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Care of Students with Diabetes Act becomes law

by Maureen Anichini Lemon

Recognizing the serious health condition posed by diabetes, the Illinois General Assembly passed Public Act 96-1485, the Care of Students with Diabetes Act ("Act"). Governor Quinn tried to postpone the effective date of the law until June 2011, but the governor's amendatory veto was overridden by the Illinois General Assembly. The law became effective December 10, 2010.

A school district's obligations to a student with diabetes begins with a diabetes care plan ("DCP"), signed by the student's parent/guardian and submitted to the school district for any student with diabetes who seeks assistance in the school setting. The DCP shall address the student's needs at school and at school-sponsored activities, and identifies the appropriate school staff to provide and supervise the student's diabetic services. This information should be received through the parent/guardian, who is responsible for sharing any instructions received by the student's health care provider concerning the student's diabetes management during the school day. These instructions must include a copy of the signed prescription and method of insulin administration, if applicable. The family shall submit the DCP to the school district at the beginning of each school year, upon enrollment, as soon as practical following a student's diagnosis, or when a child's care needs change during the school year.

Upon receipt of a DCP, each school district shall develop a Section 504 plan and provide reasonable services and accommodations to the diabetic student. Using a form developed by the Illinois State Board of Education, the DCP shall include a uniform record of glucometer readings and insulin administered by the school nurse or a 'delegated care aide' during the school day. The Act defines a delegated care aide as a school employee who has agreed to receive training in diabetes care and to assist students in implementing their DCPs and has entered into an agreement with a parent/guardian and with the school district. The DCP shall include procedures regarding when a delegated care aide shall consult with the parent/guardian, school nurse, where available, or health care provider to confirm that an insulin dosage is appropriate. As an example, a delegated care aide may need to confirm that the insulin dosage is appropriate given the number of carbohydrates to be taken and the student's blood glucose level when an unexpected snack or meal requires insulin to be administered.

Delegated care aides must be trained to perform specific tasks necessary to assist a student with diabetes in accordance with the student's DCP, including: checking blood glucose and recording results; recognizing and responding to the symptoms of hypogly-

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State and federal anti-bullying measures

by David Zafiratos

State and federal law require Illinois school districts to address bullying in schools. In the past year, the Illinois General Assembly beefed up the state's anti-bullying statute, and the U.S. Department of Education recently provided a Dear Colleague Letter providing an overview of federal anti-bullying requirements.

Illinois Public Act 96-0952

Originally enacted in 2006, Section 27-23.7 of the School Code addresses bullying prevention. It applies to all public elementary and secondary school districts, as well as all non-public, non-sectarian elementary and secondary school districts. Effective June 28, 2010, Public Act 96-0952 amended Section 27-23.7 by defining bullying; prohibiting bullying; and requiring schools to educate parents, students and school personnel about bullying. Now, bullying is defined as severe or pervasive physical or verbal acts or conduct, including written or electronic communications, directed toward a student that has or can be reasonably predicted to have the effect of (1) placing the student in reasonable fear of harm to himself or property; (2) causing a substantially detrimental effect on the student's physical or mental health; (3) substantially interfering with the student's academic performance; or (4) substantially interfering

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When student silence is golden *and* permitted by the Constitution

by Brian J. O'Connor

The shortest of laws can yield disproportionate impacts. Such is the case with the two-sentence October 2007 amendment to Illinois' Silent Reflection and Student Prayer Act ("Act"), which *required* the observation of a moment of silence at the beginning of each school day (105 ILCS 20/1). This Act initially failed a court challenge in federal district court, only to be recently upheld as being valid by the Chicago-based federal appellate court in *Sherman v. Koch* 623 F.3d 501 (7th Cir. Oct. 15, 2010).

Prior to the amendment, teachers had the option of observing a period of silence at the beginning of the school day: the change from an optional to a mandated moment of silence provided the basis for the legal challenge. In this instance, a parent (Robert Sherman) on behalf of his daughter-student (Dawn Sherman) challenged the implementation of the mandated period of silence by the Illinois State Board of Education and Township School District 214, as being impermissible under the Constitution's First Amendment prohibition against government advancement of religion (the "Establishment Clause"), and because it was unconstitutionally vague (imprecise and lacking essential details).

The *Sherman* court's ruling noted that the stated statutory purpose for this moment of silence was important to its successful survival of Mr. Sherman's Establishment Clause challenge. The full text of Section 1 provides as follows:

> In each public school classroom the teacher in charge shall observe a brief period of silence with the participation of all the pupils therein assembled at the opening of every school day. This period shall not be conducted as a religious exercise but shall be an opportunity for silent prayer or for silent reflection on the anticipated activities of the day.

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with the student's ability to participate in or benefit from the school's services, activities or privileges.

Public Act 96-0952 also added two new sections to the School Code. Section 27-23.9 requires the creation of a statewide School Bullying Prevention Task Force, which must study bullying in schools and report back to the Governor and the General Assembly. Section 27-23.10 recommends but does not require school districts to provide students with gang resistance education and training.

U.S. Department of Education Dear Colleague Letter

The recent U.S. Department of Education Dear Colleague Letter ("Dear Colleague Letter"), dated October 26, 2010 and available at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html, also clarifies the obligations placed on school districts under federal law to protect students from bullying. Included in the Dear Colleague Letter are the various federal anti-discrimination laws applicable to school districts, with an explanation of how these laws relate to anti-bullying efforts.

As a word of caution, the Letter points out that school districts might violate federal anti-discrimination laws if bullying is based on race, color, national origin, sex or disability. A school district will violate federal law if it encourages, tolerates, does not adequately address or altogether ignores bullying which is based on any of the above mentioned characteristics. The Letter then reviews specific examples of bullying that, if not addressed by a school district, would cause a violation of federal anti-discrimination statutes.

School districts must address harassment if they know or reasonably should know of its existence. In responding to harassment, schools must act immediately and take the action necessary to investigate the matter. As stated in the Letter, when schools determine harassment has occurred, they must take effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent harassment from recurring."

As further practical advice, the Letter includes advice for dealing with bullying that rises to the level of harassment. It states the school should separate the accused harasser and the target, provide counseling, or discipline the harasser. However, any steps a school takes to address the matter should not penalize the student who was harassed.

Response to Dear Colleague Letter

The National School Board Association ("NSBA"), through its General Counsel, wrote a Response to the Dear Colleague Letter on December 7, 2010. The Response is available at: http://www.nsba.org/SecondaryMenu/COSA/Updates. In its Response, the NSBA expresses its concern that the Dear Colleague Letter will invite "misguided liti-

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In its analysis of the statutory provision, the *Sherman* court applied the first two parts of the three-part test from the 1971 ruling by the U.S. Supreme Court in *Lemon v. Kurtzman* (the "Lemon Test") for whether a statute violates the Establishment Clause. The *Sherman* court first focused on whether this statute had a secular purpose and, second, whether it neither advanced nor inhibited religion. The opinion only briefly addressed the third Lemon Test requirement, that the law not foster an excessive government entanglement with religion, because Mr. Sherman had not challenged the law on this basis.

In a lengthy reflection of prior court rulings, the *Sherman* court reversed the determination of the lower district court. The *Sherman* court first found the Act had a secular purpose of establishing a uniform moment of quiet reflection at the start of the school day, and referenced the intent of the legislature in enacting the law. The *Sherman* court noted that a moment of silence may include a prayer option without being contrary to the first part of the Establishment Clause's Lemon Test.

The *Sherman* court then found that the Act did not have the principal effect of advancing or inhibiting religion: it was expressly neutral in its language, avoiding endorsement of religion by stating that the period of silence was not to be conducted as a religious exercise. The Act avoided inhibiting religion by stating that the period of silence was to be an opportunity for prayer or silent reflection.

Mr. Sherman's second challenge to the statute was that the mandated period of silence was unconstitutionally vague. Mr. Sherman argued that the law failed to state how the moment of silence would be implemented, and failed to identify penalties for non-compliance. The *Sherman* court noted that the threshold matter was whether the statute was vague in its operations. In its ruling, the *Sherman* court reviewed Township School District 214's proposed process of implementing the moment of silence, which began with a school-wide morning announcement "We will now have a brief period of silence" and after fifteen seconds the announcer would begin the Pledge of Allegiance. The *Sherman* court determined that the process was not vague, stating: "A student of ordinary intelligence would clearly understand that he is to remain silent for the fifteen seconds between the announcement and the beginning of the Pledge [of Allegiance]." The *Sherman* court also noted that the Constitution did not "mandate a cornucopia of additional details or a statement of the punishment students" might face for failing to comply with the required moment of silence. Based on this reasoning the *Sherman* court did not find the law unconstitutionally vague.

Sherman offers several lessons for Illinois schools. First, the *Sherman* court ruled that the current requirement is constitutionally acceptable. Recently, a federal judge lifted the injunction banning the practice. All Illinois school districts should comply with the daily moment of silence mandate.

Second, school employees need to exercise due care and caution in implementing the Act, to avoid running afoul of any prohibitions found in *Sherman,* and in the Establishment Clause's Lemon Test. Policies and procedures need to maintain a secular purpose, neither advance/endorse nor inhibit/disapprove of religion, and avoid government "entanglement" by avoiding school, teacher, staff, and student interaction on the topic of religion. ■

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gation that needlessly drains precious school resources and creates adversarial climates that distract schools from their educational mission."

The Response provides the opinion that the Dear Colleague Letter incorrectly states the applicable legal standards for school district responsibility in peer harassment situations. Additionally, the Response points out that the practical advice provided in the Letter is merely one view of the best practices regarding anti-bullying. The Response also takes issue with the Dear Colleague Letter's minimal attention to student First Amendment free speech rights. Interestingly, Section 27-23.7(e) of the Illinois School Code expressly states that nothing in Section 27-23.7 is intended to infringe upon anyone's right to exercise free expression or the free exercise of religion.

Conclusions

Although the U.S. Department of Education has not yet replied to the NSBA's Response, it is clear that both Illinois and federal law mandate school districts to address bullying in schools. We encourage you to read through the definitions and expectations contained in Section 27-23.7 of the School Code, develop and implement an appropriate anti-bullying policy, and offer the necessary training to students, parents and school personnel. Given the vast number of scenarios that might occur, each instance of bullying should be dealt with on a case-by-case basis to ensure that the rights of all students involved are protected.

If you have any questions regarding your obligation in this area, please do not hesitate to contact one of the attorneys with whom you have worked. ■

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cemia or hyperglycemia; estimating the number of carbohydrates in a snack or lunch; administering insulin and keeping a record of the amount administered; and responding in an emergency, including how to administer glucagon and call 911.

In addition to the training received by delegated care aides, the Act requires schools to train all school employees in the basics of diabetes care, how to identify when a student with diabetes needs immediate or emergency medical attention, and whom to contact in case of an emergency. This training must occur during regular in-service training provided by Section 10-22.39 of the School Code, 105 ILCS 5/10-22.39. The initial training must be provided by a licensed health care provider with expertise in diabetes or a certified diabetic educator, and individualized by a diabetic student's parent or guardian. Subsequent training shall occur when the DCP is updated and at least annually.

Any school employee who transports a diabetic student for school-sponsored activities must receive an information sheet identifying potential emergencies relating to the student's diabetes, appropriate responses to such emergencies, and emergency contact information.

While the Act clarifies that school districts do not need to hire additional personnel for the sole purpose of serving as a designated care aide, it may leave school districts that do not have sufficient coverage by school nurses at a clear disadvantage. Unfortunately for these school districts, the Act also notes that the State is not required to reimburse school districts for complying with the Act's requirements.

Finally, the Act permits students to self-manage their diabetes if their DCP authorizes such self-management. Specifically, students whose DCPs authorize self-management may do any of the following:

1. Check blood glucose whenever and wherever needed;
2. administer insulin;
3. treat hypoglycemia and hyperglycemia and otherwise attend to his diabetic needs in the classroom, in any area of the school or school grounds and at any school-related activity or event; and
4. retain in his possession the supplies and equipment necessary to monitor and treat diabetes, including, but not limited to, glucometers, lancets, test strips, insulin, syringes, insulin pens and needle tips, insulin pumps, infusion sets, alcohol swabs, a glucagon injection kit, glucose tablets, and food and drink.

Not all students will be permitted to manage their diabetes personally. Yet, for those students that are permitted to do so, this is a vast departure from the current practice of school districts to require students to manage their diabetes only in a school nurse's office. School districts must consider how they will address the potential distraction and disruption arising from a student's diabetic self-management at any time and at any place on school property.

The Act raises numerous additional challenges and concerns for school districts including potential employment and labor issues, and implications for Section 504 plans and IEPs. If you have any questions regarding the Act and your district's obligations under it, please do not hesitate to contact Maureen Anichini Lemon at (630) 682-0085. ■

Ottosen Britz Kelly Cooper Gilbert & DiNolfo, Ltd.'s newsletter, ***Legal Insights for School Districts,*** is issued periodically to keep clients and other interested parties informed of legal developments that may affect or otherwise be of interest to its readers. Due to the general nature of its contents, the comments herein do not constitute legal advice and should not be regarded as a substitute for detailed advice regarding a specific set of facts. Questions regarding any items should be directed to:

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