

February 22, 2011

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Dear Mr. Boltz, Mr. Connor and Mr. Reisberg:

The Special Education Committee of the Illinois Council of School Attorneys is drafting guidance for school districts on the Care of Students with Diabetes Act. This is very difficult because the Act is unclear and conflicts with other laws. I am sending this letter to request guidance from your respective agencies regarding the conflict between the Act and the Illinois Nurse Practice Act. Unless schools receive guidance from you, we anticipate that the Act's implementation will be incomplete and inconsistent. Moreover, schools need guidance to overcome paralysis caused by wanting to comply with conflicting laws.

The ICSA Special Education Committee drafted the enclosed memorandum to provide a detailed explanation of the conflict.

Your assistance will be greatly appreciated.

Best regards,



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Enclosure
cc: Lisa Madigan, Attorney General

CARE OF STUDENTS WITH DIABETES ACT

February 2011

This memo is written on behalf of the Illinois Association of School Boards (“IASB”) and Illinois Council of School Attorneys (“ICSA”). We respectfully request a formal advisory opinion or guidance on a significant new conflict presented by Public Act 96-1485 (i.e., the Care of Students with Diabetes Act or “CSDA”) and the Illinois Nurse Practice Act.

LEGAL FRAMEWORK

By way of introduction, we note that the issue of administration of medication (including, but not limited to, insulin) has long presented a significant conflict between Section 10-22.21b of the School Code and the Nurse Practice Act that has been difficult for Illinois school districts and special education cooperatives to reconcile. Specifically, this long-standing conflict concerns the authority of licensed nurses employed or contracted by a district or cooperative to delegate the provision of “nursing activities” (as defined by the Nurse Practice Act) to other school employees. It is clear that the Nurse Practice Act and its implementing regulations provide that certificated school nurses and registered professional nurses/licensed practical nurses are responsible for performing nursing activities and may not delegate such activities to unlicensed school personnel. However, according to one of the Illinois Department of Financial & Professional Regulation’s (“IDFPR”) legal counsel in a recent telephone conversation with attorney Cynthia Baasten of the Sraga Hauser firm, parents/guardians of students may be able to delegate nursing activities to unlicensed (i.e., without a nurse license) school personnel directly. Many ICSA members do not recommend that districts and cooperatives pursue this type of delegation for the reasons provided below.

As you are aware, the Nurse Practice Act and its implementing rules (at 225 ILCS 65/50-1 et seq. and 68 Ill. Admin. Code §1300.10 et seq., respectively) provide that nursing may only be practiced by a licensed practical nurse (LPN), registered professional nurse (RN), and an advanced practice nurse (APN). A “**nursing activity**” is defined as any work requiring the use of knowledge acquired by the completion of an approved program for nurse practice licensure. The administration of medication is expressly included within the definition of a “nursing activity.” On the other hand, a “**task**” is work that does not require nursing knowledge, judgment, or decision-making. An RN or LPN may delegate a “task” to unlicensed individuals. An RN may not delegate a “nursing activity” that requires the specialized knowledge, judgment, and skill of a licensed nurse, to anyone other than RNs or LPNs.

In addition to the Nurse Practice Act, the IDEA implementing regulations expressly distinguish between “school health services” and “school nurse services.” See 34 C.F.R. §300.34(c)(13). The IDEA regulations provide that “school health services” means health services that are designed to enable a child with a disability to receive a FAPE as set forth in the child’s IEP. “School nurse services” are those provided by a

qualified school nurse, while “school health services” are services that may be provided by either a qualified school nurse or other qualified person. The U.S. Department of Education (“DOE”) explained in its Comments to the regulations that a qualified school nurse means a nurse that meets state standards for a qualified school nurse, i.e., a certificated school nurse. The U.S. DOE also stated that it recognizes that many schools rely on other qualified personnel to provide school health services under the direction of a school nurse.

The Nurse Practice Act, its implementing rules, and the IDFPR do not provide any specific guidance or examples of what types of acts constitute “nursing activities.” Per the IDFPR’s legal counsel, the IDFPR refers to industry- and geographic-specific standards of care in determining whether an act constitutes a nursing activity. The IDFPR reportedly also considers factors such as who has the ability to address the particular issue, who is usually trained to conduct such acts, and who typically performs the act. The IDFPR’s legal counsel further advised Ms. Baasten that an RN/LPN may educate unlicensed school personnel about nursing activities, but is prohibited from delegating such nursing activities to them. If an activity that requires the specialized knowledge, judgment, and skill is delegated by a physician (i.e., a nursing activity) to an RN/LPN, the licensed nurse may not then further delegate that activity to an unlicensed individual. That said, the IDFPR’s legal counsel indicated that a parent/guardian of a student may delegate any activity, including those that constitute a “nursing activity,” to unlicensed school personnel due to their *in loco parentis* status under the Illinois School Code. The rationale is that a parent/guardian may delegate any act to a school employee, regardless of whether that employee is a licensed nurse because he or she is assuming the role of the parent/guardian while the child attends school. The IDFPR’s legal counsel stated that so long as an RN/LPN is not responsible for supervising the unlicensed school personnel in performing the delegated activity, the RN/LPN will not violate his or her duties under the Nurse Practice Act. The IDFPR’s legal counsel did not cite to any legal authority in support of this position and declined to provide Ms. Baasten with a written confirmation of her statements.

It is our opinion that, while plausible, the rationale of the IDFPR’s legal counsel does not take into consideration the nuances and limitations of the *in loco parentis* status afforded to school personnel under the Section 5/24-24 of School Code and relevant decisional law. Section 5/24-24 provides that all school personnel, whether or not certificated, stand *in loco parentis*, or in the relation of parents/guardians of the students, in all activities connected with the school program, and they may exercise their *in loco parentis* status at any time for the safety and supervision of the students in the absence of their parents or guardians. It is well-settled in case law that *in loco parentis* status is not limited to disciplinary or supervisory authority in the school setting, but encompasses the entire range of a student’s course of instruction. *In loco parentis* status affords school personnel, districts, and cooperatives with immunity from negligence claims, but not from claims of willful and wanton misconduct.

In *Wallace v. Smyth*, 203 Ill.2d 441 (2002), the Illinois Supreme Court explained that the scope of the *in loco parentis* status (also referred to as the parental immunity

doctrine) is based upon public policy that courts should not be involved in matters between a parent and child because such matters, by definition, involve a substantial amount of discretion in discipline, supervision, and care. Therefore, the central issue in determining whether a school employee's act falls within the *in loco parentis* status is whether the act is conduct intimately associated with the parent-child relationship, i.e., the care, supervision and discipline of a child. In *Cates v. Cates*, 156 Ill.2d 76 (1993), the Illinois Supreme Court generally explained (albeit in the context of a biological parent's immunity) that parental discretion in the provision of care includes medical treatment.

However, the case law is unclear as to whether providing routine (i.e., non-emergency) medical care to a student at the parent/guardian's direction would fall within the scope of school personnel's *in loco parentis* status. In *O'Brien v. Township High School District 214*, 83 Ill.2d 462 (1980), the Illinois Supreme Court held that the school district and its personnel were not immune from claims that school personnel were negligent by having an untrained student trainer provide medical and surgical care for an abrasion on plaintiff O'Brien's knee. (O'Brien had incurred an abrasion on his knee when falling at a public pool the day before football practice commenced at the high school. During the first day of practice, the abrasion began to bleed and the student trainer bandaged O'Brien's knee. After the student trainer cleaned and rebandaged the knee for two weeks, the knee had a "boil" and appeared infected. At the direction of the football coach, the student trainer opened the abrasion on O'Brien's knee, cleaned it, and rebandaged it, thereby exacerbating the infection.) The Court held that the alleged activities were not connected with the school program because the student's original injury did not arise from a school-related activity. The Court also noted that none of the school personnel had the competence or training to administer medical treatment to the student's knee. The Court concluded that the alleged treatment was totally outside the ambit of a teacher's *in loco parentis* status. Significantly, the Court reasoned that teachers are not privileged to do everything that a parent may do and any decision as to the necessity of medical treatment, at least of the type alleged in this case, was for the parents to make rather than the teachers.

The *O'Brien* decision has been distinguished in subsequent cases, all of which involved the provision of medical care to a student immediately following an injury sustained during a school-related activity. For instance, in *Gara v. Lomonaco*, 199 Ill. App. 3d 633 (1st. Dist. 1990), the Illinois Appellate Court for the First District held that teachers were entitled to immunity from claims that they were negligent in refusing to allow the student to see the nurse after sustaining an ankle injury in physical education class. The court explained that these circumstances were distinguishable from those in *O'Brien* because the student was injured on school premises in an activity connected with a school program. The court also explained that the school personnel did not venture outside of their expertise and impose improper medical treatment as in *O'Brien*.

In *Halper v. Vayo*, 210 Ill. App. 3d 81 (2nd. Dist. 1991), the Illinois Appellate Court for the Second District similarly held that a teacher/wrestling coach was immune from liability for ordinary negligence, where the student alleged that he had injured his leg during wrestling practice and the coach negligently conducted a medical assessment

and administered medical treatment to the student's leg. The court held that, unlike *O'Brien*, the teacher was alleged to have treated the student's injury immediately after it occurred in a school activity. The court explained that due to the unavailability of doctors at the scene of many school athletic injuries, school coaches and trainers are expected to provide initial first aid for both minor and serious injuries. The court held that the circumstances were distinguishable because in *O'Brien* the alleged treatment was surgical intervention that was provided for injury which had occurred several days earlier and there was no apparent emergency requiring immediate treatment. The court explained *O'Brien* stands for the proposition that, under such circumstances, teachers may not usurp the decision-making authority of parents in a matter as fundamental as a child's medical care. The court held that the *O'Brien* decision should not be read as barring teachers from administering first aid to students under any circumstances.

Additionally, in *Grandalski v. Lyons Township High School District 204*, 305 Ill. App. 3d 1 (1st. Dist. 1999), the Illinois Appellate Court for the First District held that the school district, teacher, and school nurse were immune from alleged negligence under Section 6-105 of the Tort Immunity Act. In that case, a student fell on her head while performing a gymnastics move during physical education class. The student alleged that the teacher and school nurse rendered negligent medical care by failing to immobilize the student, permitting her to lie down, failing to assess her neck injury, and failing to request appropriate medical intervention including transportation by ambulance to the hospital. The court explained that Section 6-105 of the Tort Immunity Act provides immunity to a public employee for an injury caused by the failure to make a physical/mental examination or to make an adequate physical/mental examination. Section 6-105 contains no exception for willful and wanton misconduct. The court held that the alleged actions taken by the teacher and school nurse were in connection with an evaluation of the student's injuries and thus were immune under Section 6-105. The court further held that there were no facts to support that the school personnel engaged in willful and wanton misconduct with respect to the care and treatment provided to the student after her injury.

The *O'Brien* and subsequent decisions do not address whether the *in loco parentis* immunity from negligence would apply to circumstances wherein (1) the parent or guardian of a student delegates to school personnel the responsibility of providing routine medical care/treatment to the student during school and school-related activities, and (2) school personnel receive training in the provision of the routine medical care/treatment. Therefore, it is unclear whether the immunity afforded to school personnel under Section 24-24 would apply in a situation where a parent or guardian delegates certain routine medical/health activities. Arguably, the provision of medical/health care to a child falls within school personnel's *in loco parentis* status because such activities are directly associated with the care of the child. However, if such activities fall outside the scope of the *in loco parentis* status, a school district or cooperative and its personnel would be exposed to liability for negligence rather than willful and wanton conduct.

Even if these activities are within the scope of *in loco parentis status*, a school district or cooperative and its personnel do not have absolute immunity and may be held liable for an employee's willful and wanton misconduct when providing medical

care/treatment. Willful and wanton misconduct is shown where a school employee makes a conscious choice of action either with knowledge of a serious danger to others or with knowledge of facts which would disclose this danger to a reasonable person. Willful and wanton conduct involves more than inadvertence, incompetence, unskillfulness, or a failure to take precautions.

Moreover, setting aside our concerns regarding the IDFPR legal counsel's lack of supporting legal authority for her opinion and refusal to memorialize it in writing, a school district or cooperative and its personnel (including administrators) could be subject to criminal and civil penalties for the unlicensed practice of nursing under the Nurse Practice Act. The Nurse Practice Act expressly states that any person who practices, offers to practice, attempts to practice, or holds oneself out to practice nursing without being licensed shall pay a civil penalty to the IDFPR in an amount not to exceed \$10,000 for each offense. An exemption from civil liability does exist for emergency care as provided in the Good Samaritan Act. The Nurse Practice Act further states that a person who practices as an APN, RN, or LPN without a valid license; attempts, offers, or knowingly aids, abets, or assists in practicing nursing without a license; employs persons not licensed to practice nursing; is deemed a supervisor when delegating nursing activities; or otherwise intentionally violates the Nurse Practice Act is guilty of a Class A misdemeanor.

Another concern is that a school district or cooperative may violate the IDEA and its implementing regulations by using unlicensed school personnel, who are not certificated school nurses or otherwise qualified, to provide school health services or school nurse services that are included in students' IEPs. The regulations do not define "school nurse services" but expressly provide that school nurse services may only be provided by certificated school nurses. Likewise, the IDEA and its implementing regulations do not clarify whether other "qualified" school personnel who may provide school health services include unlicensed personnel or are limited only to non-certificated, licensed nurses. Significantly, the U.S. DOE has indicated that school health services are provided under the direction of a certificated school nurse, which is inconsistent with the position of the IDFPR legal counsel that activities delegated by a parent to school personnel would not be subject to the requirements of the Nurse Practice Act so long as licensed nurses did not supervise the school personnel in performing the activities.

It is important to note that Section 10-22.21b of the Illinois School Code provides that under no circumstances may a school employee (other than a certificated school nurse or RN, or administrator) be required to administer medication to a student. Accordingly, even if a parent/guardian delegates the administration of medication to an unlicensed school employee, that employee must accept the delegation voluntarily and a district or cooperative may not direct the employee to do so. There is no similar provision in the School Code regarding other activities that presumably meet the definition of "nursing activities" and/or involve medical care (e.g., maintenance of a student's gastronomy or tracheotomy tube, changing a student's catheter, monitoring a student's insulin pump). Thus, it appears that a district or cooperative may direct an unlicensed

employee to perform any medical care/treatment activities other than the administration of medication under the School Code. However, that does not resolve our concerns regarding a violation of the Nurse Practice Act.

**OVERLAPPING ISSUES RAISED BY
THE CARE OF STUDENTS WITH DIABETES ACT**

Many of the long-standing issues set forth above are now being confronted by Illinois school districts and special education cooperatives in the context of Public Act 96-1485, the new Care of Students with Diabetes Act (“CSDA”). Under the CSDA, a delegated care aide - not necessarily a certified school nurse, RN, or LPN - is authorized, *inter alia*, to administer insulin to a student, estimate the number of carbohydrates in a snack or lunch, recognize and respond to a student’s symptoms of hypoglycemia or hyperglycemia, and administer glucagon in an emergency. Since a student’s diabetes care plan is to be signed by the parents and the student’s physician, this may arguably be consistent with the oral opinion offered to Ms. Baasten by one of IDFPR’s legal counsel--namely, that the parents may delegate medical care to an unlicensed employee (i.e., an employee who is not a licensed nurse). However, given the potential exposure to liability faced by districts and cooperatives, the IASB and ICSA are requesting a formal opinion or guidance from the ISBE, IDPH, and/or IDFPR regarding the conflicts between (1) Section 10-22.21b of the School Code and the Nurse Practice Act, and (2) Public Act 96-1485/the CSDA, Section 10-22.21b of the School Code, and the Nurse Practice Act.

Thank you in advance for your attention to these important issues and anticipated formal opinion or guidance with respect to same.