

K.C. Settlement Agreement & Legal Advisory

This settlement agreement and legal advisory spell out the legal responsibilities of a school district when a student requires administration of insulin during the school day.

[Acuerdo Conciliatorio de K.C. y Asesoría Legal \(Español\)](#) (Revised 21-Nov-2013)

NOTE:

Update as of November 6, 2013

On August 12, 2013, the California Supreme Court issued a decision in *American Nurses Association v. Tom Torlakson*, 57 Cal.4th 570 (2013). In its decision, the Court stated that the "California law does permit trained, unlicensed school personnel to administer prescription medications, including insulin, in accordance with written statements of individual students' treating physicians, with parental consent (Ed. Code §§ 49423, 49423.6; tit. 5 §§ 600-611.)..." Id. at 591. The California Supreme Court's decision may be found in [American Nurses Association v. Torlakson 57 Cal. 4th 570](#) (PDF). The Supreme Court remanded the case back to the Court of Appeals to resolve any outstanding claims. Once the case is complete, CDE will review whether the Legal Advisory needs to be revised to comply with the courts' orders.

On December 26, 2008, the Sacramento County Superior Court held that the portions of the Legal Advisory stating that trained unlicensed school personnel may administer insulin in the absence of a licensed nurse violate state law. The case was heard by the Court of Appeals, which upheld the trial court's decision. 110 Cal. Rptr. 3d 305 (2010). This decision was appealed by the defendants to the California Supreme Court.

EXHIBIT A

LEGAL ADVISORY ON RIGHTS OF STUDENTS WITH DIABETES IN CALIFORNIA'S K-12 PUBLIC SCHOOLS

Pursuant to the recent Settlement Agreement in *K.C. et al. v. Jack O'Connell, et al.*, Case No. C-05-4077 MMC, in the United States District Court for the Northern District of California, the California Department of Education (CDE) has agreed to remind all California school districts and charter schools of the following important legal rights involving students with diabetes who have been determined to be eligible for services under either the Individuals with Disabilities Education Act (IDEA) and related California law or Section 504 of the Rehabilitation Act of 1973 (Section 504) and related California law.

The CDE notes that this is a complex area of the law. Every effort has been made to be clear and concise in providing this advisory.

- I. [The Applicability of Two Federal Anti-Discrimination Statutes \(Section 504 and the ADA\) to those Public School Students with Diabetes Who Require Diabetes Health Related Services While Attending K-12 Schools in California](#)
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I. The Applicability of Two Federal Anti-Discrimination Statutes (Section 504 and the ADA) to those Public School Students with Diabetes Who Require Diabetes Health Related Services While Attending K-12 Schools in California

Two federal anti-discrimination statutes, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA), together establish rights for eligible students with diabetes in California's public schools. Together, they serve to protect such students from discrimination based upon their disability including the right to receive a free appropriate public education (FAPE). The two statutory schemes are treated synonymously. (*Wong v. Regents of University of California*, 192 F.3d 807, 816 n. 26.) Hence, in this Legal Advisory, Section 504 will mean both Section 504 as well as the ADA unless otherwise noted.

A. Eligibility

In general, a student will be determined to have a disability under Section 504 if he/she has a mental or physical impairment that substantially limits one or more major life activities, such as eating, breathing, caring for oneself, performing manual tasks, hearing, speaking, walking, and learning. (See 34 CFR sec. 104.4, subds. (j), (k), and (i).) Accordingly, learning is not the only major life activity that must be considered when determining eligibility under Section 504. (*Rock Hill (OH) Local Schools*, 37 IDELR 222 (OCR 2002).)

The Ninth Circuit Court of Appeals recently determined that diabetes is a "physical impairment" and then addressed whether that impairment substantially limited a major life activity under the facts of that case. (*Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003).) In finding that the plaintiff had presented evidence that she was substantially limited in eating, the court noted that the plaintiff was required to be vigilant about testing blood glucose levels and adjusting food intake, insulin and physical activity accordingly. *Id.* at 1040-1041.

Fluctuations in blood glucose levels can impact concentration and comprehension, as well as have significant and potentially life-threatening short and long term health implications. See [Helping the Student with Diabetes Succeed - A Guide for School Personnel](#) , U.S. Department of Health and Human Services (2003).

To avoid these fluctuations in blood glucose levels, students with diabetes must be vigilant about balancing food consumption, exercise, and administration of medication. For these reasons, the Office for Civil Rights of the United States Department of Education (OCR) has found that students with diabetes to be "disabled" under Section 504. (See *Bement (IL) Community Unit School District #5*, 14 EHLR 353:383 (OCR 1989) (holding that a student with diabetes is disabled under Section 504 when she required close monitoring of her diet, behavior, and activities at all times in order for her to be able to attend school); *Irvine (CA) Unified Sch. Dist.*, 19 IDELR 883, 884 (OCR 1 993) (determining that the student with type 1 diabetes was a "disabled person" as defined by the regulation implementing Section 504).

B. 504 Plans

Once a local education agency (LEA) determines that a student is entitled to Section 504 protections, this includes the provision of a free appropriate public education. (34 CFR sec. 104.35.) Services, and accommodations are determined through the 504 planning process, and documented in a 504 plan. (*Henderson County (NC) Pub. Schs.*, 34 IDELR 43, 44 (OCR 2000) (voluntary resolution agreement reached to develop Section 504 plan providing for a broad range of diabetes-related aids and services, including training staff to monitor blood glucose, count carbohydrates, manage student's insulin pump, and establish procedures for the provision of appropriate emergency services); *Prince George's County (MD) Schools*, 39 IDELR 103, 104 (OCR 2003) (district required to develop a Section 504 Plan tailored to the individual needs of a student with type 1 diabetes).

Academic modifications may be necessary whether or not the major life activity of "learning" is affected. A student with diabetes may need to have his/her curriculum adapted in a variety of ways such as changes in physical education instruction, in the regular school day schedule (such as breaks required to test for and treat abnormal blood sugar levels), in additional breaks or other time modifications during tests, and in the regular schedule for eating, drinking and toileting. These accommodations should be documented in the 504 plan. Decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered, usually are based on the treating physician's written orders. (See Cal. *Ed. Code* section 49423.) In rare circumstances, the 504 team will question the doctor's treatment plan as being outside standards of care and will seek a second opinion at school district expense. (See section of this advisory discussing IDEA entitled *Related Services as Including Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI* below.)

C. Individualized Inquiries Required; Blanket Policies Prohibited

An LEA may not have a blanket policy or general practice that insulin or glucagon administration, or other diabetes-related health care services, will only be provided by district personnel at one school in the district or will always require removal from the classroom in order to receive diabetes related health care services. For example, in *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1 205, 1212 (9th Cir. 2004), the Ninth Circuit Court of Appeals noted that OCR has repeatedly held that blanket policies that preclude individual evaluation of a particular child's educational and health related services needs violate Section 504. (See also *Conejo Valley (CA) Unified Sch. Dist.*, 20 IDELR (LRP) 1276, 1280 (OCR 1993) (district violated Section 504 by failing to perform an evaluation that was individualized by proposing changes in placement based upon a generalized district policy regarding who could perform injections without regard to student's individual education needs); *Irvine (CA) Unified Sch. Dist.*, 23 IDELR 1144, 1146 (OCR 1995) (district's "unwritten policy" prohibiting blood glucose testing in classroom violated 34 CFR sec. 104.35(c)(3) requiring that a team of persons give careful consideration to all of the information available and makes determinations based upon the individual needs of the disabled student).) See further discussion below in the section of this advisory discussing IDEA entitled *Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI*.

In addition, a school or district may not require the parent or guardian to waive any rights or agree to any particular placement or related services as a condition of administering medications or assisting a student in the administration of medication at school. (*Berlin Brothersvalley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (district policy of giving school officials discretion in whether to administer needed medication and conditioning the provision of services required by Section 504 or IDEA on parents signing a waiver of liability is prohibited). See further discussion below in the section of this advisory discussing IDEA entitled *School Placement Decisions*.

D. FAPE Under Section 504

Pursuant to 34 CFR section 104.33, school districts must provide a free appropriate public education (FAPE) to all students with disabilities in public elementary and secondary schools. Under Section 504, "appropriate education" means "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 CFR sections 104.34, 104.35, and 104.36." (34 CFR section 104.33 (b)(emphasis added).)

The OCR has applied the FAPE obligation broadly to ensure nondiscrimination by providing individual accommodations that provide each disabled student with a FAPE. The requirement to provide FAPE under Section 504 has been applied in the context of the administration of medication in general and diabetes-based related services in particular. (See *Conejo Valley (CA) Unified Sch. Dist.*, *supra*; *Irvine (CA) Unified Sch. Dist.*, *supra*; and *Prince George's County (MD) Schools*, *supra*.) See also, Chapter 4 of [Compliance With The Americans With Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools](#) (last visited March 30, 2007) Office for Civil Rights Department of Education, United States of America (1995). Unlike the requirement to provide auxiliary aids in contexts other than FAPE ... the obligation to provide related aids and services necessary to the provision of FAPE is not subject to the limitations regarding undue financial and administrative burdens or fundamental alteration of the program." *Id.* at 73.

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II. California's Anti-Discrimination Statutes and Students with Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California

California's anti-discrimination statutes prohibit discrimination on the basis of disability under any program or activity funded directly by the State. (Cal. Gov. Code sec. 11135(a).) "Disability" means any mental or physical disability as defined by *Government Code* section 12926. (Cal. Gov. Code sec. 11135(d)(1).) "Physical disability" is defined in *Government Code* section 12926(k)(1) and (2). It affords broader coverage than Section 504 because it requires a "limitation" rather than a "substantial limitation" of a major life activity. (Cal. Gov. Code secs. 12926(k)(1)(B); 12926.1(c), (d)(2); see generally *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1022-1032.)

In addition, whether a physical disability limits a major life activity under California's statutory scheme must "be determined without regard to mitigating measures such as medications...." (Cal. Gov. Code sec. 12926(k)(1)(B)(i).) This provision has made the Supreme Court's holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999), which required consideration of such mitigating measures inapplicable under California law. Furthermore, section 1 2926(k)(2) of the *Government Code* provides that all students with diabetes who require special education or related services (i.e., health-related services) are protected by state anti-discrimination laws.

Government Code section 111 35 incorporates the rights under the ADA and thus Section 504. (See *Gov. Code* sec. 11135(b) and 42 USC sec. 1 2133; 28 CFR sec. 35.103(a)). Therefore, the discussion above regarding Section 504 and students with diabetes is applicable under the broad definitions of physical disability in California.

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III. The IDEA and Students With Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California

The primary purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” (20 USC secs. 1400(d)(1)(A), 1401 (a).) California law sets the same standard for educating individuals with exceptional needs as the reauthorized IDEA. (Cal. *Ed. Code* secs. 56000, 56363(a).)

A. Eligibility

The IDEA requires LEAs to conduct “child find” activities to ensure that children with diabetes are identified, located, and evaluated. (20 USC sec. 1412(a)(3).) Under the IDEA, a child with diabetes is evaluated for eligibility under one of the 13 categories of disability, including the disability of “other health impaired” (OHI). (20 USC sec. 1401(3)(A); 34 CFR sec. 300.8; Cal. *Ed. Code* sec. 56026; Cal. *Code Regs.*, Tit. 5, sec. 3030.) The reauthorized IDEA defines “child with a disability” in the following way:

The term “child with a disability” means a child -


- (i) with ... other health impairments and
- (ii) who, by reason thereof, needs special education and related services. (20 USC sec. 1401(3)(A).)

The term “other health impairments” (OHI) is further defined in the recently promulgated regulations as follows:

(c) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the education environment, that -

- (i) is due to chronic or acute health problems such as diabetes and
- (ii) adversely affects a child's educational performance.

Hence, an individualized education program (IEP) team can determine that a child with diabetes is eligible under the disability of OHI because high or low blood glucose levels can cause symptoms giving him/her limited strength, limited alertness, and creating chronic or acute health problems that adversely affect the student's educational performance. (See [Helping the Student with Diabetes Succeed - A Guide for School Personnel](#) , U.S. Department of Health and Human Services, 2003). Fluctuations in blood glucose levels may have an adverse effect on education in a variety of ways, including the effect on concentration, comprehension, and energy levels. It should be noted that the IEP team “must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services.” (34 CFR sec. 300.101(c).)

B. Special Education Defined

The IDEA defines “special education” as meaning “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including -

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.” (20 USC section 1401 (29).)

“Specially designed instruction” means “adapting, as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery or instruction (i) to address the unique needs of the child that result from the child's disability and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” (34 CFR sec. 300.39(b)(3).)

For example, an IEP team could determine that a child who meets the criteria for eligibility under the category of OHI based upon chronic or acute health problems arising from diabetes would need to have his/her curriculum adapted in ways such as changes in the physical education instruction, in the regular school day schedule (such as various breaks required by abnormal blood sugar levels involving medical treatment), in allowed time for taking tests, in the regular schedule for eating, drinking and toileting, in assignment due dates, and in various other academic adaptations.

C. Individualized Education Program

Determinations about eligibility, special education and related services under the IDEA and relevant state statutes are made generally by the child's Individualized Education Program (IEP) team. (See generally Cal. *Ed. Code* secs. 56340-56347.) Such determinations are always based upon the unique needs of the individual child.

The term "individualized education program" (IEP) means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with 20 USC section 1414(d). As a part of each IEP, there must be "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child..." (20 USC sec. 1414(d)(1)(A)(i)(IV)) in school and in extracurricular and other nonacademic activities. The 2006 implementing regulations are located at 34 CFR sections 300.320 through 300.328.

D. Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI

In general, the reauthorized IDEA includes "school nurse services" as a "related service." (20 USC sec. 1401 (26).) The statutory definition was expanded in the regulations to include school health services. (34 CFR sec. 300.34.) California's definition of designated instruction and services/related services is located in *Education Code* section 56363 and is synonymous with related services in the reauthorized IDEA in 20 USC section 1401 (26). California's designated instruction services thus do not deviate from the federal related services.

If a child needs both special education and health services, then, as determined by the child's IEP team, school nurse/health services should be made available to a child with the eligible disability of OHI as documented in the student's IEP. Services related to an OHI-eligible child's diabetes health care needs at school, including those involving the management and administration of insulin, are covered under the IDEA as nursing and health services rather than excluded from coverage as medical services requiring a physician to provide them. (See *Clovis Unified School Dist. v. Office of Administrative Hearings*, 903 F.3d 635, 641-643 (9th cir. 1990) discussing and applying *Irving Independent School District v. Tatro*, 468 u.s. 883 (1984).)

In California, by statute both a written statement from the child's physician as well as a written statement from the child's parent are required before either a school nurse or other designated school personnel may assist the child with the administration of medication. (Cal. *Ed. Code* sec. 49423.) Hence, decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered usually are based on the treating physician's written orders. (See Cal. *Ed. Code* sec. 49423.) In rare circumstances the IEP team will question the doctor's treatment plan as being outside the standard of care and then request clarification from the treating physician or a second opinion with the consent of the parent, at the district's expense. (See 34 CFR sec. 300.300; *Shelby S. ex rel. Kathleen T. v. Conroe Independent School Dist.*, 454 F.3d 450, 454-455 (5th Cir. 2006) (school district authorized to compel medical examination over parent objection and necessity demonstrated).) In addition, the IEP team is responsible for determining educational modifications. (See, *Special Education Defined*, above).

E. Individualized Inquiries Required; Blanket Policies Prohibited

As with Section 504 determinations discussed above in Part I.C., decisions by IEP teams must be based upon individualized inquiries. The IDEA and its implementing regulations are premised upon the fact that each child is "unique" (20 USC sec. 1400(d)(1)(A)) and must receive an "individualized education program" (20 USC sec. 1401(14); see generally *Porter v. Board of Trustees of Manhattan Beach Unified School Dist.*, 307 F.3d 1064, 1066 (9th Cir. 2002) quoting *Bd. of Educ. v. Rowley*, 458 U.S. 176, 188-189 (1982) ("right to public education for students with disabilities 'consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction'.) As a consequence, decisions about a specific child's eligibility for services under the IDEA must not be based upon the generalized or "blanket" policies of a local education agency rather than the unique needs of the individual child. (See Part I.C., supra.) Therefore, policies that restrict the availability of health related services across-the-board would be out of compliance with the mandate to individualize decisions about special education and related services needs.

F. School Placement Decisions

School placement decisions may not be based upon the unwillingness of a district to provide needed related services to a child with OHI-diabetes disability at the school that the child would otherwise attend. A district may not require the parent to waive any rights, hold the district harmless, or agree to any particular placement or related services as a condition of administering medication or assisting a student in the administration of medication at school. (See Comment to IDEA regulations at p. 46587 (federal register) involving 34 CFR sec. 300.116(c): "Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled Public agencies must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff," see also *Berlin Brothers Valley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (blanket waiver of liability as condition to provision of medical services prohibited). For example, a district may not have a blanket policy or general practice that insulin or glucagon administration or other diabetes-related health care service are only going to be provided by district personnel at one school in the district, or that a child will always need to be removed from the classroom in order to receive diabetes related health care services. An IEP developed in the legally-required manner, which takes into account all of the relevant medical and education factors under the IDEA for each disabled child, is the only way to ensure that such a student receives an individualized determination of what constitutes FAPE under the IDEA and relevant state statutes.

G. Administrative Procedures; Financial Burden Not a Defense

A parent of a child with the disability of OHI or an organization can file an administrative complaint with the CDE alleging that a school district is violating the IDEA or relevant state statutes by failing to identify, evaluate, or provide a FAPE to a student with diabetes or a group of students with diabetes, including challenging a district policy or practice that restricts the provision of related health services to students eligible for such services under the IDEA. (34 CFR secs. 300.151-300.153; Calif. *Code Regs.*, Tit. 5, secs. 4600-4671.)

In the alternative, a parent who disagrees with the IEP decision regarding identification, evaluation, or the provision of FAPE and related services can file for an impartial due process hearing with the Office of Administrative Hearings. (20 USC sec. 1415 (e)-(i).) An OAH judge can order that the applicable required related school health services be provided by the district, including the administration of insulin during the school day. (20 USC sec. 1415(f)(3)(E).) Financial burden is not a valid defense available to the LEA under the *Garret F. case*. (*Cedar Rapids v. Garret F.*, 526 U.S. 66, 75, fn. 6, 78-79 (1999) (district required to fund related school health services under 34 CFR sec. 300.13(a) where necessary in order to provide student with meaningful access to public school).)

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IV. Who May Administer Insulin in California to Students with Diabetes As a Related Service Under Section 504 and the IDEA

A. California Law

It is the position of the CDE that the *Business and Professions Code* section 2725(b)(2) and the California *Code of Regulations*, Title 5, section 604 authorize the following types of persons to administer insulin in California's public schools pursuant to a Section 504 Plan or an IEP:

1. self administration, with authorization of the student's licensed health care provide and parent/guardian;¹
2. school nurse or school physician employed by the LEA;
3. appropriately licensed school employee (i.e., a registered nurse or a licensed vocational nurse) who is supervised by a school physician, school nurse, or other appropriate individual;
4. contracted registered nurse or licensed vocational nurse from a private agency or registry, or by contract with a public health nurse employed by the local county health department;
5. parent/guardian who so elects;
6. parent/guardian designee, if parent(/guardian so elects, who shall be a volunteer who is not an employee of the LEA;
and
7. unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727(d) of the *Business and Professions Code* (epidemics or public disasters).²

B. Federal Law

As noted above in Parts I and III, federal law under Section 504 and the IDEA provides that the administration of insulin can be determined to be a related service that must be provided to a student pursuant to a Section 504 Plan or an IEP in order to ensure FAPE. CDE has recognized in the regulations which implement *Education Code* section 49423 regarding the administration of medication to students during the school day that they did not affect "in any way" either the content or implementation of a student's Section 504 Plan or IEP. (Calif. *Code Regs.*, Tit. 5, section 610(d).) Further, CDE's [Program Advisory on Medication Administration](#) (PDF) (required by Section 611 of the regulations) recognized that students' rights under Section 504 and the IDEA are distinct from state legal requirements.

C. Reconciliation of State and Federal Law

The difficult issue in this area is reconciling state and federal requirements. Clearly the first set of personnel who are authorized to administer insulin pursuant to a Section 504 Plan or an IEP are those persons who are expressly so authorized under California law, as set forth in Part IV.A, supra. The question is what should occur when no expressly authorized school personnel are available.

In CDE's view, the list cannot be taken as exhaustive because LEAs must also meet federal requirements - even if the personnel expressly authorized by California are not available. In practical terms, this means that the methodology followed by some LEAs of training unlicensed school employees to administer insulin during the school day to a student whose Section 504 Plan or IEP so requires it is a valid practice pursuant to federal law. If the LEA determines that insulin administration by the types of persons listed in categories 2-4 are not available or feasible, then unlicensed school employees with appropriate training would be authorized under federal law to administer insulin in accordance with the student's Section 504 Plan or IEP. What is not valid is for an LEA to adopt a general policy or practice that a Section 504 Plan or IEP need not be developed or followed because the LEA is not able to comply with the student's federal rights based upon the express provisions of state law.

When federal and state laws are reconciled, it is clear that it is unlawful for an LEA to have a general practice or policy that asserts that it need not comply with the IDEA or Section 504 rights of a student to have insulin administered at school simply because a licensed professional is unavailable. In such situations, federal rights take precedence over strict adherence to state law so that the educational and health needs of the student protected by the Section 504 Plan or IEP are met.

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V. Monitoring and Compliance by CDE

A. IDEA

Under the IDEA, the CDE monitors compliance with federal and state special education statutes and regulations with its Quality Assurance Process (QAP). That process is characterized by the gathering and evaluating of data in order to identify districts and areas within districts to aid in the inquiry, evaluation, and review of compliance issues. This enables the LEA and the CDE to develop corrective action plans, program improvement goals, and provide technical assistance to improve services to special education students throughout California.

Pursuant to the K.C. Settlement Agreement, the CDE has agreed to modify its QAP monitoring instruments and process to include special evaluation items related to students with the disability of OHI with chronic or acute health problems arising from diabetes.

The CDE also assures compliance under the IDEA by maintaining an administrative complaints system as required by federal regulation. (See 34 CFR sections 300.151-300.153.) Under 34 CFR section 300.153(a), a complainant can be either an organization or an individual who files a signed written complaint alleging any violation concerning identification, evaluation, placement, or the provision of a FAPE in the least restrictive environment including the provision related services. For example, a complaint may allege policies and/or practices that violated the child's right to receive an individualized assessment or eligibility and/or the provision of diabetes related health care services pursuant to the IEP process and/or any dispute arising out of the IEP process.

The required elements of a complaint are set forth in 34 CFR section 300.153(b). Of particular note is the requirement that a complaint alleging child-specific issues must contain the name and address of the residence of the child (34 CFR sec. 300.153(b)(4)(a).) Complaints of a systemic nature under the IDEA do not need to identify the individual student by name, although they still must provide facts of the alleged violation that are sufficient for the CDE or the district to conduct an effective investigation, and they must be signed.

B. Section 504/State Statutes



As required by the Uniform Complaints Procedure, CDE's Office of Equal Opportunity will continue to accept and investigate complaints pursuant to Section 504 and *Government Code* section 111 35 which are filed by an organization or a student with a disability that alleges individual or systemic discrimination arising from an alleged non-compliant policy or practice or the failure to provide diabetes-related health services, reasonable accommodations or modifications to the student's educational program. (See Chapter 5.1, the Uniform Complaint Procedures (Sections 4600-4670) and Chapter 5.3, involving Nondiscrimination and Educational Equity, Sections 4900-4965.)

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VI. Impartial Due Process Hearings

Parents who disagree with a school district's decisions regarding their child's eligibility and/or placement under the IDEA also have a federal right to request a due process mediation and/or hearing. (20 USC sec. 1415.) Procedural rights to an impartial hearing provided by the local district if a parent disagrees with a Section 504 team decision are also required by federal law. (34 CFR sec. 04.36.)

VII. Resources

CDE recommends that local education agencies and special education local plan areas (SELPA) use the following documents as guidelines for compliance: [Program Advisory on Medication Administration](#) (PDF) (California State Board of Education, 2005); [Sample Section 504 Plan and Diabetes Medical Management Plan](#) , and [Helping the Student with Diabetes Succeed - A Guide for School Personnel](#)  (U.S. Department of Health and Human Services, 2003).

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Checklist: Who May Administer Insulin in California's Schools Pursuant to An IEP or a Section 504 Plan

Business and Professions Code section 2725(b)(2) and the *California Code of Regulations*, Title 5, section 604 authorize the following types of persons to administer insulin in California's public schools pursuant to a Section 504 Plan or an IEP:


1. self administration, with authorization of the student's licensed health care provide and parent/guardian;
2. school nurse or school physician employed by the LEA;
3. appropriately licensed school employee (i.e., a registered nurse or a licensed vocational nurse) who is supervised by a school physician, school nurse, or other appropriate individual;
4. contracted registered nurse or licensed vocational nurse from a private agency or registry, or by contract with a public health nurse employed by the local county health department;
5. parent/guardian who so elect;
6. parent/guardian designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of the LEA; and
7. unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727(d) of the *Business and Professions Code* (epidemics or public disasters).³

When no expressly authorized person is available under categories 2-4, supra, federal law - the Section 504 Plan or the IEP - must still be honored and implemented. Thus, a category #8 is available under 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.

¹ Unlicensed school personnel are authorized under state law to assist students as needed with insulin self-administration. Cal. *Ed. Code* sec. 49423 provides that unlicensed school personnel may assist with medication administration.

² In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled "Diabetes Care Tasks At School: What Key Personnel Need to know: Insulin Administration" (Attachment A). Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

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I. The Applicability of Two Federal Anti-Discrimination Statutes (Section 504 and the ADA) to those Public School Students with Diabetes Who Require Diabetes Health Related Services While Attending K-12 Schools in California

Two federal anti-discrimination statutes, Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990 (ADA), together establish rights for eligible students with diabetes in California's public schools. Together, they serve to protect such students from discrimination based upon their disability including the right to receive a free appropriate public education (FAPE). The two statutory schemes are treated synonymously. (*Wong v. Regents of University of California*, 192 F.3d 807, 816 n. 26.) Hence, in this Legal Advisory, Section 504 will mean both Section 504 as well as the ADA unless otherwise noted.

A. Eligibility

In general, a student will be determined to have a disability under Section 504 if he/she has a mental or physical impairment that substantially limits one or more major life activities, such as eating, breathing, caring for oneself, performing manual tasks, hearing, speaking, walking, and learning. (See 34 CFR sec. 104.4, subds. (j), (k), and (i).) Accordingly, learning is not the only major life activity that must be considered when determining eligibility under Section 504. (*Rock Hill (OH) Local Schools*, 37 IDELR 222 (OCR 2002).)

The Ninth Circuit Court of Appeals recently determined that diabetes is a "physical impairment" and then addressed whether that impairment substantially limited a major life activity under the facts of that case. (*Fraser v. Goodale*, 342 F.3d 1032 (9th Cir. 2003).) In finding that the plaintiff had presented evidence that she was substantially limited in eating, the court noted that the plaintiff was required to be vigilant about testing blood glucose levels and adjusting food intake, insulin and physical activity accordingly. *Id.* at 1040-1041.

Fluctuations in blood glucose levels can impact concentration and comprehension, as well as have significant and potentially life-threatening short and long term health implications. See [Helping the Student with Diabetes Succeed - A Guide for School Personnel](#) , U.S. Department of Health and Human Services (2003).

To avoid these fluctuations in blood glucose levels, students with diabetes must be vigilant about balancing food consumption, exercise, and administration of medication. For these reasons, the Office for Civil Rights of the United States Department of Education (OCR) has found that students with diabetes to be "disabled" under Section 504. (See *Bement (IL) Community Unit School District #5*, 14 EHLR 353:383 (OCR 1989) (holding that a student with diabetes is disabled under Section 504 when she required close monitoring of her diet, behavior, and activities at all times in order for her to be able to attend school); *Irvine (CA) Unified Sch. Dist.*, 19 IDELR 883, 884 (OCR 1 993) (determining that the student with type 1 diabetes was a "disabled person" as defined by the regulation implementing Section 504).

B. 504 Plans

Once a local education agency (LEA) determines that a student is entitled to Section 504 protections, this includes the provision of a free appropriate public education. (34 CFR sec. 104.35.) Services, and accommodations are determined through the 504 planning process, and documented in a 504 plan. (*Henderson County (NC) Pub. Schs.*, 34 IDELR 43, 44 (OCR 2000) (voluntary resolution agreement reached to develop Section 504 plan providing for a broad range of diabetes-related aids and services, including training staff to monitor blood glucose, count carbohydrates, manage student's insulin pump, and establish procedures for the provision of appropriate emergency services); *Prince George's County (MD) Schools*, 39 IDELR 103, 104 (OCR 2003) (district required to develop a Section 504 Plan tailored to the individual needs of a student with type 1 diabetes).

Academic modifications may be necessary whether or not the major life activity of "learning" is affected. A student with diabetes may need to have his/her curriculum adapted in a variety of ways such as changes in physical education instruction, in the regular school day schedule (such as breaks required to test for and treat abnormal blood sugar levels), in additional breaks or other time modifications during tests, and in the regular schedule for eating, drinking and toileting. These accommodations should be documented in the 504 plan. Decisions about what health care services a student will receive, including treatment while at school, such as the timing and dosage of insulin to be administered, usually are based on the treating physician's written orders. (See Cal. *Ed. Code* section 49423.) In rare circumstances, the 504 team will question the doctor's treatment plan as being outside standards of care and will seek a second opinion at school district expense. (See section of this advisory discussing IDEA entitled *Related Services as Including Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI* below.)

C. Individualized Inquiries Required; Blanket Policies Prohibited

An LEA may not have a blanket policy or general practice that insulin or glucagon administration, or other diabetes-related health care services, will only be provided by district personnel at one school in the district or will always require removal from the classroom in order to receive diabetes related health care services. For example, in *Christopher S. v. Stanislaus County Office of Educ.*, 384 F.3d 1 205, 1212 (9th Cir. 2004), the Ninth Circuit Court of Appeals noted that OCR has repeatedly held that blanket policies that preclude individual evaluation of a particular child's educational and health related services needs violate Section 504. (See also *Conejo Valley (CA) Unified Sch. Dist.*, 20 IDELR (LRP) 1276, 1280 (OCR 1993) (district violated Section 504 by failing to perform an evaluation that was individualized by proposing changes in placement based upon a generalized district policy regarding who could perform injections without regard to student's individual education needs); *Irvine (CA) Unified Sch. Dist.*, 23 IDELR 1144, 1146 (OCR 1995) (district's "unwritten policy" prohibiting blood glucose testing in classroom violated 34 CFR sec. 104.35(c)(3) requiring that a team of persons give careful consideration to all of the information available and makes determinations based upon the individual needs of the disabled student).) See further discussion below in the section of this advisory discussing IDEA entitled *Related Services May Include Management/Administration of Insulin and Other Diabetes Care Tasks for Children With the Disability of OHI*.

In addition, a school or district may not require the parent or guardian to waive any rights or agree to any particular placement or related services as a condition of administering medications or assisting a student in the administration of medication at school. (*Berlin Brothersvalley (PA.) School Dist.*, EHLR 353:124 (OCR 1988) (district policy of giving school officials discretion in whether to administer needed medication and conditioning the provision of services required by Section 504 or IDEA on parents signing a waiver of liability is prohibited). See further discussion below in the section of this advisory discussing IDEA entitled *School Placement Decisions*.

D. FAPE Under Section 504

Pursuant to 34 CFR section 104.33, school districts must provide a free appropriate public education (FAPE) to all students with disabilities in public elementary and secondary schools. Under Section 504, "appropriate education" means "the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 34 CFR sections 104.34, 104.35, and 104.36." (34 CFR section 104.33 (b)(emphasis added).)

The OCR has applied the FAPE obligation broadly to ensure nondiscrimination by providing individual accommodations that provide each disabled student with a FAPE. The requirement to provide FAPE under Section 504 has been applied in the context of the administration of medication in general and diabetes-based related services in particular. (See *Conejo Valley (CA) Unified Sch. Dist.*, *supra*; *Irvine (CA) Unified Sch. Dist.*, *supra*; and *Prince George's County (MD) Schools*, *supra*.) See also, Chapter 4 of [Compliance With The Americans With Disabilities Act: A Self-Evaluation Guide for Public Elementary and Secondary Schools](#) (last visited March 30, 2007) Office for Civil Rights Department of Education, United States of America (1995). Unlike the requirement to provide auxiliary aids in contexts other than FAPE ... the obligation to provide related aids and services necessary to the provision of FAPE is not subject to the limitations regarding undue financial and administrative burdens or fundamental alteration of the program." *Id.* at 73.

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II. California's Anti-Discrimination Statutes and Students with Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California

California's anti-discrimination statutes prohibit discrimination on the basis of disability under any program or activity funded directly by the State. (Cal. Gov. Code sec. 11135(a).) "Disability" means any mental or physical disability as defined by *Government Code* section 12926. (Cal. Gov. Code sec. 11135(d)(1).) "Physical disability" is defined in *Government Code* section 12926(k)(1) and (2). It affords broader coverage than Section 504 because it requires a "limitation" rather than a "substantial limitation" of a major life activity. (Cal. Gov. Code secs. 12926(k)(1)(B); 12926.1(c), (d)(2); see generally *Colmenares v. Braemar Country Club, Inc.* (2003) 29 Cal.4th 1019, 1022-1032.)

In addition, whether a physical disability limits a major life activity under California's statutory scheme must "be determined without regard to mitigating measures such as medications...." (Cal. Gov. Code sec. 12926(k)(1)(B)(i).) This provision has made the Supreme Court's holding in *Sutton v. United Airlines*, 527 U.S. 471 (1999), which required consideration of such mitigating measures inapplicable under California law. Furthermore, section 1 2926(k)(2) of the *Government Code* provides that all students with diabetes who require special education or related services (i.e., health-related services) are protected by state anti-discrimination laws.

Government Code section 111 35 incorporates the rights under the ADA and thus Section 504. (See *Gov. Code* sec. 11135(b) and 42 USC sec. 1 2133; 28 CFR sec. 35.103(a)). Therefore, the discussion above regarding Section 504 and students with diabetes is applicable under the broad definitions of physical disability in California.

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III. The IDEA and Students With Diabetes Who Require Diabetes Health Related Services During the Day In Order to Safely Attend K-12 Schools in California

The primary purpose of the IDEA is “to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.” (20 USC secs. 1400(d)(1)(A), 1401 (a).) California law sets the same standard for educating individuals with exceptional needs as the reauthorized IDEA. (Cal. *Ed. Code* secs. 56000, 56363(a).)

A. Eligibility

The IDEA requires LEAs to conduct “child find” activities to ensure that children with diabetes are identified, located, and evaluated. (20 USC sec. 1412(a)(3).) Under the IDEA, a child with diabetes is evaluated for eligibility under one of the 13 categories of disability, including the disability of “other health impaired” (OHI). (20 USC sec. 1401(3)(A); 34 CFR sec. 300.8; Cal. *Ed. Code* sec. 56026; Cal. *Code Regs.*, Tit. 5, sec. 3030.) The reauthorized IDEA defines “child with a disability” in the following way:


The term “child with a disability” means a child -

- (i) with ... other health impairments and
- (ii) who, by reason thereof, needs special education and related services. (20 USC sec. 1401(3)(A).)

The term “other health impairments” (OHI) is further defined in the recently promulgated regulations as follows:
(c) Definitions of disability terms. The terms used in this definition of a child with a disability are defined as follows:

(9) Other health impairment means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the education environment, that -

- (i) is due to chronic or acute health problems such as diabetes and
- (ii) adversely affects a child's educational performance.

Hence, an individualized education program (IEP) team can determine that a child with diabetes is eligible under the disability of OHI because high or low blood glucose levels can cause symptoms giving him/her limited strength, limited alertness, and creating chronic or acute health problems that adversely affect the student's educational performance. (See [Helping the Student with Diabetes Succeed - A Guide for School Personnel](#) , U.S. Department of Health and Human Services, 2003). Fluctuations in blood glucose levels may have an adverse effect on education in a variety of ways, including the effect on concentration, comprehension, and energy levels. It should be noted that the IEP team “must make an individual determination as to whether, notwithstanding the child's progress in a course or grade, he or she needs or continues to need special education and related services.” (34 CFR sec. 300.101(c).)

B. Special Education Defined

The IDEA defines “special education” as meaning “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including -

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.” (20 USC section 1401 (29).)

“Specially designed instruction” means “adapting, as appropriate to the needs of the eligible child under this part, the content, methodology, or delivery or instruction (i) to address the unique needs of the child that result from the child's disability and (ii) to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.” (34 CFR sec. 300.39(b)(3).)

For example, an IEP team could determine that a child who meets the criteria for eligibility under the category of OHI based upon chronic or acute health problems arising from diabetes would need to have his/her curriculum adapted in ways such as changes in the physical education instruction, in the regular school day schedule (such as various breaks required by abnormal blood sugar levels involving medical treatment), in allowed time for taking tests, in the regular schedule for eating, drinking and toileting, in assignment due dates, and in various other academic adaptations.

C. Individualized Education Program

Determinations about eligibility, special education and related services under the IDEA and relevant state statutes are made generally by the child's Individualized Education Program (IEP) team. (See generally Cal. *Ed. Code* secs. 56340-56347.) Such determinations are always based upon the unique needs of the individual child.

When federal and state laws are reconciled, it is clear that it is unlawful for an LEA to have a general practice or policy that asserts that it need not comply with the IDEA or Section 504 rights of a student to have insulin administered at school simply because a licensed professional is unavailable. In such situations, federal rights take precedence over strict adherence to state law so that the educational and health needs of the student protected by the Section 504 Plan or IEP are met.

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V. Monitoring and Compliance by CDE

A. IDEA

Under the IDEA, the CDE monitors compliance with federal and state special education statutes and regulations with its Quality Assurance Process (QAP). That process is characterized by the gathering and evaluating of data in order to identify districts and areas within districts to aid in the inquiry, evaluation, and review of compliance issues. This enables the LEA and the CDE to develop corrective action plans, program improvement goals, and provide technical assistance to improve services to special education students throughout California.

Pursuant to the *K.C. Settlement Agreement*, the CDE has agreed to modify its QAP monitoring instruments and process to include special evaluation items related to students with the disability of OHI with chronic or acute health problems arising from diabetes.

The CDE also assures compliance under the IDEA by maintaining an administrative complaints system as required by federal regulation. (See 34 CFR sections 300.151-300.153.) Under 34 CFR section 300.153(a), a complainant can be either an organization or an individual who files a signed written complaint alleging any violation concerning identification, evaluation, placement, or the provision of a FAPE in the least restrictive environment including the provision related services. For example, a complaint may allege policies and/or practices that violated the child's right to receive an individualized assessment or eligibility and/or the provision of diabetes related health care services pursuant to the IEP process and/or any dispute arising out of the IEP process.

The required elements of a complaint are set forth in 34 CFR section 300.153(b). Of particular note is the requirement that a complaint alleging child-specific issues must contain the name and address of the residence of the child (34 CFR sec. 300.153(b)(4)(a).) Complaints of a systemic nature under the IDEA do not need to identify the individual student by name, although they still must provide facts of the alleged violation that are sufficient for the CDE or the district to conduct an effective investigation, and they must be signed.

B. Section 504/State Statutes



As required by the Uniform Complaints Procedure, CDE's Office of Equal Opportunity will continue to accept and investigate complaints pursuant to Section 504 and *Government Code* section 111 35 which are filed by an organization or a student with a disability that alleges individual or systemic discrimination arising from an alleged non-compliant policy or practice or the failure to provide diabetes-related health services, reasonable accommodations or modifications to the student's educational program. (See Chapter 5.1, the Uniform Complaint Procedures (Sections 4600-4670) and Chapter 5.3, involving Nondiscrimination and Educational Equity, Sections 4900-4965.)

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VI. Impartial Due Process Hearings

Parents who disagree with a school district's decisions regarding their child's eligibility and/or placement under the IDEA also have a federal right to request a due process mediation and/or hearing. (20 USC sec. 1415.) Procedural rights to an impartial hearing provided by the local district if a parent disagrees with a Section 504 team decision are also required by federal law. (34 CFR sec. 04.36.)

VII. Resources

CDE recommends that local education agencies and special education local plan areas (SELPA) use the following documents as guidelines for compliance: [Program Advisory on Medication Administration](#) (PDF) (California State Board of Education, 2005); [Sample Section 504 Plan and Diabetes Medical Management Plan](#) , and [Helping the Student with Diabetes Succeed - A Guide for School Personnel](#)  (U.S. Department of Health and Human Services, 2003).

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Checklist: Who May Administer Insulin in California's Schools Pursuant to An IEP or a Section 504 Plan

Business and Professions Code section 2725(b)(2) and the *California Code of Regulations*, Title 5, section 604 authorize the following types of persons to administer insulin in California's public schools pursuant to a Section 504 Plan or an IEP:


1. self administration, with authorization of the student's licensed health care provide and parent/guardian;
2. school nurse or school physician employed by the LEA;
3. appropriately licensed school employee (i.e., a registered nurse or a licensed vocational nurse) who is supervised by a school physician, school nurse, or other appropriate individual;
4. contracted registered nurse or licensed vocational nurse from a private agency or registry, or by contract with a public health nurse employed by the local county health department;
5. parent/guardian who so elect;
6. parent/guardian designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of the LEA; and
7. unlicensed voluntary school employee with appropriate training, but only in emergencies as defined by Section 2727(d) of the *Business and Professions Code* (epidemics or public disasters).³

When no expressly authorized person is available under categories 2-4, supra, federal law - the Section 504 Plan or the IEP - must still be honored and implemented. Thus, a category #8 is available under 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.

¹ Unlicensed school personnel are authorized under state law to assist students as needed with insulin self-administration. Cal. *Ed. Code* sec. 49423 provides that unlicensed school personnel may assist with medication administration.

² In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled "Diabetes Care Tasks At School: What Key Personnel Need to know: Insulin Administration" (Attachment A). Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

³ In such emergency cases, an unlicensed voluntary school employee should have been trained to at least the standards specified by the American Diabetes Association's training slides entitled [Diabetes Care Tasks At School: What Key Personnel Need to Know](#) . Such a voluntary school employee should be regularly, and at least quarterly, supervised by a school nurse, physician, or other appropriate individual under contract with the LEA, providing the training, and with emergency communication access to the same school nurse or physician. Documentation of training, ongoing supervision, and annual written verification of competency are strongly recommended, and such documentation should be annually submitted to the LEA employing the unlicensed person by the school nurse or physician.

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