

**IN THE COURT APPEALS OF FRANKLIN COUNTY, OHIO  
TENTH APPELLATE DISTRICT**

State ex rel.,  
Lancaster School Support  
Association, OEA/NEA, et al.

CASE NO. 06 AP 305

Appellants, Cross-Appellees

(REGULAR CALANDAR)

v.

On Appeal from the Franklin County  
Common Pleas Court,  
Case No. 03 CVH 02 1443

Board of Education,  
Lancaster City School District, et al.,

Appellees, Cross-Appellants

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**AMICUS BRIEF OF THE EPILEPSY FOUNDATION AND THE EPILEPSY  
FOUNDATION OF CENTRAL OHIO *INSTANTER***

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## **I. STATEMENT OF ISSUES PRESENTED FOR REVIEW**

### **PROPOSITIONS OF LAW**

1. The administration of Diastat requires no specialized knowledge, judgment or skill, and thus a school board may properly designate school employees to administer the medication.
2. A school board may properly authorize the administration of some prescription medicines pursuant to R.C. 3313.713.
3. Administration of Diastat to a child experiencing a generalized seizure constitutes a medical emergency and thus is excluded from the Nurse Practices Act under R.C. 4723.32.
4. Allowing unlicensed school personnel to administer Diastat promotes compliance with federal law ensuring equal access to educational opportunities.
5. Other states have recognized that UAPs can effectively and safely administer Diastat and similar medications in school.

## **II. STATEMENT OF INTEREST**

The Epilepsy Foundation (national office) is the sole national voluntary health organization dedicated to improving the quality of life for people with epilepsy. The Foundation was created to advance the interests of the more than 2.7 million Americans with epilepsy. With its affiliates throughout the nation, including the Epilepsy Foundation of Central Ohio, the Foundation maintains and disseminates information about epilepsy and seizures; promotes public understanding of the disorder; and supports research, professional awareness and advocacy on behalf of people with seizures. The Epilepsy Foundation has, since its inception, advocated for full access to all appropriate accommodations and services for students with epilepsy -- including the administration of emergency epilepsy medication if necessary -- to ensure that they can benefit fully from educational and related opportunities. With the guidance of the Foundation's Professional Advisory Board, comprised of leading experts in the field of epilepsy care and research, including neurologists, nurses and allied health professionals, the Foundation is particularly well-qualified to address these issues.

The Epilepsy Foundation of Central Ohio (EFCO) is an affiliate of the Epilepsy Foundation. EFCO provides immediate assistance to newly diagnosed patients and their families; to provide ongoing support to persons with epilepsy of all ages in the achievement of their goals for independence and seizure control; and finally to perpetuate advocacy in the community by educating our neighbors about epilepsy, its causes, treatments and social ramifications. EFCO is the only agency providing services specifically for people with epilepsy of all ages, free of charge, in the Central Ohio area. EFCO's goal is to better the lives of people with epilepsy by improving quality of life, decreasing fear and anxiety and ultimately increasing seizure control.

With regard to matters relating to medical care and research, the Foundation is guided by its Professional Advisory Board (“PAB”). This body is comprised of leading experts in the field of epilepsy care and research, including neurologists, nurses and allied health professionals. Many of the PAB members are neurologists and nurses who have worked directly with patients who require Diastat, the medication which is the subject of this appeal.

### **III. STATEMENT OF THE CASE**

The central issue of this appeal is whether Ohio law permits unlicensed assistive personnel (UAP) in schools to administer Diastat, an emergency medication for persons with epilepsy who are experiencing certain types of prolonged seizures. In the case at bar, the trial court held that Appellee was authorized under Ohio law to delegate the administration of Diastat by UAPs. Amici agree with the trial court’s judgment that such action does not violate Ohio’s Nurse Practice Act. Notwithstanding this, amici also believe that R.C. 3313.713 alone provides the authority for school boards to take action independent of Ohio’s Nurse Practice Act. For these reasons, amici adopt and incorporate by reference the statement of the case as set forth in Appellee’s Brief and contained in Appellee’s Cross Appeal.

Amici have received many reports about the practice of schools in Ohio, and around the country, of relying on 911 emergency medical services to transport students with epilepsy experiencing prolonged seizures 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 and transport a child, could result in neurological damage or other serious health consequences. Such delay inevitably will occur if UAPs are not permitted to administer this emergency medication, given the lack of available

school nurses to provide this service in each and every school throughout the day, during school bus rides and/or after school activities.

It is the position of Amici that UAPs, with proper training, can safely and effectively administer Diastat to children whose treating physician has prescribed the medication.<sup>1</sup>

In relevant part, the position of the Epilepsy Foundation, National Office is as follows:

For most people, conventional medications that can be taken orally are effective in controlling seizures. A number of children in particular though, are susceptible to prolonged, cluster, or status seizures; these seizures may last longer than five minutes in duration and can cause serious injury and even death. For these people, the doctor may prescribe a product called Diastat ® (rectally administered diazepam) to be administered on an emergency basis, or some other similar treatment. Following standard procedures, as prescribed by the treating physician, caretakers such as parents, school nurses, teachers or daycare providers, can administer these therapies on-site when a prolonged seizure or cluster of seizures occurs. . . .

Federal and state laws guarantee every child/student the right to participate in free, appropriate public education in the least restrictive setting. Schools, camps, and day care providers are also required to provide many health-related services, including administering medicine, if needed, to students with disabilities, as either a reasonable accommodation or a related service. The purpose of these laws is to ensure that children with chronic health conditions like epilepsy can be educated in the least restrictive environment and participate in recreational activities, camp and daycare programs with their peers. Because medicines, including rectally administered diazepam, can be administered by nonmedical personnel who have received proper instruction, lack of access to a doctor or full-time nurse is not an acceptable reason to refuse to administer the medication on-site or to deny a child or student access to the program. The Epilepsy Foundation wholly supports these principles as being in the best interest of the child.

(The full statement available at its Web site at

<http://www.epilepsyfoundation.org/advocacy/care/treatmentsinschool.cfm>)

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<sup>1</sup> Amici, however, are not opposed to involving school nurses in reviewing any protocols for UAPs regarding administration of Diastat. In addition, it may be appropriate for a UAP to call 911 when the seizure does not resolve within a specified time after the medication is administered -- if that directive is contained in the prescribing physician's instructions.

#### **IV. STATEMENT OF THE FACTS**

Amici adopt by reference the Statement of Facts contained in Appellee's Brief and Appellee's Brief in support of its Cross Appeal. In addition, Amici offer the following for a complete understanding of Epilepsy and the treatment of seizures through the administration of Diastat.

##### **A. Overview of Epilepsy and Seizures Requiring Treatment with Diastat**

Epilepsy is the most common serious neurological condition and approximately 2.7 persons have this condition in the U.S. alone. The condition is generally defined by a tendency for recurrent seizures, unprovoked by any known cause such as hypoglycemia. There are a variety of causes for epilepsy, including head trauma, cerebrovascular disease, encephalitis, bacterial meningitis and neurological deficits at birth such as cerebral palsy and mental retardation. W.A. Hauser and D.C. Hesdorffer, *EPILEPSY: FREQUENCY, CAUSES AND CONSEQUENCES* (2000); J. Annegers, *THE NATURAL COURSE OF EPILEPSY: AN EPIDEMIOLOGICAL PERSPECTIVE*, in A. Wyler and B. Hermann, *THE SURGICAL MANAGEMENT OF EPILEPSY* (1994). The risk of developing epilepsy is about 1 percent to age 20 years and reaches over 3 percent over the life span.

A seizure is a change in sensation, awareness, or behavior brought about by a brief electrical disturbance in the brain. Seizures vary from a momentary disruption of the senses, to short periods of unconsciousness or staring spells, to convulsions. Some people have just one type of seizure; others have more than one type. Several drugs (called antiepileptic or anticonvulsant drugs) are prescribed to prevent seizures. Many factors are involved in choosing the right seizure drug. The goal of treatment is to stop seizures without side effects from

the medicines. See John Pellock, *Management of Acute Seizure Episodes* (Pellock Study), 39 *Epilepsia* S28 (1998).

Many epilepsy patients go into remission with treatment (remission refers to being seizure free after discontinuing medication for a specific period, usually five years). In many patients, seizures are well controlled with anti-epileptic drugs, but approximately 25 to 30 percent continue to experience recurrent seizures. F. Seman, et al., *Is the underlying Cause of Epilepsy a Major Prognostic Factor for Recurrence?*, 51 *Neurology* 1256 (1998). Surgery, diet (primarily in children), or electrical stimulation of the vagus nerve, a large nerve leading into the brain, may be options if medications fail to control seizures.

A number of children with epilepsy in particular are susceptible to prolonged seizures; these seizures can cause serious injury and even death. One type of extremely serious prolonged seizure is “status epilepticus” (SE). SE is defined as a seizure lasting 30 minutes or longer (though some experts use 10 minutes as a benchmark), or as intermittent seizures lasting that period from which the patient does not regain consciousness. Pellock Study, *supra.*, at S28.

A number of patients, both children and adults, also experience repetitive seizures lasting several minutes or longer, whose pattern is different from their usual pattern; between such seizures the individual does regain consciousness. These seizures are referred to as serial, cluster or acute repetitive seizures. See Wendy Mitchell, *Status Epilepticus and Acute Repetitive Seizures in Children, Adolescents and Young Adults*, 37 *Epilepsia Supp* 1:S74 (1996). These seizures are distinct from a child’s other seizures in frequency, severity or duration. Robert Kriel, et al., *Rectal Diazepam Gel for Treatment of Acute Repetitive Seizures*, 20 *Pediatric Neurology* 282-287 (1999). If left untreated, acute repetitive seizures can evolve into a serious medical condition, including SE. Fritz Dreifuss, et al. *A Comparison of Rectal Diazepam Gel and*

*Placebo for Acute Repetitive Seizures*, 338 New Eng. J. of Med. 1869-1875 (1998) (Dreifuss Study).

Any type of seizure may become prolonged and thus be considered SE, including seizures which do and do not involve loss of consciousness. Pellock Study. The incidence of SE alone is estimated at 100,000-150,000 cases per year, with the largest proportion of cases among children under the age of ten. *Id.* at S29. The causes of SE include cerebralvascular accidents, inadequate antiepileptic drug levels, and infections. *Id.* at S.30.

Caregivers are directed to administer Diastat, typically within five minutes after a seizure commences, in order to abort the seizure and prevent SE or acute repetitive seizures.

It must be emphasized that prolonged or cluster seizures of the type for which Diastat is prescribed constitute a true medical emergency. The following findings, from a major study on the issue, support this conclusion:

Although most seizures are self-limiting, a prolonged seizure can evolve into status epilepticus, defined as a life-threatening seizure lasting 30 minutes or more. The overall mortality rate of patients experiencing status epilepticus is estimated to be 20%. Morbidity is characterized by intellectual dysfunction, neurology deficits, and chronic epilepsy. . . . Due to the substantially increased risk of mortality, every epileptic seizure should be treated as a potential major medical emergency.

Evelyne Peeters, *Treatment of Epileptic Seizures as Medical Emergencies: A Prospective Analysis of a Decision Tree for Nonmedically Trained Staff*, 9 *Seizure* 473-479, 473 (2000).

“The longer an episode of SE continues, the more likely it is to result in permanent neurological damage and the more refractory [resistant] it is to treatment. Therefore, immediate and aggressive treatment of SE or ongoing seizures that may progress to SE is necessary.” Pellock Study, *supra*, at S30.

Accordingly, appellants’ assertion that administration of Diastat to treat children experiencing prolonged seizures does not fall within the emergency exception to the Nurse

Practice Act (NPA) is without merit.<sup>2</sup> At least one other state has issued guidance on emergency exceptions to its NPA which supports the view that seizures do indeed constitute such an emergency. Guidance issued by the West Virginia Board of Examiners for Registered Professional Nurses states that “It is recognized that particular health problems may precipitate emergency situations requiring immediate treatment. Emergency situations are situations which cannot be predicted to occur at a particular time, or with a great degree of regularity, and which require definitive treatment within a very narrow period of minutes to avoid severe and perhaps permanent harm.” Guidelines for Acts that May be Assigned or Delegated by Registered Nurses, July 15, 2005 (available <http://www.wvrnboard.com/images/pdf/6707.pdf> ). This position, based on common sense, rejects that of appellants – that simply because a child is known to experience seizures it is not an “emergency” within the meaning of the NPA when they do occur.

**B. Overview of Diastat, its Ease of Administration and Safety**

Diastat is the trade name for a gel preparation of diazepam for rectal administration in the treatment of cluster or prolonged seizures in the patient who has refractory epilepsy (that is, epilepsy which is not effectively treated by other measures). The medication was specifically developed to be administered by people without medical training, such as parents, teachers and other caregivers. In fact, the manufacturer’s instructional video, and also its printed materials explaining how to administer the medication, are both targeted to non-licensed medical personnel. These materials are available on the manufacturer’s Web site at <http://www.diastat.com/HTML-INF/index.htm>. It is the only FDA-approved medication for treatment of these seizures by non-medically trained caregivers. *See* James Cloyd, et al., *A Single*

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<sup>2</sup> We assume for the sake of argument that the NPA applies, but agree with Appellee’s position, stated in its cross appeal, that R.C 3313.713 independently authorizes UAPs to administer Diastat notwithstanding the NPA.

*Blind, Crossover Comparison of the Pharmacokinetics and Cognitive Effects of a New Diazepam Rectal Gel with Intravenous Diazepam*, 39 *Epilepsia* 520-526 (1998).

Following standard procedures, as prescribed by the treating physician, caretakers such as parents, school nurses, teachers or daycare providers, can easily and safely administer the medication on-site when a prolonged seizure or cluster of seizures occurs. See, e.g., Dreifuss Study, *supra*. The medication is contained in pre-packaged syringes that are already prepared with the appropriate dose, with a rectal tip that is either pediatric or universal in size. One box contains two doses (2 syringes), lubricating jelly and patient/caregiver information. The most common side effects are those of drowsiness, headache, dizziness, diarrhea, flushing, unsteady gait, agitation, and confusion.

The manufacturer advises, and medical practitioners agree, that no particular medical expertise is needed to administer Diastat. Moreover, the two general types of seizures (cluster and prolonged seizures) that require treatment with this medication are easily identifiable by lay persons.

Virtually all studies have concluded that Diastat is a completely safe and effective treatment for prolonged or cluster seizures; these studies also confirm that caregivers without specialized medical knowledge or training can safely and effectively administer the medication and monitor any side effects. See, e.g., John Pellock, *Respiratory Adverse Events Associated with Diazepam Rectal Gel*, 64 *Neurology* 1768-1770 (2005); Evelyne Peeters, *Treatment of Epileptic Seizures as Medical Emergencies: A Prospective Analysis of a Decision Tree for Nonmedically Trained Staff*, 9 *Seizure* 473-479 (2000); Wendy Mitchell, et al., *An Open-label Study of Repeated Use of Diazepam Rectal Gel (Diastat) for Episodes of Acute Breakthrough Seizures and Clusters: Safety, Efficacy and Tolerance* (Mitchell Study), 40 *Epilepsia* 1610-1617

(1999); Robert Kriel, et al., *Home Use of Rectal Diazepam for Cluster and Prolonged Seizures: Efficacy, Adverse Reactions, Quality of Life, and Cost Analysis* (Kriel Study), 14 *Pediatric Neurology* 13-17 (1998); J. J. Cereghino, et al. *Treating Repetitive Seizures with a Rectal Diazepam Formulation*, 51 *Neurology* 1274-1280 (1998); Dreifuss Article, supra.<sup>3</sup>

For instance, in the Mitchell study, the researches evaluated the administration of Diastat by non-medically trained caregivers to 149 subjects, involving over 1500 administrations of the medication, finding no significant adverse events (including respiratory complications that might require specialized medical care). This study also noted that “Improvements in the quality of life reported anecdotally by families [participating in the study] included reduced ER visits and

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<sup>3</sup> When the Dreifuss Study, funded by the National Institute of Neurological Disorders and Stroke (NIND), was published that agency issued a press release (available at [http://www.ninds.nih.gov/news\\_and\\_events/press\\_releases/pressrelease\\_seizures\\_062498.htm](http://www.ninds.nih.gov/news_and_events/press_releases/pressrelease_seizures_062498.htm)) which stated in part as follows:

[Diastat] clearly reduces the number of seizures for both children and adults and protects patients from seizure recurrence," said Philip H. Sheridan, M.D., Chief of the NINDS Epilepsy Branch. "Informed caregivers are often able to recognize the onset of a seizure cluster. Now, with this preparation, they can be trained to administer treatment privately, quickly, and safely. The study was a randomized, double-blind study of 91 individuals with acute repetitive seizures. It was conducted by investigators collaborating at ten university medical centers nationwide. The NINDS provided support to six of the 10 centers participating in the Rectal Administration of Diazepam for Acute Repetitive Seizures (RADARS) study. A frequently reported side effect was sleepiness, common to most medicines used to treat epilepsy.

The new preparation is marketed in a Quick-Dose delivery system as Diastat (diazepam rectal gel) . . . . In addition to the new gel formulation, administered with an applicator, diazepam is also sold in oral form. Administration of diazepam in oral form is problematic for both physicians and family members because the patient must be alert in order to swallow.

This is a safe and effective way of addressing an urgent health condition and one that enables flexible, convenient treatment outside of a hospital or clinic, including the patient's home," says Dr. Sheridan. This trial is a striking example of how a relatively small research investment, in this case about \$850,000, will save American families substantial amounts of money by enabling patients to stay out of hospital emergency rooms and to receive treatment in their homes.

hospitalizations, reduced disruption of daily activities, reduced time lost from work or school, and increased sense of ‘control.’” Id. at 1616.

Similarly, the Kriel study found that somnolence to be the only significant adverse effect seen when the medication was administered to a large group of children. This study also reported that as a result of reliance on this medication, there was a 67 percent decrease in emergency room visits and a cost savings of \$1000 per family per year, reducing family disruption and improving the quality of life.

The Dreifuss Study documented similar findings, noting that “informed and educated caregivers can identify the onset of acute repetitive seizures, safely and successfully administer diazepam rectally, and assess the patient’s response.” Id. at p. 1864. The study reported no significant adverse effects (as compared to a group which received a placebo) in a study involving the administration of the medication by caregivers without medical training. Id. at p. 1872.

Based on the personal knowledge of amici, across the United States, people without formal medical training, including parents, teachers, school administrators, and even bus drivers, are successfully administering rectal diazepam when needed, and as directed by the treating physician. The use of non-licensed employees to administer Diastat has been particularly important in the school setting, where, oftentimes, there is not a licensed practical nurse or registered nurse available every day, all day, or for extracurricular activities and field trips. Because the medication is particularly effective when administered within 15-30 minutes of seizure onset, and permanent neurologic damage may result with a delay in administration, school staff must be immediately available. See Peeters and Pellock Studies, *supra*.

## **V. LAW AND ARGUMENT**

### **A. Standard of Review**

Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Ohio Civ. R. 56(C). “A motion for summary judgment forces the non-moving party to produce evidence on any issue for which that party bears the burden of production at trial.” *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St. 3d 108, 111, 570 N.E. 2d 1095. Where, as here, no disputed facts exist and the only issue is the proper application of statutes, a question of law is presented that may properly be resolved on summary judgment. The court reviews the trial court’s entry of summary judgment de novo. *Mentor Chiropractic v. State Farm Fire* (2000), 139 Ohio App. 3d 407, 410, 744 N.E. 2d 207.

### **B. R.C. 3313.713 Authorizes School Boards to Designate Unlicensed Assistive Personnel to Administer Prescribed Medications to Students**

Appellants’ principal argument asserts that R.C. Chapter 4723, and pertinent administrative code sections regulating the unauthorized practice of nursing, are controlling on the issue of whether or not school boards may designate non-nurse personnel or UAPs to administer Diastat. Appellant’s argument is in error. R.C. 3313.713 clearly and unambiguously authorizes school boards, with the appropriate approval of parents and physicians, to designate UAPs to administer Diastat.

Appellants’ assert that the designation of non-nursing personnel to administer Diastat constitutes the unauthorized practice of nursing. However, the Nurse Practice Act, by its own

terms undermines Appellants' argument. The administration of prescription medication by school employees is specifically authorized by R.C. 3313.713. R.C. 3313.713 states:

The board of education of each city, local, exempted village, and joint vocational school district shall . . . adopt a policy on the authority of its employees . . . to administer drugs prescribed to students enrolled in the schools of the district. The policy shall provide either that: . . . ***Designated persons employed by the board are authorized to administer to a student a drug prescribed for the student.*** Except as otherwise provided by federal law, the board's policy may provide that certain drugs or types of drugs shall not be administered or that no employee, or no employee without appropriate training, shall use certain procedures, such as injection, to administer a drug to a student.

R.C. 3313.713 (Emphasis Added). The Ohio Administrative Code takes into consideration the authorization of unlicensed individuals to administer medication by stating:

The unauthorized practice of nursing shall not be construed to prevent any person registered, certified, licensed, or otherwise legally authorized in this state under any law from engaging in the practice for which such person is registered, certified, licensed, or authorized. Individuals "***legally authorized***" includes, but is not limited to, ***individuals authorized pursuant to section 3313.713 of the Revised Code***, MR/DD personnel authorized pursuant to sections 5123.41 to 5123.47 of the Revised Code, and individuals authorized pursuant to Chapter 4731 of the Revised Code.

OAC 4723-3-01 (Emphasis Added)<sup>4</sup>. The plain language of OAC 4723-3-01 and R.C. 3313.713, when read together present no conflict as OAC 4723-3-01 clearly reflects that it was never intended to regulate those persons "legally authorized" pursuant to R.C. 3313.713. As such, the school board is properly authorized, pursuant to the plain language of R.C. 3313.713, to designate the administration of Diastat.

In addition to the above, amici adopt and incorporate by reference the well-reasoned arguments set forth in Appellee's Brief in support of the proposition that R.C. 3313.713, and not the Nurse Practice Act, governs the administration of prescribed medication to include Diastat.

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<sup>4</sup> Similarly, OAC 4723-13-02 and 4723-13-04 specifically authorize the delegation of administration of prescription medicine to school boards pursuant to R.C. 3313.713.

**C. The Administration of Diastat Requires No Specialized Knowledge, Judgment or Skill, and Thus A School Board May Properly Designate School Employees to Administer the Medication**

Appellants contend the Nurse Practices Act, R.C. 4723 *et seq.*<sup>5</sup>, prohibits school employees from administering Diastat because it requires nursing judgment. Contrary to Appellants' argument, however, the administration of Diastat does not require nursing judgment and is not the type of medication contemplated by R.C. 4723.01. Revised Code Section 4723.01(B) defines the practice of nursing as a registered nurse as, "providing to individuals and groups nursing care *requiring specialized knowledge, judgment and skill* derived from the principles of biological, physical, behavioral, social, and nursing sciences." R.C. 4723.01(B) (Emphasis Added). Although the administration of certain medicines will undoubtedly require specialized knowledge, judgment and skill, the Code clearly contemplates that some care or administration of medicine will not require special expertise. As such, care not requiring special expertise will fall outside the practice of nursing, and will not subject individuals to liability pursuant to the Nurse Practices Act.

In the case at bar, Appellant's own witnesses testified that the seizures associated with the medication Diastat are easy to identify, and that the actual application of Diastat requires no special skill. Appellant's expert Ms. Blackford, a geriatrics nurse, testified that tonic clonic seizures are easier to identify than other seizures. Decision and Entry, (March 6, 2006) Franklin County Court of Common Pleas at 6. In addition, Appellant's expert Ms. Mosca, a professor of nursing, testified that a layperson could be trained to identify the appropriate symptoms, and the administration of the medication does not make it a nursing task. *Id.* at 5.

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<sup>5</sup> R.C. 4723.03 prohibits persons from engaging in the practice of nursing as a registered nurse without holding a current valid nursing license. The term "practice of nursing as a registered nurse" is defined in R.C. 4723.01. Again, as noted in footnote 2, *supra*, we only assume for the sake of argument that the Nurse Practices Act applies, but agree with appellees' position that R.C. 3313.713 independently authorizes UAPs to administer Diastat.

Further, Dr. Glauser, a pediatric neurologist, testified that Diastat could be administered by anyone who has regular interaction with a child, and that general tonic seizures are easily identifiable. *Id.* at 6, 7. In regard to the qualification necessary to administer Diastat, Dr. Glauser testified:

Well, I would say that they don't necessarily have to be literate. I would say this, they need probably at least a grade school education where they can follow directions and they can read time . . . probably about a grade school level of education would be the minimum requirements for someone that we would want to have to administer Diastat.

*Id.* at 7.

In the end, the trial court correctly determined that no evidence suggested that the administration of Diastat to a student experiencing a generalized seizure required specialized knowledge, judgment or skill. *Id.* at 10. In addition, the court found that no evidence suggests that a child would be harmed if the medication is erroneously administered. *Id.* Further, any risk is minimized by the school's requirement to immediately call an emergency medical service when the medicine is administered. *Id.* Having determined that Diastat requires no special expertise, the Revised Code provides multiple methods to delegate the responsibility of administering prescription medication.

**D. Administration of Diastat to A Child Experiencing A Generalized Seizure Constitutes A Medical Emergency and Thus is Excluded From the Nurse Practices Act Under R.C. 4723.32**

Assuming, *arguendo*, that the administration of Diastat is not authorized by R.C. 3313.713, and it is not a delegable duty, administration of Diastat is considered a medical emergency and thus excluded from the Nurse Practices Act. R.C. 4723.32 states:

[The Nurse Practices Act] does not prohibit any of the following:  
(D) *The provision of nursing services to family members or in emergency situations.*

R.C. 4723.32(D) (Emphasis Added). As such the plain language of the Nurse Practices Act authorizes unlicensed individuals to provide nursing care when the care is provided in an emergency situation.

Appellant argues that simply because a potential seizure is foreseeable then the risk of that seizure is no longer an emergency situation. Further, Appellant argues that the emergency situation exception should operate similar to a Good Samaritan law, providing protection only after the emergency has occurred. Appellant's position is without merit and is detrimental to students requiring emergency medicine throughout the state.

Notably, guidance issued by the West Virginia Board of Examiners for Registered Professional Nurses states that "It is recognized that particular health problems may precipitate emergency situations requiring immediate treatment. Emergency situations are situations which cannot be predicted to occur at a particular time, or with a great degree of regularity, and which require definitive treatment within a very narrow period of minutes to avoid severe and perhaps permanent harm." Guidelines for Acts that May be Assigned or Delegated by Registered Nurses, July 15, 2005 (available <http://www.wvrnboard.com/images/pdf/6707.pdf> ). This position, based on common sense, rejects that of appellants – that simply because a child is known to experience seizures it is not an "emergency" within the meaning of the NPA when they do occur.

There can be no doubt that many situations are considered emergencies despite the fact that their occurrence is foreseeable. For example, the trial court identified that an emergency situation arises when a bee stings an allergic child even though it is previously known that the child is allergic to bees. Similarly, here, an emergency situation arises when the student has a seizure, even though it is previously known that the student has seizures. It is undisputed that

seizures are a dangerous and life threatening condition if not properly addressed. Diastat could potentially save this student's life if administered soon after a seizure begins.

Appellant's analysis seeks to punish the school for being prepared for a future emergency. Appellant implicitly admits that if a school employee administered Diastat in the heat of a student's seizure, then this would qualify as an emergency and thus would be exempted under the Nurse Practices Act. However, simply because the school is aware of a student who has seizures, and seeks to provide training in advance, the Appellant now attempts to say the situation is no longer an emergency. It is ludicrous to suggest that a student's life must be put on the line to allow a school to take precautions to save the student's life.

There can be no doubt that an individual who has been properly trained to identify seizures and administer Diastat will be able to better serve the interests of the seizing child during a seizure. Similarly, school employees are trained in other life preserving emergency procedures such as the Heimlich maneuver and CPR because it is foreseeable that a child may choke or stop breathing. Waiting to exempt the administration of Diastat from the Nurse Practices Act until a seizure actually begins serves no purpose when school employees could properly be trained on the medicine in advance.

The foreseeability of a seizure does not change the fact that when a seizure occurs it is an emergency situation. Because Diastat is only administered in an emergency situation, its administration falls plainly within the statutory exemption found in R.C. 4723.32(D). Therefore, Appellants were not subject to liability for violating the Nurse Practices Act and Appellees are entitled to judgment as a matter of law.

**E. Allowing Unlicensed School Personnel to Administer Diastat Promotes Compliance with Federal Law ensuring Equal Access to Educational Opportunities**

Allowing UAPs to administer this medication, not only reduces the risk of life-threatening injuries that can result when a child has prolonged or repetitive seizures, it also enables schools to comply with federal law assuring that children with special health care needs are served and integrated into regular education programs. Both Section 504 of the Rehabilitation Act, 29 U.S.C. 794, and the Individuals with Disabilities Education Act, 20 U.S.C. 1400 *et seq.* require that children with disabilities receive health-related services, such as medication, while in school so that they can participate in integrated educational programs.

Courts and hearing officers have affirmed that administration of Diastat and similar medications is indeed a required “related service” under IDEA. See, e.g., *Student v. San Francisco Unified School District*, No. 2331 (CA Special Education Hearing Officer 2002). In this case, the school district had asserted that the possibility of respiratory complications and the need to provide respiratory intervention places the administration of Diastat 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. 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).

In addition, the opinion points out that allowing a school to rely on 911 services to provide care for children experiencing seizures (as this school district had), who easily could be quickly and effectively treated in the school setting with Diastat, is unnecessary, costly and

traumatic. This will certainly be the result if only nurses are allowed to administer the medication, because, as noted above, there clearly will not be sufficient nursing staff available for this task. In this regard, the opinion states:

The testimony . . . establishes that STUDENT, to the extent feasible, needs to be treated by familiar people and recover from seizures in a quiet, familiar setting among familiar people. STUDENT should not be unnecessarily subjected to strangers in a strange setting amid strange activities and noises. While it is not possible to ascertain the exact nature of the trauma STUDENT experiences in an emergency room, it is clear that he suffers substantial stress and anxiety there. The District's protocol does not take Student's response to emergency services into account.

Student's parents have already suffered a nightmarish year of 911 calls, emergency room visits, and attendant long waits and anxiety over whether STUDENT is receiving proper treatment by 911 crews and emergency room staffs. The parents in consultation with [their child's doctor] chose to use Diastat to avoid further unnecessary encounters with emergency services. The parents expressed a need to know that STUDENT will be looked after and ministered to by people who are familiar with him and who the parents, as well as STUDENT, know and trust. The parents need to know that STUDENT will be spared the trauma of unnecessary emergency services. They themselves need to avoid further lengthy stays at the emergency room and possible unnecessary absences from their jobs. Although STUDENT is currently attending school, Ms. MOTHER indicated that she will be forced to remove him if he suffers serious seizures at school and is automatically turned over to 911 services.

The District's protocol of 911 fails to meet Student's needs in a number of ways: STUDENT will not be allowed to remain in school and awaken in a familiar setting surrounded by familiar people; STUDENT will be subjected to the stresses and possible mistakes of emergency services; Student's parents will suffer anxiety over how STUDENT will be treated by emergency personnel and feel compelled to leave their jobs and rush to the emergency room; and Student's parents, or at least one of them, will have to take substantial time from work until STUDENT is released from the emergency room and then transport him to his respite nurse.

*Id.*

For the reasons set forth above, it is clear that the issues addressed in this case have far broader reach and implication than simply the application of the Appellee's authority to

designate non-nurse personnel to administer Diastat. Indeed, the underlying issue in this case is the ability of a student with special healthcare needs to have access to and are integrated into a customary education as mandated by federal law.

**F. Other States Have Recognized that UAPs Can Effectively and Safely Administer Diastat and Similar Medications in School**

It is clear that a significant number of states, through legislation or regulation, have specifically authorized UAPs to administer Diastat and similar medications in schools. These states have recognized that this is an appropriate and safe function for UAPs, especially in emergency situations. This supports the reasonableness of the trial court's views about the interpretation of the Ohio statutes in issue.

For instance, in the District of Columbia, any school employee who has been trained, "pursuant to written authorization by the principal of a public school, may administer prescription or nonprescription medication to a student in compliance with the signed, written instructions of a licensed practitioner," if certain procedural safeguards are in place. D.C. CODE § 38-632. These safeguards include written consent from the student's parents and supervision of the employee by a licensed practitioner.

In Kentucky, the state legislature enacted amendments expressly authorizing UAPs to administer Diastat in schools. Kentucky law provides that the governing body of public, private and parochial schools shall require that at least one school employee, who has met competency requirements specified elsewhere in state law, be on duty at each school during the entire day to administer Diastat in an emergency. KY. REV. STAT. ANN. § 158.838 The parents or guardians of children to receive this treatment shall provide the school with a written authorization for the

treatment, along with the medication itself and written instructions from the student's health care practitioner regarding its administration. KY. REV. STAT. ANN. § 158.838 (2) (a)-(c).

In Louisiana, a school nurse may delegate medication administration to trained UAPs once he or she has determined that this administration can be safely performed by and delegated to that UAP. LA. REV. STAT. ANN. § 17:436.1 (B) (1) (a)-(c). State guidance specifically states that the statute authorizes UAPs to administer Diastat, provided there is compliance with certain procedural requirements, including a signed agreement from the student's parents authorizing the administration of Diastat to their child. *Louisiana Board of Nursing, Declaratory Statement Regarding the Registered School Nurse Delegating to Trained Unlicensed School Employees the Administration of Rectal Diastat in Certain Emergency Situations*, March 15, 2005.

In Florida, UAPs are allowed to perform health-related services upon successful completion of child-specific training, including administering emergency injectable medication. FLA. STAT. § 1006.062 (4). Similarly, in Oklahoma, UAP's are allowed to administer prescription medicine, in the absence of a nurse, if a student's parent or guardian authorizes the school to so administer. 10 Okl.St.Ann. § 170.1.

In Hawaii, State law provides as follows:

School health aides may assist the student by administering oral and topical medication, and in emergency situations, other pre-measured medication; provided that:

- (1) If the student receiving the medication is a minor, a parent or guardian requests and authorizes such administration of medication;
- (2) The medication has been prescribed by a licensed physician . . . or by a practitioner with prescriptive authority;
- (3) The administration of such medication is with the approval of the department of health; and
- (4) The administration of the medication is necessary for the health of the student and for the student's attendance at school.

HAW. REV. STAT. § 321-242 (1997).

Similarly, under Illinois law, “Any properly trained staff member at the school – whether certificated or not – may administer medication in an emergency.” Illinois Department of Human Services and the Illinois State Board of Education, *Recommended Guidelines for Medication Administration in Schools* (Sept. 2000), p. 4 available at <http://www.dhs.state.il.us/chp/ofh/SchoolHealth/pdf/MedGuide2000.PDF>.

And, in West Virginia, medication may be administered by “school personnel who are designated, qualified, trained and authorized to administer medications to students.” W. VA. CODE R. 126-27-4.4.1. There are no restrictions on the types of medications or the routes of administration. *The only requirement is that the employee agrees to administer medications, successfully completes training, and is qualified for the delegation of the administration of prescribed medications.* W. VA. CODE R. 126-27-4.4.5

State guidance regarding Diastat provides that the authority to administer the medication may be delegated to UAPs when there is a written physician order that indicates that the medication may be administered by such personnel. Council of School Nurses, *The Basic and Specialized Health Care Procedure Manual for West Virginia Public Schools*, at 47 (2004). Under this policy, a UAP can administer Diastat after a RN has reviewed the student’s medical history and the UAP has been trained to administer the medication and monitor the student response. *Id.* at 47-48.

## **VI. CONCLUSION**

Appellant has failed to establish that a school is not properly authorized under R.C. 3313.713 to authorize the administration of Diastat by school employees. Further, there can be no doubt that a child suffering a seizure constitutes a medical emergency, and thus is exempted from the Nurse Practices Act by R.C. 4723.32, that is, assuming for the sake of argument that the

NPA has any application. In addition, allowing unlicensed school employees to administer Diastat fosters compliance with federal equal access to educational opportunity laws. For all of the foregoing reasons, Amici respectfully request that this Court affirm the trial court ruling that Ohio law authorizes unlicensed assistive personnel in schools to administer Diastat, an emergency anti-seizure medication.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing document has been sent by regular U. S. Mail, postage prepaid, on the \_\_\_\_\_ day of June 2006 to:

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