North Bay Schools Insurance Authority

UPDATED MEMBER ALERT

INJECTABLE INSULIN

I. INTRODUCTION

In November 2008, Sacramento Superior Court Judge Lloyd Connelly held that California school districts were prohibited from allowing non-medical employees to administer insulin (and certain other injectable medications) to students. The decision was stayed while the American Diabetes Association and the California Department of Education ("CDE") appealed the adverse ruling. During the appeal period, the prior CDE Legal Advisory remained in effect, with California school districts still legally permitted to rely upon it in allowing non-medical professionals to continue administering injections as authorized by a physician and a student's Individual Education Plan.

On June 8, 2010, the Third District Court of Appeal upheld Judge Connelly's ruling. While it is unclear whether a Petition for Reconsideration (made to the Court of Appeal) or Petition for Review (made to the Supreme Court) will be made, or acted upon, there is an immediate need for school districts to plan for compliance with these Court Orders because there is no certainty that the Legislature will also respond to the Courts' invitations to change these problematic laws.

II. BACKGROUND

On October 11, 2005, four diabetic students filed suit against the Fremont and San Ramon Valley Unified School Districts and the California Department of Education ("CDE") alleging that they were not receiving a safe and appropriate free education as required under state and federal law. They maintained that their respective school districts were obligated to have district personnel (employees or independent contractors) provide them with needed insulin injections, a potentially significant financial burden on school districts which, even then, were reducing the number of school nurse and medical care provider employees due to budgetary constraints.

A settlement of the students' litigation was reached in August 2007. The settlement required the CDE to issue a Legal Advisory providing written guidance to school districts with respect to the providing of insulin injections to diabetic students. In conformity with the settlement, and the CDE's interpretation of California law, the CDE Legal Advisory concluded that voluntarily trained but unlicensed school employees could inject students with insulin in both emergency and non-emergency situations. The CDE believed this approach also ensured school district compliance with the Individuals with Disabilities Education Act ("IDEA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504").

III. THE CURRENT LITIGATION AND RECENT COURT OF APPEAL DECISION

On October 9, 2007, various nursing associations ("Nurses") filed suit against the CDE asserting that the use of voluntary, non-medical employees was a violation of California law, and that the Legal Advisory was ineffective in changing the governing statutory provisions. The Nurses ultimately convinced Judge Connelly that only nurses, medical doctors (including physicians' assistants and nurse practitioners), and parents were legally authorized to administer insulin injections if a student is unwilling or unable to self-inject.

On June 8, 2010, the Court of Appeal adopted Judge Connelly's analysis, although noting a desire to have the Legislature modify this negative situation in order to allow a broader range of individuals to assist students in need of medical injection assistance.

A Petition for Rehearing (asking the Court to reconsider its ruling) must be filed no later than June 24, 2010. A Petition for Review to the Supreme Court must be filed no later than July 19, 2010. Because there have been no amicus filings in the case, seeking to support the American Diabetes Association and CDE's efforts, it seems unlikely that any such efforts would be successful.

IV. PENDING REMEDIAL LEGISLATION

Assemblyman Hall, along with co-authors Assemblymen Blumenfield and Nestande, and Senators Padilla, Cox, and McLeod, have co-sponsored AB1802 that seeks to add new Education Code Section 49414.6. The proposed new law would "authorize a parent or guardian of a pupil with diabetes to designate one or more school employees as parent-designated school employees for the purpose of administering insulin to the pupil as necessary during the regular school day when a credentialed school nurse or other health care professional is not immediately available onsite. The new law would authorize a parent-designated school employee to administer insulin only (1) on a volunteer basis, (2) in accordance with the performance instructions set forth by the licensed health care provider of the pupil, and (3) after receiving appropriate training."

The law largely tracks the provision of the CDE Legal Advisory, providing a flexible alternative for meeting diabetic student needs while also ensuring school district compliance with governing disability laws in a financially responsible and appropriate manner.

The bill has been placed on inactive status. This may be due to the press of other fiscal business or it may reflect a decision by lawmakers to await the outcome of the Court of Appeals decision. With the adverse decision not entered, efforts should probably be undertaken by interested parties to convince the involved lawmakers to reactivate this important remedial legislation in order to avoid significant fiscal and/or litigation exposures.

V. CONCLUSION

The Court of Appeals decision is not yet final. Absent further action by the Court of Appeal, or prompt action by the Legislature that is coupled with an "emergency clause" making any remedial legislation immediately effective, school districts will need to provide a nurse or other qualified medical assistance to those students unwilling or unable to self-inject insulin, at least in the absence of the situation proceeding to a point where the student's life may actually be in jeopardy, a true "emergency" situation.