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INTRODUCTION

The issues in this case are whether Respondent, San Francisco Unified School District (District), is obligated to administer Diastat on the basis that Diastat is a “related service” versus a “medical service,” and whether the administration of Diastat is required to assist Petitioner, a child with multiple disabilities, including a seizure disorder, with meaningful access to a free, appropriate, public education.

The facts are clear and unequivocal. The law is clear and unequivocal. Reduced to the most simple terms possible, the truth is this: Aden Garvey’s personal physicians have evaluated and diagnosed Aden. Aden has a seizure disorder. Diastat is a medication ordered by Aden’s physicians and approved by Aden’s parents for the purpose of aborting seizures. The administration of Diastat is a simple procedure that may be accomplished by lay persons, unlicensed medical technicians, licensed vocational nurses, registered nurses, and/or “trained professionals.” The administration of Diastat is a “related service” necessary for Aden to attend school and benefit from his public education. Federal law requires that District administer Diastat to Aden Garvey.

Neither Petitioner nor Respondent have requested that the Special Education Hearing Office (SEHO) determine the specific level of care (intermittent versus continuous) required for the administration of Diastat. Neither Petitioner nor Respondent have requested that SEHO determine the level of licensure (LVN/RN/other) necessary for the administration of Diastat. The issues before SEHO are narrow and circumscribed.

STATEMENT OF THE FACTS

Aden is now three and one-half years old and in a special education class at Las Americas. Aden is “a very handsome, sweet little boy who lives in a loving home with his parents.” Ex. 3 at 1. Aden “enjoys playing with a variety of toys. He loves playing with water...and likes being around other children. He likes going to the park with his parents...and will watch what other children are doing and [try] to imitate what they do, such as clapping.

1 [Aden] tries to walk a couple of steps by being held by both of his hands.” Ex. 46 at 5. Aden
2 “thrives on [an] environment with other children,” and “needs a routine that is predictable.” Ex. 19
3 at 2. Aden “shows interest in other children” and “he has good eye contact when feeling well and in
4 [a] calm environment.” Id. at 9. “A familiar adult speaking to [Aden] appears to have an organizing
5 effect.” Id. Aden shows recognition of familiar people such as his nurses and may look back and
6 forth between two people.” Ex. 3 at 4.

7 Aden was born at the University of California Medical Center July 29, 1998. As soon as
8 Aden was born, it was noted that his head was microcephalic and he was mildly dysmorphic. Exhibit
9 1 at 1. Chromosome testing showed an inversion of chromosome 5. Id. Genetics felt that it was
10 unusual that Aden should have simple inversion leading to multiple dysmorphic features; it was felt
11 that this could occur in up to 10% of the people with inversions. Id. Chromosome 5 inversion is a
12 rare condition. Strober Testimony.

13 Aden had no problems with seizures until the approximate age of 12 months or one year.
14 Exhibit 1 at 1. Aden was hospitalized at this point for placement of a G-tube. Following discharge
15 from the hospital, Aden had a five-minute seizure; EEG findings were negative. Aden then had a
16 fifteen minute seizure in September 1999 and was started on Phenobarbital. Id. Aden had around 3-
17 4 seizures per day when he was on the Phenobarb and was changed to Clonazepam. This medicine
18 was stopped and Aden was tried on Lamictal. Id.

19 Once starting the Lamictal, Aden was hospitalized for increased seizures. In the hospital,
20 Aden was started on Depakote. Id. at 1. For about three weeks, Aden had only one seizure per
21 week. Id. at 2. When Aden’s CBC and liver function became abnormal, the Depakote was
22 “emergently withdrawn” in favor of Dilantin. Lamictal was added and he was weaned off Dilantin.
23 Aden continued to have seizures on a daily basis (3-4 short ones per day). Id. Aden may now have
24 longer seizures which he aborts with Diastat. Id. at 2. Exhibits 38,
25 39, 40. Tawfik, Strober Testimony.

26 Aden was “enrolled in the SFUSD Early Start Program [beginning] November 2, 1999.”
27 Ex. 3 at 1 and 2. Aden and his parents received Early Start Coordination services from
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4 Florence Lam at Golden Gate Regional Center (GGRC). Id. at 1. Lam Testimony. Aden is a
5 consumer of GGRC services. Id. While attending the Family Development Center (FDC) through
6 Early Start, GGRC funded or “vendored” three LVN nurses who rotated caring for Aden both at
7 home and at FDC. Id. Ex. 8. These licensed nurses administered Diastat to Aden according to the
8 orders of Aden’s physicians. Lam, Branner Testimony.

9 Aden was followed by his pediatrician, Gerald Harris, M.D., and his pediatric
10 neurologists, Jonathan Strober, M.D. and John Sum, M.D. Id. Harris and Strober Testimony. Aden’s
11 Pediatric Neurologist, Dr. Sum, determined that Aden would be admitted to the hospital March 6,
12 2001, to be evaluated for a ketogenic diet. Aden had been tried on multiple medications “without
13 effect.” Id. at 3. Strober Testimony. A Vagal Nerve Stimulator was implanted in September, 2001.
14 The ketogenic diet was discontinued after the implant. Id.

15 Aden had a “Person-Centered Individual Program Plan (IPP)” completed by GGRC on
16 July 12, 2001. Ex. 46. The IPP noted that “Aden’s parents requested a special day class from
17 SFUSD.” Id. at 5. At or around the time that Aden was about to turn three, when Early Start
18 services would end, District conducted an assessment. Ex. 3. Aden’s “parents believ[ed] that Aden
19 [could] benefit from the class at SFUSD with all necessary therapy and nursing services for his
20 special medical and physical needs. Aden’s mother requested a special day class for Aden with a 1:1
21 LVN nurse in the initial “Individual Education Plan” (IEP) on June 6, 2001.” Ex. 46 at 7. In support
22 of this request, a letter dated July 6, 2001, was written by Aden’s pediatrician, Dr. Harris. Id. Ex. 13.
23 It was the opinion of GGRC that “the LVN nurse at [the] special day class should be funded by
24 SFUSD.” Ex. 46 at 14. Lam Testimony.

25 The letter from Dr. Harris noted that Aden’s “physical problems make it necessary to
26 provide special services.” Ex. 13. Dr. Harris specifically noted, “Aden will continue to need
27 continuous care by an LVN during the day program and also on the bus while going to and from
28

1 school. The aide will need specific instruction on administering the ketogenic diet and on what to do
2 if he spits up or gags. He or she will need to participate in feeding sessions with the parents before
3 school begins and should read instructional material the parents can provide. A backup

4 3

5 aide should be available if the primary caregiver cannot be with Aden on a particular day. In
6 addition, if Aden has a seizure, the caregiver should be able to give him his Diastat, an antiseizure
7 medication.” Id.

8 One day prior to Dr. Harris’ letter, on July 5, 2001, a letter was also written by Dr.
9 Strober. Exhibit 14. Dr. Strober ordered the following: “After 10 minutes, 2.5 mgm of Diastat (half
10 of a 5mgm) should be administered rectally by a trained healthcare professional or 911 should be
11 called. If the Diastat is given and the seizure continues for another 5 minutes the second half of the
12 Diastat should be administered.” Id. Dr. Strober testified that the “or” language in the letter, i.e.,
13 “Diastat or 911,” was intended to provide protection to Aden in the event that District would not
14 administer the Diastat as ordered. Strober Testimony.

15 Both Dr. Strober and Dr. Harris signed another document dated October 30, 2001.
16 Exhibit 22. The approval date for any modified Diastat order was not extended past November 16,
17 2001, or the date when the physician’s anticipated the matter to go to hearing. District’s nurse
18 specifically understood this dated material to be an “override” of any previous order limiting the use
19 of Diastat in favor of 911. To quote District’s nurse, “Professionally, he [Dr. Harris] overrode Dr.
20 Strober’s order.” Stiles Testimony. Dr. Strober testified that physician’s do discontinue the orders
21 of other physicians. Strober Testimony.

22 Aden’s Individualized Education Program (IEP), dated August 21, 2001, specifically
23 included information from Dr. Harris and noted that “classroom staff will receive specific instruction
24 in feeding Aden the ketogenic diet; what to do if he spits up and gags; parent will provide feeding
25 session at school before school begins to train staff [and] staff will be trained on Aden’s seizures;
26 what they look like and emergency procedures. Staff will document seizures on daily basis in
27 written form. At least one trained person must be with [Aden] at all times.” Ex. 19 at 14. Aden’s
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1 IEP provided that Aden be accompanied by a “para professional from home to school and school to
2 home and receive training along with the classroom staff.” Additional “para professional support”
3 was to be provided during school hours. Id. Although the IEP documented the existence of Aden’s
4 seizure disorder and the use of “rectal Valium” to treat these seizures,

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6 specified supports by school personnel were not identified. Id. at 11 and 14.

7 On September 6, 2001, another letter was written--this one by Dr. Sum. Exhibit 12. Dr.
8 Sum wrote as follows: “Because of [Aden’s] seizures, he should have p.r.n. (as needed) Diastat
9 available for treatment of more prolonged seizures. This will help shorten his seizures and hopefully
10 prevent hospitalization.” Id. Dr. Sum further provided that “should the seizure last for over 10
11 minutes, a trained professional (LVN nurse) should administer the Diastat 2.5mgm rectally. This
12 should be done per the package insertion instructions. [Aden] should be observed for respirations
13 and seizure activity during this time. Should the seizures continue for another five minutes, an
14 additional 2.5 mg of Diastat should be administered by the trained medical professiona.” Id. Dr.
15 Sum concluded his letter by noting that “an LVN nurse and/or RN should be available at all times to
16 administer the rectal Diastat should Aden require it.” Id.

17 Although the orders of the involved physicians were clarified, District’s nurse testified in
18 the following manner: “He [Dr. Strober] thought the risk [of Diastat] wasn’t as great as I thought.”
19 As further clarification, GGRC began to require formal documentation, in the form of progress notes
20 and a seizure record; this documentation had not previously been required for respite nursing.
21 Exhibit 39 and 40. Lam, Branner Testimony. Despite written clarification from Aden’s health care
22 providers and verbal discussion, Aden was ordered removed from his special day class. Hall
23 Testimony.

24 On October 29, 2001, District’s nurse specifically wrote in Aden’s IEP the following:

25 **“S.F.U.S.D. will not administer rectal Valium in the school setting”**

26 (emphasis added). Ex. 20 at 3.

27 On December 10, 2001, Aden had a seizure while at school that lasted more than 10
28

1 minutes. District did not administer the Diastat as ordered by Aden’s physicians. Aden was
2 allowed by District to seize uncontrollably when Diastat could have been administered by District
3 personnel to abort Aden’s seizure. Aden’s mother was called and arrived at approximately 13-14
4 minutes after the seizure started. She administered 5 mgm of Diastat. Subsequent to the seizure and
5 administration of the Diastat, Aden was “postictal and in a deep sleep.” Ex. 000187

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7 and 000188. Strober Testimony. Aden was not unconscious; he was sleeping. Hall Testimony.
8 Consistent with the written statement by District’s nurse in Aden’s IEP dated October 29, 2001, and
9 consistent with District’s action on December 10, 2001, in failing to administer Diastat, District’s
10 nurse then wrote a letter on December 21, 2001, and solicited the signatures of other nurses in
11 “opposition to the use of Diastat (rectal valium gel) in school settings...” Exhibit 000135.

12 Prior to enrollment in Las Americas, Diastat was routinely administered per the orders of
13 Aden’s physicians for the purpose of aborting seizures. This administration was accomplished by
14 Aden’s parents and licensed nurses vendored by Aden’s regional center. Aden was able to complete
15 his Early Start program through District with this support and the provision of these “related
16 services.” Aden has not had a cardiac or respiratory arrest following the administration of Diastat.
17 The administration of Diastat has accomplished precisely what it was intended to accomplish. It
18 allowed Aden to access his Early Start program, to benefit from a free, appropriate, public education,
19 and to have his seizures treated when indicated, wherever he might be. The administration of Diastat
20 has allowed Aden to lead a life in the community with his family and at FDC without the necessity
21 of initiating the emergency response system in San Francisco. District now seeks to deny this
22 opportunity to Aden Garvey.

23
24 **STATUTORY AND REGULATORY FRAMEWORK**

25 As a recipient of federal funds under the Individuals with Disabilities Education Act
26 (IDEA), California has a statutory duty to provide all children with disabilities a free, appropriate,
27 public education (FAPE). 20 U.S.C. §1400(c). Federal funding is conditioned on the agreement by
28

1 the State to provide “related services” to children receiving special education. “Related services are
2 defined as those services “that may be required to assist a child with a disability to benefit from
3 special education.” § 1401(a)(17). The question of what constitutes a “related service” is not a new
4 question. See Appendix A, B, C, D.

5 In its current form, the “related services” provision was initially enacted in 1977,
6
7 42 Fed. Reg. 42, 479 (1977). The regulation was subsequently codified at 45 C.F.R. § 121a.13
8 (1978), and can currently be found at 34 C.F.R. § 300.16. For more than twenty years, “related
9 services” have included “school health services,” including but not limited to, “services provided by
10 a qualified school nurse or other qualified person.” *Id.* at § 300.16(a) and (b)(11). “Medical
11 services” are those provided by a licensed physician in order to determine the existence of a
12 medically related disability that results in the need for special education and related services. *Id.* at §
13 300.16(a) and (b)(4). “Medical services” and “related services” are thus distinguished.

14 “Medical services” can only be performed by a physician. “Related services” are those
15 necessary to assist a child with a disability to benefit from special education. They can be provided
16 by many different types of qualified health personnel as long as the provision of the service assists
17 the child to benefit from special education. Variable licensing standards from state to state do not
18 diminish or preclude a child’s access to the entitlements guaranteed by IDEA. “Related services”
19 are an entitlement guaranteed by IDEA.

20 In *Irving Independent School District v. Tatro*, 468 U.S. 883 (1984), the Court examined
21 this precise issue—“medical services” versus “related services.” *Id.* at 887. The Court determined
22 that “medical services” under the requirements of the Education of the Handicapped Act, 84 Stat.
23 175, as amended by the Education for All Handicapped Children Act of 1975, 89 Stat. 773, 20
24 U.S.C. §§ 1401(17) are services provided by licensed physicians for the purpose of diagnosis or
25 evaluation. *Id.* The *Tatro* Court specifically noted that school nurses dispense medications or
26 administer emergency injections in accordance with a physician’s prescription to children *without*
27 disabilities. It was noted that Congress was not willing to guarantee services to nondisabled children
28

1 while simultaneously denying the same services to children with disabilities. *Id.* at 894.

2 Specifically, the Court reasoned that “a service that enables a handicapped child to remain at school
3 during the day is an important means of providing the child with the meaningful access to education
4 that Congress envisioned.” *Id.* at 891.

5 In deciding the case, the Court held that a specific form of health care (clean intermittent
6 catheterization) was a “supportive service required to assist a handicapped child to benefit from
7
8 special education,” and therefore, “related.” *Id.* at 890. The “related” service could be provided
9 competently by a school nurse or other trained personnel. If the “particular” medication or treatment
10 must be administered “during the school day,” the school is required to provide nursing services to
11 administer it. *Id.* at 894.

12 Following *Tatro*, the questions related to “medical” and “related services” was revisited in
13 *Cedar Rapids Community School District v. Garret*, 526 U.S. 66 (1999). Garret F. was a youngster
14 when he was involved in disabling motorcycle accident. The accident left Garret quadriplegic,
15 ventilator dependent, and in a wheelchair. In order to access public education in a meaningful way,
16 Garret required “related services” during his school day—services that would allow Garret to remain
17 at school and to benefit from his education. *Id.* at 68-69. Garret’s needs included continuous one-
18 on-one (1:1) care for the following purposes:

19 “...assistance with urinary bladder catheterization once a day, the
20 suctioning of his tracheotomy tube as needed, but at least once every
21 six hours, with food and drink at lunchtime, in getting into a reclining
22 position for five minutes of each hour, and ambu bagging occasionally
23 as needed when the ventilator is checked for proper functioning. He
24 also needs assistance from someone familiar with his ventilator in the
25 event there is a malfunction or electrical problem, and someone who
26 can perform emergency procedures in the event he experiences auto-
27 nomic hyperreflexia. Autonomic hyperreflexia is an uncontrolled
28 visceral reaction to anxiety or a full bladder. Blood pressure in-
creases, heart rate increases, and flushing and sweating may occur.
Garret ha[d] not experienced autonomic hyperreflexia frequently in
recent years, and it ha[d] usually been alleviated by catheterization.
He ha[d] never experienced autonomic hyperreflexia at school.
Garret [was] capable of communicating his needs orally or in another
fashion so long as he [had] not been rendered unable to do so by an

1 extended lack of oxygen (emphasis added).” *Id.* at 69.

2 The *Garret* Court held, “The IDEA requires the District to provide Garret with the nursing
3 services he requires during school hours. The IDEA’s “related services” definition, *Tatro*, and the
4 overall statutory scheme support the [decision].” *Id.* at 66. Consistent with the underlying decision
5 by the Administrative Law Judge (ALJ), it was determined that the IDEA

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7 required the District to bear financial responsibility for all of the services in dispute, including
8 continuous nursing care. *Id.* at 71. No authority cited by the District in *Tatro* require[d] an
9 additional inquiry if the requested service was both “related” and “non-medical” (emphasis added).
10 *Id.* at 66. As the Court noted, even if § 1401(a)(17) demanded an additional step, the factors
11 proposed by the District [were] hardly more useful in identifying “nursing” services than they [were]
12 in identifying “medical” services; the District cannot limit educational access simply by pointing to
13 the limitations of existing staff. *Id.* The IDEA requires schools to hire specially trained personnel to
14 meet disabled student needs (emphasis added). *Id.*

15
16
17 In referring to the administrative hearing below and to *Tatro*, the *Garret* Court stated:
18 “As the ALJ concluded, the in-school care necessitated by Garret’s ventilator dependency does not
19 demand the training, knowledge, and judgment of a licensed physician.” *Id.* at 71. While more
20 extensive (than *Tatro*), the services Garret needs are no more “medical” in nature than was the care
21 sought in *Tatro*.” This finding was made despite the fact that “autonomic hyperreflexia is a life-
22 threatening abnormal response of the autonomic nervous system that can occur in a ventilator
23 dependent individual...and must be treated immediately.” TR at 76-77, 81-82. “Observation and
24 monitoring services must be provided continuously by trained personnel because Garret could die if
25 his breathing were interrupted for just a few minutes.” TR at 338.

26
27 **ARGUMENT**

1 not administered by District as ordered after Aden had been seizing for more than ten minutes on
2 school grounds in December of 2001 (emphasis added). These facts satisfy the second prong of
3 *Tatro's* bright-line test (*Tatro* at 66): The services provided by Aden's physicians are distinguished
4 from those services which can be provided by a nurse or qualified layperson. The administration of
5 Diastat is not a "medical service" that can only be provided by a physician.

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7
8 California law, in addition to the IDEA and related cases, provides additional
9 instruction in delineating the bright line between "related" and "medical" services. California law
10 specifies that the practice of nursing...means those functions, including basic health care, as well as
11 all of the following:

12 Direct and indirect patient care services, including, but not limited
13 to, the administration of medications...ordered by and within the
scope of licensure of a physician. Cal.Bus. & Prof.Code § 2725.

14 The District's "Job Description" for those "holding a Registered Nurse License for the San Francisco
15 Unified School District, Special Education, Designated Instructional Services," specifically
16 provides:

17 The primary function of those with a Registered Nurse License
18 in the Special Educational Classroom is to perform skilled
19 nursing procedures as ordered by the physician and in accordance
20 with the Agency policies currently contracted with the S.F.U.S.D.,
21 and within the scope of the Nurse Practice Act, **Business and**
Professions Code, Section 2725 (emphasis added).

22 Paragraph IV of "Job Description" specifically outlines the procedures to be performed.
23 These procedures require nurses to "administer and record medication, administer oxygen, care for
24 tracheostomy and perform suctioning, perform CPR, change dressings, insert urinary catheters,
25 check for positioning of and feeding via nasogastric tubes, feeding via gastrostomy tube and use of
26 pumps, interpreting glucometer readings for sliding scale insulin regimen, basic nursing duties such
27 as temperature, pulse, respiration, and blood pressure, changing diapers and skin care" (emphasis
28

1 added). Id. at paragraph IV (a) through (k). “Job Description” for Licensed Vocational Nurse
2 specifically outlines the “route” of administration of medication that is to be performed according to
3 “Guidelines and Procedures,” California Department of Special Education (1990) as follows: “oral,
4 I.M. (intramuscular), S.Q.

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7 (subcutaneous), and suppositories (per rectum).” Paragraph 1(a). “Job Description” additionally
8 purports to have been reviewed for compliance with the Americans with Disabilities Act. See
9 “Critical Job Functions.”

10 When queried as to relevant functions in the instant case, District’s nurse testified that
11 nurses are required to perform those functions according to the requirements of the “Job
12 Descriptions.” Stiles Testimony. In addition, District’s nurse testified that “diagnosis of illness,
13 injury, or advice on how to treat,” are prohibited. Paragraph VIII(c). In developing “Job
14 Descriptions” for application in the Special Education Classroom, District expressly adopted the
15 standards set forth in Business and Professions Code § 2725, “Guidelines for Procedures”
16 promulgated by the California Department of Special Education (1990), and the Americans with
17 Disabilities Act.
18

19 District’s expert on “scope of nursing practices” did not know what a regional center was.
20 She had never worked as a school nurse. She did not know what a Phenobarbital/Dilantin push was
21 or a Pentobarbital induced coma. Phillips Testimony. District’s expert, not knowing what a regional
22 center was, was not competent to testify about nursing practice related to nursing services provided
23 by regional center nurses to consumers with developmental disabilities. District’s expert, having no
24 personal experience as a school nurse, was not competent to testify about nursing practice within the
25 District. District’s expert, not knowing the potential outcome of untreated prolonged seizures, was
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1 not competent to testify regarding any nursing practice related to Aden Garvey.

2 Diastat is a diazepam (Valium) gel provided in a prefilled, unit dose, rectal delivery

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4 system. Exhibit 23 at 1. District is required by law and according to its own “Job Descriptions” to
5 administer medications, including suppositories. The administration of Diastat by District is a
6 “related service” that can be performed within the special education classroom of Aden Garvey.

7 District cannot plausibly argue, under the facts of this case, that the administration of Diastat is a
8 “medical service,” “overlapping service,” or “emergency service,” that can only be accomplished by
9 a physician.
10

11 **B. The Foreseeability of Seizures in Aden’s Future Demands That District**
12 **Administer Diastat to Aden As a “Related Service.”**

13 It is foreseeable that Aden will continue to have seizures. Strober Testimony. Based on
14 this inevitable fact, Aden’s physicians prescribe certain medications and treatments related to Aden’s
15 condition, they recommend that Aden be attended by a “trained professional,” and they require that
16 this individual be trained in CPR. In the event that Aden does not respond to the prescribed
17 medication within a specified period of time, Aden’s physicians require that the emergency response
18 system be activated (911/EMT’s). Neither the prescribing of medications and treatments nor the
19 recommended level of response transforms these events, circumstances, functions, or actions into
20 “medical services.” Physicians are not present during any of these anticipated periods. In fact, at the
21 most critical point, when the emergency response system is activated, it is unlicensed personnel who
22 respond. It is these unlicensed personnel or EMT’s who then administer the medication (Diastat)
23 under the direction of a physician.

24 Aden is now 3 ½ years old. He is entitled now to the same “related services” that were
25 previously provided to him in his Early Start program based on the foreseeability of his having
26 seizures. This medication is ordered for Aden so that he can live as normal a life as possible. This
27 medication is ordered for Aden to assist him with meaningful access to a free, appropriate, public
28

1 education.

2 **II. DISTRICT MUST ADMINISTER DIASTAT IN ACCORDANCE WITH THE**
3 **LEAST RESTRICTIVE ENVIRONMENT REQUIREMENTS OF THE IDEA,**

4 13

5 **THE AMERICANS WITH DISABILITIES ACT, AND PUBLIC POLICY**
6 **CODIFIED IN LEGISLATIVE ENACTMENT IN CALIFORNIA**

7 **A. Least Restrictive Environment.**

8 20 U.S.C. 1412(a)(5) provides that “to the maximum extent appropriate, children with
9 disabilities, including children in public or private institutions or other care facilities be educated
10 with children who are not disabled.” In those instances when a specialized educational setting is
11 required, the same principles apply and the same requirements related to the least restrictive
12 environment attach. Home teaching has traditionally been recognized as one of the most restrictive
13 alternative options available. This method of education isolates the child and deprives the child of
14 the rich interactive environment of a free, appropriate, public education.

15 Aden is entitled to an individualized education plan within the context of his special
16 education class that is the least restrictive possible and which maximizes his potential to access and
17 benefit from his educational program. Aden’s IEP specifically states that he thrives on an
18 environment with other children, that he needs a routine that is predictable, and that a familiar adult
19 speaking to Aden appears to have an organizing effect.

20 Aden has already been provided “related services” by District personnel in his special
21 education class. He has been assisted with feeding, both orally and through his G-tube. He has
22 received his ketogenic diet. He has received other medication. Aden has been able to remain in his
23 classroom because these services were provided to him. District must also administer Diastat to
24 Aden when he needs it so that he may remain in his classroom. Aden’s unique and special needs
25 demand this.
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1 The emergency response system in San Francisco, staffed by strange and unfamiliar

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3 people, in large and intrusive vehicles, with bright lights and loud sirens, and the medical emergency
4 room of the county hospital, are not the least restrictive environment for Aden Garvey. This is not
5 the environment that was envisioned by Congress when it enacted IDEA. Aden is entitled to have
6 his disability related needs managed in a setting where his care providers are familiar with him and
7 he is familiar with them. The problems related to having seizures at school can “be overcome or
8 prevented through appropriate management by an informed school staff, particularly the classroom
9 teacher and the school nurse.” Ex. 24 at 1. “Staying in the classroom [after a seizure] allows for
10 continued participation in classroom activity and is psychologically less difficult for the child.” Id.
11 at 3. Shore Testimony.
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13 **B. Americans with Disabilities Act (ADA).**
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15 The intent of Congress in enacting the ADA was to “establish a clear and
16 comprehensive” national mandate for the elimination of discrimination based on disability. 42
17 U.S.C. § 12101 provides that some “43,000 Americans have one or more physical or mental
18 disabilities.” “Historically, society has tended to isolate and segregate individuals with disabilities,
19 and despite some improvements, such forms of discrimination against individuals with disabilities
20 continue to be a serious and pervasive problem.” Id. at (a)(1) and (2). Congressional findings note
21 that “discrimination against individuals with disabilities persist in such critical areas as
22 education...and access to public services...” Id. at (a)(3).
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24 “Individuals with disabilities continually encounter various forms of discrimination,
25 including outright intentional exclusion...overprotective rules and policies...exclusionary
26 qualification standards and criteria.” Id. at (a)(5). “Individuals with disabilities are a discrete and
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2 insular minority who have been faced with restrictions and limitations, subjected to a history of
3 purposeful unequal treatment, and relegated to a position of political powerlessness in our society,
4 based on characteristics that are beyond the control of such individuals and resulting from
5 stereotypic assumptions not truly indicative of the individual ability of such individuals to participate
6 in, and contribute to, society.” Id.

7
8 Aden has been diagnosed with multiple disabilities that are beyond his control to change.
9 His family and his physicians have zealously sought, over Aden’s lifetime, to provide maximum
10 support and assistance to Aden in the most creative and innovative ways imaginable. New medical
11 therapies, diets, vagal nerve stimulators, and stimulating environments have consistently been
12 provided in order for Aden to maximize his potential and to experience and enjoy the world in which
13 he lives. District now seeks, based on false information, misguided and misleading assumptions, and
14 a degree of paternalism that would undermine more than 20 years of law, to deny Aden Garvey the
15 very services he needs to access his public education and to free himself of the stigma and stereotype
16 of disability. Safe, effective medication, in the form of Diastat, is available as ordered by Aden’s
17 physicians, for the purpose of affording Aden the opportunity to live freely in his community and to
18 attend school. District, in denying to administer Diastat to Aden, violates both the IDEA and the
19 ADA.
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22 **C. Public Policy Codified in Legislative Enactment in California.**

23 **1. Early Intervention Services (Early Start).**

24 The California Early Intervention Services Act Funding under Part H of the IDEA is to be
25 used to improve and enhance early intervention services by developing innovative ways of
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1 providing family focused, coordinated services, which are built on existing systems. Cal.Gov.Code
2 § 95001(7)(b)(1). To the maximum extent possible, infants and toddlers with disabilities and their
3 families are to be provided service in the most natural environment in a manner that is responsive to
4 the families and children within the context of cooperation and coordination. *Id.* at § 95001(7)(b)(6)
5 and (7). Lam Testimony.

6 Aden was eligible for and did attend Early Start through the San Francisco Unified School
7 District. Exhibit 8. Aden’s regional center vendored and funded nursing services while he was
8 participating in the Early Start Program. *Id.* FDC felt that “a 1:1 staff person would be greatly
9 beneficial to assist Aden in participating in activities with his typically developing peers—a goal that
10 [had] been consistently important to his parents.” *Id.* These 1:1 services were provided on the basis
11 of Aden’s special needs. *Id.*

12 **2. California Education Code.**

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15 The Legislature in California has found and declared “that all individuals with exceptional
16 needs have the right to participate in free appropriate public education and that special educational
17 instruction and services for these persons are needed in order to ensure them of the right to an
18 appropriate educational opportunity to meet their unique needs. Cal.Educ. Code § 56000. The
19 legislature, in enacting the provisions related to education in California, specifically intended that no
20 right provided individuals with special needs under the Individuals with Disabilities Education Act
21 (20 U.S.C. §§ 1400 *et seq.*) be abrogated. *Id.* Special needs of individual students must be met. *Id.*
22 at § 56031. Special education provides a continuum of options...to meet the educational and service
23 needs of individuals with exceptional needs in the
24

26 least restrictive environment.
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1 Aden’s IEP identifies his special needs. Aden’s needs include being with people who he
2 is familiar with in a calm environment. Aden’s needs include the administration of medication when
3 Aden has a seizure. District must administer Aden’s medication and not be allowed to abrogate the
4 rights of Aden.

5 **3. The Lanterman Act.**

6 The Lanterman Developmental Disabilities Services Act (the Lanterman Act)
7 establishes the right of persons with developmental disabilities to services and supports needed to
8 lead independent, productive, and normal lives in the community. §§ 4500 *et seq.* Significant
9 emphasis is placed on providing these services and supports to meet each person’s individualized
10 needs and using them to integrate each person into the mainstream of community life. *Id.* California
11 has accepted its responsibility to provide these services and supports in a comprehensive manner
12 sufficiently complete to meet the needs of each person with a developmental disorder. Cal. Welf. &
13 Inst. Code § 4501.

14 Section 4502 of the Welfare and Institutions Code specifically provides the following in
15 relation to education:

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18 Persons with developmental disabilities have the same legal rights
19 and responsibilities guaranteed all other individuals by the United
20 States Constitution and laws and the Constitution and laws of the
21 State of California. No otherwise qualified person by reason of
22 having a developmental disability shall be excluded from participa-
23 tion in, be denied the benefits of, or be subjected to discrimination
24 under any program or activity, which receives public funds. It is
25 the intent of the Legislature that person with developmental disabilities
26 shall have rights including, but not limited to, the following:

27 18

28 A right to participate in an appropriate program of publicly supported
education, regardless of degree of disability (emphasis added). § 4502(c).

Section 4502(a) further provides that services “shall protect the personal liberty of the

1 individual and shall be provided with the least restrictive conditions necessary to achieve the
2 purposes to the treatment, services, and supports.” Id.

3 It is in this context that individuals such as Aden Garvey and his family are provided with
4 opportunities to exercise choice, to make determinations about health care, and to participate in
5 program planning and implementation. It is within this context that individuals like Aden Garvey
6 and his family should feel free from abuse and neglect. By refusing to administer Diastat, District
7 substitutes its own judgment for that of Aden Garvey, his parents, and his physicians and denies the
8 right of choice. By refusing to administer Diastat, District denies Aden Garvey and his family, the
9 right to active participation in program planning and implementation. By refusing to administer
10 Diastat, District abuses and neglects the rights of Aden Garvey and his family.
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13 **III. DISTRICT IS PROHIBITED BY LAW FROM DEPRIVING ADEN GARVEY**
14 **OF PROTECTIONS PROVIDED TO CHILDREN WITH DISABILITIES,**
15 **PARTICULARLY AS THOSE PROTECTIONS RELATE TO PARENTAL**
16 **CONSENT, LEAST RESTRICTIVE ENVIRONMENT, AND RELATED**
17 **SERVICES.**

18 By refusing to administer Diastat to Aden and by taking the position that Diastat will not
19 be administered on school grounds, District enters into prohibited territory and deprives Aden, as
20 well as other students, of protections and entitlements that are guaranteed to them as a matter of law.
21 District has quite essentially, by any interpretation, exceeded the scope of its authority, violated
22 federal and state law, and developed “underground” regulations for application within the District.
23 District has done this in total disregard of the special disability related needs of an individual child,
24 in total disregard of the consent and approval of an individual child’s parents,

26 and in total disregard of the treatment recommendations and direct orders of the physicians of an
27 individual child. Not only has District created unlawful “underground” regulations, it has
28 specifically forbidden other care providers, including Aden’s mother and his regional center, from

1 providing the service to Aden at his school site—the very same service that is provided to Aden
2 when he is not at school—the administration of Diastat.

3 20 U.S.C. § 1407(b) specifically provides that the “lessening of procedural or substantive
4 protections is prohibited.” The Secretary himself is prohibited from lessening existing protections as
5 noted:

6 The Secretary may not implement, or publish in final form, any
7 regulation prescribed pursuant to this chapter which would
8 procedurally or substantively lessen the protections provided
9 to children with disabilities under this chapter, as embodied in
10 regulations in effect on July 20, 1983, (particularly as such
11 protections relate to parental consent in initial evaluation
or initial placement in special education, least restrictive
environment, related services, timelines, attendance of evaluation
12 personnel at individualized education program meetings, or
13 qualifications of personnel (emphasis added).

14 District has promulgated and implemented unlawful regulations. District has
15 simultaneously forbidden Aden from attending his special education class for a period of days and it
16 has expressly threatened to report Aden’s mother to child protective services if she did not comply
17 with District’s unlawful demands. Hall Testimony. Exhibit 000138. District wrote a letter alleging
18 that Aden Garvey did not live within the District and could not attend his special education classes.
19 Exhibit 41. District’s nurse incited other school nurses to violate federal and state law and to refuse
20 to administer Diastat. Ex. 000135. District’s nurse specifically solicited signatures in support of
21 “opposition to the use of Diastat (rectal valium gel) in school settings...” Id. District violated and
22 refused to follow the orders of Aden’s physicians in December 2001,

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25 leaving Aden to seize uncontrollably until such time as his mother could arrive at the school site to
26 administer the necessary medication. Exhibit 000186-000188. The attempted reach of District in
27 violating the federal and state rights of Aden Garvey is so broad that it defies characterization.
28

1 District attempts to support its actions as being proper on the basis that Diastat creates
2 risks of respiratory depression/arrest for Aden. In developing its position, District relies on an article
3 that stated the “overall incidence of respiratory depression following the use of diazepam was 9%.”
4 Exhibit 000162. This article has been criticized on the basis that it was hospital based and the
5 finding could not easily be extrapolated to the community. Exhibit 30. The authors of the article
6 specifically agreed with this criticism and stated, “We agree it would be inappropriate to extrapolate
7 our findings from a hospital study to the community (emphasis added).” Id.
8

9 In addition, both the physician for Petitioner and for District testified that the risk level is
10 much lower than noted in the article, beginning at the 0.3% range. Dieckmann, Strober Testimony.
11 District’s nurse has disagreed with this assessment, despite clarification by Aden’s physicians and
12 the testimony of the District’s own expert. Stiles Testimony. No other available research supports
13 the position of District’s nurse. In those instances when problems do arise, it is primarily when the
14 seizure is not treated and comorbidity results. Ex. 30. Strober Testimony.
15

16 District sought to reinforce its position by sending information to the California Board of
17 Registered Nursing (BRN) that indicated Diastat “places a student at risk of endangerment or death
18 in the classroom.” Stiles Email to BRN dated December 11, 2001. The opinion of the BRN was
19 based on information provided by District’s nurse and based on a misstatement of the risk level
20 related to the administration of Diastat. District’s nurse then did proceed in the Email to the
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23 BRN to propose the availability of certain equipment and medication, i.e., “the drug Atropine would
24 need to be available.” Neither Petitioner’s nor District’s physician experts ever testified that
25 Atropine was necessary or ordered for Aden Garvey or any other child. District’s nurse has
26 expressly exceeded the scope of her authority, violated District’s “Job Description” that prohibits
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1 “advice on how to treat,” and requested a BRN opinion letter based on this information. The BRN
2 issued its opinion on the basis of it’s apparently internal “Advisory Statement.” This “Advisory
3 Statement” was not produced at hearing. This “Advisory Statement” is not contained in any statute
4 or regulation in the State of California.

5 District has further sought to justify its position by criticizing the nature and quality of
6 documentation by Aden’s mother and care providers. Stiles Testimony. District asserts this
7 criticism while simultaneously authorizing the administration of anticonvulsant medication
8 (Dilantin) in the classroom by lay personnel (teacher) who are not required to maintain any
9 documentation whatsoever. Hall Testimony. District did not produce any policies and procedures
10 related to the administration of medication within the District despite Petitioner’s demands.
11

12 It was in the development and enactment of IDEA that Congress sought to prevent the
13 very conduct exhibited by District. It was in the promulgation of a related regulatory framework that
14 implementation and enforcement was intended to prohibit the very conduct exhibited by District.
15 All other statutory and regulatory schemes, both federal and state, seek to deter and to prevent the
16 very conduct exhibited by District. It is the decisions of the United States Supreme Court, in
17 interpreting the IDEA, that specifically hold that conduct consistent with that of District in failing to
18 provide “related services” necessary to provide meaningful access to a free,
19 provide “related services” necessary to provide meaningful access to a free,
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22 appropriate, public education, is prohibited. District must be compelled to provide “related services”
23 to Aden Garvey.

24 As our history has shown us, there is a point when the uninformed become unpredictable.
25 There is a point, when the uninformed, do in fact, become dangerous. The San Francisco Unified
26 School District has taken an uninformed, unpredictable, and dangerous position in regard to Aden
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1 Garvey. In regard to Aden Garvey, the District attempts to deny and to defy all existing federal and
2 state law--law that has as its central and core purpose the protection and education of children with
3 disabilities. The District, based on its uninformed, unpredictable, and dangerous position, bleeds all
4 color from the existing landscape of disability rights within the educational system.

5 **CONCLUSION**

6
7 Petitioner, Aden Garvey, respectfully requests an Order from SEHO compelling District
8 to administer Diastat as a "related service." Petitioner respectfully requests an Order from SEHO
9 compelling District to schedule an IEP within ten (10) working days of the date of the decision in
10 this matter, for said purpose. Petitioner requests an Order from SEHO awarding damages to Aden
11 Garvey in the amount of \$500,000.00 for the violation of Aden Garvey's federal and state rights.
12 Petitioner requests an Order awarding attorney fees should Petitioner prevail in this matter.

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14 Respectfully submitted,

15 Dated: February 22, 2002

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17 Gail L. Gresham, Attorney for Aden Garvey

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**SPECIAL EDUCATION HEARING OFFICE
INSTITUTE FOR ADMINISTRATIVE JUSTICE**

**ADEN GARVEY,
Petitioner,
vs.**

**SAN FRANCISCO UNIFIED SCHOOL
DISTRICT,
Respondent.**

) **Case No.: SN 01-02331**
)
) **PETITIONER'S CLOSING BRIEF**
)
) **DATE: February 22, 2002**
)
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