

**Diastat Administration in Schools  
Summary of Relevant Federal Laws and Selected Cases**

Background on Medication in School and Day Care

Schools and day care facilities all too often refuse to permit their staff to administer a FDA-approved emergency medication, Diastat, to treat children who have prolonged seizures accompanied by loss of consciousness. Instead, schools and day care facilities will frequently call 911 to transport the child to an emergency room for treatment, even if this practice is contrary to the care plan established by the child's neurologist. Delay in administering Diastat for the time it takes emergency personnel to arrive could result in neurological damage or other serious health consequences.

In public schools, administrators frequently assert this practice is justified because their schools lack personnel with necessary expertise, or they may assert that state laws permit only RNs (who may not be immediately available at the school) to administer this medication. And in the case of day care programs, it is argued that such health services are beyond their capacity or design, and therefore are not required. However, these arguments are unjustified because Diastat may be appropriately administered by non-medical personnel.

Courts and hearing officers have ruled that schools and day care facilities are indeed required to ensure that Diastat, and similar medications such as for treatment of diabetes, are administered to comply with the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act and ADA. These laws require school and day care administrators to ensure that health services and accommodations are provided for children with epilepsy and other disabilities. The Foundation's position statement on these matters is available at

<http://www.epilepsyfoundation.org/advocacy/care/treatments.cfm>. For general information on the legal issues, see the EpilepsyUSA article on the subject from 2003, available at <https://www.epilepsyfoundation.org/epilepsyusa/schooldiastat.cfm>.

In order to address concerns raised by school and day care administrators, Epilepsy Foundation affiliates have pursued a range of different advocacy strategies, including efforts to change the state laws that may restrict school personnel from administering this medication. For instance, last year, largely as the result of the efforts by the Kentuckiana Affiliate, the Kentucky Governor signed into law a bill that provides for the administration of Disastat (along with glucagon for diabetes treatment) in public, private and parochial schools. The statute provides that schools shall require that at least one

school employee, who has met state competency requirements (and consents to provide the medication) be on duty at each school during the entire day to administer Disastat (and glucagon) in an emergency. The law is available on the Kentucky Legislature's Web site at <http://www.lrc.ky.gov/record/05rs/HB88.htm> (click on the last link – "FCCR").

Other affiliates have been successful in promoting similar amendments to state laws, regulations and practices in this area. See the accompanying chart for information on other state laws pertaining to medication administration in school.

### Federal Laws Applicable to Public Schools

The following is a brief outline of the primary federal laws that establish rights and remedies concerning services for public school students with disabilities, including epilepsy.<sup>1</sup> For more information, please see the Foundation fact sheet on the subject, which was prepared for consumers and advocates, available at <http://epilepsyfoundation.org/answerplace/Legal/educationlaw/Education.cfm>. See also the education resources for consumers on the Defense Fund's Web site at <http://epilepsyfoundation.org/epilepsylegal/consumerresources.cfm>.

#### *Section 504*

Section 504 of the Rehabilitation Act prohibits schools that receive federal funding from discriminating against a child because of disability in academic and nonacademic activities, such as school field trips and extracurricular activities. The law also requires schools to provide a reasonable accommodation to a child who is otherwise qualified to participate in the particular activity. A reasonable accommodation is a modification in a program or policy, or an auxiliary aid that enables an individual with a disability to participate in a program.<sup>2</sup>

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<sup>1</sup> The remainder of this discussion addresses legal protections that apply in the public school context and does not address day care providers. Also, a discussion of the obligations of private schools, including parochial schools, is beyond the scope of this outline. Note, however, that parochial schools in particular present special concerns, as such schools are covered under federal law (Section 504 of the Rehabilitation Act) only to the extent they receive (directly or indirectly) federal financial assistance. We would be glad to provide more information on the legal issues relating to day care providers and private schools upon request.

<sup>2</sup> Title II of the ADA applies to public schools as well. Because Section 504 contains more specific implementing regulations than the ADA with respect to the operation of schools, the Department of Education's Office for Civil Rights (OCR), which enforces both Section 504 and Title II of the ADA, generally relies on Section 504 and its implementing regulations.

Under Section 504, schools may not deny students with disabilities the opportunity to participate in or benefit from any aid, benefit or service afforded to their peers without disabilities, even if a modification or accommodation must be provided to allow participation. Section 504 requires public schools receiving federal funds to provide a free and appropriate education to all qualified students with disabilities in their jurisdiction.<sup>3</sup> An “appropriate” education is one that provides regular or special education services and related aids designed to meet the educational needs of students with disabilities.

Section 504 may be enforced by filing a complaint with OCR. Alternatively, individuals have the option of filing litigation in federal court to enforce their rights.

## IDEA

The Individuals with Disabilities Education Act (IDEA) is a federal program under which states receive federal funds for special education services in exchange for their provision of certain special education requirements. The primary requirement is that students with disabilities receive a free appropriate public education that conforms to their individualized education program (IEP).

Unlike the ADA and Section 504, which are both anti-discrimination statutes designed to “level the playing field,” IDEA imposes affirmative obligations on states and school districts to provide services to specific classes of students. To qualify for protection under IDEA, a child must have a disability that adversely affects his or her ability to learn, and thus needs “special education” and “related services.”

“Special education” includes instruction that is specifically designed to meet the child’s unique needs that result from a disability. It can involve adapting the content, methodology or delivery of the instruction. “Related services” include “transportation and such developmental, corrective and other supportive services (including . . . medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability benefit from special education.” The IDEA regulations also include “school health services” as a related service and define “school health services” as services provided by a qualified school nurse or other qualified person.

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<sup>3</sup> At times, a school may assert that a student with a seizure disorder is not entitled to coverage under Section 504 because he or she is not “substantially limited” in a major life activity. This claim may be based on the fact that the disorder is controlled by medication. (In 1999, the Supreme Court issued a series of decisions ruling that, in determining whether a condition is substantially limiting, the effects, both negative and positive, of “mitigating measures” -- such as medication -- must be considered.) However, OCR has issued guidance clarifying that this analysis does not apply in the school context -- when permission on the part of the school is required for a student to access medication or other treatment.

As discussed in the case summaries below, the administration of Diastat may be considered to be a required “related service” under IDEA. It also may be viewed as a required reasonable accommodation under Section 504.

Disabilities covered under IDEA may include health impairments such as epilepsy, as well as traumatic brain injuries, learning disabilities, mental retardation and autism. (A child with epilepsy or another disability who does not qualify for services under IDEA may, however, qualify for services under Section 504 of the Rehabilitation Act, as discussed above.)

In enforcing rights under IDEA, an individual must exhaust state level administrative procedures. This process generally involves requesting mediation, a due process hearing (involving an impartial hearing officer who renders an opinion), or filing a complaint with the State education agency. A party dissatisfied with the final state determination may have it reviewed by filing litigation in federal court.

## **Selected Cases involving School Administration of Diastat**

### IDEA Cases

*Silsbee Independent School Dist.*, 25 IDELR 1023 (Tex. SEA 1997).

The hearing officer held that calling 911 was not an appropriate response where treatment for a seizure disorder was needed, because there was no guarantee an ambulance would arrive within any particular time frame, despite the fact that a hospital was nearby. The student in this case was a seven-year old first grader who experienced convulsive seizures, along with drop apnea. The school had a seizure protocol, which involved having school personnel turning the student, Steve, on his side, timing the seizure, contacting the school nurse and administering Diastat if his seizure and apnea lasted for three minutes or more.

Steve’s neurologists recommended to the school district that Diastat be administered only by a RN and not a LVN, and that the RN be on-call and available at all times. The neurologists had indicated that this procedure requires a RN due to potential complications, including the possibility of puncture with the needle and the perforating of the bowel when inserting the hard syringe during convulsions. (At the time this case was heard, administration of the medication involved drawing it from a glass ampule by a needle and syringe and removing the needle before inserting the syringe.) The school district requested the due process hearing to determine whether providing a RN, as opposed to a LVN, is required by IDEA as a related service and whether training of teachers and staff in seizure response is such a required service.

The hearing officer ruled that the school must ensure that a RN or other equally qualified person capable of administering the medication rectally in case of prolonged seizure is in close proximity to the student at all times during the school day. The presence of such a person on the school campus, the hearing officer concluded, is a

supportive service necessary to assist Steve in receiving a benefit from his special education. The hearing officer also clarified that maintaining a full-time RN on campus does not amount to a “medical service,” which the school district is not required to provide, as clarified under relevant Supreme Court decisions.<sup>4</sup>

The hearing officer also determined that having staff resuscitate Steve using oxygen (an AMBU bag) is a required related supportive service.

*Student v. San Francisco Unified School District*, No. 2331 (CA Special Education Hearing Office 2002)

In this case, a positive decision along the lines of that in *Silsbee* above was reached. However, unlike *Silsbee*, in this case, the school district had refused altogether to administer Diastat and would call 911 as its only response to a prolonged seizure of five minutes or more.

The school district had asserted that the possibility of respiratory complications and the need to provide respiratory intervention places the administration of Disastat outside the scope of mandatory special education services. The hearing officer found that the evidence indicated that there is no unreasonable risk of respiratory complications for this student, and that in any event, such possible complications can be effectively addressed by a trained professional aide.

The hearing officer ruled that the implementation of the protocol of the student's neurologist for the administration of Diastat by qualified District personnel is necessary to make public education meaningfully accessible to the student. It was also found that the protocol is necessary to meet the student's unique needs and afford him an educational benefit. The protocol, therefore, is a related service the District must provide. The State Hearing Officer opinion is available on-line at [http://www3.scoe.net/speced/seho/seho\\_search/sehoSearchDetails.cfm?ID=1742](http://www3.scoe.net/speced/seho/seho_search/sehoSearchDetails.cfm?ID=1742).

*Christian v. Clark County School District* (Nevada State Review Officer Opinion, 2004). In this case, a state review officer, affirming the due process hearing officer's decision, found that the school in issue was not required to provide a full-time nurse at the child's neighborhood school to administer Diastat.

A nine-year old student with a seizure disorder enrolled in a local school after spending his first two years of elementary school being home-schooled. His mother requested that either she or a school nurse be on school grounds at all times in case the child

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<sup>4</sup> There are two interpretations of this issue. One interpretation holds that if the service only can be provided by a physician, it is a medical service that the school need not provide. Another interpretation holds that if the service is too burdensome for the school, it need not provide it. The hearing officer found that, under either interpretation, maintaining a RN full-time is a required school health service.

needed Diastat; however, the school district stated that its emergency seizure management protocol (calling 911) was sufficient and that it was not required to provide the services of qualified personnel for this purpose. The district offered the option of reassigning the student to a school six miles away, where a registered nurse is present at all times.

The State Review Officer (SRO) found no indication on the student's IEP that the school district was required to allow the mother to stay at the school to administer the Diastat. Under IDEA, a school district has the discretion in choosing a provider of services; therefore, it need not grant a parent's request to be designated as such. In addition, the policy of the Nevada State Board of Nursing requires that Diastat be given by a nurse, distinguishing this case from the *San Francisco Unif. School District* case, where California law permitted administration of Diastat by either a school nurse or other qualified personnel.

The SRO went on to state that even if the student's medical needs required the presence of a nurse on school grounds at all times, the student does not have an automatic right to be educated at the neighborhood school. The court relied on *White v. Accession Parrish Sch. Bd.*, 39 IDELR Para. 182 (5<sup>th</sup> Cir. 2003) (upholding a school district's decision to provide centralized services for students with hearing impairments where only one student would utilize the service).

The mother countered that requiring her son to attend a different school would be inconvenient and potentially frightening because he would be away from his siblings; however, the SRO stated that these arguments were "in part just not true and on balance are trivial compared to meeting all of the Petitioner's education needs!"

### Nursing Practice Act Cases

*Lancaster School District Support Association v. Board of Education, Lancaster City School District*, No. 03 CVH 02 02143 (Ohio Ct. of Common Pleas March 6, 2006), *appeal pending*. In this case, a school union filed an action objecting to two of its members, educational assistants, being designated by the school board to administer Diastat to a student with epilepsy. This service was a part of the child's IEP and the union asserted that the directive to these employees to administer the medication violates the State Nurse Practice Act ("the Act"), arguing that it would amount to an unauthorized practice of nursing, in violation of the Act. The court ruled (the sole issue it addressed) that these employees' administration of Diastat would not violate the Act and is permissible.

The Act requires licensed nurses alone to administer medication (and to provide other treatment) when doing so requires specialized knowledge, judgment and skill derived from the nursing sciences. The court noted that the Act contains an exception in emergency situations. Another state law allows the school board to authorize non-

medically trained employees to administer prescribed drugs if certain conditions are met, such as a signed parental request, instructions from the prescribing physician and appropriate training for employees. The court found that the two laws together authorize a school board to establish a policy whereby an unlicensed employee can administer prescribed medication that does not require the exercise of independent nursing judgment contemplated by the Act.

The court determined that administering Diastat does not require such independent judgment, and therefore, is not a violation of the Act. Also, the court noted that administering Diastat to a child experiencing a generalized seizure constitutes a medical emergency, and therefore falls under an exception to the Act. (Here the court rejected the rather weak argument of the union that because the child is known to experience seizures, it is not an “emergency” when they do occur.)

In reaching its conclusion about the level of judgment needed to administer the medication, the court was persuaded by the testimony of an expert witness, Dr. Glauser. This witness testified that the medication can be safely administered by an individual with a grade school level of education. Dr. Glauser noted that Diastat is not associated with respiratory depression, as is intravenous administration of valium, and thus, does not require medical expertise to monitor side effects. The court found that the student’s IEP calls for emergency medical personnel to be called after medication administration, thus minimizing the responsibility of school employees to monitor the child post-administration.

The court concluded by observing that “Unfortunately, it does not appear possible for a school nurse to be present at all times in very school building. Accordingly, just as it is important for education professionals to be trained in other life preserving emergency procedures such as the Heimlich maneuver or CPR, it is important that educational professionals become adequately trained at administering this potentially life saving medication.”

### Cases Involving Diabetes Care in Schools

In the diabetes context, schools may be required to assist children in administering glucagon because failure to do so may effectively deny needed services to students with disabilities, in violation of Section 504. Glucagon is given when a child has lost consciousness due to severe hypoglycemia, and must be injected; failure to administer the medication in a timely fashion can be life threatening. The American Diabetes Association believes that a school’s decision to call “911” rather than administer a Glucagon injection unnecessarily denies treatment, and that the appropriate response is to both give the injection and call emergency services.

Although many schools take the position that glucagon may only be administered by a nurse or other health care professional, the inability to delegate these tasks does not

diminish the schools' responsibility to provide the service. In several disputes heard by the Department of Education's Office for Civil Rights, it was determined that the lack of a school nurse does not release a school from its obligation to provide required medical services for students with diabetes. See, for instance, *Prince George's (MD) County Schools*, Complaint No. 03-02-1258, 39 IDELR 103 (OCR 2003); *Hasbrouck Heights Sch. Dist.*, Complaint No. 02-01-1121 (OCR 2001).

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