August 15, 2013

To: District Superintendents  
Regional Occupational Program Superintendents  
Assistant Superintendents of Business  
Assistant Superintendents of Human Resources  
Assistant Superintendents of Instruction  
SELPA Directors  
Special Education Directors  
Directors of Child Welfare and Attendance  
School Nurses

From: Ronald D. Wenkart  
General Counsel

Re: Administration of Medication by School Employees

On August 12, 2013, in American Nurses Association v. Torlakson, the California Supreme Court unanimously ruled that 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 parental consent pursuant to Education Code section 49423.

The California Supreme Court held that such practices did not violate the Nursing Practice Act which prohibits the unauthorized practice of nursing. The court held that state law authorizes each student’s physician, with parental consent, to decide whether prescription medication, such as insulin, may safely and appropriately be administered by unlicensed school personnel. The court further held that state law reflects the practical reality that most insulin administered outside of hospitals and other clinical settings is administered by laypersons.

1 American Nurses Association v. Torlakson, ___ Cal.4th ___ (2013).
BACKGROUND

The California Supreme Court framed the question before it as whether California law permits unlicensed school personnel to administer medications and held that it was a question of law rather than a question of fact. State law requires that nurses administer all medications, including insulin, in hospitals and other licensed healthcare facilities. Outside of such facilities, the court noted that insulin is normally administered by laypersons according to a physician’s directions, most often by the diabetic person themselves or by friends or family members.

The court stated that public school students with diabetes who cannot self-administer insulin are normally entitled to have it administered to them at no cost pursuant to Section 504 of the Rehabilitation Act (Section 504), Title II of the Americans with Disabilities Act (ADA), and the Individuals with Disabilities Education Act (IDEA). Public schools must offer to students covered by these laws a free and appropriate public education that includes related aides and services designed to meet their individual educational needs. Under these laws, diabetic students pay for insulin, supplies and equipment, but not the cost of administering insulin. A school’s obligations to a particular diabetic student are normally set forth in a Section 504 plan or an individualized education program (IEP).

The court observed that approximately 14,000 school-age children in California suffer from diabetes. Diabetic students who depend on insulin injections typically need them during the school day, both at regularly-scheduled times and unpredictably to correct for fluctuations in blood glucose. The need for insulin can arise anytime and anywhere. The court noted that 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 six million public school students. While five percent of schools have a full-time nurse, 69 percent of schools have only a part-time nurse, and 26 percent have no nurse at all.

The court also observed that some schools allow unlicensed school personnel to administer insulin while others do not. In some cases, 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 school day.

In October 2005, the parents of four diabetic students filed a class action lawsuit in federal court alleging that schools in Fremont Unified School District and the San Ramon Valley Unified School District had failed to meet their obligations to diabetic students under federal law. The California Department of Education (CDE) was also named in the lawsuit. The plaintiffs alleged that the school districts violated Section 504 and the IDEA by refusing to permit unlicensed school personnel to administer insulin when no nurse was available.

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2 Business & Professions Code section 2725.3.
3 See, 29 U.S.C. Section 794 (Section 504); 42 U.S.C. Section 12131 et seq. (Title II of the ADA); 20 U.S.C. Section 1400 et seq. (IDEA).
In July 2007, the plaintiffs entered into a settlement with the CDE and the State Board of Education. The agreement required the CDE to fulfill its legal obligations to monitor local educational agency’s compliance with Section 504 and the IDEA, and to issue a 2007 Legal Advisory. The 2007 Legal Advisory recognized that some students cannot self-administer insulin and that when a school nurse is not available, unlicensed trained school employees who volunteer may be permitted to administer insulin to students.

As a result of the 2007 Legal Advisory, the American Nurses Association and the California Nurses Association filed a lawsuit in state court against CDE seeking to invalidate the 2007 Legal Advisory. The Superior Court and the Court of Appeal ruled in favor of the American Nurses Association. The American Diabetes Association, also a party in the lawsuit, petitioned for review by the California Supreme Court.

STATUTORY ANALYSIS

To determine whether unlicensed school personnel may administer a prescription medication, such as insulin, the California Supreme Court reviewed the provisions of Education Code section 49423 and its legislative history. Section 49423(a) states:

“Notwithstanding Section 49422, any pupil who is required to take, during the regular school day, 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).” [Emphasis added.]

The California Supreme Court noted that the Legislature’s reason for authorizing school personnel to administer medications, according to the original statute’s 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.” Originally, Section 49423 did not require implementing regulations and was thus self-executing. However, over time, some schools refused to administer prescribed medications to students, and in 1997, the State Superintendent of Public Instruction sent a letter to school superintendents reminding them that federal law permitted students to receive medication during the school day and that medication could properly be administered by unlicensed personnel who have been appropriately trained by a credentialed school nurse, public health nurse, or a physician.

The court noted that some districts also required parents to sign waivers to sign away their children’s right to medical treatment at school as a condition of enrollment or attendance.
To address these issues, the Legislature directed CDE to develop and recommend regulations regarding the administration of medication in the public schools pursuant to Section 49423.4

In 2003, the State Board of Education adopted Sections 600 through 611 of Title 5 of the California Code of Regulations.5 These regulations expressly declare that unlicensed school personnel may administer medications. Section 604(b) states, “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 healthcare professionals, in keeping with applicable standards of professional practice for their license.” Section 601 defines “other designated school personnel” as any individual employed by the local educational agency who has consented to administer the medication to the pupil or otherwise assist the pupil in the administration of medication and may legally administer the medication to the pupil or otherwise assist the pupil in the administration of medication. The court, after reviewing Education Code section 49423 and its implementing regulations, concluded:

“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.”

The court went on to reject all of the legal arguments made by the nurses association, indicating that the nurses have misinterpreted Education Code section 49423 and its implementing regulations. The court stated, “The routine administration of insulin outside of hospitals and clinical settings . . . 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.”

The court noted that the Nursing Practice Act expressly exempts from the definition of the practice of nursing the carrying out of medical orders prescribed by a licensed physician by unlicensed persons.6 The court stated, “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 physician’s medical orders in accordance with Section 49423 and its implementing regulations.” The court concluded:

“For all 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

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4 See, Education Code section 49423.6(a), added by Stats. 2000, ch. 281, § 2, p. 2477.
5 All references in this paragraph are to Title 5 of the California Code of Regulations.
6 See, Business & Professions Code section 2727(e).
exception by ‘assuming to practice as a nurse’ . . . 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.”

The California Supreme Court noted that 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, glucagon for severe hypoglycemia, and antiseizure medication for epilepsy. Each of these statutes, while expressing the Legislature’s preference that registered nurses administer the medications whenever possible, expressly permit trained, unlicensed school personnel to administer the medication when no nurse is available. The court held that having generally authorized unlicensed school personnel to administer medications pursuant to Education Code section 49423, the Legislature nevertheless retained the power to impose additional restrictions on individual drugs when justified.

After rejecting each of the nurses association’s arguments, the court concluded:

“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 student’s treating physician, with parental consent . . . and that persons who act under this authority do not violate the NPA. . . . Because schools may administer prescription medications only in accordance with physician’s written statements . . . 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 healthcare provider. State law, however, presents no categorical obstacle to the use of unlicensed personnel for this purpose.” [Emphasis added.]

**SUMMARY**

In summary, the California Supreme Court held that California law authorizes unlicensed school personnel to administer insulin and other prescription medications to students in accordance with written statements of the student’s treating physician with parental consent. The court further held that the authorization to allow unlicensed school personnel to administer

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7 See, Business & Professions Code section 2727(e).
8 Education Code section 49414.
9 Education Code section 49414.5.
10 Education Code section 49414.7.
11 See, Business & Professions Code section 2727(e).
prescription medication does not violate the Nursing Practice Act. Therefore, school nurses may lawfully train unlicensed school personnel to administer medication pursuant to Education Code sections 49423, 49426,\textsuperscript{12} and Title 5 of the California Code of Regulations sections 600 through 611.

This decision will affect public school students in need of prescription medication during the school day administered by unlicensed school employees. If you have any further questions regarding this issue, please do not hesitate to contact our office.

\textsuperscript{12} Education Code section 49426 outlines the qualifications and the role of the school nurse. The role of the school nurse is to strengthen and facilitate the educational process by improving and protecting the health status of children. The major focus is the prevention of illness and disability, and the early detection and correction of health problems. The school nurse is uniquely qualified in preventive health, health assessment, and referral procedures. In addition, the school nurse may design and implement health plans to meet individual student health needs, incorporate plans directed by a physician, as well as consult with, train, and serve as a resource to teachers and administrators.