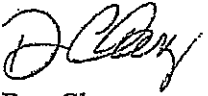




## MEMORANDUM

<b>DATE</b>	March 15, 2010
<b>TO</b>	Louise Bailey Interim Executive Officer Board of Registered Nursing
<b>FROM</b>	 Don Chang Supervising Senior Counsel
<b>SUBJECT</b>	Administration of Diastat

You have asked for the following questions:

1. Does the Nursing Practice Act (Business and Professions Code section 2700 et seq. hereafter referred to as the "NPA") permit unlicensed school personnel to administer Diastat to a student undergoing an epileptic seizure as part of a school district program to provide such students with medical care?
2. Does the NPA permit a school nurse to train or to supervise unlicensed school personnel as part of a school program to administer Diastat to a student experiencing epileptic seizures?

### Conclusion

1. The NPA does not permit unlicensed school personnel to administer Diastat to a student undergoing an epileptic seizure. Diastat is a medication and its administration constitutes the practice of nursing. A school district's use of unlicensed school personnel to administer Diastat to fulfill its duty to provide medical services to students undergoing seizure is not exempt from the NPA.

2a. The NPA does not permit a nurse to train unlicensed school personnel knowing that the purpose for the training is to enable the trainees to administer Diastat to a student, and the unlicensed person actually administers Diastat in violation of the NPA. Such conduct may subject the nurse to discipline for aiding and abetting the unlicensed practice of nursing.

2b. The NPA does not permit a nurse to establish and supervise a program where unlicensed school personnel administer Diastat to students during the school day. Such conduct may subject the nurse to discipline for being a departure from the standards of competent performance established in 16 CCR 1443.5 in that he or she would be delegating a health care task to a person who is not legally able to perform that task.

#### Background Information

Diastat is trade name for a gel preparation of diazepam (valium), a schedule IV controlled substance, which is administered rectally by a prefilled unit dose plastic syringe as an emergency medication for treatment of cluster or prolonged seizures in patients with epilepsy. To be effective, it must be administered when the child is seizing. The manufacturer of Diastat claims that it was specifically developed to be administered by people without medical training.

The Board has been advised that some school districts have instructed their school (registered) nurses to train unlicensed school employees to administer Diastat to students with epilepsy who are suffering seizures during school hours pursuant to the consent of the student's parents and the orders of the student's treating physician.

#### Federal and State Law – Students With Disabilities

School districts are required by section 504 of the federal Rehabilitation Act of 1973 to provide school health services, including the administration of medications, to students with disabilities if it is necessary for them to attend school. Such services are to be provided by a qualified nurse or other qualified person.

California Education Code section 49423 provides that any pupil who is required to take, during the regular school day, medication prescribed for him or her by a physician "may be *assisted* by the school nurse or *other designated school personnel...*" (Emphasis added)

The Department of Education (DOE) has adopted regulations which define the phrase "other designated school personnel," to mean "... any individual employed by the local education agency who: (1) Has consented to administer the medication; and (2) May *legally administer* the medication to the pupil or otherwise assist the pupil in the administration of the medication." (5 CCR section 601(e))

The DOE has further provided that "other designated school personnel" may "administer medication to pupils or otherwise assist pupils in the administration of medication *as allowed by law...*" (5 CCR section 604)

The Administration of Diastat  
Constitutes the Practice of Nursing

Business and Professions Code ("B & P Code") section 2795 makes it unlawful for any person to practice nursing in this state unless that person holds an active registered nursing license issued by the Board or is otherwise authorized to practice nursing under the NPA.

Section 2725 of the NPA defines the practice of nursing as performing enumerated functions "that require a substantial amount of scientific knowledge or technical skill, *including all of the following*." It then lists different functions that are associated with the treatment of illnesses that constitute the practice of nursing. One of these functions is providing patient care services, including the administration of medications necessary to implement a treatment ordered by an appropriately licensed health care professional.

The Legislature determined that the administration of medication ordered by a physician requires a substantial amount of scientific knowledge or technical skill to perform and therefore such services constitute the practice of nursing.

This is especially true with regard to Diastat. Diastat is a controlled substance that must be administered rectally to control seizures. It must be administered when a child is seizing. The rectal cannula or tube is approximately 2 to 3 inches long and is made of plastic so the possibility of piercing the rectal cavity is high. Because a seizure can happen at any moment, privacy for that seizing child is of great concern. If the appropriate dosage is not given, severe consequence due to respiratory failure may occur. The very nature of the medication in question and the method of administration require a substantial amount of scientific knowledge and technical skill to administer. The administration of Diastat constitutes the practice of nursing.

The Administration of Diastat By  
Unlicensed School Personnel is Not Exempt From the NPA

The administration of Diastat to students during the regular school day by unlicensed school personnel does not fall within any of the exemptions from the NPA.

Statutes conferring exemptions from regulatory schemes are narrowly construed. The purpose of an exemption from a regulatory scheme is to exclude in limited circumstances designated activities or persons from the regulatory scheme and the penalties included therein.

B & P Code section 2727 provides exceptions from the licensing requirements of the NPA. It provides as follows:

"This chapter does not prohibit:

- (a) Gratuitous nursing of the sick by friends or members of the family.

(b) Incidental care of the sick by domestic servants or by persons primarily employed as housekeepers as long as they do not practice nursing within the meaning of this chapter.

(c) Domestic administration of family remedies by any person.

(d) Nursing services in case of an emergency. "Emergency," as used in this subdivision includes an epidemic or public disaster.

(e) The performance by any person of such duties as required in the physical care of a patient and/or carrying out medical orders prescribed by a licensed physician; provided, such person shall not in any way assume to practice as a professional, registered, graduate or trained nurse."

B & P Code Section 2727 exemptions cover personal or domestic relations (subdivisions (a), (b) and (c)) and are inapplicable to the administration of Diastat in a school setting. The exemption for carrying out of medical orders found in subdivision (e) of section 2727 is also inapplicable because it requires the person carrying out the medical order to not assume the practice nursing. As discussed above, the administration of Diastat constitutes the practice of nursing. Accordingly, we focus our inquiry on whether the administration of Diastat is exempt from the NPA under B & P Code section 2727(d) exemption for an "emergency."

With regard to providing aid during an emergency, the general rule is that one has no duty to come to the aid of another. However, a person who undertakes to come to the aid of another is under a duty to exercise due care in the performance. Under this general rule, there is little incentive for a member of the public to risk their personal and financial security to come to the aid of another person. In response to this, many jurisdictions, including California, have enacted Good Samaritan laws to address this problem.

California has a number of Good Samaritan statutes. Under California's Good Samaritan statute (Health & Safety Code §1799.102), those who act in good faith to provide emergency medical care at the scene of an emergency are immune from civil liability. Within the health care area, it is not uncommon to find Good Samaritan statutes that insulate a health care provider from civil liability when he or she renders emergency medical care. B & P Code section 2727.5 provides such protection for nurses who render emergency care at the scene of an emergency. In addition to the various requirements that must be met to qualify for immunity under these statutes, case law has developed a requirement that the Good Samaritan must not have a pre-existing duty of professional care to the victim.

The NPA's emergency exemption is analogous to a Good Samaritan statute in that under limited circumstances, an unlicensed person is permitted to engage in the practice of nursing without being subject to penalties specified in the NPA.

In accordance with school district protocols, unlicensed school personnel volunteering to administer Diastat to students undergoing seizures during the school day must undergo school approved training. The unlicensed school personnel must obtain the consent of the school to

LOUISE BAILEY

March 15, 2010

Page 5

engage in this activity while on school grounds or during school functions. Conversely, the school has the authority to withdraw its approval of a volunteer to administer Diastat to a student. The schools admit that it is necessary for them to allow unlicensed school personnel to perform this activity because under federal and state law they are legally obligated to provide such services to disabled students attending their schools and funding cuts have prevented them from hiring sufficient number of licensed health care professionals to perform these services. Thus, the schools are using the unlicensed school personnel to fulfill their legal duty to provide medical services to students.

The emergency exemption in B & P Code section 2727(d) is not applicable to unlicensed school personnel who are acting on the behalf of a school district. A Good Samaritan statute is not available to a person who has a duty to provide medical services. The rationale is that if you have a duty to provide medical services, you cannot be insulated from liability when performing that legal duty. A school district has a legal duty to provide school health services to students with disabilities if it is necessary for them to attend school, accordingly it cannot rely on the NPA's emergency exemption when fulfilling this duty. It would be contrary to public policy and the NPA mandate for consumer protection to interpret the emergency exemption to allow a party to fulfill its legal obligation to provide medical services by using unlicensed personnel to address situations, e.g., seizures, which it knows will occur. Unlicensed school personnel, while trained in the administration of Diastat, do not have the knowledge, skills and abilities that a registered nurse would have in assessing the symptoms and the subsequent reactions to the medication.

Where unlicensed school personnel administer Diastat to a student on school grounds or during school hours as fulfillment of the school's legal obligation to provide such students with medical services, the unlicensed school personnel are not exempt from the NPA and are engaged in the unlicensed practice of nursing and such conduct is not permitted under the NPA.

Nurses Who Train or Supervise Unlicensed School Personnel  
To Administer Diastat May Be Subject to Discipline By the BRN

B & P Code section 2795 makes it unlawful for any person, except as otherwise provided in the NPA, to practice nursing in this state unless the person holds a license in an active status.

B & P Code section 2761(d) provides that the BRN may discipline a nurse for assisting in or abetting the violation of, or conspiring to violate any provision of the NPA.

As discussed above, the administration of Diastat by unlicensed school personnel constitutes the practice of nursing and where unlicensed school personnel administer Diastat to students during school hours to fulfill the school's legal obligation to provide medical care to students, such activity is not exempt from the NPA.

Where a school nurse trains unlicensed school personnel to administer Diastat knowing that the purpose of such training is to enable such persons to administer Diastat to a student during the school day, and that person actually administers Diastat in violation of the NPA, the nurse may be subject to discipline as having aided and abetted the unlicensed practice of nursing.

LOUISE BAILEY

March 15, 2010

Page 6

In addition, the BRN has regulations that define the standard of competence applicable to a registered nurse. It provides that a registered nurse is considered competent when he or she consistently demonstrates the ability to transfer scientific knowledge from social, biological and physical sciences in applying nursing processes when, among other things, he or she "[d]elegates tasks to subordinates based on the legal scopes of practices of the subordinates and on the preparation and capability needed in the tasks to be delegated and effectively supervises nursing care being given by subordinates." 16 CCR 1443.5(a)(4))

If a school nurse establishes and supervises unlicensed school personnel to administer Diastat to students during the school day, such conduct may constitute an actionable departure from the standards of competent performance in that the nurse would be delegating a health care tasks to a persons who is not legally able to perform that type of patient care service.

In summary, the administration of Diastat is the practice of nursing and a school district's use of unlicensed school personnel to fulfill its duty to provide medical services to students undergoing seizure is not permissible and is not exempt conduct under the NPA.

A nurse who trains or supervises unlicensed school personnel may be subject to discipline under the NPA for either aiding and abetting the unlicensed practice of nursing or incompetence.

In order to permit the conduct in question, a modification of the law is required. Ultimately, such an effort would require a compelling public policy basis and adequate assurances that such a proposal would continue to protect the public health, safety and welfare.