



## Heads Up! Legal Counsel Alert

# Unlicensed School Personnel Do Not Have Statutory Authority To Administer Insulin To Students Who Require Injections Under An Individualized Education Program Or Section 504 Plan

June 15, 2010 | Bulletin No. 943179.1

**Disclaimer:** *Legal Alerts* are published by Kronick Moskowitz Tiedemann & Girard as a timely reporting service to alert clients and other friends of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.

In *American Nurses Association v. O’Connell*, (--- Cal.Rptr.3d ---, Cal.App. 3 Dist., June 8, 2010), a court of appeal considered whether unlicensed school personnel are authorized to administer insulin injections to diabetic students. The court concluded “unlicensed school personnel are not authorized by current law to administer prescribed injections of insulin to a diabetic student, even if the student requires such injections pursuant to a Section 504 or IEP plan, absent express statutory permission.”

**Note:** This Legal Alert updates our previous Legal Alert on the subject entitled, [“California Department Of Education Issues Legal Advisory To Clarify School Districts’ Legal Responsibilities When Students Require Administration Of Insulin During The School Day,”](#) September 17, 2009.

## Facts

The American Nurses Association and the American Nurses Association/California (collectively, “Nurses Association”) filed an action against the California State Department of Education (“Department”) and Superintendent of Public Instruction, Jack O’Connell (“Superintendent”) in California state court that challenged one of the provisions of a legal advisory distributed by the Department to school districts throughout the State. The advisory was sent as part of the settlement of an earlier federal court case that had been brought by diabetic students and the American Diabetes Association surrounding the issue of administration of insulin to diabetic students at school.

The legal advisory provides the following persons may administer insulin to students in California's public schools under California law: (1) a student may self administer insulin with authorization from his or her health care provider and parents; (2) a school nurse or school physician who is employed by the local education agency; (3) "appropriately licensed school employee . . . who is supervised by a school physician, school nurse, or other appropriate individual;" (4) a registered or licensed vocational nurse contracted from a private agency or registry or a public health nurse from the county health department; (5) a parent or guardian; (6) a parent's or guardian's designee; (7) an "unlicensed voluntary school employee with appropriate training, but only in emergencies defined by Section 2727 (d) of the Business and Profession Code (epidemics or public disasters)." The advisory provides that the following eighth option is available pursuant to 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."

The Nurses Association challenged the eighth option, which allows unlicensed school employees to administer insulin. The trial court found that unlicensed school personnel are not authorized under current law to administer insulin to diabetic students. The Department and the American Diabetes Association appealed the trial court's decision.

## **Decision**

The court of appeal affirmed the judgment of the trial court. The appellate court found the lower court "correctly determined the portion of the legal advisory, authorizing unlicensed designated school personnel to administer insulin to diabetic students in nonemergency situations, is inconsistent with California law and therefore, invalid."

The Nurses Association asserted the Nursing Practice Act ("NPA") prohibits unlicensed persons from performing the functions of a nurse. Business and Professions Code section 2725 includes the administration of medications as a function of a nurse, and the Nurses Association argued that there is no statutory exception to section 2725 that would allow unlicensed school personnel to administer insulin injections to students absent an emergency or epidemic. The court of appeal agreed with the Nurses Association.

The NPA prohibits the practice of nursing without a license. The court found administering an insulin injection is a function of a licensed nurse. "The plain language of section 2725, subdivision (b) (2) includes in the function of a nurse . . . 'the administration of medications' ordered by a physician." The court stated, "the injection of insulin into diabetic students would appear to fall within the 'administration of medications' - - a practice of nursing." The court found the administration of insulin by unlicensed school personnel does not fall within any of the NPA's exceptions to the prohibition against unlicensed nursing practice. In addition to other exceptions the court found inapplicable, the court found that the emergency exception did not apply "to the situation presented by the shortage of school nurses being currently experienced in California."

The court of appeal further found that the Education Code provision governing the administration of prescribed medications to students does not allow unlicensed school personnel to administer insulin injections. Education Code section 49423 provides that a student who is required to take prescribed medication during the school day "may be assisted by the school nurse or other designated personnel." The court found the term assist as used here "means to help

in whatever way is legally permitted by the specific individual who is doing the assisting.” The court found the concept of “assistance” is broader than that of “administration.” “[A] school nurse, as a registered nurse, is authorized to administer medications, the assistance by the school nurse includes the administration of medications.” However, “the assistance by other designated school personnel would not include the administration of medications unless they are licensed nurses or fall within some other express statutory authorization or statutory exception to the prohibition of the practice of nursing.”

Prior to the time the legal advisory was issued, the Department took the position that section 49423 and Department regulations precluded unlicensed school personnel from administering insulin to students with diabetes. The Legislature’s actions in regard to this subject have shown “the Legislature has seen fit to authorize the administration of only a limited number of medications in limited situations to students by unlicensed personnel.” The court found that “[t]his suggests the Legislature believes express statutory authorization is necessary in light of the NPA.” The court concluded “section 49423 does not authorize unlicensed school personnel to administer the insulin injections that diabetic students may require pursuant to a Section 504 Plan or IEP.”

The court held that current law does not authorize unlicensed school personnel to administer insulin injections to a diabetic student even where the student’s IEP or Section 504 plan requires such injections. The court also concluded that federal law does not preempt the California requirements regarding the administration of insulin.

## **What This Means To You**

In the absence of new legislation, school districts will no longer be able to train employees who are not licensed to administer insulin shots to diabetic students as part of their IEPs or Section 504 plans in a non-emergency situation. The California Department of Education’s legal advisory still lists seven other ways of complying with state and federal law, as noted above. Districts should conduct a review of any IEPs or 504 plans involving the administration of insulin to make sure they conform to one or more of the remaining seven methods.

For information on the legal advisory, see the Department’s web site at <http://www.cde.ca.gov/ls/he/hn/legaladvisory.asp#number4> . As of the date of preparation of this Legal Alert, the Department had not yet updated its advisory to reflect this appellate court decision. Further, there is a bill in the Legislature (A.B. 1802, Hall) that would authorize the parents to designate a school employee to administer insulin under specified circumstances, but the bill is currently inactive.

## **Questions**

If you have any questions concerning the content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

[Diana D. Halpenny](#) | 916.321.4500

©2010 Kronick Moskovitz Tiedemann & Girard | Website Design by [Cake Farm](#)