



BARGAINING and LEGAL ADVISORY

Legal and Bargaining Advisory SB 161 Epilepsy Medication (Diastat) Legislation

Background

SB 161 (Huff) was signed into law in October 2011 and adds a new provision to the Education Code – Section 49414.7 – that allows public education employers, upon a parent’s request, to provide non-licensed school employees with voluntary training on the administration of emergency antiseizure medication, including Diastat, to epileptic students.¹ The legislation contains the following key elements:

- It enables a school district, county office of education, or charter school to elect to participate in a program to allow non-licensed employees to volunteer to be trained to administer emergency antiseizure medication to a student experiencing an epileptic seizure. Our view is that it does not *require* the employer to adopt such a program.
- The employer may adopt such a program only if *no* credentialed school nurse or other licensed nurse is onsite at the school that the student attends. Whenever possible, a school nurse or trained licensed vocational nurse should administer emergency antiseizure medication.
- An employer’s election to participate in such a program is triggered by a request from a student’s parent or guardian. The parent or guardian may request that one or more employees at the school receive training to administer emergency antiseizure medication if the student suffers a seizure when a nurse is not available.
- Diastat, or diazepam rectal gel, is generally administered with a syringe, and it is an “emergency antiseizure medication” under the statute. The statute also defines such medications as those approved by the FDA for epileptic patients “for the management of seizures” by nonmedical persons; however, it is not clear which if any medications fall into this category other than Diastat.
- If a parent or guardian requests that school employee(s) be trained to administer a prescribed, emergency antiseizure medication, the school must notify the parent/guardian that the child might be eligible for a Section 504 plan or IEP and must encourage and assist the parent/guardian in exploring the 504 Plan/IEP option.
- If the employer adopts a training program for volunteer staff, it must distribute an *electronic* notice to all staff (no more than twice per year per child) regarding the request for volunteers. The electronic notice must contain specified information, including a description of the voluntary nature of the program. The electronic notice is the *only* means by which an employer may solicit volunteers.



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- If no one volunteers, the employer should re-notify the parent or guardian of the option for a Section 504 assessment.
- A non-licensed employee's decision to be trained must be *truly voluntary*. No administrator or employee may directly or indirectly use or attempt to use his or her authority or influence for the purpose of intimidating, threatening, or coercing employees who choose not to volunteer.
- A volunteer may revoke her/his offer to administer Diastat up to three days after completion of the training. After that time, s/he may revoke with a two-week notice or until a new individual health plan or Section 504 plan has been developed for the student.
- Once an employee volunteers and completes training, administering Diastat in an emergency arguably becomes part of her/his job duties. Thus, the employer can require the employee to administer Diastat in an emergency and, potentially, can discipline the employee if s/he refuses to fulfill that responsibility.
- CDE, in consultation with the State Department of Public Health, must develop training and supervision guidelines regarding Diastat administration, and it must publish those guidelines by July 1, 2012. CDE must also publish on its website "a clearinghouse of best practices" in training nonmedical personnel to administer emergency antiseizure medication.
- Volunteer training should include instruction in matters such as how to recognize different types of seizures and basic follow-up procedures. A volunteer should also receive training in the drug manufacturer's instructions and the particular health care provider's instructions.
- A trained volunteer must attend a refresher training once every two years if s/he has not administered antiseizure medication in the prior two years.
- Trainings may be conducted by a physician, physician assistant, credentialed school nurse, registered nurse, or certificated public health nurse.
- For each volunteer, the employer must provide defense and indemnification for any and all civil liability that could arise in connection with Diastat administration. While the statute does not spell out the full scope of indemnification, at a minimum it ensures that if a student or parent sues the employee for negligence (and the employee is not accused of acting in bad faith), the employer must pay any fees and costs necessary to defend the lawsuit and likely would pay any compensatory damages that could result.



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- A classified employee who volunteers will get paid overtime if Diastat administration and subsequent student monitoring require the volunteer to work beyond normally scheduled hours.
- Similar to the existing glucagon statute (Ed. Code Section 49414.5), SB 161 appears to create an exception to the Nursing Practice Act's general prohibition on the administration of prescription medications by non-licensed persons.
- The legislation will remain in effect until January 1, 2017, unless the Legislature enacts a subsequent statute that deletes or extends that date.

Advice and Bargaining Implications

When a district or other education employer is considering adoption of a Diastat administration program under the statute, consider providing information to the employer regarding the associated risks. Even if a robust training program for volunteers is established, Diastat administration involves substantial physical risks for the student and substantial liability and other risks for employers and staff.

If a public education employer chooses to adopt a volunteer-training program under the new statute, the employer should comply with the minimum requirements set forth in the statute. At a minimum, the association should demand bargaining over the effects of the employer's decision to adopt the program (e.g., the program's impact on hours and safety conditions of employment).

In addition to advising members regarding the statute's parameters, local chapters may wish to bargain additional protections for unit members. For example:

- Advise non-licensed members that they can choose *not to volunteer* to be trained to administer Diastat. They cannot be forced or intimidated into volunteering, and they cannot even be personally solicited to volunteer.
- Advise non-licensed members that if they choose to volunteer and receive training, then the employer can require them to administer Diastat to students and possibly could discipline them for failing to perform that obligation.
- Some CBA's already have language prohibiting non-licensed personnel from assisting in the administration of medication to students. Review such language and/or obtain additional/clarifying language to prohibit non-licensed unit members from administering emergency antiseizure medication.



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- Urge non-licensed members who volunteer to become CTA members or to maintain their CTA membership. CTA members have the benefit of liability insurance coverage under the NEA Educators Employment Liability Insurance plan. This coverage could be important if, for example, the employer identifies a reason for refusing to defend and indemnify the employee in a particular case.
- Consider bargaining over additional pay for volunteering as well as additional pay for time that volunteers spend being trained.
- Bargain training protocols or procedures that go beyond the minimum training requirements set forth in the statute and in the forthcoming CDE guidelines. Propose, for example, that volunteers will receive refresher training once every six months or once each year (rather than once every two years).
- Attempt to bargain that only doctors (not nurses) will perform trainings under the employer's program. Many nurses are not comfortable training nonmedical personnel in the administration of Diastat. CTA and nurses' organizations have consistently and strongly opposed bills such as SB 161, primarily because they compromised student safety.
- Bargain that the employer, at its own expense, will provide or make available to volunteers the Hepatitis B vaccination, to ensure protection against the Hepatitis B virus.
- Bargain additional liability and immunity protections for trainers *and* volunteers in the bargaining unit. If the employer wants to encourage members to volunteer, it should be motivated to guarantee employees that they will not be responsible for paying monetary awards that could result from potential lawsuits. For example, propose that the employer will indemnify and be wholly responsible for any civil liability and/or payment of any damages award that might result from a claim that a nurse member failed adequately to train volunteers. Consider proposing that the employer will defend against any civil claims brought against a volunteer unit member regarding administration of emergency antiseizure medication, including claims for punitive damages.

Conclusion

While we believe that only licensed personnel should administer antiseizure medications to students, SB 161 has been enacted into law, and associations should be prepared to advise members accordingly and consider the bargaining implications of an employer's decision to adopt a Diastat program under the new law. If you have questions or need further assistance, please contact the Legal Department or your NODD specialist.



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ⁱ Statutory Backdrop

The new statute joins a series of Education Code provisions that address administration of medication to students. For example, Education Code Section 49423 provides that any student who is required to take prescribed medication during the school day may be “assisted” by a credentialed, licensed school nurse or other designated personnel if 1) the health care provider provides various written information regarding the medication, and 2) the student’s parent or guardian requests in writing that assistance be provided to the student. See Ed. Code Sections 49423, 49423.6(b); 5 C.C.R. Sections 600-603. CTA, nursing associations, and others understand Section 49423 to mean that personnel may “assist” with medication only in legally permissible ways, and that only licensed personnel may legally administer prescription medications. In *ANA v. O’Connell*, 185 Cal.App.4th 393 (2010) (review granted), the California Court of Appeal agreed with this interpretation. The Court held that the Nursing Practice Act prohibits non-licensed personnel from administering insulin injections to students, and that Education Code Section 49423 neither undermines nor contradicts the Nursing Practice Act. The American Diabetes Association appealed that decision to the California Supreme Court, where the case remains pending.

Prior to passage of SB 161, the Education Code already contained provisions allowing non-licensed school personnel to be trained and supervised to administer two medications in emergency situations: 1) auto-injector epinephrine to persons suffering from an anaphylactic reaction as a result of a food allergy, insect sting, etc.; and 2) glucagon to diabetic students suffering from severe hypoglycemia. See Ed. Code Sections 49414; 49414.5.

Further, prior legislation already provided that a non-licensed school employee may be trained and supervised to assist in providing specialized physical health care services to students with exceptional needs, but only in limited circumstances: when the services are routine for the student, pose little potential harm, are performed with predictable outcomes, and do not require a nursing assessment, interpretation, or decision-making. Ed. Code Section 49423.5(a)(2); see also 5 C.C.R. Section 3051.12(b)(1)8.