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FROM: Victoria Thomas
RE: OSHA Regulations Relevant to Diabetes Care at School and in Employment
DATE: June 6, 2008

THE OCCUPATIONAL SAFETY AND HEALTH ACT AND BLOODBORNE
PATHOGENS STANDARD: APPLICATION TO DIABETES CARE TASKS AT SCHOOL
AND IN EMPLOYMENT

I. INTRODUCTION

The purpose of the Occupational Safety and Health Act (OSH Act) is to assure “safe and healthful working conditions . . . by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment.”¹ The Occupational Safety and Health Administration (OSHA) is the federal agency within the Department of Labor that sets and enforces standards for workplace safety.² This memo addresses the question of how the OSH Act and its regulations apply to diabetes care in the workplace and in schools. Specifically, this memo addresses: 1. how the OSH Act may apply to school staff who assist students in diabetes care tasks at school; 2. how the OSH Act may apply to school staff when students self-administer diabetes care in school; and 3. how the OSH Act and its regulations may apply to workers who self-administer diabetes care in the workplace.

¹ 29 U.S.C. § 651, Sec. 2, (b) – (b)(1) (2008).

² OSHA’s Mission, Occupational Safety & Health Administration website, *available at* <http://www.osha.gov/oshinfo/mission.html>.

II. APPLICABILITY OF THE OSH ACT TO SCHOOL EMPLOYEES

Whether or not school staff members are protected by health and safety standards depends in part upon whether the state has opted to create its own state health and safety plan, or whether, instead, the state is subject to the OSH Act. If the state has not opted to create its own state health and safety plan, but is rather covered by the OSH Act, public school staff will not be covered and private school staff will be covered because the OSH Act applies to private, but not public, employers.³ The OSH Act states that public employers include state and municipal governments, specifically including public schools as exempt employers.⁴ The OSH Act allows a state to opt to create its own, state-controlled occupational safety and health plan,⁵ and requires that this state plan apply to state and local government employers.⁶ These optional plans must be approved by the Secretary of Labor and must be at least as rigorous as the OSH Act.⁷ As a result, all private school staff members are covered, either by the OSH Act or a state plan. All

³ 29 C.F.R. § 1975.5(a)(5) (2008) (“The term ‘employer’ means a person engaged in a business affecting commerce who has employees, but does not include the United States or any State or political subdivision of a State”).

⁴ Id.; 29 C.F.R. § 1975.5 (e)(1) (2008).

⁵ 29 U.S.C. § 667(b) (2008) (“Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 6 [29 U.S.C. § 655 (2008)] shall submit a State plan for the development of such standards and their enforcement”).

⁶ 29 C.F.R. § 1902.3 (j) (2008) (“The State plan shall include... an effective and comprehensive occupational safety and health program covering all employees of public agencies of the State and its political subdivisions”). For example, California’s state occupational health and safety plan applies to state and local government workers. Cal Lab Code § 6304 (2007) (under the Occupational Safety and Health Code, “‘Employer’ shall have the same meaning as in Section 3300”); Cal Lab Code § 3300 (2007) (“As used in this division, ‘employer’ means: (a) The State and every State agency; (b) Each county, city, district, and all public and quasi public corporations and public agencies therein”).

⁷ 29 U.S.C. § 667(c)(2) (2008).

states and territories except for Alabama, Florida, Idaho, and North Dakota have created their own state health and safety plans.⁸ As a result, the vast majority of public school staff, and all private school staff, are protected by public health and safety laws.

As previously mentioned, state health and safety plans must be at least as rigorous as the standards under the OSH Act.⁹ As a result, the OSH Act standards and interpretations supply a baseline even in states with state plans- although research on a state's health and safety code would be required for full information. In addition, the OSH Act created the National Institute for Occupational Safety and Health (NIOSH), a part of the Centers for Disease Control and Prevention in the U.S. Department of Health and Human Services.¹⁰ The Director of NIOSH may make recommendations for the development of standards to the Secretary of Labor and the Secretary of Health, Education, and Welfare.¹¹ In addition, the Assistant Secretary of Labor may consult with NIOSH when evaluating state plans, and NIOSH is tasked with developing recommended standards in occupational safety and health.¹² Thus, NIOSH standards are similarly useful for guidance on occupational safety and health requirements, even in states with state plans.

⁸ See LexisNexis 50 State Comparative Legislation/Regulations: Employee Safety and Health (June 2007).

⁹ 29 U.S.C. § 667(c)(2) (2008).

¹⁰ 29 U.S.C. § 671 (2008); About NIOSH: NIOSH Origins and Mission, Centers for Disease Control and Prevention Website, *available at* <http://www.cdc.gov/niosh/about.html>.

¹¹ 29 U.S.C. § 671 (2008).

¹² 29 C.F.R. § 1902.6 (2008).

III. APPLICABILITY OF THE OSH ACT TO STUDENTS

Because the OSH Act and state health and safety plans are meant to assure safe and healthful *working* conditions, and to apply to *employers* and *employees*, they do not protect the safety of students.¹³ Whether other laws and regulations, unrelated to the OSH Act, apply to students is not within the scope of this memo. However, the OSH Act applies to school staff interaction with students, if such interaction would trigger health and safety concerns, for example because school staff are administering injections to students.

IV. THE BLOODBORNE PATHOGENS STANDARD

The OSH Act regulation most relevant to diabetes care concerns in school and employment is the Bloodborne Pathogens Standard.¹⁴ According to the Standard, employers must develop and use certain precautions if an employee will experience occupational exposure to blood and other potentially infectious materials.¹⁵ The definition of occupational exposure is: “reasonably anticipated... contact with blood or

¹³ Occupational Safety & Health Administration, Standard Interpretations: Clarification of OSHA Jurisdiction over Entry Access and Exist at a Public School in Pennsylvania (June 14, 2007) (letter from Richard E. Fairfax, Directorate of Enforcement Programs, to Gerald J. Baldauff), *available at* www.osha.gov/pls/oshaweb/owadisp.show_document?ptable=INTERPRETATIONS&p_id=25894 (“the Agency has no authority over students and the schools that they attend since they have no employer-employee relationship”).

¹⁴ 29 C.F.R. § 1910.1030 (2008), available in Appendix.

¹⁵ 29 C.F.R. § 1910.1030(c) (2008).

other potentially infectious materials that may result from the performance of an employee's duties.”¹⁶

Employers must write an Exposure Control Plan¹⁷ (ECP) if the employment falls under the Standard.¹⁸ The ECP must contain an exposure determination, with a list of all jobs which have occupational exposure, including a list of which specific tasks involve exposure.¹⁹ In addition, employees in those listed jobs must receive training at the time that they are assigned to the task involving occupational exposure, and again at least once a year.²⁰ The training must include, for example, information on the symptoms and epidemiology of bloodborne pathogens, instructions on how to request a copy of the ECP, an explanation of the ECP, an explanation of the use of personal protective equipment, and record-keeping procedures.²¹ The Standard also requires that ECPs be available to the Director of NIOSH upon request, although there is no stated requirement that NIOSH or any other agency approve the Plan.²²

¹⁶ 29 C.F.R. § 1910.1030(b) (2008).

¹⁷ The portions of the Bloodborne Pathogens Standard, 29 C.F.R. § 1910.1030 (2008), relevant to the Exposure Control Plan, 29 C.F.R. § 1910.1030(c) (2008), are available in the Appendix.

¹⁸ 29 C.F.R. § 1910.1030(c) (2008).

¹⁹ 29 C.F.R. § 1910.1030(c)(1)(ii)(A) (2008); 29 C.F.R. § 1910.1030(c)(2) (2008).

²⁰ 29 C.F.R. § 1910.1030(g) (2008).

²¹ *Id.*

²² 29 C.F.R. § 1910.1030(c)(1)(vi) (2008).

A. Application of the Bloodborne Pathogens Standard to Diabetes Care in the Workplace

Although diabetes care, such as insulin injections and blood glucose testing, can produce waste materials that could conceivably expose other employees to blood or other infectious materials, OSHA explained in a Standards Interpretation Letter²³ titled “Whether Diabetics Who Self-Administer at Work Can Dispose of Capped Insulin Syringes in an Office Trash Container”²⁴ that “the Bloodborne Pathogens Standard, 29 CFR 1910.1030, does not apply to the self-administration of insulin by employees or their disposal of insulin syringes used for self-administration except at places otherwise covered by the standard, such as health care facilities, industrial first aid units and laboratories.”²⁵ Thus, self-administered diabetes care, including disposal of syringes and other materials, does not meet the definition of occupational exposure to bloodborne pathogens, because the diabetes care is not required by the occupation. The standard may apply when others directly assist with injections and other diabetes care, for example in

²³ OSHA has a call help line, electronic question form, and mailing address where individuals, business, organizations, and government entities may ask workplace safety and health questions. Occupational Safety & Health Administration website, Contact Us page, *available at* http://www.osha.gov/html/Feed_Back.html. Calls and e-mails do not constitute official OSHA communications, but written and mailed letters do constitute official communications. *Id.* The call line number is 1-800-321-OSHA (6742); the electronic question form is available online at http://www.osha.gov/pls/edata/owae_data.osha_form; and the mailing address is: U.S. Department of Labor, Occupational Safety & Health Administration, 200 Constitution Avenue, Washington, D.C. 20210. *Id.*

²⁴ Available in the Appendix.

²⁵ Occupational Safety & Health Administration, Standard Interpretations: Whether Diabetics Who Self-Administer at Work Can Dispose of Capped Insulin Syringes in an Office Trash Container, (June 29, 2007) (letter from Richard E. Fairfaz, Directorate of Enforcement Programs, to Keith Dill), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=25890.

the school setting, but the Standard Interpretations letter makes clear that self-administration does not trigger coverage.

The Standard Interpretations Letter explains that although syringes in the trash could present a health threat to coworkers, coverage of the Bloodborne Pathogen Act is still not triggered by self-administered diabetes care and disposal of diabetes care materials. Rather, the Standard Interpretations letter states that “the use and disposal of such syringes at the typical office, such as a call center, would not be covered.”²⁶ Although it is conceivable that “[i]mproper disposal... can create a safety hazard for maintenance workers, waste handlers, and janitors who must later handle office trash,” OSHA can only recommend, not require, that employers self-regulate by setting protocols for disposal of diabetes care materials used in self-administration. As previously mentioned, however, OSHA does require protocols for the safe disposal of potentially infectious materials in an Exposure Control Plan if the diabetes care is part of the job, such as for school nurses.

B. Application of the Bloodborne Pathogens Standard to Diabetes Care at School

The previously discussed OSHA Standards Interpretation “Whether Diabetics Who Self-Administer at Work Can Dispose of Capped Insulin Syringes in an Office Trash Container” addressed self-administration by adults in the work setting, but the same argument applies to children self-administering at school: if a school employee is

²⁶ *Id.*

not assisting or otherwise likely to come in contact with diabetes care supplies, self-administration by a student at school is not covered by OSHA

Some students are not able to self-administer and need the assistance of school staff. Depending on the circumstances, the assistance may or may not meet the occupational exposure definition. For example, a staff person who helps a student count carbohydrates and watches the child self-administer insulin- but who does not touch the syringe or the child- would likely not meet the definition of occupational exposure. Such duties would not meet the definition because watching a person conduct a blood glucose test and use a syringe is not reasonably likely to expose staff to potentially infectious materials. Staff who are likely to come in contact with blood or blood products, such as staff who assist or wholly perform blood glucose checks and insulin administration by pen or syringe, would meet the definition.

The Bloodborne Pathogen Standard applies only where occupational exposure exists.²⁷ As a result, its purpose and application are limited, existing only where an employee has “reasonably anticipated skin, eye, mucous membrane, or parenteral contact with blood or other potentially infectious materials that may result from the performance of an employee's duties.”²⁸ In the school context, this means that where staff members are not directly assisting with blood glucose testing, insulin injections, insulin pump site changes, attaching, detaching, and reattaching insulin pumps, and glucagon injections, the Bloodborne Pathogen Standard does not apply to diabetes care because there is no occupational exposure.

²⁷ 29 C.F.R. § 1910.1030(a) (2008).

²⁸ 29 C.F.R. § 1910.1030(b) (2008).

Where staff members do meet the occupational exposure definition, the school must create an ECP, discussed above. However, the ECP is limited similarly to the Standard: it is required only where a school has an employee with occupational exposure²⁹ and it must be “designed to eliminate or minimize *employee* exposure.”³⁰ A student who carries diabetes care materials with them, disposes of diabetes care materials by himself or herself, and self-administers diabetes care tasks at school would not trigger the standard and would not cause the school to need an ECP. If these school employees have occupational exposure, the school’s ECP must be designed to protect such employees and will apply to those work areas where there is occupational exposure.³¹ However, the ECP is not relevant for those employees who do not face occupational exposure³² and those areas of the workplace where occupational exposure does not occur. For example, if a school nurse assists a student with administering insulin in his classroom, the ECP would address protecting the nurse while she administered insulin by requiring her to wear gloves while administering insulin, and cover those areas of the school that could expose employees to potentially infectious materials, such as the area where the nurse administers the insulin. However, school staff who do not have occupational exposure would not need to be addressed in the ECP.

Although the Bloodborne Pathogens Standard and OSHA suggests that students are not covered by occupational health and safety laws, NIOSH has developed a School

²⁹ 29 C.F.R. § 1910.1030(c) (2008).

³⁰ Id.

³¹ Id.

³² The ECP requirements would be onerous as well as irrelevant for employees who do not have occupational exposure; for example, requiring employers to provide protective equipment to employees who are not interacting with potentially infectious materials would be nonsensical.

Bloodborne Pathogens Self-Inspection Checklist³³ that discusses safety precautions for both teachers and students who are exposed to bloodborne pathogens.³⁴ The introduction explains that the checklist:

applies to work activities that may result in exposure to blood or other potentially infectious materials. Such activities might include students learning how to take blood tests or teachers who are trained in first aid and are required to render first aid in case of emergency. This checklist does not cover acts that result in exposure to blood or other potentially infectious materials when someone voluntarily helps others in an emergency. The regulations cited apply only to private employers and their employees, unless adopted by a State agency and applied to other groups such as public employees.³⁵

Thus, the checklist allows schools to self-evaluate whether they are complying with the Bloodborne Pathogen Standard. NIOSH is not granted any enforcement or law-making power under the OSH Act; rather, NIOSH's role is to "develop and establish

³³ Available in the Appendix.

³⁴ Compare Occupational Safety & Health Administration, Standard Interpretations: Clarification of OSHA Jurisdiction over Entry Access and Exist at a Public School in Pennsylvania (June 14, 2007) (letter from Richard E. Fairfax, Directorate of Enforcement Programs, to Gerald J. Baldauff), *available at* www.osha.gov/pls/oshaweb/owadisp.show_document?ptable=INTERPRETATIONS&p_id=25894 ("the Agency has no authority over students and the schools they attend since they have no employer-employee relationship"), *with* National Institute for Occupational Safety and Health, Bloodborne Pathogens-Part 1: Self-Inspection Checklist," *available at* www.cdc.gov/niosh/docs/2004-101/chklists/n77blo~1.htm (The checklist covers the Bloodborne Pathogens Standard at school and states that it applies to school activities such as "students learning how to take blood tests").

³⁵ National Institute for Occupational Safety and Health, *supra* note 35.

recommended occupational safety and health standards” (emphasis added).³⁶ As a result, NIOSH publications that are not directly tied to a law or regulation are non-binding recommendations for schools. To the extent that an item on the checklist reflects a cited provision of a law, schools are required to meet that requirement. However, the checklist also contains items that are not required by the OSH Act but are instead are based on a “nonregulatory recommendation.”³⁷ OSHA explains that “if an employee is expected, as part of his or her job duties, to render first aid or medical assistance, that employee is covered by” the Bloodborne Pathogens Standard, and the NIOSH checklist breaks down the Standard and other recommendations into specific questions.³⁸ Thus, staff trained to assist in diabetes care such as insulin injections, glucagon, inserting or reinserting an insulin pump, and blood glucose testing likely would be covered by the Bloodborne Pathogens Standard according to OSHA and NIOSH. However, some of NIOSH’s publications include recommendations that do not have a basis in actual legal duties, which could explain why the NIOSH checklist has references to student safety. For example, question 8 of the checklist asks: “Do *students* and employees wash their hands immediately after removing gloves or other personal protective equipment?” (emphasis added) and is followed by a citation.³⁹ However, the regulation cited applies only to

³⁶ 29 U.S.C. § 671(c)(1) (2008).

³⁷ National Institute for Occupational Safety and Health, *supra* note 35.

³⁸ Occupational Safety & Health Administration, Standard Interpretations: Applicability of Bloodborne Pathogens Standard to Emergency Responders, Decontamination, Housekeeping, and Good Samaritan Acts, (December 4, 1992) (letter from Roger A. Clark, Director of Compliance Programs, to W. Valentini, President of Federal Compliance & Reporting Service), *available at* http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=20948.

³⁹ National Institute for Occupational Safety and Health, *supra* note 35.

employees.⁴⁰ While it is unclear, the reference seems to be to students in health care fields who are learning to do blood tests on others as gloves would not be appropriate for self-testing. In any event, the NIOSH checklist's references to student safety are not accompanied by citations to laws or regulations that mention students, so these references to student safety appear to be recommendations, rather than legal requirements.

The questions on the NIOSH school compliance checklist cite to relevant portions of the Bloodborne Pathogens Standard and provide examples of how schools can comply with the Standard. For example, question 1 notes: "The exposure control plan must include (a) a list of tasks identified as having a potential for exposure to bloodborne pathogens; (b) methods to protect students and employees." Question 10 is particularly relevant to diabetes care at school because it makes clear that OSHA only permits recapping of needles using a medical device or one-handed technique, using the needle to pick up the cap.⁴¹ As the cited portion of the Bloodborne Pathogens Standard explains: "Contaminated needles and other contaminated sharps shall not be bent, recapped, or removed... unless the employer can demonstrate that no alternative is feasible or that such action is required by a specific medical or dental procedure."⁴² It further states: "Such bending, recapping or needle removal must be accomplished through the use of a mechanical device or a one-handed technique."⁴³

The checklist's requirements include:

- (1) a written ECP that includes:

⁴⁰ 29 C.F.R. § 1910.1030(d)(2)(v) (2008) ("Employers shall ensure that employees wash their hands immediately or as soon as feasible after removal of gloves or other personal protective equipment").

⁴¹ Id.

⁴² 29 C.F.R. § 1910.1030(d)(2)(vii) (2008).

⁴³ Id. at (d)(2)(vii)(B).

- (a) a list of tasks identified as having a potential for exposure to **bloodborne pathogens**;
 - (b) methods to protect students and employees;
 - (c) dates and procedures for providing hepatitis B vaccinations to employees with occupational exposure;
 - (d) procedures for post-exposure evaluation;
 - (e) content and methods for training students and employees; and
 - (f) procedures for maintaining records;
- (2) the ECP be available for examination and copying;
 - (3) the ECP is updated yearly;
 - (4) students and employees treat all materials which could be potentially infectious as if they were infectious (“universal precautions”);
 - (5) engineering and work practice controls to prevent exposure are used before personal protective equipment;
 - (6) these controls are regularly examined for effectiveness;
 - (7) handwashing facilities are accessible, and if this is not possible, antiseptic hand cleanser or similar substitutes are used;
 - (8) students and employees immediately wash their hands after removing personal protective equipment;
 - (9) students and employees immediately wash areas that come into contact with potentially infectious materials;
 - (0) recapping sharps is avoided, or are only recapped according to a one-handed method;

- (11) eating, drinking, smoking, handling contact lenses, and applying cosmetics is prohibited in areas where exposure exists;
- (12) food and drink are not stored in areas where potentially infectious materials are kept;
- (13) tasks involving blood are performed to minimize splashing, and pipetting and suctioning of blood is forbidden;
- (14) potentially infectious materials are disposed of in safe containers;
- (15) personal protective equipment is available to students and employees potentially exposed to bloodborne pathogens, properly disposed of, and worn when there is a potential for exposure;
- (16) work areas and equipment that become soiled with potentially infectious materials are properly cleaned;
- (17) sharps disposal containers and other biohazard disposal containers are properly accessible, labeled, and are designed and used to minimize exposure;
- (18) the hepatitis B vaccine is available to people with occupational exposure;
- (19) after an exposure incident, medical evaluation is available;
- (20) people with occupational exposure promptly and regularly receive training on bloodborne pathogens; and
- (21) records of training, exposure incidents, hepatitis B vaccinations and other medical information are maintained.⁴⁴

The checklist requirements exhaustively cover the applicable requirements of the Bloodborne Pathogens Standard.⁴⁵

⁴⁴ National Institute for Occupational Safety and Health, *supra* note 34.

⁴⁵ 29 C.F.R. § 1910.1030 (2008).

III. CONCLUSION

The various interpretations and guidelines for the OSH Act's application to workers and students suggests that in both the workplace and at school, self-administration of diabetes care tasks likely does not trigger the OSH Act or state versions of the OSH Act. In the school setting, however, staff who assist with certain diabetes care tasks are likely protected by the Bloodborne Pathogens Standard or state versions of it. This does not create a basis for schools to limit where, when, or who performs diabetes care tasks, because the NIOSH school checklist does not suggest that the Bloodborne Pathogens Standard creates any serious obstacles to providing diabetes care. Rather, the NIOSH school checklist and the Bloodborne Pathogens Standard merely require safety precautions such as a written Exposure Control Plan and precautions when school staff handle syringes, pens, and lancets.