



**February 2017**

**California  
Bar  
Examination**

**Performance Test A  
INSTRUCTIONS AND FILE**

# IN RE COLUMBIA NURSES ASSOCIATION

Instructions .....

## **FILE**

Memorandum to Applicant from James Wood .....

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Helping the Student With Diabetes Succeed: A Guide for School Personnel .....

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# **IN RE COLUMBIA NURSES ASSOCIATION**

## **INSTRUCTIONS**

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4. The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no parameters on how to apportion your time, you should allow yourself sufficient time to thoroughly review the materials and organize your planned response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

**STATE OF COLUMBIA**  
**DEPARTMENT OF EDUCATION**  
**OFFICE OF THE GENERAL COUNSEL**

**MEMORANDUM**

**TO:** Applicant  
**FROM:** James Wood, General Counsel  
**DATE:** February 21, 2017  
**RE:** Columbia Nurses Association Demand Letter

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On February 10, 2017, the Columbia Department of Education (Department) issued a Legal Advisory to all superintendents of school districts advising them: (1) the Columbia School Medication Act authorizes school personnel who are not school nurses—unlicensed school personnel—to administer insulin to students with diabetes, including by injection; and (2) the Columbia Nursing Practice Act does not prohibit them from doing so.

Unsurprisingly, on February 16, 2017, the Columbia Nurses Association (CNA) sent the Department a letter demanding that it withdraw the Legal Advisory. The CNA argues that the Nursing Practice Act prohibits unlicensed school personnel from administering insulin to students with diabetes and that the School Medication Act does not authorize them to do so.

Please draft, for my signature, a letter to the CNA responding to its demand letter, stating that the Department declines to withdraw the Legal Advisory and arguing that the Department's position is sound and that the CNA's is not.

**STATE OF COLUMBIA**  
**DEPARTMENT OF EDUCATION**  
**LEGAL ADVISORY**

**TO:** All Superintendents of School Districts  
**FROM:** Lila Lanford, Secretary of the Department of Education  
**DATE:** February 10, 2017  
**RE:** Administration of Insulin to Students With Diabetes

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Some school districts have recently raised the question whether school personnel other than school nurses—unlicensed school personnel—may administer insulin to students with diabetes, including by injection. Citing the Columbia Nursing Practice Act, they have proceeded to give a negative answer.

Broadly speaking, the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400, et seq., was enacted by Congress as anti-discrimination statutes to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families, in order to enable them to take full advantage of educational opportunities equally with their peers. The health care services to which students with disabilities have a right include the administration of needed medication. Students with diabetes are students with a disability within the meaning of the IDEA, and need medication including insulin.

It is undisputed that, under the School Medication Act and the Nursing Practice Act, school nurses may administer insulin to students with diabetes. After review, we have concluded that, under the School Medication Act, unlicensed school personnel may do so as well, without offense to the Nursing Practice Act.

Properly construed, the School Medication Act authorizes unlicensed school personnel to administer insulin to students with diabetes, and the Nursing Practice Act does not prohibit them from doing so. Any other construction of the School Medication Act and the Nursing Practice Act would yield unreasonable results and run the risk of making the statutes an obstacle to Congressional objectives as they appear in the IDEA.

If you have any questions about this Legal Advisory, please contact General Counsel James Wood at the Columbia Department of Education, 300 King Street, Springfield, Columbia or [jwood@cde.columbia.gov](mailto:jwood@cde.columbia.gov).

**COLUMBIA NURSES ASSOCIATION**  
**2000 FRANKLIN STREET**  
**MAPLETON, COLUMBIA**

February 16, 2017

James Wood, Esq.  
General Counsel  
Columbia Department of Education  
300 King Street  
Springfield, Columbia

Re: Legal Advisory

Dear Mr. Wood:

On February 10, 2017, as you are aware, the Columbia Department of Education (Department) issued a Legal Advisory on the “Administration of Insulin to Students With Diabetes.” In the Legal Advisory, the Department concluded that school personnel other than school nurses—unlicensed school personnel—are authorized to administer insulin to students with diabetes, including by injection, by the School Medication Act, and are not prohibited from doing so by the Nursing Practice Act.

On behalf of the Columbia Nurses Association (CNA), whose 310,000 members include the state’s 2,800 school nurses, I am writing to demand that the Department withdraw the Legal Advisory immediately.

***First***, contrary to the conclusion advanced by the Department in the Legal Advisory, the School Medication Act does *not* authorize unlicensed school personnel to administer insulin to students with diabetes. The School Medication

Act authorizes unlicensed school personnel only to *assist* students with medication, that is, only to *help* students administer medication *to themselves*, not to *administer* medication to students. School Medication Act, Section 3(a). That means that the School Medication Act authorizes unlicensed school personnel only to help students with diabetes administer insulin to themselves, not to administer insulin to students. If there were any ambiguity on this point, the legislative history of the School Medication Act would dispel it. In 2002, the Legislature amended the School Medication Act to authorize unlicensed school personnel to administer insulin to students with diabetes, but the Governor vetoed the amendment.

**Second**, contrary to the conclusion advanced by the Department in the Legal Advisory, the Nursing Practice Act prohibits unlicensed school personnel from administering insulin to students with diabetes. The Nursing Practice Act provides that, unless he or she possesses a license, no person may engage in the practice of nursing, which includes the administration of medication, such as insulin. Nursing Practice Act, Sections 2 and 3(a)(2). Although the Nursing Practice Act contains exceptions, *id.* Section 4, none allows unlicensed school personnel to administer insulin to students with diabetes. The exception that arguably comes closest is not close enough. The Nursing Practice Act provides that it “does not prohibit” the “performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician,” as long as such a person does not engage in the practice of nursing. *Id.* Section 4(e). In administering insulin to a student with diabetes, unlicensed school personnel would necessarily be engaging in the practice of nursing, since the practice of nursing includes the administration of medication, even if unlicensed school personnel were acting “in accordance with orders issued by a physician.”

**Third**, the CNA recognizes that, under the Individuals with Disabilities Education Act (IDEA), students with diabetes have a disability and need medication



including insulin. That said, the IDEA does not displace state statutes. See, U.S. Dept. of Health and Human Services, *Helping the Student With Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016). Neither does the IDEA grant students with disabilities any right to medication except as needed. See, *Davis v. Francis Howell School District* (U.S. Dist. Ct., N.D. Columbia, 2015). Of course, no student with diabetes needs insulin administered by unlicensed school personnel. It goes without saying that the administration of insulin is hardly a trivial matter. Insulin has been identified as a “high-alert” medication by the United States Department of Health and Human Services. U.S. Dept. of Health and Human Services, *High-Alert Medications* (Jan. 1, 2017). As a high-alert medication, insulin is presumptively too dangerous for unlicensed school personnel to administer.

If the Department fails to withdraw the Legal Advisory immediately, the CNA will initiate an action to declare the Legal Advisory invalid as contrary to law. The CNA is confident that it would prevail in such an action.

The CNA urges the Department not to waste its limited resources in litigation, but to use such resources wisely for the benefit of all students, including students with diabetes, to help school districts hire more school nurses. The CNA accordingly urges the Department to do what is both proper and prudent—withdraw the Legal Advisory straightaway.

Very truly yours,

*Marilyn Cones*

Marilyn Cones

Associate General Counsel

# **Helping the Student With Diabetes Succeed: A Guide for School Personnel**

**United States Department of Health and Human Services**

**September 1, 2016**

Diabetes is one of the most common chronic diseases in school-aged children, affecting about 200,000 young people in the United States. According to recent estimates, about 19,000 youths are diagnosed with diabetes each year.

**Diabetes is a serious chronic disease in which blood glucose (sugar) levels are above normal due to defects in insulin production, insulin action, or both.**

Diabetes is the sixth leading cause of death by disease in the United States. Long-term complications of diabetes include heart disease, stroke, blindness, kidney failure, nerve disease, gum disease, and amputation of the foot or leg. Although there is no cure, diabetes can be managed and complications can be delayed or prevented.

**Diabetes must be managed 24 hours a day, 7 days a week.** For many students with diabetes, that means careful monitoring of their blood glucose levels throughout the school day. It also means administering multiple doses of insulin by injection to control their blood glucose and minimize complications in order to enable them to survive. Insulin must be administered at unpredictable as well as predictable times in the course of the school day, at unpredictable as well as predictable places on and off campus, including in the classroom and on field trips and during extracurricular activities. Some students with diabetes can monitor their own blood glucose levels and administer insulin to themselves. Monitoring blood glucose levels and administering insulin are tasks well within the competence of practically all adults and many young people as well. But although some students with diabetes can monitor their own blood glucose levels and administer insulin to

themselves, many others cannot. As a result, coordination and collaboration among members of the school health team—including the school nurse, if any, other school personnel, and the student himself or herself—and the student’s personal diabetes health care team—including the student’s physician, the student’s parents or guardians, and again the student himself or herself—are essential for helping students manage their diabetes in the school setting.

The purpose of this guide is to educate school personnel about effective diabetes management and to share a set of practices that enable schools to ensure a safe learning environment for students with diabetes, particularly those who use insulin to control the disease. The school health team and the training approach for school-based diabetes management explained in this guide build on what schools already are doing to support children with chronic diseases. The practices shared in this guide are consistent with the requirements of the Individuals with Disabilities Education Act (IDEA), which is enforced by the U.S. Department of Education for each student with diabetes. This guide can be used, however, in determining how to address the needs of students with diabetes. The individual situation of any particular student with diabetes will affect what is legally required for that student. In addition, this guide does not address State and local laws, because the requirements of these laws may vary from state to state and school district to school district. This guide should be used in conjunction with Federal as well as State and local laws.

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# High-Alert Medications

United States Department of Health and Human Services

January 1, 2017

High-alert medications are substances that carry a heightened risk of causing significant patient harm when they are used in error. Although errors may or may not be more common with these substances, the consequences of an error are clearly more devastating. We hope you will use this list to determine which of these substances require special safeguards to reduce the risk of errors. This may include strategies like improving access to information about these substances; limiting access; using auxiliary labels and automated alerts; standardizing ordering, storage, preparation, and administration; and employing redundancies such as automated or independent double-checks when necessary.

Colchicine injection

Epoprostenol

Insulin

Magnesium sulfate

Methotrexate

Opium tincture

Oxytocin

Nitroprusside sodium

Potassium chloride

Potassium phosphate

Promethazine

Sodium chloride

Sterile water for injection, inhalation, and irrigation

# **The Nursing Shortage in Columbia: Policy Advisory**

**State of Columbia  
Board of Nursing  
January 15, 2017**

With only 310,000 nurses to serve a population of 35 million people, Columbia is experiencing a severe nursing shortage—a shortage that is likely to become even more severe in the foreseeable future.

Just last year, the Columbia Legislature found that the state “faces an ever-increasing nursing shortage that jeopardizes the health and well-being of the state’s citizens.” A forecast for 2030 predicts that Columbia will need 100,000 to 120,000 more nurses than the state will have available to meet health care needs. That statewide challenge will call for different responses depending on the region. Urban areas will need nurses to care for a growing, aging population. Rural areas are likely to lose nurses as their nurse population retires and are unlikely to replace them because of the absence of nursing education programs there. All areas will need nurses for safe, competent care in a host of settings.

By way of example, Columbia faces an ever-increasing school nursing shortage. There are more than 6 million students in Columbia public schools. Among them, 600,000 have some sort of disability, including 14,000 with diabetes, 12,000 with hearing impairment, 12,000 with orthopedic impairment, and 6,000 with visual impairment. There are only 2,800 school nurses to care for all of these 6+ million students, constituting only 1 school nurse for every 2,200 students; only 5 percent of schools have a school nurse full-time; 69 percent have a school nurse part-time; and 26 percent have no school nurse at all.

Factors contributing to Columbia's nursing shortage include changes in the healthcare environment that resulted in downsizing of the nursing work force as a result of managed care, the aging nursing work force, and public policy regarding nursing education. As a result, Columbia ranks 50<sup>th</sup> in the nation in number of nurses per 100,000 population. The current shortage is termed a "public health crisis" owing to a projected shortfall of 25,000 nurses within the next five years. Finding 25,000 additional nurses over the next five years only maintains the status quo.

Columbia cannot easily obtain additional nurses by increasing out-of-state recruitment. Half of the nurses working in Columbia already are educated in other states or countries. The shortage is occurring in other states and the educational pipeline, especially at the baccalaureate level, is decreasing nationally. Recruitment efforts aimed at increasing enrollments in Columbia programs are problematic. Until recently, all pre-licensure nursing education programs were fully subscribed, many with waiting lists of up to four years. Additionally, the number of pre-licensure nursing education enrollment opportunities have decreased slightly over the last 10 years rather than increasing to keep pace with increases in population.

While nursing shortages are not new, the current situation differs from past shortages. Not only is the shortage in number of nurses, the educational preparation of nurses is inadequate to meet the demands of today's health care system. Employers demand more nurses for hospitals and specialty nurses for intensive care units, operating rooms, emergency rooms, and other specialized areas of acute care.

In an effort to address the nursing shortage, the Board of Nursing has divided its work into three phases. The first phase will focus on development of a dynamic work force forecasting model to measure the need for nurses. The second phase will focus on a master plan for nursing education and practice. The third

phase will focus on evaluating the utility of the competencies for education and practice, synthesizing the next set of data, and creating an ongoing mechanism to continue collecting and analyzing data regarding the nursing work force. The Board of Nursing will publish an interim report on the completion of each phase, aiming for publication of the first-phase interim report in October 2017, the second-phase interim report in February 2018, and the third-phase interim report in May 2018. The Board of Nursing will publish a final report containing a comprehensive action plan in or around September 2018.



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**Performance Test A  
LIBRARY**



# IN RE COLUMBIA NURSES ASSOCIATION

## LIBRARY

**Selected Entries from the  
21<sup>st</sup> Century American Dictionary .....**

**Selected Provisions of the  
Columbia School Medication Act .....**

**Selected Provisions of the  
Columbia Nursing Practice Act .....**

**Davis v. Francis Howell School District  
U.S. Dist. Ct. N.D. Columbia (2015).....**

**Selected Entries from the  
21st Century American Dictionary  
Third Edition, 2016**

**Administer**

ad·min·is·ter verb \əd-'mi-nə-stər\

transitive verb

1: to manage or supervise the execution, use, or conduct of <*administer* a trust fund>

2a : to mete out : dispense <*administer* punishment> b : to give ritually <*administer* the last rites> c : to give remedially by placing into or onto the body <*administer* a dose of medicine>

intransitive verb

1: to perform the office of administrator

2: to furnish a benefit : minister <*administer* to an ailing friend>

3: to manage affairs

\* \* \* \* \*

**Assist**

as·sist verb \ə-'sist\

transitive verb

: to give support or aid to another by doing something for the other <*assisted* the boy with his dressing by putting on his rain boots> or by helping the other do something him- or herself <*assisted* the girl with her lessons by answering her questions>

intransitive verb

1: to give support or aid <*assisted* at the stove> <another surgeon *assisted* on the operation>

2: to be present as a spectator <the ideal figures *assisting* at Italian holy scenes — Mary McCarthy>

\* \* \* \* \*

## **Selected Provisions of the Columbia School Medication Act**

### **Section 1.**

- (a) This statute may be referred to as the School Medication Act.
- (b) This statute shall be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of students in the public schools of this state.
- (c) The Legislature finds that there is a severe shortage of school nurses in this state and declares that it enacts this statute to address that shortage.

### **Section 2.**

No person shall administer medication to any student in any public school in this state.

### **Section 3.**

- (a) Notwithstanding Section 2 of this statute, any student who is required to take medication prescribed for him or her by a physician may be assisted by a school nurse or by other school personnel, whether or not such personnel are licensed as health care professionals, if the school district receives the appropriate written statements identified in subsection (b).
- (b) In order for a student to be assisted pursuant to subsection (a), the school district shall obtain (i) written orders issued by the student's physician for the administration of the medication, detailing the name of the medication, method, amount, and conditions for its administration and (ii) written consent by the student's parent or guardian indicating a desire that the school district provide assistance to the student in the matters set forth in the written orders of the physician.

**Section 4.**

- (a) Notwithstanding Section 2 of this statute, any student with diabetes who is required to take insulin prescribed for him or her by a physician may administer insulin to himself or herself if the school district receives the appropriate written statements identified in subsection (b).
  
- (b) In order for a student with diabetes to administer to himself or herself pursuant to subsection (a), the school district shall obtain (i) written orders issued by the student’s physician for the self-administration of insulin, detailing the name of the insulin, method, amount, and conditions for its self-administration and (ii) written consent by the student’s parent or guardian indicating a desire that the school district allow the student to administer insulin to himself or herself in the matters set forth in the written orders of the physician.

\* \* \* \* \*

**Historical and Statutory Notes.**

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Section 3. In 2002, the Legislature passed Assembly Bill No. 481 (2002 Reg. Sess.), which would have amended Section 3 to provide that, in the absence of a school nurse, other school personnel without any license as a health care professional “shall administer assistance to students with diabetes,” including “administering insulin” to them. Assem. Bill No. 481 (2002 Reg. Sess.), as enrolled Sept. 17, 2002, Section 2. The Governor vetoed Assembly Bill No. 481. In the veto message, the Governor stated that “Section 3 ‘already provides that any student who is required to take ... medication ... may be assisted by unlicensed school personnel,’ and hence already authorizes such personnel to administer insulin to students with diabetes.” Governor’s Veto Message to Assem. on Assem. Bill No. 481 (2002 Reg. Sess.) (Sept. 26, 2002).

## **Selected Provisions of the Columbia Nursing Practice Act**

### **Section 1.**

This statute may be referred to as the Nursing Practice Act.

### **Section 2.**

No person may engage in the practice of nursing in this state without a valid and current license issued by the Board of Nursing.

### **Section 3.**

(a) The practice of nursing within the meaning of this statute consists of those functions, including basic health care, that help people cope with difficulties in daily living that are associated with their actual or potential health or illness problems or the treatment thereof, and that require a substantial amount of scientific knowledge or technical skill. Such functions may include any and all of the following:

- (1) Direct and indirect patient care services that ensure the safety, comfort, personal hygiene, and protection of patients; and the performance of disease prevention and restorative measures.
- (2) Direct and indirect patient care services, including, but not limited to, the administration of medication, necessary to implement a treatment, disease prevention, or rehabilitative regimen ordered by a physician, dentist, podiatrist, or clinical psychologist.
- (3) The performance of skin tests, immunization techniques, and the withdrawal of human blood from veins and arteries.

- (4) Observation of signs and symptoms of illness, reactions to treatment, general behavior, or general physical condition, and (i) determination of whether the signs, symptoms, reactions, behavior, or general appearance exhibit abnormal characteristics, and (ii) implementation, based on observed abnormalities, of appropriate reporting or referral or the initiation of emergency procedures.

**Section 4.**

This statute 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.
- (c) Domestic administration of family remedies by any person.
- (d) Nursing services in case of an emergency. "Emergency," as used in this subsection, means an epidemic or public disaster.
- (e) The performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician, as long as such a person does not hold him- or herself out as a nurse.

\* \* \* \* \*

**Section 35.**

This statute shall be construed broadly in order to give effect to the intent of the Legislature, which is to promote the health and safety of the people of this state.

## **Davis v. Francis Howell School District**

**United States District Court for the Northern District of Columbia (2015)**

Mary and Bobby Davis sued the Francis Howell School District, claiming that its refusal to administer to their son Shane his prescribed dose of Ritalin to treat attention deficit hyperactivity disorder (ADHD) violates the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. Sections 1400, et seq.

The school district has moved for summary judgment.

The law is settled. Congress enacted the IDEA as an anti-discrimination statute to grant students with disabilities a right to a free appropriate public education, with a complementary right to health care services, at no cost to themselves or their families, in order to enable them to take full advantage of educational opportunities equally with their peers. Congress stated the IDEA's purpose as to include "ensur[ing]" that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related" health care and other "services designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Section 1400(d)(1)(A). The health care services to which students with disabilities have a right include the administration of needed medication. 34 C.F.R. Section 300.34(c)(13). Any prohibition in state law that stands as an obstacle to the accomplishment of Congressional objectives is preempted under the Supremacy Clause of the United States Constitution. *Hines v. Davidowitz* (U.S. Supreme Ct. 1941).

The evidence is undisputed. Suffering as he does from ADHD, Shane is a student with a disability. His physician has prescribed a daily dosage of 360 milligrams of Ritalin to control his symptoms of ADHD, up to 120 milligrams of which must be administered during the school day in one or two doses. The school nurse at Shane's school had been administering his school-time dose of

Ritalin for over a year when she expressed concern to Mrs. Davis that the dose might be dangerous because it far exceeded the recommended maximum dosage of 60 milligrams stated in the Physician's Desk Reference, which is the leading authoritative source of drug information approved by the Food and Drug Administration. Under the Columbia Medication Review Act, a "school nurse has the right and obligation to refuse to give any medication in excess of the recommended maximum dosage as stated in the Physician's Desk Reference." Medication Review Act Section 3. In accordance with the statute, the school nurse at Shane's school refused to continue to administer his school-time dose of Ritalin. The school district offered to allow the Davises to come to school to administer the medication themselves, but they refused the offer.

In moving for summary judgment, the school district argues that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law because Shane was not denied any right under the IDEA.

For the school district's summary judgment motion, the threshold issue—which turns out to be dispositive—involves the proper construction of the IDEA and the Medication Review Act.

In construing a statute, a court undertakes a single fundamental task, which is to effectuate the intent of the legislative body. *Smith v. District Court* (15th Cir. 2006). It begins with the language of the statute. *Cummins, Inc. v. District Court* (15th Cir. 2005). In doing so, it takes the statute's words as it finds them, giving them their usual and ordinary meaning. *Id.* Not only does it begin with the words of the statute, it also ends with them if they are unambiguous. *Id.* But if the words of the statute are ambiguous, it proceeds to extrinsic materials including legislative history and background facts. *Smith, supra.* In resolving any ambiguity that might remain in the words of the statute, it adopts a reading of the statute that yields reasonable results and rejects a reading that yields unreasonable ones. *Id.* Among other things, it avoids reading the statute in such



a way as to set up an obstacle to the accomplishment of Congressional objectives and would thereby avoid preemption. *Santa Clara County Local Transportation Authority v. Guardino* (15th Cir. 1995).

Although Congress intended to grant students with disabilities a right to receive the administration of needed medication by means of the IDEA, there is absolutely *no* language in the IDEA that could conceivably be read to grant *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. As noted, the IDEA's purpose includes "ensur[ing]" that "all children with disabilities have available to them a free appropriate public education that emphasizes special education and related health care and other "services," such as administration of needed medication, "designed to meet their unique needs and prepare them for further education, employment, and independent living." 20 U.S.C. Section 1400(d)(1)(A). Not a word of the IDEA's language supports the existence of any right to receive medication in a potentially dangerous dosage. Quite the contrary. The IDEA's language precludes the existence of any such right because the IDEA aims to further the welfare of children with disabilities, not to undermine it.

And even if the language of the IDEA were ambiguous on this score—and it is not—there is *no* extrinsic material supporting a reading that the IDEA granted *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. That is hardly surprising, since, as indicated, the IDEA aims to further, not undermine, the welfare of children with disabilities.

In attempting to avoid summary judgment, the Davises ignore the IDEA itself. Instead, they argue that the language of the Medication Review Act is ambiguous in stating that a "school nurse has the right and obligation to refuse to give any medication in excess of the recommended maximum dosage as stated in the Physician's Desk Reference" (Medication Review Act Section 3) and that, if it were read in accordance with the apparent meaning of its words, it would set up

an obstacle to the accomplishment of Congressional objectives in the IDEA and would thereby suffer preemption. We disagree. There is nothing ambiguous about the language of the Medication Review Act. Nor does the Medication Review Act's language constitute an obstacle to any Congressional objectives in the IDEA. As stated, the IDEA does not grant *any* student with *any* disability a right to receive even needed medication *in a potentially dangerous dosage*. Practically by definition, a dosage of any medication that is in excess of the recommended maximum dosage as stated in the Physician's Desk Reference is a potentially dangerous dosage.

Because, under the law and the evidence, Shane was not denied any right under the IDEA, there is no genuine dispute as to any material fact and the school district is entitled to judgment as a matter of law. We accordingly grant the school district's motion for summary judgment and enter judgment in its favor.

**1) Please type the answer to PT-A below. (Essay)**

James Wood, Esq.  
STATE OF COLUMBIA  
DEPARTMENT OF EDUCATION  
OFFICE OF THE GENERAL COUNSEL  
300 King Street  
Springfield, Columbia  
jwood@cde.columbia.gov

February 21, 2017

Marilyn Cones, Esq.  
Associate General Counsel  
Columbia Nurses Association  
2000 Franklin Street  
Mapleton, Columbia

Re: Legal Advisory

Dear Ms. Cones,

This letter is in response to your letter dated February 16, 2017 regarding the Legal Advisory on the Administration of Insulin to Students with Diabetes I issued our school district superintendents on February 10, 2017. After a careful review of the points and authorities in your letter, the Columbia Department of Education (Department) has determined that the Columbia Nurses Association's (CNA) position is not legally sound. First, the Columbia School Medication Act *expressly* authorizes unlicensed school personnel to administer insulin to diabetic students. Second, the Columbia Nursing Practice Act prohibits unauthorized individuals from holding themselves out as nurses while conducting the full range of nurse duties, not the administration of insulin to diabetics. Third,

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the Department need not contest the CNA's position that IDEA does not displace state statutes as no such inconsistencies arise. Finally, the Department contends that diabetic students, parents, and physicians who expressly authorize unlicensed school personnel to administer insulin to those diabetics may actually need those personnel to administer insulin, contrary to the position in your letter. Thus the Department respectfully declines the CNA's demand to withdraw the Legal Advisory.

#### 1. Unlicensed School Personnel Expressly Authorized to Administer Insulin to Diabetic Students

The Department disagrees with the CNA's position that the School Medication Act -- despite its plain language expressly providing as such -- does not authorize unlicensed school personnel to administer insulin to diabetic students. As support for this position, you cite Section 3(a) of the School Medication Act. Indeed, that section exempts unlicensed school personnel from the prohibition in Section 2. Section 2 notably states, "No person shall *administer* medication to any student in any public school in this state." (emphasis added). While Section 3(a) does read that students may be "assisted" by exempted personnel, the CNA has not demonstrated the statutory meaning of the word "assisted" to prohibit assisting a diabetic by administering insulin, nor will it be able to. If the subsection drew such an impasse between administering insulin and assisting diabetic students in self-administering insulin, I have no doubt you would have demonstrated as such in your letter.

The Department finds that a court is also unlikely to support the CNA's interpretation of the statutory scheme. "In construing a statute, a court undertakes a single fundamental task, which is to effectuate the intent of the legislative body. It begins with the language of the statute. In doing so, it takes the statute's words as it finds them, giving them their usual and ordinary meaning..." *Davis v. Francis Howell School District* (U.S. Dist. Ct., N.D.

Columbia, 2015) (citations omitted). While this federal ruling may not immediately control a state court's potential ruling on the statutes in question, we find that a state court is also unlikely to have a contrary method of interpreting statutes. Consulting a dictionary further indicates that the word "assist" does not preclude a meaning of completing an action on behalf of another, defining it as "to give support or aid to another by doing something for the other ... or by helping the other do something him- or herself." 21st Century, American Dictionary (2016 3d Ed.). While we do not contest the legality of an unlicensed school personnel's assistance with a diabetic student's self-administration of insulin, it is unreasonable to interpret the statutory scheme to mean that those personnel are exempt from assisting self-administration of insulin while prohibited from administering insulin with the students, parents, and physicians' permission.

"But if the words of the statute are ambiguous, it proceeds to extrinsic materials including legislative history and background facts." *Davis, supra* (citations omitted). While we do not find the statute ambiguous, a court considering your use of the statutory amendment's historical veto would also have to consider the official explanation for that veto. "Section 3 'already provides that any student who is required to take ... medication ... may be assisted by unlicensed school personnel,' and hence already authorizes such personnel to administer insulin to students with diabetes." Governor's Veto Message to Assem. on Assem. Bill No. 481 (2002 Reg. Sess.) (Sept. 26, 2002). In executing the veto you cited, the governor further demonstrated the lack of ambiguity in the statute, and explained that the primary purpose of the veto was to prevent redundant legislation.

"In resolving any ambiguity that might remain in the words of the statute, [a court] adopts a reading of the statute that yields reasonable results and rejects a reading that yields unreasonable ones." *Davis, supra* (citations omitted). In addition to Section 2's indication that the subsequent use of "assisted" refers to administering medication, Subsection (b), Section 3 requires the school district to

obtain the written orders of the student's physician "for the administration of the medication detailing the ... conditions for its administration [and] written consent by the student's parent or guardian indicating a desire that the school district provide assistance to the student..." To interpret the statutory scheme in a way that would prohibit the school district from carrying out the specific instructions of a diabetic student, her physician(s), and her parent(s) to administer insulin is an entirely unreasonable result.

Further reading of the statutory scheme shows that assistance to students' self-administering of insulin is expressly provided for in Section 4. The statutory interpretation relied upon in your letter would mean that the legislation redundantly provided for the exact same assistance in two consecutive sections. This again is an unreasonable result, and inconsistent with how a court would interpret the legislation. I relied upon a more reasonable interpretation in my Legal Advisory, that understands these two consecutive sections to provide for our personnel's administering of insulin as well as assistance to students' self-administering of insulin.

## 2. Nursing Practice Act Prohibits Unauthorized Individuals from Holding Themselves Out as Nurses, Not Administering Insulin to Diabetics

The Department further disagrees with the CNA's position that "unlicensed school personnel would necessarily be engaging in the [unauthorized] practice of nursing, since the practice of nursing includes the administration of medication." Based upon this rationale, each individual service provided for in the Nursing Practice Act is strictly prohibited conduct by persons not licensed as nurses. This is not so. "The practice of nursing within the meaning of this statute ... the treatment [of actual or potential health or illness problems] that require a substantial amount of scientific knowledge or technical skill. Such functions *may* include any *and all* of the following..." Section 3(a) (emphasis added). With the understanding that nurses often have to perform unskilled lay services as well

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special technical services, the Nursing Practice Act is carefully worded to help define the profession without penalizing, for example, school personnel from executing the orders of a student's physician and parents.

The statutory scheme is not unlike the laws governing unauthorized practice of law that you are likely familiar with. As you noted, it "does not prohibit ... performance by any person of such duties as required in the physical care of a patient in accordance with orders issued by a physician." Section 4(e). The CNA's position that the administering of insulin to diabetic students "would necessarily be engaging in the practice of nursing" is unsupported. The circular logic provided, that "since the practice of nursing includes the administration of medication," would result in the strict prohibition of "care services that ensure the safety, comfort, personal hygiene, and protection of [sick persons]." Section 3(a)(1). Again, this is an unreasonable interpretation, and the Department finds that a court would not favor your rationale.

For comparison, a court might entertain a claim that this law was violated if a layperson were to conduct "the performance of skin tests, immunization techniques, and the withdrawal of human blood from veins and arteries." Section 3(a)(3). But as you concede, the statute expressly provides for a number of exceptions, the broadest of which includes "any person ... in accordance with orders issued by a physician, as long as such a person does not hold him- or herself out as a nurse." Section 4(e). Read together, the clear purpose of these statutes is to maintain the standard of the nursing profession, rather than to prohibit a wide array of services including lay services.

### 3. The IDEA Right to Medication Is Consistent with School Medication Act Authorization to Administer Insulin

The Department's reasonable interpretation of the state statutory schemes results in an accordance with the Individuals with Disabilities Education Act

(IDEA), rather than conflicting with it. As set out above, we understand the legislation to empower school personnel in their roles supporting students with disabilities, not to limit it. As such is the case, we need not dispute your contention that the IDEA "does not displace state statutes." Further, you contend that IDEA does not "grant students with disabilities any right to medication except as needed." This contention seems to ignore the fact that medications are, by their very definitions, needed. It also ignores the case law cited in your letter for that very proposition. "The health care services to which students with disabilities have a right include the administration of needed medication." *Davis, supra*, citing 34 C.F.R. Section 300.34(c)(13).

The Department of Health and Human Services (DHHS) resource you included also seems to disagree with your position. Although you cited it for the proposition that the IDEA does not displace state statutes, it also serves to explain the unreasonable risk that would result by prohibiting school personnel from administering insulin to diabetic students. "Diabetes must be managed 24 hours a day, 7 days a week... that means careful monitoring of [diabetic students'] blood glucose levels throughout the school day. It also means administering multiple doses of insulin by injection ... in order to enable them to survive." U.S. Dept. of Health and Human Services, *Helping the Student with Diabetes Succeed: A Guide for School Personnel* (Sept. 1, 2016) (DHHS). Again, we find that there is no conflict between the IDEA and the School Medication Act. To the contrary, they both seem to indicate that our state and federal legislators have designed these laws to expand services for diabetic students, rather than restrict them.

#### 4. Diabetic Students Expressly Authorizing School Personnel to Administer Insulin May Need School Personnel to Administer Insulin

Finally, the Department must address your letter's disturbing claim that "[o]f course, no student with diabetes needs insulin administered by unlicensed



school personnel." Again, the DHHS resource you cited helps to illustrate the fatal risk our students face without assistance by school personnel. We implore you to compare the present situation to that in the *Davis* case. The *Davis* student required Ritalin to control his symptoms of ADHD. In limiting the student's dosage to the maximum recommendation provided by a leading authoritative source, the nurse in *Davis* did not place the student in any apparent life-threatening risk. By comparison, "[d]iabetes is the sixth leading cause of death by disease in the United States." DHHS, *supra*. We do not believe a court will support your position that the risks of permitting unlicensed school personnel to administer insulin under physician orders outweigh the risk of allowing them to perform this task.

In your letter, you argue that the DHHS identified Insulin as a "high-alert" medication, and that it cannot be entrusted to unlicensed school personnel even under a physician's orders. A closer look at the resource you cited shows no rationale for the inclusion of Insulin as a "high-alert" medication, particularly when that list also includes "sterile water." U.S. Dept. of Health and Human Services, *High-Alert Medications* (Jan. 1, 2017) Again, there is insufficient support to show any danger in allowing unlicensed school personnel to administer insulin under physician orders.

By returning to the exceptions set out in the Nursing Practice Act, we can see that this scenario is provided for in the legislation. Section 4(d) permits unlicensed "[n]ursing services in case of an emergency. 'Emergency' as used in this subsection means an epidemic or public disaster." Our state is facing a worsening public health crisis, with a shortage of available nurses anticipated to decrease even further. Columbia Board of Nursing, *The Nursing Shortage in Columbia: Policy Advisory* (Jan. 15, 2017). That shortage has and will continue to most heavily impact our state's most vulnerable populations, including public school students.

For all the foregoing reasons, the Department cannot and will not withdraw its Legal Advisory. I implore the CNA to consider the potentially fatal ramifications of restricting the ready availability of diabetes treatment for our public school students.

Sincerely,

James Wood  
General Counsel

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Question #1 Final Word Count = 2117

**END OF EXAM**