



Schools Legal Service is a joint powers entity providing legal and collective bargaining services to California public education agencies since 1976.

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CONFIDENTIAL ATTORNEY/CLIENT
PRIVILEGED COMMUNICATION

TO: Schools Legal Service Clients
FROM: Stacy L. Inman
DATE: June 21, 2010
RE: California Appellate Court Prohibits California Department of Education From Authorizing Non-medical Personnel to Administer Insulin to Students

On June 8, 2010, the 3rd District Court of Appeal for the State of California ruled that unlicensed school personnel are not authorized by current law to administer prescribed injection(s) of insulin to a diabetic student, even if the student requires such injections pursuant to a Section 504 Plan or IEP, absent express statutory permission. The Appellate Court, therefore, determined that Section 8 of the CDE's Legal Advisory (which states that unlicensed school personnel can administer insulin injections) is invalid.

In 2005, the American Diabetes Association ("ADA") and several California public schools students with disabilities filed a class action lawsuit against Jack O'Connell, in his capacity as the Superintendent of Public Instruction for California, the Board of Education of California, the California Department of Education ("CDE") and two local school districts and their superintendents. The ADA alleged that the Defendants violated federal law by failing to ensure the provision of health care services to students with disabilities, including insulin administration, that was necessary to enable those students to obtain free appropriate public education. The parties reached a settlement in 2007 which required CDE to issue a specific legal advisory regarding the rights of students with diabetes in California's K-12 public schools. The CDE issued the legal advisory as was required by the settlement agreement. The legal advisory took the position that in order to comply with federal law, California law should be interpreted to allow, if a licensed person is not available or feasible, trained unlicensed school employees to administer insulin during the school day to a student whose Section 504 Plan or IEP required such insulin administration.

Thereafter, the American Nurses Association filed a legal action against Jack O'Connell as Superintendent of Public Instruction and the CDE challenging the legal advisory which allowed unlicensed school employees to administer insulin during the school day to a student whose Section 504 plan or IEP required such insulin administration.

In Sacramento County Superior Court, the trial court in this case agreed that, as a matter of policy, unlicensed trained school personnel should be authorized to administer insulin to diabetic students but found that they were not authorized to do so under current California law. The trial court concluded that California law authorizes:

“[T]he administration of insulin to a student only by a licensed health care professional acting within the scope of practice for which he or she is licensed under the Business and Professions Code. (E.g., a nurse licensed under the NPA, Business and Professions Code Section 2700 et seq. to perform services within the meaning of Business and Professions Code section 2725. Or by an unlicensed person who is expressly authorized by statute to administer insulin in specified circumstances. . . .)”

The trial court issued a peremptory writ of mandate directing the CDE to refrain from implementing or enforcing the position of the CDE’s Legal Advisory that authorized the administration of insulin to students by school personnel who are not authorized to administer it under state statutes and to remove those portions from its legal advisory.

The CDE and the ADA appealed.

The California Court of Appeal for the 3rd District concluded that the trial court had correctly determined that the portion of CDE’s legal advisory authorizing unlicensed designated school personnel to administer insulin to diabetic students in nonemergency situations is inconsistent with California law and, therefore, is invalid.

The Court of Appeal acknowledged that the record established that there are a large number of diabetic students in California and some of these students must take insulin several times a day in order to survive, and that students required such insulin shots not just at school, but on school field trips and when they are participating in extracurricular school activities. The Appellate Court recognized that California has a significant shortage of registered nurses, in particular school nurses, and that California is currently gripped by fiscal crisis. However, the Court indicated that the Legislature understands that there is a need for statutory authorization needed for unlicensed school personnel to administer insulin to diabetic students and they also understand the need for an exception in the law to cover such administration of medicines. In 2001, the Legislature adopted Education Code section 49414 which allows schools to choose to provide emergency epinephrine auto-injectors to unlicensed, but trained, personnel and to allow those personnel to utilize those auto-injectors to provide emergency medical aid to persons suffering from anaphylactic reaction.

Even though this ruling has been made, the CDE continues to have its legal advisory authorizing non-medical personnel to administer insulin to students. We recommend that local education agencies refrain from allowing non-medical personnel to administer insulin to students. That is our recommendation because this case may be appealed to the California Supreme Court and unless overturned by the Supreme Court, we recommend that educational agencies utilize only appropriately licensed nurses to administer insulin to school students who are unable to self-administer the insulin injection or have a family member or friend voluntarily administer the insulin. It is our understanding that this may be most easily accomplished by contracting with entities who employ licensed vocational nurses ("LVN").

The Court of Appeal has held that it is for the Legislature, not the Courts, to determine whether unlicensed school personnel can safely administer insulin to diabetic students. In order to do so, the Legislature must change the law.

Please contact our office if you have any questions regarding the above information.

SLI/ajj