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LEGAL UPDATE

October 23, 2009

To: Superintendents, Member School Districts (K-12)

From: Carl D. Corbin, Assistant General Counsel CDC

Subject: ADMINISTRATION OF DIASTAT BY TRAINED SCHOOL
PERSONNEL IS PERMISSIBLE
Memo No. 27-2009

This Legal Update is being provided to advise member school districts of our opinion that school personnel who agreed to be trained may administer Diastat to students whose health care provider has issued a written statement specifying the medication to be taken, the dose, the time, and the method of administration and if the student's parents also provide written permission.

Diastat is the trade name for a rectally administered form of Diazepam (Valium) used to treat seizures. Diastat is packaged in flexible tubes with available pediatric tips.¹ The medication was specifically developed and approved by the U.S. Food and Drug Administration ("FDA") to be administered by lay people such as parents, teachers, and other school personnel.² The national Epilepsy Foundation has specifically endorsed the use of Diastat by trained unlicensed school personnel (i.e. non-nurses) with students in order to allow students with epilepsy to attend school in the least restrictive environment while still having immediate access to Diastat in an emergency.³

September 10, 2009 Letter from the California Board of Registered Nurses

On September 10, 2009, the California Board of Registered Nurses ("BRN") sent a letter to a school nurse stating that the administration of Diastat is a nursing function that cannot be

¹ *San Francisco Unified School District* (SEHO 2002) 37 IDELR 144.

² See www.diastat.com; James Cloyd, et al., A Single Blind, Crossover Comparison of the Pharmacokinetics and Cognitive Effects of a New Diazepam Rectal Gel with Intravenous Diazepam, 39 *Epilepsia* 520-526 (1998).

³ See www.epilepsyfoundation.org.

performed by unlicensed personnel and, therefore, school nurses may not train or supervise unlicensed school personnel to administer Diastat.⁴ This letter has resulted in widespread fear among school nurses that they could lose their license if they train or supervise unlicensed school employees in the administration of Diastat. It is our opinion and the opinion of school attorneys across the state that the BRN is incorrect in its conclusion regarding this issue.⁵ In addition, the September 10, 2009 letter from BRN is non-legally binding as the BRN must go through the public rule-making process in order to develop regulations on this issue if the BRN wishes to take action against a school nurse.

The BRN's analysis is based on an overly restrictive view of the California Nurse Practices Act ("NPA").⁶ Essentially, the BRN concluded that administering Diastat falls within the scope of the practice of nursing and, therefore, a nurse cannot train or supervise non-licensed personnel to administer Diastat. However, the NPA provides specific exceptions that allow for medication to be administered by non-nurses such as in case of an emergency⁷ or in a case where professional training is not required.⁸

Federal, State, and Case Law Allow for Trained School Personnel to Administer Diastat

California Education Code section 49423(a) provides: "any pupil who is required to take, during the regular schoolday, medication prescribed for him or her by a physician or surgeon, may be assisted by the school nurse or **other designated school personnel.**" (Emphasis added). Title 5 of the California Code of Regulations sections 600-611 provide the regulatory guidance on the administration of medication to students during the regular school day with Section 600 specifically providing:

Pursuant to Section 49423 and subdivision (b) of Section 49423.6 of the Education Code, any pupil who is required to take, during the regular school day, prescribed medication may be assisted by a school nurse or other designated school personnel if both of the following conditions are met:

(a) The **pupil's authorized health care provider executes a written statement** specifying, at a minimum, the medication the pupil is to take, the dosage, and the period of time during which the medication is to be taken, as well as otherwise detailing (as may be necessary) the method, amount, and time schedule by which the medication is to be taken.

(b) The pupil's **parent or legal guardian provides a written statement** initiating a request to have the medication administered to the pupil or to have the pupil otherwise assisted in the administration of the medication, in accordance with the

⁴ See attached letter.

⁵ See the October 7, 2009 Legal Opinion from the Orange County Department of Education, Schools Legal Service, on this issue: <http://www.ocregister.com/newsimages/2009/10/12/OCDE%20Diastat%20letter%20100709.pdf>.

⁶ Business and Professions Code sections 2700, et seq.

⁷ Business and Professions Code section 2727(d).

⁸ Business and Professions Code section 2727(e).

authorized health care provider's written statement. (Emphasis added).

Case law is replete with cases that have defined the administration of Diastat as a special education “related service” under the Individuals with Disabilities Education Act (“IDEA”).⁹ These cases have supported the administration of Diastat to students by trained school personnel who were not nurses or otherwise licensed medical personnel. For example, in one of the special education cases, the administrative law judge found, after extensive medical testimony and medical documentary evidence, that Diastat is a “safe and effective medication that can be administered by parent, caregiver, and trained school personnel.”¹⁰ In this case, calling 911 and waiting was found to be impractical due to the delay and damage a student with seizures could suffer while waiting for an emergency response.

Moreover, the issue of whether a school nurse could provide training to school personnel to administer Diastat was upheld in *Kern County Superintendent of Schools and Greenfield Union School District*.¹¹ In another case, the administrative law judge found that a student’s unique needs, which included administration of Diastat, could be met by a trained one-to-one paraprofessional who was supervised by a school nurse.¹²

Summary

In our opinion, Diastat may be administered by trained school personnel to students when there is a written statement authorizing the medication and the student’s parents have signed a request for administration in accordance with the health care provider’s written statement. This practice is specifically allowed as an exception under the NPA (under the emergency exception and an exception as a service that does not require the skill of a nurse) and authorized by Education Code section 49423.

Our office will keep school districts advised if there are any changes in this issue. In the interim, please contact any of our attorneys if you have questions regarding this or any other issue.

⁹ *Kern County Superintendent of Schools and Greenfield Union School District* (SEHO 2004) 104 LRP 41104, SN04-00671/SN04-00971; *San Diego Unified School District* (SEHO 2004) 41 IDELR 195; *San Francisco Unified School District* (SEHO 2002) 37 IDELR 144.

¹⁰ *San Francisco Unified School District* (SEHO 2002) 37 IDELR 144.

¹¹ (SEHO 2004) 104 LRP 41104, SN04-00671/SN04-00971.

¹² *San Diego Unified School District* (SEHO 2004) 41 IDELR 195.