Trained, Unlicensed Personnel May Not Administer Insulin to Students

By Deborah R.G. Cesario and Susan Winkelman

In recent years, there has been much debate about who may administer insulin to students with diabetes. Faced with increasing financial strains and logistical challenges, many school districts have adopted a practice of allowing volunteer, unlicensed school personnel, such as teachers, to administer insulin to students with diabetes after receiving appropriate training. However, certain school nurses' associations have voiced objections to such policies, and have argued that only licensed health care professionals should be permitted to provide insulin injections.

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On June 8, 2010, the California Court of Appeal weighed in on this highly debated issue. It held that California law does not allow unlicensed school personnel to administer insulin to students with diabetes who require injections in non-emergency situations. (*American Nurses Assoc. et al., v.Connell et al.*, 2010 DJDAR 8490.)

This case arose as a result of a legal advisory the California Department of Education (CDE) issued in 2007 as part of a settlement of another lawsuit, *K.C. v. Jack O'Connell.* The advisory stated that, among other individuals, a "voluntary school employee who is unlicensed but who has been adequately trained" may legally administer insulin to students with diabetes under California law. The American Nurses Association and the American Nurses Association/California filed a lawsuit alleging that the advisory violated the Nursing Practice Act, the Education Code, and the Administrative Procedures Act.

The trial court held that state laws authorize the administration of insulin to a student only by a licensed health care professional acting within the scope of practice for which he or she is licensed. The trial court invalidated the portion of the CDE advisory that allowed unlicensed school personnel to administer insulin to students. It found that the advisory conflicted with state law and, therefore, could not be enforced. The American Diabetes Association and CDE appealed the ruling to the California Court of Appeal.

The Court of Appeal upheld the trial court's decision and confirmed that the portion of CDE's advisory that authorized unlicensed school personnel to administer insulin to students with diabetes was inconsistent with California law and, as such, invalid. The court initially analyzed the Nursing Practice Act and determined that the injection of insulin is a nursing function that may only be performed by licensed health care professionals. The court acknowledged that the Nursing Practice Act contains certain exceptions, including an emergency exception, but found that none were applicable. The court explained that an "emergency" under the Nursing Practice Act includes an epidemic or public disaster that is extraordinary, often without warning, wide-spread, and which requires an immediate response. It stated that an emergency is not a long-term chronic situation or hardship, such as the shortage of school nurses. The court also noted that an emergency is not the regular administration of medication to a student with a disability who is protected by Section 504 of the Rehabilitation Act of 1973 (Section 504) and/or the Individuals with Disabilities Education Act.

The court then turned to Education Code Section 49423, which states that a student who is required to take prescribed medication during the school day may be "assisted" by the school nurse or other designated school personnel. Based on the statutory language, the court concluded that "assist" means to "help in whatever way is legally permitted by the specific individual who is doing the assisting." However, as explained above, the Nursing Practice Act only permits licensed health care personnel to administer insulin injections. Therefore, the court held that assistance by "other designated school personnel" does not include the administration of insulin, unless such personnel are licensed health care professionals.

After determining that California law prohibits unlicensed school personnel from administering insulin to students with diabetes, the court examined whether federal laws protecting students with disabilities preempt state law. The court ultimately concluded that there was no preemption because California law does not prevent school districts from complying with their federal mandate to provide students with disabilities with a free, appropriate public education as is required by Section 504 and the IDEA. It explained that school districts are able to comply with both federal and state law by ensuring that licensed health care professionals are available to administer insulin to students with disabilities who require injections.

In its concluding remarks, the court stressed that it was not deciding whether unlicensed school personnel can safely administer prescribed insulin to students with diabetes or whether it would be reasonable to allow them to do so. It stated that if students with diabetes would be better served by allowing unlicensed, but trained, school personnel to administer insulin, it was up to the Legislature, not the courts, to change the law.

Earlier this year, California lawmakers introduced Assembly Bill 1802, which would allow trained volunteer school employees, designated by students' parents, to administer insulin to students if a school nurse or other licensed health care professional was not immediately available. That bill is currently stalled in the Health Committee.

Court of Appeal decisions generally become effective 30 days after a published decision is filed. This short time frame may create a challenge for school districts that will be faced with the task of hiring a sufficient number of licensed health care professionals, despite the shortage of school nurses and diminishing funds.

Delivering on Due Diligence

Jeffrey M. Weiner authored the lead chapter in the recently released book from Thomson Reuters, "*Business Due Diligence Strategies*." In his chapter, "*Due Diligence in M&A Transactions: A Conceptual Framework*," he provides for all those engaged in buying, selling or investing in businesses, and their advisors, a unique and entertaining discussion of the what, why, who, how and when of due diligence, emphasizing that it's all about minimizing risk, allocating risk and maximizing shareholder value. Below is an excerpt on the "why" of due diligence.

BOOK EXCERPT

Why Perform Due Diligence?

Why do we perform due diligence? Is there a law that mandates due diligence examinations in certain circumstances? Or do buyers or investors simply perform due diligence out of the goodness of their hearts, on a voluntary basis?

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While I am not aware of any statute mandating the performance of due diligence (except to take advantage of the "due diligence" defense in securities actions) in an acquisition transaction, we are all familiar with the fiduciary duties of directors. One such basic fiduciary duty is the duty of care. It is clear from a number of court decisions that a buyer's board of directors would be in breach of its fiduciary duty of care if it did not perform due diligence on a target company prior to acquisition, or did not perform an adequate due diligence examination. These cases also make clear, however, that boards are free to delegate the due diligence examination, and thereby discharge their fiduciary duty in this respect, to outside professionals, such as accountants, investment bankers, lawyers, and other experts.

But assume for a moment that your client is 100 percent owned by Jack and Jill, husband and wife, and suppose they are the only directors, as well as the sole joint shareholders. What then? The director fiduciary duty of care in these circumstances is, by hypothesis, essentially a non-issue. While technically even the husband and wife co-directors have the same fiduciary duty as the board of directors of IBM, it would be something of a stretch to equate the two situations. The husband and wife directors, as the sole shareholders of our buyer, are not likely to feel that they must perform due diligence because of the technical legal duty they in effect owe only to themselves.

In the circumstance posed, we must obviously find the impetus for performing due diligence in something other than mere legal obligation. Let us remember, now, where we started: We are all about minimizing risk, allocating risk, and maximizing shareholder value. And, as we have said, "due diligence" is "a future-oriented super audit to help minimize the risk and maximize the shareholder value of an M&A transaction."

Even absent the legal compulsion of a meaningful duty of due care in our husband/wife, sole directors hypothetical, minimizing risk and maximizing shareholder value are, of course, two very good things. After all, who would not want to minimize their risk and maximize their deal value? In mergers and acquisitions, ignorance definitely is *not* bliss — knowledge is power. Therefore, the more knowledge our client, the buyer, can gather about the target, the greater the likelihood that our client, with our assistance and that of the rest of the deal team, will be able to minimize deal risk and maximize deal value. Effective due diligence is how we gather the relevant information to pursue these objectives. Due diligence, however, is not the only tool we can use for this purpose.

Let us consider for a moment the interrelationship between due diligence and the definitive acquisition agreement. Suppose our client, together with our help and the help of a large team of outside experts, could perform the most perfect, complete, and penetrating investigation of the target company imaginable, leaving — literally — no stone unturned. And assume the transaction takes the form of a stock purchase, in which case no conveyancing or other asset transfer documents are necessary to effect the purchase. In this circumstance, would our client need *any* acquisition agreement? Theoretically, probably not, or at least not a very long one. I am reminded of the story, perhaps apocryphal, about Warren Buffet many years ago buying a rather large company using only a one-page stock purchase agreement.

Conversely, suppose we could draft the most complete — indeed, perfect — acquisition agreement, describing in excruciating detail precisely and completely the business and assets our client is buying. Further, suppose this perfect acquisition agreement contains complete and "lifetime" indemnification provisions covering all items of any concern to our client, and that the indemnities are backed either by a giant parent company or a Forbes 100 super-wealthy shareholder. In this situation, would our client need to perform *any* due diligence examination? Again, theoretically, probably not, or at least not a very extensive due diligence investigation.

To illustrate this interrelationship between due diligence and the definitive acquisition agreement, let us take an example that arises in almost every deal — undisclosed liabilities. Representing the buyer, we of course want to investigate the target as thoroughly as possible to make sure our client is aware of any and all liabilities it may be assuming, especially in the case of a stock purchase or merger. This can obviously be a very arduous and costly investigation, going well beyond basic public records searches, especially in a company of any size or complexity.

Alternatively, staying with our "undisclosed liabilities" example, we can insert in the acquisition agreement something like the following:

"Target has no liabilities whatsoever other than as set forth on Target's balance sheet dated __________, 2010 or incurred thereafter in the Target's ordinary course of business, consistent with past practice, and not exceeding $___ as to any individual item, or $____ as to all such items in the aggregate."

What we have just seen, then, are two very different ways (using due diligence versus using the acquisition agreement) to achieve the same goal — i.e., minimizing risk — and in this case, it is minimizing the risk of undisclosed liabilities. Due diligence and the acquisition agreement are the "ingredients" or tools we use, in the right proportions and at the right times, to help our clients. What we also know is that there is no such thing as "perfect" due diligence or a "perfect" acquisition agreement. Therefore, we must work with our clients to first understand their business objectives and transaction concerns. Once these are understood, we can work collaboratively to achieve the right mix or blend of "due diligence" and "acquisition agreement," to achieve the goal of minimizing the risk of undisclosed liabilities.

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