted the regulations. Before explaining that conclusion, however, and in order to clarify the scope of our holding, we note that one significant premise of the Nurses' argument is correct: There is no reason to believe the Legislature intended to delegate to the Board, a state educational agency charged with governing the public schools (see §§ 33000, 33031), any authority to override statutes in which the Legislature has required specific licensure before a person may perform a health care function. We assume the Board shares this understanding. In section 610 of title 5, the Board explains that "[n]othing in this article may be interpreted as . . . affecting in any way: [¶] (a) The statutes, regulations, or standards of practice governing any health care professional licensed by the State of California in the carrying out of activities authorized by the license . . . ." Viewed in this light, the language in the Board's regulations that qualifies the authority of unlicensed school personnel to administer medications — "as allowed by law" (tit. 5, § 604, subd. (a); see also id., § 601, subd. (e)(2)) — is

reasonably and appropriately interpreted as reflecting the Board's deference to laws articulating policy choices that lie beyond the scope of its delegated authority over the state's public schools.

This does not mean, however, that only licensed health care professionals may administer prescription medications in public schools. It means, rather, only that the Board's regulations do not authorize unlicensed school personnel to administer such medications *in violation of other applicable laws or regulations*. To illustrate, only licensed health care providers may administer controlled substances. (See Health & Saf. Code, § 11154, subd. (a).) Also, the Legislature has mandated specific training before unlicensed school personnel may administer three specially regulated emergency medications to students. (See §§ 49414 [epinephrine auto-injectors for anaphylaxis], 49414.5 [glucagon for severe hypoglycemia] and 49414.7 [antiseizure medication for epilepsy].) A school employee without the licensure or training required by statute for such medications would not be "allowed by law" (tit. 5, § 604, subd. (a)) to administer them and, thus, not permitted to do so solely by force of the Board's regulations. Compliance with those other laws would also be necessary.

In contrast, no such law prohibits unlicensed persons from administering prescription medications generally, or insulin in particular, in carrying out the medical orders of licensed physicians. The Nurses attempt to find such a rule in the Nursing Practice Act (Bus. & Prof. Code, § 2700 et seq.) (NPA), which defines the practice of nursing to include a list of patient care functions including "the administration of medications" (*id*., § 2725, subd. (b)(2)), and prohibits the unauthorized practice of nursing (*id*., § 2732). In opposition, the Association contends the listed functions fall within the definition of nursing practice only under circumstances where they "require a substantial amount of scientific knowledge or technical skill." (*id*., § 2725, subd. (b) ["The practice of nursing within the meaning of this chapter means

those functions, including basic health care, that help people cope with difficulties in daily living that are associated with their actual or potential health or illness problems or the treatment thereof, *and that require a substantial amount of scientific knowledge or technical skill*, including all of the following: . . .” (italics added).].) The routine administration of insulin outside of hospitals and clinical settings, the Association observes, does not require substantial scientific knowledge or technical skill and is, in fact, typically accomplished by the patients themselves, including some children, or by friends and family members.

We need not speak to the definition of nursing practice in order to resolve this case. However broadly the NPA may define the practice of nursing, and whatever the NPA may correlatively prohibit as unauthorized practice, the NPA expressly exempts from that prohibition “[t]he performance by any person of such duties as required in . . . carrying out medical orders prescribed by a licensed physician . . . .” (Bus. & Prof. Code, § 2727, subd. (e).) This medical-orders exception, as we shall explain, is broad enough to cover unlicensed school personnel who act as volunteers for specific students, at their parents‟ request, to carry out physicians‟ medical orders in accordance with section 49423 and its implementing regulations.

2. The Medical-orders Exception.

The medical-orders exception provides in full as follows: “This chapter [the NPA] does not prohibit: [¶] . . . [¶] (e) The performance by any person of such duties as required in the physical care of a patient and/or carrying out medical orders prescribed by a licensed physician; *provided, such person shall not in any way assume to practice as a professional, registered, graduate or trained nurse*.” (Bus. & Prof. Code, § 2727, subd. (e), italics added.) The meaning of the first clause and its application to this case are clear: Unlicensed school personnel acting pursuant to section 49423 and its implementing regulations “perform[] . . . duties as required . . .

in carrying out medical orders . . . .” (Bus. & Prof. Code, § 2727, subd. (e).) What the italicized proviso means is less clear, especially in its use of the word “assume.” On this point the legislative history is uninformative, reflecting only that section 2727 was added as part of the original NPA (Stats. 1939, ch. 807, § 2, p. 2349), and that the medical-orders exception was added on the Assembly floor for unrecorded reasons (Assem. J. (1939) p. 515).

The Nurses argue a person “assume[s] to practice as a . . . registered . . . nurse” (Bus. & Prof. Code, § 2727, subd. (e)) simply by performing any health care function that falls within the NPA‟s definition of nursing practice (*id*., § 2725, subd. (b)). But this cannot be what the proviso means, as it would vitiate the medical-orders exception. A person who carries out a physician’s medical orders with respect to a patient does not need an exception from the laws prohibiting unauthorized practice unless his or her conduct would otherwise violate those laws. To adopt the Nurses‟ interpretation would thus render the exemption entirely meaningless — a result we would hesitate to accept “unless absolutely necessary.” (E.g., *People v. Arias (2008) 45 Cal.4th 169, 180*.) But we need not accept it. The statute’s language, broader statutory context and interpretive history all point to a different meaning: To “assume to practice as a professional, registered, graduate or trained nurse” (Bus. & Prof. Code, § 2727, subd. (e)), means to hold oneself out, explicitly or implicitly, as being a nurse in fact.

We begin with the language. To “assume” to do a thing has two possible meanings in the present context. It might mean to “undertake” to do a thing, or “[t]o take [a thing] upon oneself” — in effect simply to do it. (Oxford Eng. Dict. Online (2013) definition II.4.a; see Webster’s 3d New Internat. Dict. (2002) p. 133, definition 2.) Alternatively, to “assume” might mean “[t]o put forth claims or pretensions,” to do a thing “in appearance only, . . . to pretend, simulate, feign.” (Oxford Eng. Dict. Online, *supra*, definition III.8, 9; see Webster’s 3d New Internat. Dict.,

supra, at p. 133, definition 4.) Building upon the former definition ("undertake"), the Nurses contend a person "assumes to practice as a . . . nurse" (Bus. & Prof. Code, § 2727, subd. (e)) by undertaking to perform — in other words, simply by performing — any of the patient care functions listed in the NPA"s definition of nursing (*id*., § 2725, subd. (b)(2)). This interpretation, as noted, cannot be correct as it would leave the medical-orders exception without meaning.

In contrast, the medical-orders exception does have meaning if one "assume[s] to practice as a . . . nurse" (Bus. & Prof. Code, § 2727, subd. (e)) by holding oneself out, explicitly or implicitly, as being a nurse in fact. The broader statutory context supports this interpretation. The list of statuses an unlicensed person who carries out medical orders may not "assume" — "professional, registered, graduate or trained nurse" (*ibid*.) —indicates that one may not evade the rule against falsely posing as a registered nurse by substituting a vaguer term such as "professional," "graduate" or "trained." A penal provision enacted by the same Legislature in the same bill as the medical-orders exception similarly declared it "unlawful for any person or persons not licensed as provided in this chapter to impersonate in any manner or pretend to be a professional nurse, or to use the title 'registered nurse,' the letters 'R.N.,' or the words 'graduate nurse,' 'trained nurse,' or any other name, word or symbol in connection with or following his [or her] name so as to lead another or others to believe that he [or she] is a professional nurse." (*Id*., former § 2796, added by Stats. 1939, ch. 807, § 2, p. 2356; see Bus. & Prof. Code, § 2796 [current version, adding "nurse anesthetist" to the list of titles one may not falsely assume].) The order in which the bill's provisions were drafted suggests the Assembly looked to the penal provision, and even borrowed some of its terms, in drafting the floor amendment that added the medical-orders exception. (Compare Assem. Bill No. 620 (1939 Reg. Sess.) § 2, p. 11, as

introduced Jan. 13, 1939 [adding Bus. & Prof. Code, § 2796], with Assem. J. (1939) p. 515 [floor amend. of Mar. 13, 1939, adding Bus. & Prof. Code, § 2727, subd. (e)].)

The broader statutory context provides additional evidence supporting our conclusion. The same section of the NPA that contains the medical-orders exception (Bus. & Prof. Code, § 2727, subd. (e)) also creates a narrower exception covering "[i]ncidental care of the sick by domestic servants or by persons primarily employed as housekeepers *as long as they do not practice nursing within the meaning of this chapter*." (*Id*., subd. (b), italics added.) Read in the context of the whole statute, the italicized language expresses the thought that domestic servants and housekeepers caring for sick persons may not perform nursing functions, without regard to how they hold themselves out. The Nurses would interpret the medical-orders exception similarly, yet the same Legislature, in the same act and section, chose the different words — "*assume* to practice as a . . . nurse" — (*ibid*., italics added) to qualify the exception for unlicensed persons who merely carry out medical orders. The inescapable inference is that the Legislature, by using different words to define the two exceptions, intended them to have different meanings.

The single prior interpretation of the medical-orders exception is consistent with our conclusion. The Attorney General has described that exception, and the NPA's related penal provisions, as "show[ing] a legislative intent to prohibit any person from holding out to the public that [he or] she is specially trained or registered in the nursing profession unless said person is licensed by the state of California in this field." (*Registered Nurse*, 32 Ops.Cal.Atty.Gen. 159, 160 (1958), referring to Bus. & Prof. Code, §§ 2727, subd. (e) [medical-orders exception; unlicensed person carrying out medical orders may not assume to practice as a nurse], 2795 [unlawful to use any title, sign, card or device to indicate nursing licensure], and

2796 [unlawful to use the titles "registered," "graduate" or "trained nurse," or the letters "R.N."].) Thus, the Attorney General concluded, an unlicensed person employed by a physician as a "doctor's nurse" was forbidden to use titles confusingly similar to "registered nurse," such as " 'Registered Doctor's Nurse' or the abbreviation 'R.D.N.' or any title, or wear or display any pin that would indicate that said person is duly licensed as a registered nurse under the laws of the state of California." (*Registered Nurse*, supra, at p. 159; cf. *Kolnick v. Board of Medical Quality Assurance (1980) 101 Cal.App.3d 80, 84* [declining to construe the exception].)

For all of these reasons, we conclude the medical-orders exception does permit a layperson to carry out a physician's medical orders for a patient, even orders that would otherwise fall within the definition of nursing practice, without thereby violating the rule against unauthorized practice. To fall outside the exception by "assum[ing] to practice as a . . . nurse" (Bus. & Prof. Code, § 2727, subd. (e)), one must go further by holding oneself out, explicitly or implicitly, to be a nurse in fact. This conclusion disposes of the issue, because unlicensed school personnel do not hold themselves out to be nurses simply by volunteering to act on behalf of particular students in accordance with the Education Code and its implementing regulations.

We thus proceed to consider the Nurses' remaining objections to the conclusion that such personnel may administer medications.

3. Medication-specific Statutes.

In statutes enacted between 2001 and 2011, the Legislature imposed additional training and administrative requirements before unlicensed school personnel may administer three specific emergency medications: epinephrine auto-injectors to treat anaphylaxis (§ 49414, added by Stats. 2001, ch. 458, § 2, p. 4023), glucagon for severe hypoglycemia (§ 49414.5, added by Stats. 2003, ch. 684, § 1, as subsequently amended), and antiseizure medication for epilepsy (§

49414.7, added by Stats. 2011, ch. 560, § 2). Each of these statutes, while expressing the Legislature's preference that registered nurses administer the subject medications whenever possible, expressly permits trained, unlicensed school personnel to do so when no nurse is available. (See §§ 49414, subd. (f)(1), 49414.5, subd. (a), 49414.7, subds. (a), (b).)

The Nurses contend these statutes would not have been necessary if the NPA"s medical-orders exception already, by its own force, permitted unlicensed school personnel to administer medications. "[T]he Legislature," the Nurses observe, "does not engage in idle acts." (Citing *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 634*.) The maxim is valid, but its application is flawed. Having generally authorized unlicensed school personnel to administer medications (§ 49423) and directed the Board to adopt implementing regulations (§ 49423.6), the Legislature nevertheless retained the power to impose additional restrictions on drugs deemed to justify special precautions. Nothing in section 49423 or 49423.6 conditioned the effectiveness of those statutes on further legislation, and nothing in the later-enacted, drug-specific statutes repeals the general authority granted in the earlier, more general provisions. So understood, none of the relevant statutes represents an idle act. In contrast, to accept the Nurses' argument would entail the implausible conclusion that the Legislature had intended section 49423 and its 1968 statutory predecessor (former § 11753.1; see ante, at p. 8) to lie dormant and ineffective until the Legislature enacted the first drug-specific statute 33 years later. (§ 49414 [concerning epinephrine auto-injectors].) History is to the contrary. As we have seen, the 1968 Legislature intended the original statute to be self-executing, and the 2000 Legislature, to force compliance, directed the Board to adopt implementing regulations in short order. (See § 49423.6 ["[o]n or before June 15, 2001"]; see also ante, at p. 9.)

4. Failed Legislation.

Despite the foregoing evidence to the contrary, amici curiae supporting the Nurses urge us to infer from a variety of failed bills that the Legislature believes further, specific legislation is necessary before unlicensed school personnel may administer insulin. Because section 49423 and its implementing regulations plainly do authorize such personnel to administer prescription medications and were in fact adopted for that purpose, "to undertake the problematic exercise of inferring legislative intent from subsequent, failed legislation seems especially inappropriate . . ." (*Martin v. Szeto (2004) 32 Cal.4th 445, 451-452*.) In any event, we find nothing in the failed bills‟ history that supports amici curiae's argument.

Assembly Bill No. 481 (2001-2002 Reg. Sess.) would have required school administrators and other designated, unlicensed personnel to be trained to administer insulin and required them to administer it, in the absence of a school nurse, in accordance with guidelines on diabetes care to be developed by a group of seven state and private organizations. The Governor vetoed the bill, explaining his reasons as follows: "Existing law already provides that any pupil who is required to take prescription medication during the regular school day may be assisted by school personnel if a written statement is obtained from a physician and a written request is made by the pupil's parent/guardian. [¶] This bill, while well-intentioned, would create a costly new state reimbursable mandate estimated by the Department of Finance to be potentially tens of millions of dollars. Neither this bill, nor the 2002 Budget Act contains an appropriation for this purpose." (Governor's veto message to Assem. on Assem. Bill No. 481 (Sept. 26, 2002) 6 Assem. J. (2001-2002 Reg. Sess.) pp. 8872-8873 [in relevant part].)

This history does not show the Legislature in 2002 — let alone in 1968 and 1976 when it enacted and reenacted the operative language of section 49423 — believed that further, more specific legislation was required to permit unlicensed school personnel to administer any

prescription medication. To the contrary, the Legislative Counsel's Digest of the vetoed 2002 bill noted that "[e]xisting law provides that any pupil who is required to take . . . medication . . . may be assisted by the school nurse *or other designated school personnel*," and explained that the bill "would specifically make those provisions applicable to a pupil with diabetes" under guidelines to be developed later. (Legis. Counsel's Dig., Assem. Bill. No. 481 (2001-2002 Reg. Sess.), italics added.) The bill was, thus, analogous to other statutes in which the Legislature has imposed, for particular medications (e.g., epinephrine, glucagon and antiseizure medication), additional restrictions on schools'' use of the general authority concerning medications granted in section 49423. The Legislature's unsuccessful attempt to impose comparable restrictions on insulin did not abrogate the existing general authority.

Three additional failed bills did not come to a vote. Senate Bill No. 1487 (2007-2008 Reg. Sess.) would have amended section 49414.5, which permits unlicensed school personnel with special training to administer glucagon in emergencies, to administer insulin under similar conditions. (Assem. Bill No. 1487, supra, § 1.) Another bill, Assembly Bill No. 1802 (2009-2010 Reg. Sess.), while expressly authorizing unlicensed personnel to administer insulin, would have permitted parents, rather than school administrators, to designate the school employees who would be allowed to administer insulin. (*Ibid*., § 2.) Finally, Assembly Bill No. 1430 (2009-2010 Reg. Sess.) would have provided that no one other than licensed health care providers would be allowed to administer any medications in schools, except in emergencies. (*Id.*, § 2.) Because none of these bills came to a vote, and because the Legislature's cursory deliberations on them postdated section 49423's enactment by decades, none provides a sound basis for inferring the 1968 and 1976 Legislatures' intents on the question whether section 49423 permits unlicensed personnel to administer insulin.

5. The Department's 2005 and 2006 Advisory Statements.

In 2005 and 2006, the Department issued advisory statements recommending that school personnel other than licensed health care providers not administer medications by injection generally (2005) or insulin in particular (2006). (State Dept. of Ed., Program Advisory on Medication Administration (May 2005) p. 7 <http://www.cde.ca.gov/ls/he/hn/documents/medadvisory.pdf > [as of Aug. 12, 2013] (2005 Program Advisory); State Dept. of Ed., Medication Administration Assistance in California . . . Frequently Asked Questions (2006) p. 1 (2006 FAQ).) The Nurses contend we should defer to these recommendations as authoritative interpretations of section 49423 by an agency charged with its enforcement. But the Department's advisory statements are not entitled to the same judicial deference as the binding, quasi-legislative regulations formally adopted by the Board. (Tit. 5, §§ 600-611; see § 49423.6 [regulatory authority].) "An agency interpretation of the meaning and legal effect of a statute is entitled to consideration and respect by the courts; however, unlike quasi-legislative regulations adopted by an agency to which the Legislature has confided the power to 'make law,' and which, if authorized by the enabling legislation, bind this and other courts as firmly as statutes themselves, the binding power of an agency's interpretation of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." (*Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1, 7.*)

Reviewing the 2005 Program Advisory and the 2006 FAQ under these principles, we find they lack persuasive force. Before explaining that conclusion, however, we note those documents do not reflect the Department's current position. In their amicus curiae brief to this court, the Department and the Superintendent maintain that section 49423 and its implementing regulations

(tit. 5, §§ 600-611), in combination with the NPA's medical-orders exception (Bus. & Prof. Code, § 2727, subd. (e)), do indeed permit unlicensed school personnel to administer insulin. With that clarification, we turn to the documents in question.

In its 2005 Program Advisory, the Department confirmed that unlicensed personnel may administer medications generally but "recommend[ed] that . . . unlicensed staff member[s] . . . not administer medications that must be administered by injection . . . ." (*Id*., at p. 7.) The 2005 Program Advisory's recommendations are nonbinding, both because the document so states (*id*., at p. 1) and as a matter of law. (See § 33308.5 ["Program guidelines issued by the [Department] shall be designed to serve as a model or example, and shall not be prescriptive"]; tit. 5, § 611 ["The [Department], with the approval of the [Board], may issue and periodically update an advisory providing non-binding guidance on the administration of medication . . . . The advisory shall be a program guideline under . . . section 33308.5 . . . ."].) The 2005 document offers no discussion or analysis of its recommendation concerning injections and cites no authority that might support it. The document does cite section 49423 and sections 600, 601 and 604 of title 5 (2005 Program Advisory, at p. 6), which, as we have seen, were specifically intended to permit unlicensed personnel to administer medications, and none of which forbids administration by injection. The document also cites statutes describing the specific licensure required of physicians, nurses and other health care providers employed as such in the schools (§§ 44871, 44873-44878), and also section 49422, which provides that only licensed health care providers and certain other persons with relevant credentials "shall be . . . employed or permitted to supervise the health and physical development of pupils . . . ." (2005 Program Advisory, at p. 6.) As already noted, however, section 49422 cannot mean that only licensed health care providers

may administer medications in schools because section 49423 expressly applies "[n]otwithstanding Section 49422." (§ 49423, subd. (a).)

Unlike the 2005 Program Advisory, which the Department issued with the Board approval required for such documents (see § 33308.5 and tit. 5, § 611), the Department apparently issued the 2006 FAQ unilaterally. In that document, the Department flatly asserts that unlicensed school personnel may not administer insulin. (2006 FAQ, at p. 1.) Ignoring its own conclusion just one year earlier that unlicensed personnel may administer medications generally, even if not by injection, the Department in the 2006 FAQ wrote that "[n]o . . . California statute" other than sections 49414 (epinephrine auto-injectors) and 49414.5 (glucagon) "allows an unlicensed school employee to administer *any other medication* in California public schools, even if the unlicensed school employee is trained and supervised by a school nurse or other similarly licensed nurse." (2006 FAQ, at p. 1, italics added.) In attempting to justify this conclusion, the Department inexplicably cited section 49423 (2006 FAQ, at p. 2, fn. 2) and omitted any reference to the statute's implementing regulations (e.g., tit. 5, § 604, subd. (b) ["Other designated school personnel may administer medication to pupils"]).

In its 2006 FAQ, the Department also invoked the NPA as authority for the following assertion: "California law states, with a few clearly specified legal exceptions, that only a licensed nurse or physician may administer medication. In the school setting, these exceptions are situations where [¶] The student self-administers the medication, [¶] A parent or parent designee, such as a relative or close friend, administers the medication, or [¶] There is a public disaster or epidemic." (2006 FAQ, at p. 1, fns. omitted.) The noted exceptions reflect statutory exceptions to the NPA. (Bus. & Prof. Code, § 2727, subds. (a) [gratuitous nursing by friends or family members], (d) [nursing services in emergencies].) But the document entirely overlooks

the medical-orders exception, which expressly permits "any person [to perform] . . . such duties as required in . . . carrying out medical orders prescribed by a licensed physician . . . ." (*Id.*, subd. (e).)

Viewing the 2005 Program Advisory and the 2006 FAQ in their full legal context, we conclude the documents" recommendations are not entitled to judicial deference to the extent they might be thought to preclude unlicensed school personnel from administering insulin. The 2005 Program Advisory makes no serious effort to reconcile its recommendation concerning injections with the applicable statutes (§§ 49423, 49423.6) and binding regulations (tit. 5, §§ 601-611), and ignores the NPA"s medical-orders exception (Bus. & Prof. Code, § 2727, subd. (e)). The 2006 FAQ shares these faults and, in addition, both contradicts the 2005 Program Advisory's correct conclusion that unlicensed personnel may administer medications generally and also lacks the Board approval required for program guidelines. (See § 33308.5; tit. 5, § 611.) Under these circumstances, the documents" recommendations lack persuasive force on the question before us, and we thus do not defer to them. (*Yamaha Corp. of America v. State Bd. of Equalization, supra, 19 Cal.4th 1, 7.*) We recognize, however, that the 2005 Program Advisory constitutes an important source of advice for local education agencies on matters beyond the scope of this case, and we emphasize that we reject that document's recommendations only to the extent they contradict the views set out in this opinion.

6. Conclusion.

Finding no merit in the arguments to the contrary, we conclude California law does permit trained, unlicensed school personnel to administer prescription medications, including insulin, in accordance with written statements of individual students' treating physicians, with parental consent (Ed. Code, §§ 49423, 49423.6; tit. 5, §§ 600-611), and that persons who act

under this authority do not violate the NPA (see Bus. & Prof. Code, § 2727, subd. (e)). Because schools may administer prescription medications only in accordance with physicians' written statements (§ 49423; tit. 5, § 600, subd. (a)), state law in effect delegates to each student's physician the decision whether insulin may safely and appropriately be administered by unlicensed school personnel or instead whether a particular student's medical needs can be met only by a licensed health care provider. State law, however, presents no categorical obstacle to the use of unlicensed personnel for this purpose.

In view of this conclusion, we need not address the Association's contention that federal law would preempt a contrary rule.

B. The APA.

The Nurses contend the 2007 Legal Advisory is ineffective on the theory the Department should have adopted it as a regulation in compliance with the APA. (Gov. Code, § 11340 et seq.) The superior court agreed with the Nurses on this point. The Court of Appeal, ruling for the Nurses on other grounds, did not reach the issue.

We also do not reach the issue, for two reasons: First, the Nurses forfeited the issue in this court by failing to file, in response to the petition for review, an answer raising it. (See Cal. Rules of Court, rule 8.500(a)(2).) While we have the power to address additional issues (*id*., rule 8.516(b)(1)), the briefs touch upon the APA issue only cursorily, and we have not requested additional briefing (cf. Cal. Rules of Court, rule 8.516 (b)(2)).

Second, and more importantly, our holding that California law permits unlicensed school personnel to administer insulin authoritatively resolves the dispute independently of the 2007 Legal Advisory, based on the relevant provisions of the Education Code and its implementing regulations. We therefore need not determine whether the Department violated the APA in

adopting the 2007 Legal Advisory. Our decision leaves the Department free to revise the Legal Advisory to reflect California law as we have interpreted it, and leaves the parties and the lower courts free to identify and resolve, if necessary, any issues that may remain concerning APA compliance.

III. DISPOSITION

The Court of Appeal's judgment is reversed and the case is remanded for further proceedings in accordance with the views set forth herein.

WERDEGAR, J.

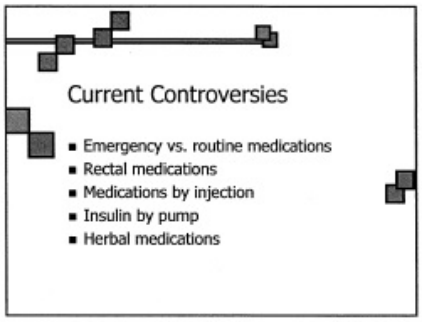
WE CONCUR:

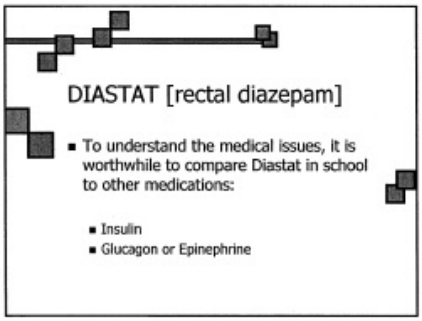
KENNARD, Acting C. J.
BAXTER, J.
CHIN, J.
CORRIGAN, J.
LIU, J.
McGUINESS, J.*

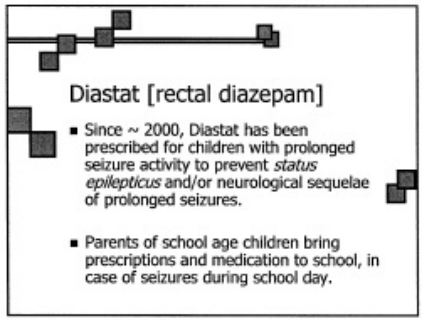
*Presiding Justice of the Court of Appeal, First Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

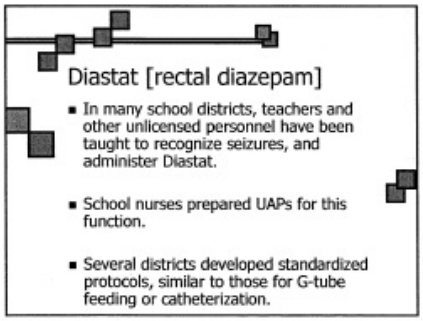
APPENDIX B: Diastat Administration in Schools: Summary of Relevant Federal Laws and Selected Cases

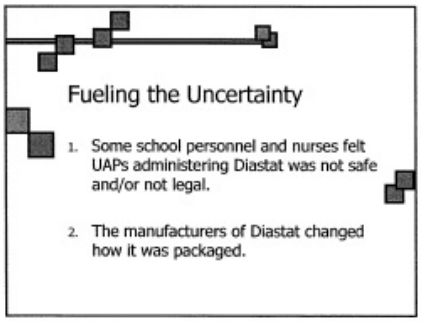
Desert/Mountain SELPA

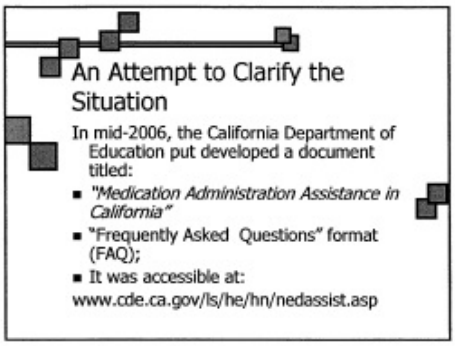


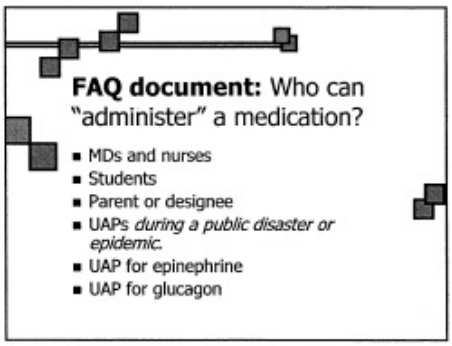


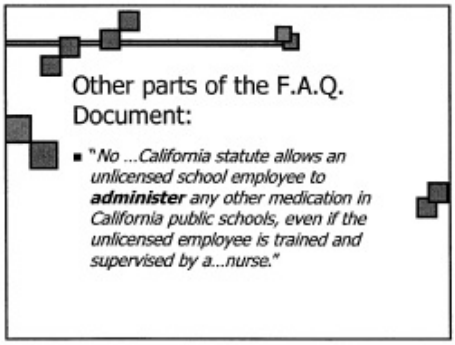


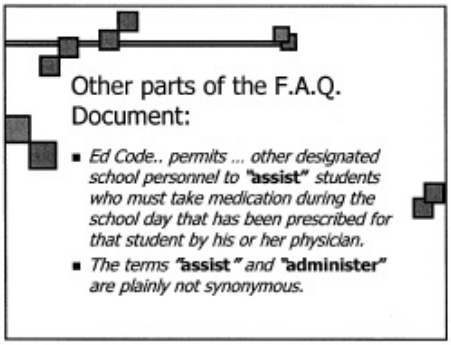


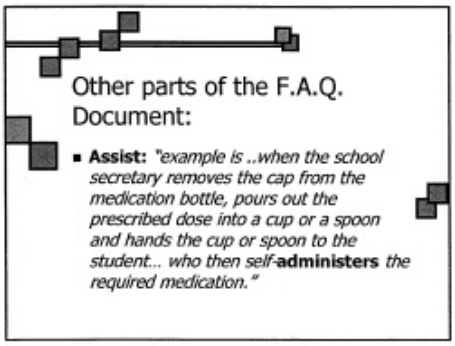


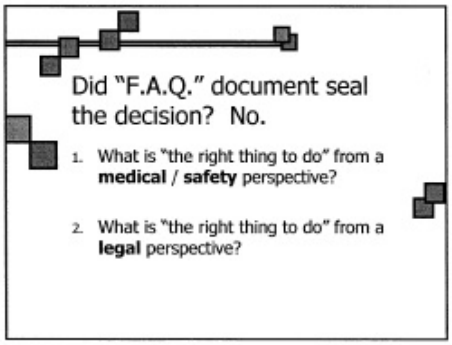

An Attempt to Clarify the Situation
In mid-2006, the California Department of Education put developed a document titled:
"Medication Administration Assistance in California"
"Frequently Asked Questions" format (FAQ);
It was accessible at:
www.cde.ca.gov/ls/he/hn/nedassist.asp

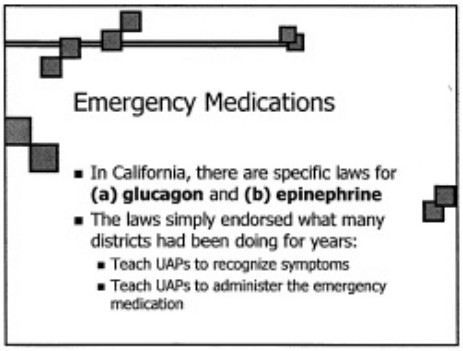

FAQ document: Who can "administer" a medication?
MDs and nurses
Students
Parent or designee
UAPs during a public disaster or epidemic.
UAP for epinephrine
UAP for glucagon

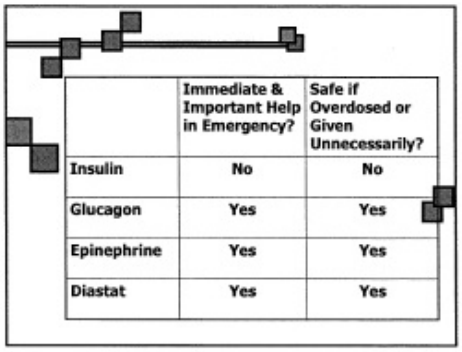

Other parts of the F.A.Q. Document:
"No ...California statute allows an unlicensed school employee to administer any other medication in California public schools, even if the unlicensed employee is trained and supervised by a...nurse."

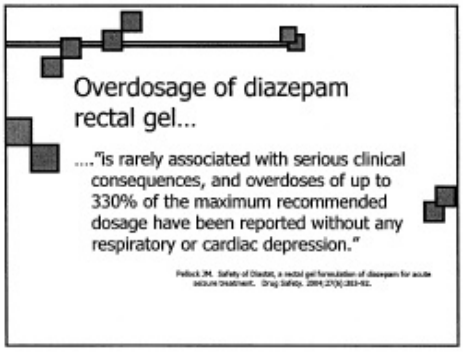

Other parts of the F.A.Q. Document:
Ed Code.. permits ... other designated school personnel to "assist" students who must take medication during the school day that has been prescribed for that student by his or her physician.
The terms "assist" and "administer" are plainly not synonymous.

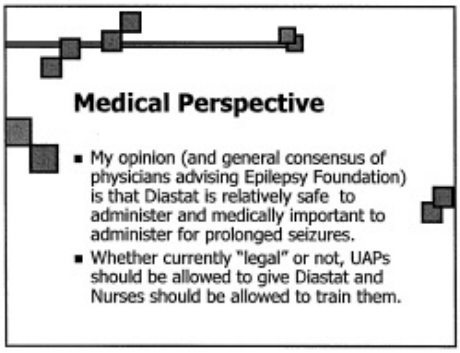

Other parts of the F.A.Q. Document:
Assist: "example is ..when the school secretary removes the cap from the medication bottle, pours out the prescribed dose into a cup or a spoon and hands the cup or spoon to the student... who then self-administers the required medication."

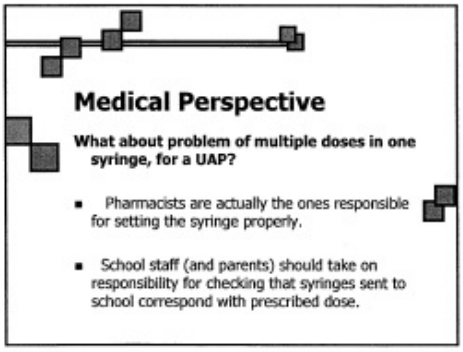

Did "F.A.Q." document seal the decision? No.
1. What is "the right thing to do" from a medical / safety perspective?
2. What is "the right thing to do" from a legal perspective?

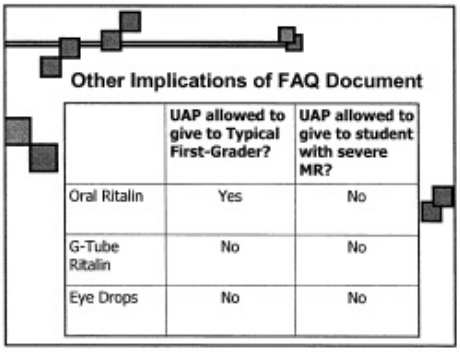

Emergency Medications
In California, there are specific laws for (a) glucagon and (b) epinephrine
The laws simply endorsed what many districts had been doing for years:
Teach UAPs to recognize symptoms
Teach UAPs to administer the emergency medication

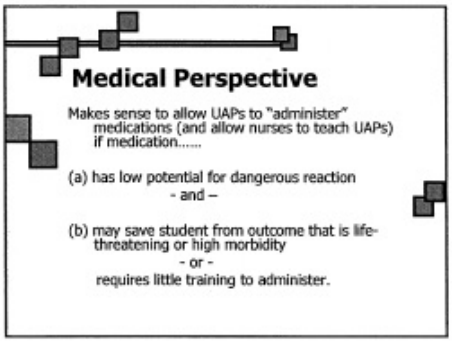

Immediate & Important Help in Emergency?
Safe if Overdosed or Given Unnecessarily?
Insulin
No
No
Glucagon
Yes
Yes
Epinephrine
Yes
Yes
Diastat
Yes
Yes

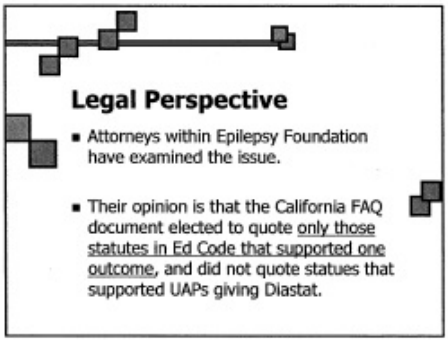

Overdosage of diazepam rectal gel...
...."is rarely associated with serious clinical consequences, and overdoses of up to 330% of the maximum recommended dosage have been reported without any respiratory or cardiac depression."

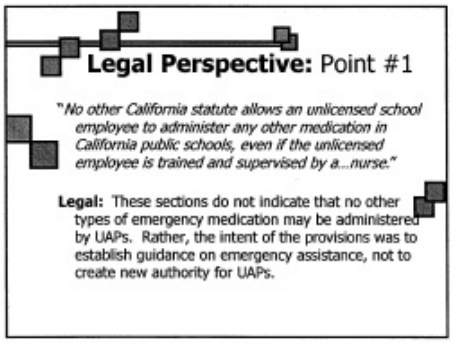

Medical Perspective
My opinion (and general consensus of physicians advising Epilepsy Foundation) is that Diastat is relatively safe to administer and medically important to administer for prolonged seizures.
Whether currently "legal" or not, UAPs should be allowed to give Diastat and Nurses should be allowed to train them.

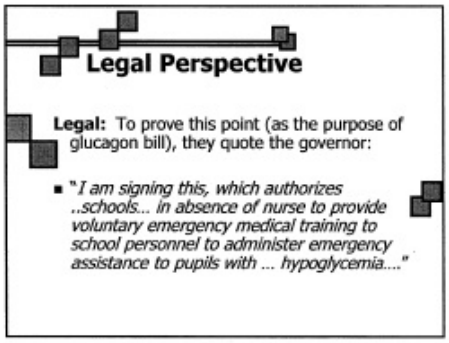

Medical Perspective
What about problem of multiple doses in one syringe, for a UAP?
Pharmacists are actually the ones responsible for setting the syringe properly.
School staff (and parents) should take on responsibility for checking that syringes sent to school correspond with prescribed dose.

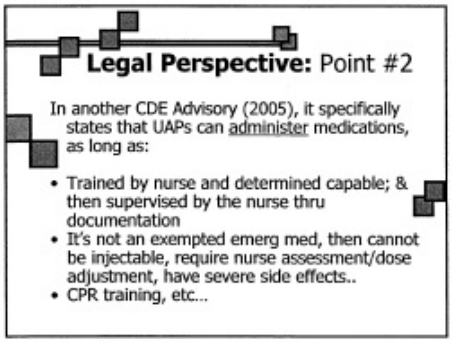

Other Implications of FAQ Document
UAP allowed to give to Typical First-Grader?
UAP allowed to give to student with severe MR?
Oral Ritalin
Yes
No
G-Tube Ritalin
No
No
Eye Drops
No
No

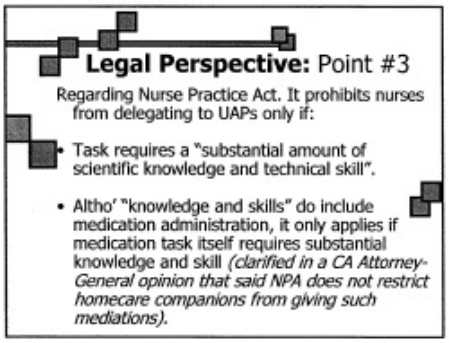

Medical Perspective
Makes sense to allow UAPs to "administer" medications (and allow nurses to teach UAPs) if medication.....
(a) has low potential for dangerous reaction
- and –
(b) may save student from outcome that is life-threatening or high morbidity
- or -
requires little training to administer.

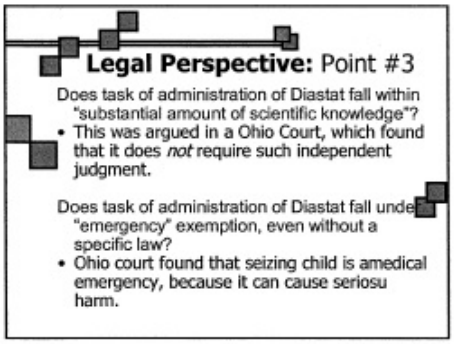

Legal Perspective
Attorneys within Epilepsy Foundation have examined the issue.
Their opinion is that the California FAQ document elected to quote only those statutes in Ed Code that supported one outcome, and did not quote statues that supported UAPs giving Diastat.

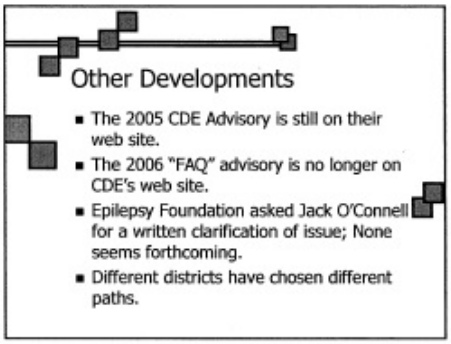

Legal Perspective: Point #1
"No other California statute allows an unlicensed school employee to administer any other medication in California public schools, even if the unlicensed employee is trained and supervised by a...nurse."
Legal: These sections do not indicate that no other types of emergency medication may be administered by UAPs. Rather, the intent of the provisions was to establish guidance on emergency assistance, not to create new authority for UAPs.

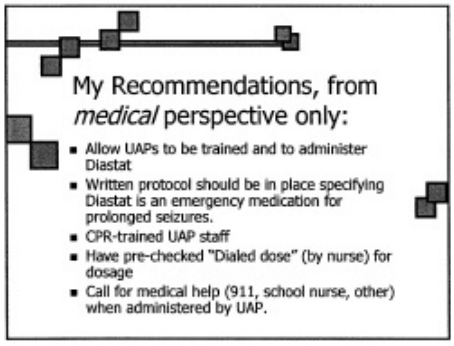

Legal Perspective
Legal: To prove this point (as the purpose of glucagon bill), they quote the governor:
"I am signing this, which authorizes ..schools... in absence of nurse to provide voluntary emergency medical training to school personnel to administer emergency assistance to pupils with ... hypoglycemia...."


Legal Perspective: Point #2
In another CDE Advisory (2005), it specifically states that UAPs can administer medications, as long as:
Trained by nurse and determined capable; & then supervised by the nurse thru documentation
It's not an exempted emerg med, then cannot be injectable, require nurse assessment/dose adjustment, have severe side effects..
CPR training, etc...


Legal Perspective: Point #3
Regarding Nurse Practice Act. It prohibits nurses from delegating to UAPs only if:
Task requires a "substantial amount of scientific knowledge and technical skill".
Altho' "knowledge and skills" do include medication administration, it only applies if medication task itself requires substantial knowledge and skill (clarified in a CA Attorney-General opinion that said NPA does not restrict homecare companions from giving such mediations).


Legal Perspective: Point #3
Does task of administration of Diastat fall within "substantial amount of scientific knowledge"?
• This was argued in a Ohio Court, which found that it does *not* require such independent judgment.
Does task of administration of Diastat fall under "emergency" exemption, even without a specific law?
• Ohio court found that seizing child is amedical emergency, because it can cause seriosu harm.


Other Developments
■ The 2005 CDE Advisory is still on their web site.
■ The 2006 "FAQ" advisory is no longer on CDE's web site.
■ Epilepsy Foundation asked Jack O'Connell for a written clarification of issue; None seems forthcoming.
■ Different districts have chosen different paths.


My Recommendations, from *medical* perspective only:
■ Allow UAPs to be trained and to administer Diastat
■ Written protocol should be in place specifying Diastat is an emergency medication for prolonged seizures.
■ CPR-trained UAP staff
■ Have pre-checked "Dialed dose" (by nurse) for dosage
■ Call for medical help (911, school nurse, other) when administered by UAP.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Epilepsy Legal Defense Fund

Diastat Administration in Schools
Summary of Relevant Federal Laws and Selected Cases

Background on Medication in School and Day Care

Schools and day care facilities all too often refuse to permit their staff to administer a FDA-approved emergency medication, Diastat, to treat children who have prolonged seizures accompanied by loss of consciousness. Instead, schools and day care facilities will frequently call 911 to transport the child to an emergency room for treatment, even if this practice is contrary to the care plan established by the child's neurologist. Delay in administering Diastat for the time it takes emergency personnel to arrive could result in neurological damage or other serious health consequences.

In public schools, administrators frequently assert this practice is justified because their schools lack personnel with necessary expertise, or they may assert that state laws permit only RNs (who may not be immediately available at the school) to administer this medication. And in the case of day care programs, it is argued that such health services are beyond their capacity or design, and therefore are not required. However, these arguments are unjustified because Diastat may be appropriately administered by non-medical personnel.

Courts and hearing officers have ruled that schools and day care facilities are indeed required to ensure that Diastat, and similar medications such as for treatment of diabetes, are administered to comply with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and ADA. These laws require school and day care administrators to ensure that health services and accommodations are provided for children with epilepsy and other disabilities. The Foundation's position statement on these matters is available at http://www.epilepsyfoundation.org/advocacy/care/treatments.cfm. For general information on the legal issues, see the EpilepsyUSA article on the subject from 2003, available at https://www.epilepsyfoundation.org/epilepsyusa/schooldiastat.cfm.

In order to address concerns raised by school and day care administrators, Epilepsy Foundation affiliates have pursued a range of different advocacy strategies, including efforts to change the state laws that may restrict school personnel from administering this medication. For instance, last year, largely as the result of the efforts by the Kentuckiana Affiliate, the Kentucky Governor signed into law a bill that provides for the administration of Disastat (along with glucagon for diabetes treatment) in public, private and parochial schools. The statute provides that schools shall require that at least one

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school employee, who has met state competency requirements (and consents to provide the medication) be on duty at each school during the entire day to administer Disastat (and glucagon) in an emergency. The law is available on the Kentucky Legislature's Web site at http://www.lrc.ky.gov/record/05rs/HB88.htm (click on the last link – "FCCR").

Other affiliates have been successful in promoting similar amendments to state laws, regulations and practices in this area. See the accompanying chart for information on other state laws pertaining to medication administration in school.

Federal Laws Applicable to Public Schools

The following is a brief outline of the primary federal laws that establish rights and remedies concerning services for public school students with disabilities, including epilepsy.[1] For more information, please see the Foundation fact sheet on the subject, which was prepared for consumers and advocates, available at http://epilepsyfoundation.org/answerplace/Legal/educationlaw/Education.cfm. See also the education resources for consumers on the Defense Fund's Web site at http://epilepsyfoundation.org/epilepsylegal/consumerresources.cfm.

Section 504

Section 504 of the Rehabilitation Act prohibits schools that receive federal funding from discriminating against a child because of disability in academic and nonacademic activities, such as school field trips and extracurricular activities. The law also requires schools to provide a reasonable accommodation to a child who is otherwise qualified to participate in the particular activity. A reasonable accommodation is a modification in a program or policy, or an auxiliary aid that enables an individual with a disability to participate in a program.[2]

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[1] The remainder of this discussion addresses legal protections that apply in the public school context and does not address day care providers. Also, a discussion of the obligations of private schools, including parochial schools, is beyond the scope of this outline. Note, however, that parochial schools in particular present special concerns, as such schools are covered under federal law (Section 504 of the Rehabilitation Act) only to the extent they receive (directly or indirectly) federal financial assistance. We would be glad to provide more information on the legal issues relating to day care providers and private schools upon request.

[2] Title II of the ADA applies to public schools as well. Because Section 504 contains more specific implementing regulations than the ADA with respect to the operation of schools, the Department of Education's Office for Civil Rights (OCR), which enforces both Section 504 and Title II of the ADA, generally relies on Section 504 and its implementing regulations.

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Under Section 504, schools may not deny students with disabilities the opportunity to participate in or benefit from any aid, benefit or service afforded to their peers without disabilities, even if a modification or accommodation must be provided to allow participation. Section 504 requires public schools receiving federal funds to provide a free and appropriate education to all qualified students with disabilities in their jurisdiction.[3] An "appropriate" education is one that provides regular or special education services and related aids designed to meet the educational needs of students with disabilities.

Section 504 may be enforced by filing a complaint with OCR. Alternatively, individuals have the option of filing litigation in federal court to enforce their rights.

IDEA

The Individuals with Disabilities Education Act (IDEA) is a federal program under which states receive federal funds for special education services in exchange for their provision of certain special education requirements. The primary requirement is that students with disabilities receive a free appropriate public education that conforms to their individualized education program (IEP).

Unlike the ADA and Section 504, which are both anti-discrimination statutes designed to "level the playing field," IDEA imposes affirmative obligations on states and school districts to provide services to specific classes of students. To qualify for protection under IDEA, a child must have a disability that adversely affects his or her ability to learn, and thus needs "special education" and "related services."

"Special education" includes instruction that is specifically designed to meet the child's unique needs that result from a disability. It can involve adapting the content, methodology or delivery of the instruction. "Related services" include "transportation and such developmental, corrective and other supportive services (including . . . medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability benefit from special education." The IDEA regulations also include "school health services" as a related service and define "school health services" as services provided by a qualified school nurse or other qualified person.

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[3] At times, a school may assert that a student with a seizure disorder is not entitled to coverage under Section 504 because he or she is not "substantially limited" in a major life activity. This claim may be based on the fact that the disorder is controlled by medication. (In 1999, the Supreme Court issued a series of decisions ruling that, in determining whether a condition is substantially limiting, the effects, both negative and positive, of "mitigating measures" -- such as medication -- must be considered.) However, OCR has issued guidance clarifying that this analysis does not apply in the school context -- when permission on the part of the school is required for a student to access medication or other treatment.

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As discussed in the case summaries below, the administration of Diastat may be considered to be a required "related service" under IDEA. It also may be viewed as a required reasonable accommodation under Section 504.

Disabilities covered under IDEA may include health impairments such as epilepsy, as well as traumatic brain injuries, learning disabilities, mental retardation and autism. (A child with epilepsy or another disability who does not qualify for services under IDEA may, however, qualify for services under Section 504 of the Rehabilitation Act, as discussed above.)

In enforcing rights under IDEA, an individual must exhaust state level administrative procedures. This process generally involves requesting mediation, a due process hearing (involving an impartial hearing officer who renders an opinion), or filing a complaint with the State education agency. A party dissatisfied with the final state determination may have it reviewed by filing litigation in federal court.

Selected Cases involving School Administration of Diastat

IDEA Cases

Silsbee Independent School Dist., 25 IDELR 1023 (Tex. SEA 1997).
The hearing officer held that calling 911 was not an appropriate response where treatment for a seizure disorder was needed, because there was no guarantee an ambulance would arrive within any particular time frame, despite the fact that a hospital was nearby. The student in this case was a seven-year old first grader who experienced convulsive seizures, along with drop apnea. The school had a seizure protocol, which involved having school personnel turning the student, Steve, on his side, timing the seizure, contacting the school nurse and administering Diastat if his seizure and apnea lasted for three minutes or more.

Steve's neurologists recommended to the school district that Diastat be administered only by a RN and not a LVN, and that the RN be on-call and available at all times. The neurologists had indicated that this procedure requires a RN due to potential complications, including the possibility of puncture with the needle and the perforating of the bowel when inserting the hard syringe during convulsions. (At the time this case was heard, administration of the medication involved drawing it from a glass ampule by a needle and syringe and removing the needle before inserting the syringe.) The school district requested the due process hearing to determine whether providing a RN, as opposed to a LVN, is required by IDEA as a related service and whether training of teachers and staff in seizure response is such a required service.

The hearing officer ruled that the school must ensure that a RN or other equally qualified person capable of administering the medication rectally in case of prolonged seizure is in close proximity to the student at all times during the school day. The presence of such a person on the school campus, the hearing officer concluded, is a

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supportive service necessary to assist Steve in receiving a benefit from his special education. The hearing officer also clarified that maintaining a full-time RN on campus does not amount to a "medical service," which the school district is not required to provide, as clarified under relevant Supreme Court decisions. [4]

The hearing officer also determined that having staff resuscitate Steve using oxygen (an AMBU bag) is a required related supportive service.

Student v. San Francisco Unified School District, No. 2331 (CA Special Education Hearing Office 2002)
In this case, a positive decision along the lines of that in *Silsbee* above was reached. However, unlike *Silsbee*, in this case, the school district had refused altogether to administer Diastat and would call 911 as its only response to a prolonged seizure of five minutes or more.

The school district had asserted that the possibility of respiratory complications and the need to provide respiratory intervention places the administration of Disastat outside the scope of mandatory special education services. The hearing officer found that the evidence indicated that there is no unreasonable risk of respiratory complications for this student, and that in any event, such possible complications can be effectively addressed by a trained professional aide.

The hearing officer ruled that the implementation of the protocol of the student's neurologist for the administration of Diastat by qualified District personnel is necessary to make public education meaningfully accessible to the student. It was also found that the protocol is necessary to meet the student's unique needs and afford him an educational benefit. The protocol, therefore, is a related service the District must provide. The State Hearing Officer opinion is available on-line at http://www3.scoe.net/speced/seho/seho_search/sehoSearchDetails.cfm?ID=1742.

Christian v. Clark County School District (Nevada State Review Officer Opinion, 2004).
In this case, a state review officer, affirming the due process hearing officer's decision, found that the school in issue was not required to provide a full-time nurse at the child's neighborhood school to administer Diastat.

A nine-year old student with a seizure disorder enrolled in a local school after spending his first two years of elementary school being home-schooled. His mother requested that either she or a school nurse be on school grounds at all times in case the child

[4] There are two interpretations of this issue. One interpretation holds that if the service only can be provided by a physician, it is a medical service that the school need not provide. Another interpretation holds that if the service is too burdensome for the school, it need not provide it. The hearing officer found that, under either interpretation, maintaining a RN full-time is a required school health service.

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needed Diastat; however, the school district stated that its emergency seizure management protocol (calling 911) was sufficient and that it was not required to provide the services of qualified personnel for this purpose. The district offered the option of reassigning the student to a school six miles away, where a registered nurse is present at all times.

The State Review Officer (SRO) found no indication on the student's IEP that the school district was required to allow the mother to stay at the school to administer the Diastat. Under IDEA, a school district has the discretion in choosing a provider of services; therefore, it need not grant a parent's request to be designated as such. In addition, the policy of the Nevada State Board of Nursing requires that Diastat be given by a nurse, distinguishing this case from the *San Francisco Unif. School District* case, where California law permitted administration of Diastat by either a school nurse or other qualified personnel.

The SRO went on to state that even if the student's medical needs required the presence of a nurse on school grounds at all times, the student does not have an automatic right to be educated at the neighborhood school. The court relied on *White v. Accession Parrish Sch. Bd.*, 39 IDELR Para. 182 (5th Cir. 2003) (upholding a school district's decision to provide centralized services for students with hearing impairments where only one student would utilize the service).

The mother countered that requiring her son to attend a different school would be inconvenient and potentially frightening because he would be away from his siblings; however, the SRO stated that these arguments were "in part just not true and on balance are trivial compared to meeting all of the Petitioner's education needs!"

Nursing Practice Act Cases

Lancaster School District Support Association v. Board of Education, Lancaster City School District, No. 03 CVH 02 02143 (Ohio Ct. of Common Pleas March 6, 2006), *appeal pending*. In this case, a school union filed an action objecting to two of its members, educational assistants, being designated by the school board to administer Diastat to a student with epilepsy. This service was a part of the child's IEP and the union asserted that the directive to these employees to administer the medication violates the State Nurse Practice Act ("the Act"), arguing that it would amount to an unauthorized practice of nursing, in violation of the Act. The court ruled (the sole issue it addressed) that these employees' administration of Diastat would not violate the Act and is permissible.

The Act requires licensed nurses alone to administer medication (and to provide other treatment) when doing so requires specialized knowledge, judgment and skill derived from the nursing sciences. The court noted that the Act contains an exception in emergency situations. Another state law allows the school board to authorize non-

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medically trained employees to administer prescribed drugs if certain conditions are met, such as a signed parental request, instructions from the prescribing physician and appropriate training for employees. The court found that the two laws together authorize a school board to establish a policy whereby an unlicensed employee can administer prescribed medication that does not require the exercise of independent nursing judgment contemplated by the Act.

The court determined that administering Diastat does not require such independent judgment, and therefore, is not a violation of the Act. Also, the court noted that administering Diastat to a child experiencing a generalized seizure constitutes a medical emergency, and therefore falls under an exception to the Act. (Here the court rejected the rather weak argument of the union that because the child is known to experience seizures, it is not an "emergency" when they do occur.)

In reaching its conclusion about the level of judgment needed to administer the medication, the court was persuaded by the testimony of an expert witness, Dr. Glauser. This witness testified that the medication can be safely administered by an individual with a grade school level of education. Dr. Glauser noted that Diastat is not associated with respiratory depression, as is intravenous administration of valium, and thus, does not require medical expertise to monitor side effects. The court found that the student's IEP calls for emergency medical personnel to be called after medication administration, thus minimizing the responsibility of school employees to monitor the child post-administration.

The court concluded by observing that "Unfortunately, it does not appear possible for a school nurse to be present at all times in very school building. Accordingly, just as it is important for education professionals to be trained in other life preserving emergency procedures such as the Heimlich maneuver or CPR, it is important that educational professionals become adequately trained at administering this potentially life saving medication."

Cases Involving Diabetes Care in Schools

In the diabetes context, schools may be required to assist children in administering glucagon because failure to do so may effectively deny needed services to students with disabilities, in violation of Section 504. Glucagon is given when a child has lost consciousness due to severe hypoglycemia, and must be injected; failure to administer the medication in a timely fashion can be life threatening. The American Diabetes Association believes that a school's decision to call "911" rather than administer a Glucagon injection unnecessarily denies treatment, and that the appropriate response is to both give the injection and call emergency services.

Although many schools take the position that glucagon may only be administered by a nurse or other heath care professional, the inability to delegate these tasks does not

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diminish the schools' responsibility to provide the service. In several disputes heard by the Department of Education's Office for Civil Rights, it was determined that the lack of a school nurse does not release a school from its obligation to provide required medical services for students with diabetes. See, for instance, *Prince George's (MD) County Schools*, Complaint No. 03-02-1258, 39 IDELR 103 (OCR 2003); *Hasbrouck Heights Sch. Dist.*, Complaint No. 02-01-1121 (OCR 2001).

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APPENDIX C: SDCOE Diazepam Guidelines (Administration of Diastat®)

Desert/Mountain SELPA

SAN DIEGO UNIFIED SCHOOL DISTRICT
Nursing & Wellness Program

SPECIALIZED PHYSICAL HEALTH CARE SERVICES

RECTAL DIAZEPAM ADMINISTRATION
(DIASTAT® or DIASTAT® AcuDial™)

THIS PROCEDURE SHALL BE PERFORMED BY THE CREDENTIALED SCHOOL NURSE IN ACCORDANCE WITH PHYSICIAN'S ORDERS. RECTAL DIAZEPAM (DIASTAT® or DIASTAT® AcuDial™) MAY BE DONE BY A SPECIALLY TRAINED STAFF MEMBER WITH CURRENT CPR TRAINING UNDER THE DIRECT/INDIRECT SUPERVISION OF A CREDENTIALED SCHOOL NURSE.

I. GENERAL INFORMATION ON SEIZURES

A. Epilepsy or other types of chronic illness or disabilities may cause seizures. The management of seizures should be consistent at home and at school. A seizure is a sudden period of altered consciousness, motor activity, sensory phenomena, or inappropriate behavior and is caused by abnormal electrical discharges within the brain.

B. A child with epilepsy or seizure disorder or any other condition in which seizures may occur should have an Individualized School Health Plan (ISHP) or emergency/first aid guidelines in place at school. Staff working with a child with a seizure disorder should be trained in its management. Information should be obtained from the student's parents, primary care physician, neurologist, and any other medical professional managing the child's condition.

C. Determine if the child is having a seizure. Seizures may be expressed as any one or a combination of the following:

1. An abrupt change in consciousness or responsiveness, including no response or an inappropriate response.
2. An alteration in perception of the environment. Any of the senses may be altered.
3. An involuntary alteration of the individual's movement, such as rigidity or loss of muscle control.

D. See attached First Aid Procedures for seizures.

II. GENERAL INFORMATION ON RECTAL DIAZEPAM (DIASTAT® or DIASTAT® AcuDial™)

A. Rectal Diazepam is used to control clusters of seizures and/or prolonged seizures. It is similar to other benzodiazepines (Valium), but because it is a rectal gel preparation, it is more convenient for patients who cannot swallow during or after seizures. Rectal Diazepam is supplied in a plastic applicator. The dose is determined by child's age and weight, and is delivered in the following dosages.

Delivery System	Rectal Tip Size	Doses Delivered
Diastat (2.5 mg)	4.4 cm	2.5 mg
Diastat AcuDial (10 mg)	4.4 cm	5, 7.5, 10 mg (exact dosage dialed in by pharmacist)*
Diastat AcuDial (20 mg)	6.0 cm	10, 12.5, 15, 17.5 20 mg (exact dosage dialed in by pharmacist)*

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See manufacturer's insert for further information about this medication. Upon receipt of physicians' orders for Rectal Diazepam administration, the school nurse should obtain and record a resting breathing rate.

B. Sedation is by far the most common and most severe side effect: some patients are sleepy for up to one day. Headache, diarrhea, and dizziness may also occur. There is significant risk of habituation and addiction if this medication is taken chronically, and risk of worsening seizures if the medication is abruptly withdrawn after chronic use. Rare problems with Rectal Diazepam that are not expected to occur with prescribed doses are: agitation, anxiety, hallucinations, fainting and decreased respiration rate (<10/minute). A rash can occur if there is an allergic reaction.

C. Rectal Diazepam is a relatively safe medication. As school personnel may not reliably know about same-day use of Rectal Diazepam prior to school or new medications that may alter the effects of Rectal Diazepam, special precautions are recommended for school administration. (* It is the PARENT'S responsibility to notify school when Rectal Diazepam has been given within a 24-hour period, outside of school hours.).

III. GUIDELINES

A. PURPOSE

The purpose of this procedure is to ensure the safe and timely administration of Rectal Diazepam if it should become necessary during the time the student is at school. Rectal Diazepam is an emergency intervention drug used in controlling or stopping status epilepticus or other seizures as directed by a physician.

B. REQUIRED PREPLANNING AND EQUIPMENT

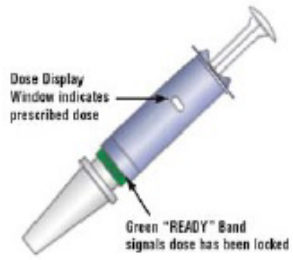
The following must be in place to enable procedure to be performed at school.

1. A complete report of a current neurological assessment (within one year).
2. A Physician's Authorization for medication completed by physician and signed by parent, including indications/contraindications and follow-up plan. (See # 2 on additional procedures for Rectal Diazepam.)
3. Properly labeled pharmaceutical container with medication and specific instructions. ***Prior to storing the medication for future use, the School Nurse must verify the correct dosage has been dialed, and document this on the Emergency Medication Log. (See # 3 on additional procedures for Rectal diazepam.)**
4. Oxygen if available and prescribed.
5. Emergency Medication Log.
6. Seizure Report.
7. Gloves.
8. Individualized School Health Plan (ISHP) or Individualized Education Plan (IEP) or other written instructions for administration of this medication.
9. Blanket or sheet to provide privacy for student.

IV. PROCEDURE

Essential Steps	Key Points and Precautions
A. Procedure for all Seizures 1. Keep calm - let seizure run its course. 2. DO NOT attempt to restrain or force objects between teeth. 3. Ease child to floor if possible and remove objects, which may cause injury. 4. Turn on side to prevent aspirating saliva. 5. Loosen tight clothing and place something soft and flat under his/her head. 6. Time the seizure and observe the seizure pattern (such as the number of seizures clustered together, nature of movements and level of consciousness). 7. All students with seizures will have either an ISHP, IEP or emergency/first aid guidelines in place and will be listed on the health problems list. 8. Check expiration date and ensure that protective cap is removed prior to administration. 9. Administer Rectal Diazepam as directed. (See attached Manufacturer's Procedure for Rectal Diazepam (DIASTAT® AcuDial™) Administration.) 10. Chart seizure activity and administration of medication on appropriate logs. 11. After administering Rectal Diazepam monitor the following for 4 hours: • Change in rate of respirations. • Change in color.	**DO NOT GIVE CPR.**
B. Additional Procedures for Rectal Diazepam 1. Either the person administering the Rectal Diazepam or persons at school readily available to the classroom must have current certification in CPR. 2. Rectal Diazepam orders must include the following information: • Duration and type of seizure activity before Rectal Diazepam is administered. Staff must be inserviced by Nurse on exact conditions when to treat with Rectal Diazepam per physician's order. • Exact dose of the drug. • Action to take once seizure activity has been stopped (This can be individualized for each student. For some students, call 911 for transport. Others may remain in school.)	**Suggested Rectal Diazepam kit** • Rectal Diazepam (medication should be locked up in the nurse's office at the end of each day, and picked up each morning.) • Blanket or towel to provide privacy during Rectal Diazepam administration. • Notebook containing instructions and physician's orders for Rectal Diazepam administration. • Safety pin and Index card with Time of Seizure onset, time of Rectal Diazepam administration, and dosage of Rectal Diazepam given. • Rubber Gloves

PROCEDURE (Continued)

Essential Steps	Key Points and Precautions
• Action to be taken if child has a bowel movement or otherwise expels the medication. • Any contraindications to the Rectal Diazepam (e.g. fever, respiratory infections, etc.). 3. School Nurse must verify the dosage received matches the physician's order and document this on the Emergency Medication Log. • Make sure the correct dose appears through the dose display window. This is a visual indication that the barrel of the DIASTAT® AcuDial™ is in the correct position for the desired dose. a. Ensure that the locking ring is engaged b. The green "READY" band will be revealed at the base of the DIASTAT® AcuDial™. This allows you to see that the unit has been locked. c. Repeat these steps for each DIASTAT® AcuDial™ received.	
4. **Always call 911 for EMS personnel if:** • Rectal Diazepam has not succeeded in ending seizure. • Seizure recurs after having Rectal Diazepam on the same school day. • The student's very first trial of Rectal Diazepam is being given at school. • Rectal Diazepam is administered by non-medical staff. • The student has seizure on school bus that requires Rectal Diazepam (911 will be called in lieu of staff giving Rectal Diazepam on the school bus.)	**If child is transported by EMS, always pin a label to the child's clothing which clearly states:** • Time of seizure onset • Rectal Diazepam dosage given • Time of Rectal Diazepam administration
5. Post administration care will be determined by child's condition and discussion with child's physician. This will be defined on the child's ISHP or IEP. Both the school district's health team and the child's managing physician must agree on the details of management. 6. Complete Emergency Medication Log. Notify school nurse or SEIN.	

Manufacturer's Procedure for DIASTAT® or DIASTAT® AcuDial™ Administration

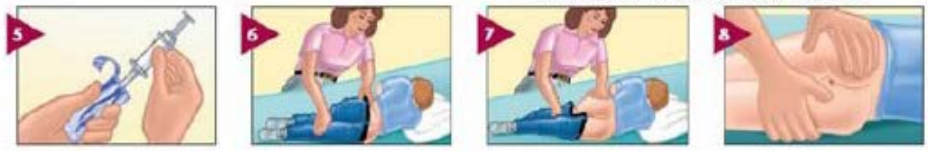
Put person on their side where they can't fall.

Get medicine.

Get syringe.

Push up with thumb and pull to remove cap from syringe.

Note: Seal Pin is attached to the cap.
Be sure Seal Pin is removed with the cap.

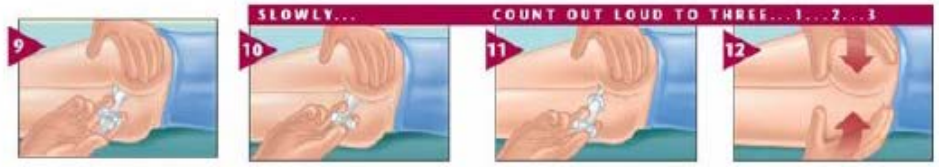


Lubricate rectal tip with lubricating jelly.

Turn person on side facing you.

Bend upper leg forward to expose rectum.

Separate buttocks to expose rectum.

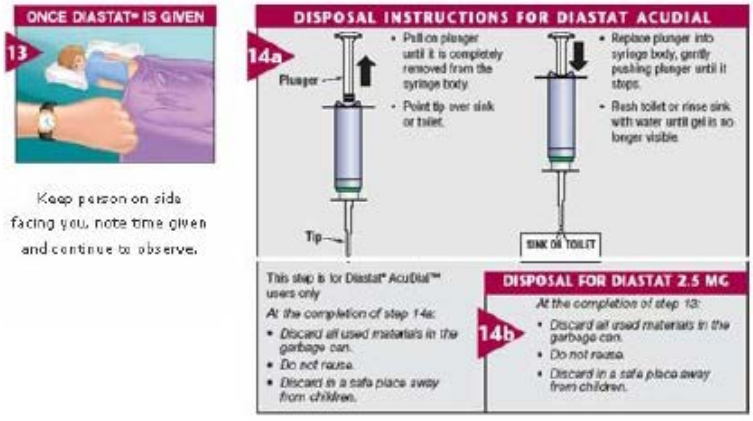


Gently insert syringe tip into rectum.
Note: Rim should be snug against rectal opening.

Slowly count to 3 while gently pushing plunger in until it stops.

Slowly count to 3 before removing syringe from rectum.

Slowly count to 3 while holding buttocks together to prevent leakage.



Keep person on side facing you, note time given and continue to observe.

Diastat AcuDial™ (diazepam rectal gel)

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Desert/Mountain SELPA

First Aid for Seizures

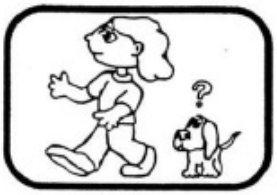
(Complex partial, psychomotor, temporal lobe)

1. Recognize common symptoms

Blank staring

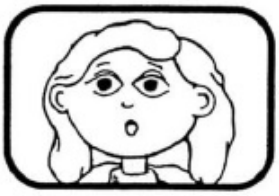
Chewing

Fumbling



Wandering

Shaking

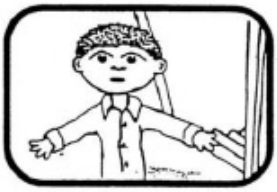


Confused speech

2. Follow first aid steps

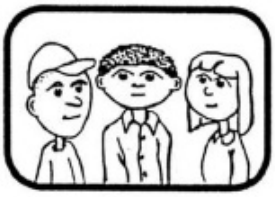
Don't grab hold

Explain to others



Block hazards

Speak calmly



Remain nearby...

...until seizure ends

People who've had this type of seizure should be fully conscious and aware before being left on their own. Make sure they know the date, where they are, where they're going next. Confusion may last longer than the seizure itself and may be hazardous. If full awareness does not return, call for medical assistance.

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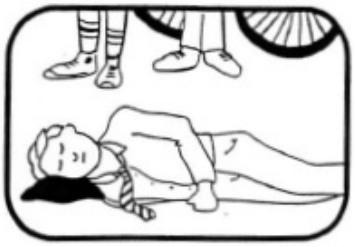
Desert/Mountain SELPA

First Aid Steps for Convulsions

(Convulsions, generalized tonic-clonic, grand mal)

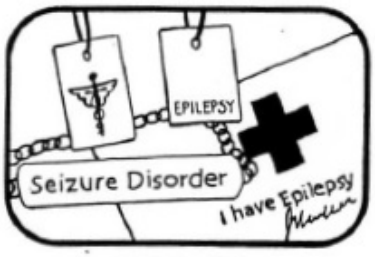
Cushion head

Loosen tight neckwear



Turn on side

Nothing in mouth



Look for I.D.

Don't hold down

As seizure ends

. . .offer help

Although most seizures end naturally without emergency treatment, a seizure in someone who does not have epilepsy could be a sign of serious illness. Call for medical assistance if:

- **the seizure lasts more than 5 minutes;**
- **there is no "epilepsy/seizure disorder" I.D. present;**
- **there is slow recovery, a second seizure, or difficult breathing afterwards;**
- **the woman is pregnant or if there is medical I.D. indicating the presence of another medical condition; or**
- **there are any signs of injury.**

This page from the Epilepsy Foundation website can be viewed at:
http://www.epilepsyfoundation.org/about/firstaid/seizurefachart.cfm

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