No. S184583

In The Supreme Court Of The State Of California

AMERICAN NURSES ASSOCIATION et al.,
Plaintiffs and Respondents,

vs.

JACK O'CONNELL, as Superintendent of Public Instruction, etc., et al.,
Defendants and Appellants,

SUPREME COURT
FILED

AMERICAN DIABETES ASSOCIATION,
Intervener and Appellant.

DEC 22 2010
Frederick K. Ohlrich Clerk
Deputy

OPENING BRIEF ON THE MERITS

On Review From A Published Decision Affirming A Judgment Including Issuance of A Peremptory Writ of Mandate
Court of Appeal, Third Appellate District, Appeal No. C061150

On Appeal From A Judgment On A Complaint And A Petition For Writ Of Mandate
Sacramento County Superior Court, No. 07AS04631
Honorable Lloyd G. Connelly

James M. Wood (SBN 58679)
Dennis Peter Maio (SBN 99894)
REED SMITH LLP
101 Second Street
Suite 1800
San Francisco, CA 94105
Telephone: 415.543.8700
Facsimile: 415.391.8269

Arlene Mayerson (SBN 79310)
Larisa Cummings (SBN 131076)
DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.
3075 Adeline Street, Suite 210
Berkeley, CA 94703
Telephone: 510.644.2555
Facsimile: 510.841.8645

Attorneys For Intervener And Appellant
American Diabetes Association

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TABLE OF ABBREVIATIONS

In this Opening Brief on the Merits, we cite to the following items thus:

The Appellant's Appendix, by volume and page, as "__AA/__."

The Reporter's Transcript, by page, as "RT/__."

The slip opinion of the majority in the Court of Appeal, by page, as "MajOpn/__."

The slip concurring opinion of Presiding Justice Scotland in the Court of Appeal, by page, as "ConcOpn/__."

I.
STATEMENT OF ISSUES

Section 504 of the Rehabilitation Act of 1973 (Section 504) [29 U.S.C. § 794], Title II of the Americans with Disabilities Act (the Americans with Disabilities Act) [42 U.S.C. § 12101 et seq.], and the Individuals with Disabilities Education Act (the IDEA) [20 U.S.C. § 1400 et seq.], are major federal civil-rights statutes. As pertinent here, they grant students with disabilities, including diabetes, a right to a free appropriate public education and related health care services, including the administration of insulin.

Subject to several exceptions, the Nursing Practice Act (NPA) [Bus. & Prof. Code § 2700 et seq.] prohibits any person without a license as a registered nurse from practicing nursing.

For its part, section 49423 of the Education Code authorizes both school nurses, who must be licensed as registered nurses, and other school personnel, who need not possess any license, to assist any student with medication, provided that certain conditions are met.

In pertinent part, [a] Legal Advisory [issued by the California Department of Education (CDE)] states that, when a school nurse or other licensed person is unavailable to administer insulin to a student with diabetes, unlicensed school personnel may do so, provided that they have volunteered and have been adequately trained, in order to implement the student's rights under the federal civil-rights statutes.

Against this background, the issues on review are these:

1. Does the NPA prohibit unlicensed persons from administering medication to anyone, including prohibiting unlicensed school personnel from administering insulin to students with diabetes?

2. Does Education Code section 49423 authorize unlicensed school personnel to administer insulin to students with diabetes?

3. If the first issue is resolved affirmatively and the second negatively, is the resulting prohibition in California law against unlicensed school personnel's administration of insulin to students with diabetes preempted by the federal civil-rights statutes, at least when a school nurse or other licensed person is unavailable?

II.
INTRODUCTION

As this Court recognized in granting review, this case presents important questions of law on which depend the health and safety and the educational opportunities of many California public school children with diabetes. To thrive in school—indeed, to survive—these children need insulin administered to them many times during the many hours of the school day. Given the severe shortage of school nurses, the consequences of any prohibition in California law against unlicensed school personnel administering insulin would be devastating. But California law in fact authorizes such personnel to administer insulin. Experts in the care of children with diabetes agree

that such a practice is safe, and indeed recommend it, whenever a school nurse or other unlicensed person is unavailable.

Moreover, Section 504, the Americans with Disabilities Act, and the IDEA grant students with diabetes a right to health care services, including the administration of insulin, in order to enjoy their underlying right to a free appropriate public education. The public education in question must be not only *appropriate* but also *free*, allowing students with diabetes to take advantage of educational opportunities as fully as other students and at no cost to themselves and their families.

There is no dispute that the thousands of students with diabetes in California public schools need the administration of insulin to remain safe and healthy, and that they have the right to receive it under Section 504, the Americans with Disabilities Act, and the IDEA. What is disputed is *whether* such students will receive the administration of insulin when a school nurse or other licensed person is unavailable. The resolution of this dispute will determine whether these students will receive what these federal statutes entitle them to or whether they will have to take their chances with a disease that, when not properly managed, is life-threatening.

The practical realities of this dispute threaten the health and safety of thousands of public school children with diabetes. Fortunately, however, this Court need not dwell on these realities. Properly construed, California law poses no obstacle to students with

diabetes as they seek to remain safe and healthy and to take full advantage of educational opportunities. The NPA does not prohibit unlicensed persons from administering medication categorically, and certainly does not prohibit unlicensed school personnel from administering insulin to students with diabetes. In fact, Education Code section 49423 authorizes such personnel to administer insulin to such students. And any prohibition in California law against such activity would be preempted by Section 504, the Americans with Disabilities Act, and the IDEA, at least when a school nurse or other licensed person is unavailable.

This Court should so declare and settle these important questions of law once and for all.

III.
FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

Diabetes is a serious, incurable disease, preventing the body from properly producing or using insulin to convert glucose, a sugar, from food into energy. (3AA/713; 6AA/1415) High blood glucose levels, or hyperglycemia, can result from too little insulin, too much food, or decreased exercise, and can impair cognitive abilities and cause increased thirst, frequent urination, nausea, blurry vision, and fatigue. (3AA/717; 6AA/1428) Untreated hyperglycemia can cause a life-threatening condition called diabetic ketoacidosis, characterized by labored breathing, weakness, confusion, and sometimes

unconsciousness. (3AA/717-18; 6AA/1429) Over time, hyperglycemia leads to serious complications, including heart disease, blindness, kidney failure, and amputation. (6AA/1428) Low blood glucose levels, or hypoglycemia, can result from too much insulin, too little food, or increased exercise, and can also impair cognitive abilities and cause irritability, shakiness, and confusion. (3AA/716-17; 6AA/1426) If not treated promptly, hypoglycemia can cause unconsciousness, seizures, and convulsions, and is life-threatening. (3AA/717; 6AA/1426)

Diabetes must be managed on an individual basis, twenty-four hours a day, seven days a week. (6AA/1419)

Most children with diabetes need insulin to survive. (3AA/714-15; 6AA/1418, 1424) The goal in treating such children is to control blood glucose levels by keeping them within a target range that is determined for each child by his or her physician. (3AA/714-15; 6AA/1424) Proper diabetes management for children generally requires regular monitoring of blood glucose levels and administration of insulin several times each day, including during school hours, to maintain the child's targeted blood glucose level. (6AA/1424) Blood glucose levels are monitored by pricking the skin with a lancet, placing a drop of blood on a test strip, and inserting the strip into a blood glucose meter. (*Ibid.*) Insulin is generally administered by means of: (1) a hypodermic syringe; (2) an insulin pen, a pen-size device fitted with a needle that holds a standardized cartridge of insulin; or (3) an insulin pump, a pager-size computerized device

containing insulin that is continuously attached to the skin and generally worn on a belt or waistband. (6AA/1430-31) When insulin is administered through a hypodermic syringe or an insulin pen, a subcutaneous injection is given just under the skin. (3AA/714) An insulin pump delivers small, steady insulin doses throughout the day and calculates and provides additional insulin doses to cover food consumption when the number of carbohydrates intended to be consumed is entered. (6AA/1431) Some children, particularly older ones, can administer insulin to themselves. (6AA/1418) Other children, particularly younger ones, need insulin administered to them. (6AA/1418)

Diabetes has a profound effect on students in California public schools. (3AA/713, 718-19; 6AA/1410, 1415-19, 1428-29, 1493) More than 6 million students attend almost 10,000 schools in almost 1,400 school districts. (6AA/1493) Approximately 14,000 of these students have diabetes and most need insulin at both predictable and unpredictable times and places in the course of the school day, including on the school site during class and away from the school site on field trips and other school activities. (3AA/713, 718-19; 6AA/1410, 1415-19, 1428-29, 1493) Failing to administer insulin when it is needed increases the risk of both hypoglycemia (if it is administered too early) and hyperglycemia (if it is administered too late), placing the student in immediate danger, making learning more difficult, and increasing the likelihood of complications. (3AA/718-19) Accordingly, to remain safe and healthy and capable of taking full advantage of educational opportunities, the student must receive

insulin whenever he or she needs it, inasmuch as a delay of even a few minutes may impede proper diabetes management and result in unnecessary hypoglycemia or hyperglycemia. (3AA/718-19)

That said, there are only about 2,800 school nurses to care for the 6+ million students in California public schools—constituting only about 1 school nurse for every 2,200 students. (6AA/1494, 1500) Only about 5 percent of schools have a full-time school nurse; about 69 percent have a part-time school nurse; and about 26 percent have no school nurse at all. (6AA/1399) There is, and for the foreseeable future will be, a severe shortage of school nurses. (6AA/1505) In addition, there is, and for the foreseeable future will be, a severe shortage of registered nurses, from whom school nurses are drawn. (*Ibid.*) Such shortages make it more costly to hire school nurses, if they do not prevent it altogether. (*See ibid.*) These costs are prohibitive for many school districts. *See* Sen. Com. on Health and Human Services, Analysis of Sen. Bill No. 1912 (2003-2004 Reg. Sess.) as amended May 3, 2004, at 3-4. For the foreseeable future, they will prove prohibitive for many more. *See* California Department of Education, Budget Crisis Report Card, *available at* http://www.cde.ca.gov/nr/re/ht/bcrc.asp (as of Dec. 20, 2010) (noting " 'unprecedented fiscal crisis' " for California public schools).

Unsurprisingly, there have been numerous failures to administer insulin to students with diabetes because of the unavailability of a school nurse or other licensed person. (3AA/627-

28, 634-42, 669-79, 713, 718-19, 794, 796, 799; 5AA/1149-55, 1191-97, 1199-1211, 1248-56, 1237-46; 6AA/1415, 1428-29)

Such failures have been widespread in Northern California [*see, e.g.*, 3AA/627-28 (Northern California generally); 3AA/634-42 (Turner Elementary School in the Antioch Unified School District in Contra Costa County); 5AA/1191-97, 1248-56 (Greenbrook and Rancho Romero Elementary Schools in the San Ramon Valley Unified School District in Contra Costa County); 5AA/1199-1211 (Haley Durham Elementary School in the Fremont Unified School District in Alameda County)]; in the Central Valley [*see, e.g.*, 3AA/794, 796, 799 (Central Valley generally)]; and in Southern California [*see, e.g.*, 3AA/669-79 (Oak Valley Elementary School in the Buellton Unified School District in Santa Barbara County)].

In addition, such failures have appeared not only in schools in relatively poor school districts [*see, e.g.*, 3AA/634-42 (Turner Elementary School in the Antioch Unified School District in Contra Costa County); 5AA/1199-1211 (Haley Durham Elementary School in the Fremont Unified School District in Alameda County)], but also in schools in relatively affluent school districts [*see, e.g.*, 5AA/1191-97, 1248-56 (Greenbrook and Rancho Romero Elementary Schools in the San Ramon Valley Unified School District in Contra Costa County)].

To ensure that students with diabetes remain safe and healthy and capable of taking full advantage of educational opportunities,

there must be someone constantly available—that is to say, immediately present at the scene or no more than a few minutes away—who can administer insulin at all of the times and places, unpredictable as well as predictable, at which such students may need insulin. (3AA/718-19) School nurses alone cannot meet that need. The reality is that many students need insulin when a school nurse is unavailable. (3AA/624-30; 5AA/1320; 6AA/1526-1680) Even if a school nurse were available, full time, at each school, matters would be no different. A school nurse could not be at two places at once, for example, on the school site during class and away from the school site on field trips and other school activities. Contracting for services by a licensed person other than a school nurse could not fill the gap: Contracting generally requires advance scheduling, which by definition cannot anticipate the unpredictable times and places at which a student may need insulin. (3AA/641, 718-19; 6AA/1428-29)

Unlicensed school personnel can be trained to administer insulin safely. (3AA/720; 4AA/844; 6AA/1647-52, 1667-68) Indeed, unlicensed persons of all backgrounds and ages have routinely been trained to do so. (3AA/720; 4AA/844; 6AA/1647-52) It is the rule that unlicensed persons, not licensed persons, usually administer insulin, and that they can, and do, administer it safely. (3AA/722-23)

In administering insulin to a student with diabetes, any person, whether a school nurse or an unlicensed school employee, first determine the proper dosage. (3AA/722; 6AA/1418, 1486-89) To do so, the person, whether school nurse or unlicensed school employee,

makes a basic calculation in accordance with specific written orders of the student's physician, and does not undertake any nursing assessment. (*Ibid.*) The person, whether school nurse or unlicensed school employee, simply follows the physician's specific written orders. (*Ibid.*)

On these points, there is broad agreement among experts in the care and treatment of persons with diabetes including the United States Department of Education; the United States Department of Health and Human Services and its Centers for Disease Control and Prevention and National Institute of Diabetes and Digestive and Kidney Diseases of the National Institutes of Health; the American Medical Association; the American Academy of Pediatrics; the American Association of Clinical Endocrinologists; the American Association of Diabetes Educators; the American Dietetic Association; the Pediatric Endocrine Nurses Society; the Pediatric Endocrine Society; Children with Diabetes; and the Juvenile Diabetes Research Foundation. (4AA/817-902, 908-12; 6AA/1652)

The fact is, every day unlicensed persons administer insulin. (3AA/720-23; 4AA/817-902; 6AA/1647, 1649-50) They include persons with diabetes—even most older children. (*Ibid.*) They also include family members of persons with diabetes, their friends, acquaintances, caregivers, and others. (*Ibid.*) Indeed, today, insulin is almost always administered by unlicensed persons. (*Ibid.*) This reality is reflected in California law, which authorizes students as

young as elementary-school age to administer insulin to themselves if they are able to do so. *See* Ed. Code § 49414.5(c).

B. Procedural History

In 2005, the American Diabetes Association (ADA) and several California public school students with diabetes, through their guardians, filed a class action in the United States District Court for the Northern District of California against Jack O'Connell, as Superintendent of Public Instruction, the CDE, and others—*K.C. et al. v. O'Connell et al.,* No. C05-4077 MMC (N.D. Cal.). (MajOpn/3) They claimed that Superintendent O'Connell and the CDE denied students with diabetes their right under, inter alia, Section 504, the Americans with Disabilities Act, and the IDEA, to a free appropriate public education and related health care services, including the administration of insulin, by failing to ensure that they received the administration of insulin when they needed it. (*Ibid.*)

In 2007, the parties entered into a settlement agreement which, among other things, required the CDE to issue a Legal Advisory regarding the rights of students with diabetes. (*Ibid.*) Based on the settlement agreement, the district court dismissed the action. (*Ibid.*)

The CDE proceeded to issue the Legal Advisory. (*Ibid.*) In pertinent part, the Legal Advisory states that, when no school nurse or other licensed person is available to administer insulin to a student with diabetes, "federal law" authorizes a "voluntary school employee

who is unlicensed but who has been adequately trained to administer insulin pursuant to the student's treating physician's orders ...." (5AA/1109; *see* MajOpn/4)

Almost immediately thereafter in 2007, the American Nurses Association and the American Nurses Association/California, which were later joined by the California School Nurses Organization and the California Nurses Association (collectively the Nurses Associations), filed this action in the Sacramento County Superior Court against Superintendent O'Connell and the CDE. (MajOpn/4-5) Among other things, the Nurses Associations claimed that the Legal Advisory's unlicensed-school-personnel provision was invalid because: (1) it was inconsistent with the NPA, which they asserted prohibited unlicensed persons from administering medication categorically; and (2) it was not supported by Education Code section 49423, which they asserted did not authorize unlicensed school personnel to administer insulin to students with diabetes, but at most authorized such personnel to help such students with administering insulin to themselves. (MajOpn/5-6)

The superior court granted ADA leave to intervene and file a complaint in intervention. (*Ibid.*) ADA claimed that the Legal Advisory's unlicensed-school-personnel provision was valid because: (1) it was consistent with the NPA; (2) it was supported by Education Code section 49423; and (3) any prohibition in California law would be preempted by Section 504, the Americans with Disabilities Act, and the IDEA. (*Ibid.*)

In 2008, the superior court declared that the Legal Advisory's unlicensed-school-personnel provision was invalid. (*Ibid.*) Although expressly acknowledging that the outcome adversely affected not only the educational opportunities of students with diabetes but also their health and safety [*see* RT/27], the court nevertheless concluded that the NPA prohibited unlicensed persons from administering medication categorically; that Education Code section 49423 did not authorize unlicensed school personnel to administer insulin to students with diabetes but only to help with self-administration; and that the resulting prohibition against unlicensed school personnel administering insulin to students with diabetes was not preempted by Section 504, the Americans with Disabilities Act, and the IDEA. (MajOpn/5-6) In so concluding, the court noted its agreement with ADA's position as a matter of "public policy." (RT/27) But the court added: "I'm a Judge, I am trying to translate that to the law in terms of what I can do to enforce the law. And so ... if I was in the Legislature you got my vote ...." (*Ibid.*) At the same time, the court noted its disagreement with the Nurses Associations' position: "I will just tell you right now, I think your [*sic*] dead wrong on the policy.... If that bill was before me, I'd sign it. It would be law because it makes sense to me." (RT/33) At the end, however, the court believed that California law diverged from, and trumped, public policy. (RT/55-60)

In 2010, the Court of Appeal for the Third Appellate District affirmed. (MajOpn/1, 2, 39) Like the superior court, the Court of Appeal concluded that the NPA prohibited unlicensed persons from administering medication categorically; that Education Code section

49423 did not authorize unlicensed school personnel to administer insulin to students with diabetes but only to help with self-administration; and that the resulting prohibition against unlicensed school personnel administering insulin to students with diabetes was not preempted by Section 504, the Americans with Disabilities Act, and the IDEA. The Court of Appeal so concluded even though, in a concurring opinion, Presiding Justice Scotland expressly acknowledged the adverse effect that affirmance would have on students with diabetes [*see* ConcOpn/1-2] and the other members did not even impliedly disagree [*see* MajOpn/38-39]. Like the superior court, Presiding Justice Scotland concluded that "allowing trained school personnel other than nurses to administer insulin injections for diabetic public school students when necessary would be the wiser public policy decision," but believed that California law stood in the way. (ConcOpn/2)

Following the Court of Appeal's decision, ADA submitted a petition for rehearing, but met with summary denial.

Thereupon, ADA submitted a petition for review, which this Court granted review unanimously.

IV.
ARGUMENT

As we shall show, the Legal Advisory's unlicensed-school-personnel provision is valid.

The NPA does not prohibit unlicensed persons from administering medication categorically, and certainly does not prohibit unlicensed school personnel from administering insulin to students with diabetes.

What is more, Education Code section 49423 in fact authorizes unlicensed school personnel to administer medication to students, including insulin.

In any event, any prohibition in California law against unlicensed school personnel administering insulin to students with diabetes would be preempted by Section 504, the Americans with Disabilities Act, and the IDEA, at least when a school nurse or other licensed person is unavailable.

In concluding to the contrary on each of these three points, the Court of Appeal erred. This Court should accordingly reverse its judgment.

A. The NPA Does Not Prohibit Unlicensed Persons From Administering Medication Categorically, And Certainly Does Not Prohibit Unlicensed School Personnel From Administering Insulin To Students With Diabetes

1. The NPA Is Properly Construed As Not Prohibitory

The rules that this Court applies in the construction of statutes like the NPA are well settled. In construing a statute, the Court

undertakes a single fundamental task, which is to effectuate the statute's purpose in accordance with the Legislature's intent. *E.g.*, *Smith v. Super. Ct.*, 39 Cal.4th 77, 83 (2006). It begins with the language of the statute. *E.g.*, *Cummins, Inc. v. Super. Ct.*, 36 Cal.4th 478, 487 (2005). In doing so, it takes the statute's words as it finds them, giving them their usual and ordinary meaning. *E.g.*, *Smith*, 39 Cal.4th at 83. It neither inserts what has been omitted nor omits what has been inserted. *E.g.*, *Manufacturers Life Ins. Co. v. Super. Ct.*, 10 Cal.4th 257, 274 (1995). Although it focuses on the statute's words, it does not read them in isolation, but rather in context. *Smith*, 39 Cal.4th at 83; *Cummins*, 36 Cal.4th at 487. Not only does it begin with the words of the statute, it also ends there if the statute's words are clear. *E.g.*, *Diamond Multimedia Systems, Inc. v. Super. Ct.*, 19 Cal.4th 1036, 1047 (1999). But if the words of the statute are unclear, it proceeds to extrinsic materials. *E.g.*, *Smith*, 39 Cal.4th at 83. In resolving any lack of clarity, it considers the consequences that would flow from competing constructions, adopting a reading whose results are reasonable and rejecting a reading whose results are absurd. *E.g.*, *Santa Clara County Local Transportation Authority v. Guardino*, 11 Cal.4th 220, 235 (1995).

By way of background to the construction of the NPA, the NPA regulates "professional nursing." Bus. & Prof. Code § 2700. In so doing, the NPA's purpose is to protect and promote the health and safety of the public. *See id.* § 2708.1.

Subject to several exceptions, the NPA prohibits the unauthorized practice of nursing—to be precise, the unauthorized practice of nursing *as a registered nurse*. Specifically, the NPA prohibits any person who does not "hold[ ] a license which is in an active status" as a "registered nurse" from "engag[ing] in the practice of nursing," "offer[ing] to practice nursing," or "us[ing] any title, sign, card, or device to indicate that he or she is qualified to practice or is practicing nursing." *Id.* §§ 2732, 2795.

Although the NPA prohibits the *unauthorized* practice of nursing, it does not define the "practice of nursing."

In its usual and ordinary meaning, to "practice" anything entails being "*professionally* engaged in [it] <*practice* medicine>." Merriam-Webster Online, "Practice," *available at* http://www.merriam-webster.com/dictionary/practice?show=0&t=1290020970 (as of Dec. 20, 2010); *see* Bus. & Prof. Code § 2700 (the NPA governs "*professional* nursing" (italics added)).

To be "professionally engaged" in anything implies "rendering [the] services" in question to the general public as a " 'means of livelihood.' " *City of Los Angeles v. Rancho Homes, Inc.*, 40 Cal.2d 764, 767 (1953); *see, e.g.*, 1 Cal. Jur. 3d *Accountants* § 1 (Westlaw 2010) (practice of accountancy); 7 Cal. Jur. 3d *Attorneys at Law* § 1 (Westlaw 2010) (practice of law); 36 Cal. Jur. 3d *Healing Arts and Institutions* § 193 (Westlaw 2010) (practice of psychology); *see also* Bus. & Prof. Code § 2861 (practice of vocational nursing).

Therefore, the "practice of nursing" must be defined as the rendering of nursing services to the general public as a means of livelihood.

Although it does not define the "practice of nursing," the NPA does define the "nursing functions" that may potentially come within the practice of nursing. *Id.* § 2725(b). Such functions consist of those tasks that, among other things, "require a substantial amount of scientific knowledge or technical skill." *Ibid.*

The NPA lists among nursing functions "[d]irect and indirect patient care services, including, but not limited to, the administration of medications ..., necessary to implement a treatment, disease prevention, or rehabilitative regimen ordered by and within the scope of licensure of a physician ...." *Id.* § 2725(b)(2).

The NPA, however, does not limit to nurses alone the performance of any of the listed nursing functions, including the administration of medication. The Board of Registered Nursing (BRN), which is the only agency authorized by the Legislature to construe the NPA [*id.* § 2725(e)], has stated that nurses may delegate to others the performance of nursing functions, including the administration of medication. *See* BRN, An Explanation of the Scope of RN Practice, *available at* http://www.rn.ca.gov/pdfs/regulations/-npr-b-03.pdf (as of Dec. 20, 2010).

Lastly, the NPA establishes several exceptions to the prohibition against the unauthorized practice of nursing. Bus. & Prof. Code § 2727. Under the so-called orders-of-physician exception, the NPA declares that it "does not prohibit" the "performance by any person of such duties as required in ... carrying out medical orders prescribed by a licensed physician; provided, such person shall not in any way assume to practice as a professional, registered, graduate or trained nurse." *Id.* § 2727(e).

Against this background, this Court should construe the NPA as follows.

***First*, the NPA does not prohibit unlicensed persons from administering medication categorically.**

As noted, the NPA prohibits only the unauthorized practice of nursing. As also noted, the practice of nursing entails the performance of a nursing function. A nursing function is a task that requires a substantial amount of scientific knowledge or technical skill. In Opinion No. 87-106, the Attorney General so concluded. 71 Ops. Cal. Atty. Gen. 190, ___ [1988 WL 385204, at *7] (1988). In that opinion, the Attorney General recognized that the NPA expressly "qualified" its definition of nursing functions "by the clause: 'which require a substantial amount of scientific knowledge or technical skill.' This would normally require an examination of the particular act in question to determine the amount of scientific knowledge and

technical skill required to perform it in order to determine whether performance of the act constituted the practice of nursing ...." *Ibid.*

The administration of medication, however, does not require a substantial amount of scientific knowledge or technical skill categorically.

The Vocational Nursing Practice Act (VNPA) [Bus. & Prof. Code § 2840 et seq.] establishes that administering medication does not necessarily require a substantial amount of scientific knowledge or technical skill. That is because the VNPA authorizes vocational nurses, who need *not* possess such knowledge or skill, to administer medication. *See id.* §§ 2859, 2860.5(a).

Common experience confirms that administering medication does not necessarily require a substantial amount of scientific knowledge or technical skill. Without possessing any such knowledge or skill whatsoever, all sorts of persons administer medication of many kinds, innumerable times everyday, to themselves and to others, altogether safely and without any untoward effects.

But even if administering medication did necessarily require a substantial amount of scientific knowledge or technical skill, the NPA would not prohibit unlicensed persons from administering medication categorically. For, as stated, the NPA does not limit the administration of medication to nurses alone, but authorizes nurses to delegate the task to others.

Because the language of the NPA clearly does not prohibit unlicensed persons from administering medication categorically, this Court need not look beyond the statute's words. But if it were to do so, it would find confirmation in the consequences flowing from the competing constructions.

For instance, in many types of settings licensed by the California Department of Health Care Services and the California Department of Social Services, unlicensed persons are authorized by regulations to administer medication to persons dependent on their services. Such facilities include child care centers [*see* 22 Cal. Code Regs. § 101226(e)], adult residential facilities [*see id.* § 85065(f)(1)], intermediate care facilities [*see id.* §§ 73313(c), 76347(i)], and correctional treatment centers [*see id.* § 79635(a)(6)].

The purpose of the NPA, of course, is to protect and promote the health and safety of the public. In view of the great benefits promised to public health and safety if services to dependent persons continue, it is reasonable to construe the statute not to prohibit unlicensed persons from administering medication. And in view of the commensurately grave costs threatened if such services end, it is absurd to construe the statute otherwise.

***Second*, the NPA does not prohibit unlicensed persons from administering insulin.**

Whatever might be true of the administration of other medications, the administration of insulin, as shown, does *not* require a substantial amount of scientific knowledge or technical skill. (3AA/720, 722-23; 4AA/844; 6AA/1647-52, 1667-68) Unlicensed persons—of all ages and education backgrounds—can be trained, and routinely have been trained, to administer insulin safely. The result is that, today, it is almost always unlicensed persons—not nurses—who administer insulin. Why else would the Legislative have authorized students as young as elementary-school age to administer insulin to themselves if they are able to do so? *See* Ed. Code § 49414.5.

***Third*, the NPA does not prohibit unlicensed school personnel from administering insulin to students with diabetes.**

Whatever might be true of any prohibition in the NPA against unlicensed persons administering other medications, there is no prohibition against unlicensed school personnel administering insulin to students with diabetes.

To begin with, the absence of any prohibition in the NPA against unlicensed school personnel administering insulin to students with diabetes rests on the fact that, in performing the task, *such personnel do not practice nursing.*

As noted, the NPA prohibits only the unauthorized practice of nursing. As also noted, the practice of nursing entails the

performance of a nursing function—but only in rendering nursing services to the general public as a means of livelihood.

In administering insulin to students with diabetes, unlicensed school personnel do not practice nursing because they do not render nursing services to the general public as a means of livelihood.

It is undisputed that, in California public schools, unlicensed school personnel are limited in their authority to administer medication to students, including insulin. Any particular school employee may do so only if: (1) the employee "has consented to administer the medication" to a particular student [5 Cal. Code Regs. § 601(e)(1)]; (2) the student's physician has provided a "written statement ... detailing the name of the medication, method, amount, and time schedules by which the medication is to be taken" [Ed. Code § 49423(b)(1)]; and (3) the student's parent has likewise provided a "written statement ... indicating [a] desire" for assistance "in the matters set forth in the statement of the physician" [*ibid.*].

As a consequence, in administering insulin to students with diabetes, unlicensed school personnel necessarily act solely and openly as volunteers for particular students, carrying out the specific written orders of each student's physician. Such school personnel are indeed volunteers, neither required to perform the task they have consented to undertake nor remunerated for performing it. In following the written orders of the student's physician—which as stated are written and are specific in stating the method, amount, and

time schedule for the administration of insulin—they simply implement particularized directives, without any nursing assessment. As shown, in administering insulin, they first determine the proper dosage; to do so, they make a basic calculation in accordance with the physician's specific written orders; in doing so, they simply follow the physician's specific written orders, doing nothing more and nothing less. (3AA/722; 6AA/1418, 1486-89)

Separately and independently, the absence of any prohibition in the NPA against unlicensed school personnel administering insulin to students with diabetes rests on the fact that, in performing the task, *such personnel come within the orders-of-physician exception to the prohibition against the unauthorized practice of nursing.*

As noted, under the orders-of-physician exception, the NPA "does not prohibit" the "performance by any person of such duties as required in ... carrying out medical orders prescribed by a licensed physician, so long as such a person does not "assume to practice as a ... nurse." Bus. & Prof. Code § 2727(e).

In administering insulin to students with diabetes, unlicensed school personnel necessarily act solely and openly as volunteers for particular students, carrying out the specific written orders of each student's physician.

As above, because the language of the NPA clearly does not prohibit unlicensed school personnel from administering insulin to

students with diabetes, this Court need not look beyond the statute's words. It would nevertheless find confirmation in the consequences flowing from the competing constructions.

As stated, among the more than 6 million students in California public schools, there are thousands of students with diabetes who need insulin at unpredictable as well as predictable times and places during the school day in order to take full advantage of educational opportunities and, indeed, simply to remain safe and healthy.

There are, however, only around 2,800 school nurses. Because they are so few in number, school nurses cannot meet the needs of all of the thousands of students with diabetes while they care for the entire 6+ million population of students. Contracting for services by a licensed person other than a school nurse could not fill the gap, inasmuch as it requires generally advance scheduling, which by definition cannot anticipate the unpredictable times and places at which a student may need insulin.

But in addition to the few school nurses, there are many unlicensed school personnel who can be trained to administer insulin safely. Such personnel can meet the needs of students with diabetes by administering insulin if they are not prohibited from doing so.

As noted, the purpose of the NPA is to protect and promote the health and safety of the public. That purpose is hardly served by putting students with diabetes at risk by prohibiting unlicensed school

personnel from administering insulin, a safe and effective practice that such students need to thrive and survive.

In view of the great benefits promised, and the commensurately grave costs threatened, to public health and safety, it is reasonable to construe the NPA not to prohibit unlicensed school personnel from administering insulin to students with diabetes, and it is absurd to construe it otherwise.

2. The Court Of Appeal's Construction Of The NPA As Prohibitory Is Erroneous

The Court of Appeal nevertheless construed the NPA to prohibit unlicensed persons, including unlicensed school personnel, from administering medication to students, including insulin. (MajOpn/8-20) It erred.

Specifically, the Court of Appeal erroneously read *out of* the NPA's definition of nursing functions its qualifying clause, which expressly "require[s] a substantial amount of scientific knowledge or technical skill" [Bus. & Prof. Code § 2725(b)]. (MajOpn/11-16) It did so on the belief that, otherwise, to list any nursing function would have served no purpose. Hardly. The nursing functions listed are illustrative of the scope of the tasks included. They are thereby crucial to a proper construction of the NPA. They are crucial as well to keeping the scope of the statute within reasonable bounds.

At the same time, the Court of Appeal erroneously read *into* the NPA's definition of nursing functions the administration of *any* medication *by any method of injection*—including insulin by subcutaneous injection. (*Ibid.*) But the Court of Appeal's only support was a passing statement in Opinion No. 87-106, that the administration of any medication by any method of injection "*would appear* to require a substantial amount of scientific knowledge and technical skill." 71 Ops. Cal. Atty. Gen. at ___ [1988 WL 385204, at *8] (italics added). Contrary to the Court of Appeal's assertion, the only support for the statement was a federal regulation that was subsequently revised in light of the fact that, "with the evolving state of clinical practice over time, the administration of a subcutaneous injection has now become commonly accepted as a *nonskilled* service," and that the "the most frequently administered type of subcutaneous medication is insulin, which has long been defined as a *nonskilled* service[.]" 63 Fed. Reg. 26252, 26284 (May 12, 1998) (italics added).

What is more, the Court of Appeal erroneously read the NPA's prohibition against the unauthorized practice of nursing *too broadly.* (MajOpn/8-16) As shown, contrary to the Court of Appeal's implication, the NPA does no more than to prohibit unlicensed persons from practicing nursing, i.e., rendering nursing services to the general public as a means of livelihood.

In contrast, the Court of Appeal erroneously read the NPA's orders-of-physician exception to its prohibition against the unauthorized practice of nursing *too narrowly*. (MajOpn/17-20)

Specifically, the Court of Appeal concluded that the NPA's orders-of-physician exception permits an unlicensed person to perform "such duties as required in ... carrying out medical orders prescribed by a licensed physician" only if he or she does not "assume," in the sense of "undertake," to "practice as a ... nurse."

In so concluding, the Court of Appeal rendered the NPA's orders-of-physician exception meaningless and thereby improperly omitted from the NPA what the Legislature had inserted. The NPA does not prohibit *anyone* from performing *any task*—it only prohibits unlicensed persons from engaging in the unauthorized practice of nursing. If an unlicensed person were not to "undertake" to "practice as a ... nurse," he or she would not come within the NPA's prohibition against the unauthorized practice of nursing in the first place—and hence would not have *any* need for *any* exception.

The Court of Appeal expressed the view that, if the NPA's orders-of-physician exception were construed according to its terms, it "would expand to nearly swallow" its prohibition against the unauthorized practice of nursing and would "potentially upset the careful balancing of responsibilities otherwise established by the Legislature for ... patient caregivers." (MajOpn/19) Not so.

The NPA's orders-of-physician exception is narrow. It applies *only when* an unlicensed person acts on behalf of a "physician" [Bus. & Prof. Code § 2727(e)], as opposed to any other health care professional, including a "dentist, podiatrist, or clinical psychologist" [*id.* § 2725(b)(2)]. And it applies *only when* the unlicensed person acts on the physician's behalf by performing "duties" that are "required in carrying out" the physician's "medical orders." *Id.* § 2727(e). Lastly, when it applies, it permits the unlicensed person *only* to perform "duties" that are "required in carrying out" the physician's "medical orders" [*ibid.*] *and nothing else*, including making any nursing assessment.

B. Education Code Section 49423 Authorizes Unlicensed School Personnel To Administer Insulin To Students With Diabetes

1. Education Code Section 49423 Is Properly Construed As Granting Authority

Education Code section 49423—entitled "Administration of prescribed medication for pupil" [West's Ann. Cal. Educ. Code § 49423 (Westlaw 2011)]—provides that a student "who is required to take, during the regular schoolday, medication prescribed for him or her by a physician or surgeon may be assisted by the school nurse or other designated school personnel ...." Ed. Code § 49423(a).

In so providing, Education Code section 49423 reveals that its purpose is to authorize unlicensed school personnel as well as school

nurses to "assist" students with medication [*id.* § 49423(a)] so as to protect and promote their "health" and "safety" [Stats. 2005, ch. 677, § 57].

Who does Education Code section 49423 authorize to act? "School nurses" and "other school personnel." "School nurses" must of course be licensed—indeed, they must be "registered nurse[s]." Ed. Code § 49426. "Other school personnel" need not possess any license. The Legislature did not draw any distinction between the authority granted to school nurses and the authority granted to unlicensed school personnel.

With respect to what does Education Code section 49423 authorize school nurses and unlicensed school personnel to act? "Medication." "Medication" includes all substances prescribed by a physician, whether or not the substance in question may be dispensed only by prescription. Such substances, in turn, include insulin. Just as the Legislature did not draw any distinction between the various medications that may be administered, neither did it draw any distinction between the methods by which such medications may be administered. Therefore, for example, if Education Code section 49423 does not authorize the administration of insulin by hypodermic injection, neither does not it authorize the administration of cough syrup by spoon.

What does Education Code section 49423 authorize school nurses and unlicensed school personnel to do? "Assist." In its usual

and ordinary meaning, "assist" broadly includes both doing something for another person and helping another person do something him- or herself. Education Code section 49423 does not reflect any other, narrower meaning. As a result, with respect to medication, "assist" includes both "administer" and also "help with self-administration."

It is indisputable that "assist" in Education Code section 49423 is broad enough to authorize school nurses to administer medication as well as help with self-administration. Indeed, the Court of Appeal concluded as much, stating that " 'assistance' is a broader concept than 'administration,' although it may include administration ...." (MajOpn/23)

It is "elementary" that a " 'word ... accorded a particular meaning in one part or portion' " of a statute " 'should be accorded the same meaning in other parts or portions' " of the statute. *County of San Bernardino v. City of San Bernardino*, 15 Cal.4th 909, 926 (1997). A fortiori, a word—including the verb "assist"—that is accorded a particular meaning *in a single statutory provision* should be accorded the same meaning *throughout that provision*—whether the subject is "school nurse" or "other ... school personnel."

Inasmuch as "assist" in Education Code section 49423 is broad enough to authorize school nurses to administer medication as well as help with self-administration, it is necessarily broad enough to authorize unlicensed school personnel to do the same.

Surely, if the Legislature had intended to draw any distinction between administration of medication and help with self-administration, it had the means at hand. Education Code section 49423 itself provides that, under certain conditions, students "may ... *self-administer* prescription auto-injectable epinephrine." Ed. Code § 49423(a) (italics added). Education Code section 49423.1 similarly provides that, under certain conditions, students "may ... *self-administer* inhaled asthma medication." Ed. Code § 49423.1(a) (italics added). Education Code section 49423, however, draws no distinction between administration and help with self-administration, nor does it draw any distinction between school nurses and unlicensed school personnel.

The context in which the language of Education Code section 49423 appears supports the conclusion that the provision authorizes unlicensed school personnel to administer medication to students, including insulin.

Education Code section 49423.5 provides that any student who requires "specialized physical health care services," such as "catheterization," during the regular schoolday, may be "assisted" by unlicensed school personnel as well as school nurses. Ed. Code § 49423.5(a), (d). To "assist" with services of this sort must include administering as well as helping with self-administration. That is because most, if not all, students who require catherization are unable to catherize themselves. Although Education Code section 49423.5 does not involve medication, it does support construing "assist" in

Education Code section 49423 to include administration as well as help with self-administration.

Since the language of Education Code section 49423 clearly authorizes unlicensed school personnel to administer medication to students, including insulin, this Court need not look beyond the provision's words. But if it were to do so, it would find confirmation in materials extrinsic to the provision.

Among the extrinsic materials bearing on the construction of Education Code section 49423 are certain acts and items within the provision's lineage.

From the time of the enactment of Education Code section 49423 in 1976 [Stats. 1975, ch. 1010, § 2]—and indeed from the time of the enactment of its predecessor, former Education Code section 11753.1, in 1968 [Stats. 1968, ch. 681, § 1]—the provision has covered both school nurses and unlicensed school personnel, drawing no distinction between the two with respect to assisting students with medication. The legislative materials accompanying the most recent amendment of Education Code section 49423 in 2004 reflect both the fact of such coverage and also the pressing need for it: Because "[p]ublic schools lack the funding to employ school nurses or other licensed health professionals," "some schools assign other school staff with healthcare duties that are secondary to their primary responsibilities." Sen. Com. on Health and Human Services, Analysis

of Sen. Bill No. 1912 (2003-2004 Reg. Sess.) as amended May 3, 2004, at 3-4.

Also among the extrinsic materials bearing on the construction of Education Code section 49423 are certain acts and items outside of the provision's lineage.

In 2002, the Legislature passed Assembly Bill No. 481 (2001-02 Reg. Sess.), which would have added Education Code section 49423.1. The bill stated that, in the absence of a school nurse, unlicensed school personnel "*shall* administer assistance to pupils with diabetes" involving "administration of ...insulin." Assem. Bill No. 481 (2001-02 Reg. Sess.), as enrolled Sept. 17, 2002, § 2, at 3-4 (italics added). By its terms, the bill would have *mandated* unlicensed school personnel to administer insulin.

The Governor, however, vetoed Assembly Bill No. 481. In his veto message, the Governor stated that Education Code section 49423 "already provides that any pupil who is required to take prescription medication ... may be assisted by school personnel." Governor's Veto Message to Assem. on Assem. Bill No. 481 (2001-02 Reg. Sess.) (Sept. 26, 2002). A Governor's veto message may, of course, provide guidance on the state of the law. *See In re Marriage Cases*, 43 Cal.4th 757, 796 n.17 (2008). That is true of the Governor's veto message on Assembly Bill No. 481. The veto message reflected an understanding that Education Code section 49423 already *authorized*

what the bill would have *mandated*—the administration of insulin to students with diabetes by unlicensed school personnel.

The extrinsic materials bearing on the construction of Education Code section 49423 also include the regulations adopted by the CDE to implement it, which are codified at section 600 et seq. of title 5 of the California Code of Regulations.

The Education Code section 49423 regulations provide that both "school nurse[s]" and "other ... school personnel" "may administer medication to a pupil or otherwise assist a pupil in the administration of medication[.]" 5 Cal. Code Regs. §§ 604(a), 604(b); *see id.* §§ 600(b), 601(c), 601(d)(4), 601(e), 603(a)(3), 603(a)(4), 603(a)(5), 604(c), 604(d), 607, 610(b), 611.

The crucial word in the Education Code section 49423 regulations is "otherwise." To speak of "administering medication to a pupil or *otherwise* assisting a pupil in the administration of medication" means that "assisting" is the *including* term and "administering" is the *included* term. Therefore, "*assisting* a pupil in the administration of medication" includes "*administering* medication" to the pupil as well as "helping the pupil" with self-administration.

This Court would find further confirmation for the conclusion that Education Code section 49423 authorizes unlicensed school

personnel to administer medication to students, including insulin, in the consequences flowing from the competing constructions.

In most cases, helping a student with self-administration of medication is the harder task, whereas administering the medication to the student is the easier one. For example, the harder task is to measure out the proper amount of cough syrup, while the easier task is simply to put the syrup into the mouth. Both tasks, however, are well within the competence of unlicensed school personnel. It would defy logic to conclude that an unlicensed school employee could help a student with self-administration of cough syrup by measuring out the syrup but could not administer the syrup by putting it into the student's mouth.

This is certainly true in the case of insulin. The harder task is to help a student with self-administration of insulin—to calculate the appropriate dose—while the easier task is simply to administer it to the student—to push the plunger of a hypodermic syringe or the buttons of an insulin pump. (3AA/721) But both tasks are well within the competence of unlicensed school personnel. (*Ibid.*) As stated, unlicensed persons have routinely been trained to administer insulin safely. Here too, it would defy logic to conclude that an unlicensed school employee could help a student with self-administration of insulin by calculating the appropriate dose but could not administer the insulin by pushing a hypodermic syringe's plunger of an insulin pump's buttons.

Moreover, to construe Education Code section 49423 to authorize unlicensed school personnel only to help a student with self-administration of medication but not to administer medication to the student him- or herself would render the provision indeterminate. There is nothing in the provision that draws any distinction between administration and help with self-administration. Neither is there anything in the provision that suggests where to sketch the line to mark where help with self-administration ends and administration begins: At the place where an unlicensed school employee measures out cough syrup or calculates a dose of insulin for a student? where the employee hands the student a spoon of syrup or a hypodermic syringe containing insulin? where the employee puts the spoon into student's mouth or inserts the syringe's needle under the student's skin? where the employee inverts the spoon or pushes the syringe's plunger? To construe the provision not to authorize administration but only to help with self-administration would raise all of these questions—and would not answer any one of them.

It is therefore be reasonable to construe Education Code section 49423 to authorize unlicensed school personnel to administer medication as well as help with self-administration and absurd to construe the provision to authorize only help with self-administration. It is especially reasonable to adopt the former construction, and especially absurd to adopt the latter one, with respect to students with diabetes and insulin, because of the serious adverse consequences to their health and safety.

2. The Court Of Appeal's Construction Of Education Code Section 49423 As Not Granting Authority Is Erroneous

The Court of Appeal nevertheless construed Education Code section 49423 *not* to authorize unlicensed school personnel to administer medication to students, including insulin. (MajOpn/20-33) It again erred.

The Court of Appeal did not dispute that, by authorizing both school nurses and unlicensed school personnel to "assist" students with "medication," Education Code section 49423 is broad enough to authorize both to administer medication as well as to help with self-administration. (MajOpn/22-23)

But to avoid giving effect to the plain meaning of "assist," the Court of Appeal concluded that " 'assist' ... means to help in whatever way is legally permitted by the specific individual who is doing the assisting" under some statute or statutory provision *other than Education Code section 49423*. (MajOpn/22)

Therefore, according to the Court of Appeal, Education Code section 49423 authorizes school nurses to "assist" students with diabetes by administering insulin because school nurses, who are by definition registered nurses, are legally permitted to administer medication including insulin under some statute or statutory provision *other than Education Code section 49423 itself*, specifically, the NPA. (MajOpn/23) In contrast, according to the Court of Appeal, Education

Code section 49423 does *not* authorize unlicensed school personnel to "assist" students with diabetes by administering insulin because unlicensed school personnel, who are by definition unlicensed, are *not* legally permitted to administer insulin under any statute or statutory provision *other than Education Code section 49423 itself.* (MajOpn/23-24)

It is evident that the Court of Appeal's conclusion amounts to a radical limitation of Education Code section 49423, depriving unlicensed school personnel of authority to administer medication to students.

It is just as evident that Court of Appeal's radical limitation of Education Code section 49423 is alien to the provision's language and purpose. On its face, the provision does not contain such words. Indeed, the words it does contain authorize unlicensed school personnel as well as school nurses to administer medication. Moreover, as stated, the purpose of the provision is to authorize unlicensed school personnel as well as school nurses to "assist" students with medication so as to protect and promote their health and safety. The Court of Appeal's conclusion would mean that the Legislature had performed an idle act, authorizing school nurses and unlicensed school personnel to do nothing for students other than what another statute or statutory provision already authorized them to do. It is presumed, however, that the Legislature does not perform such acts. *E.g.*, *Imperial Merchant Services, Inc. v. Hunt*, 47 Cal.4th 381, 390 (2009).

Apparently recognizing that its radical limitation of Education Code section 49423 was alien to the provision's language and purpose, the Court of Appeal sought to justify it on other bases.

First, the Court of Appeal claimed that its radical limitation of Education Code section 49423 was necessary to avoid conflict with the NPA. (MajOpn/23-24) The Court of Appeal purported to discern a conflict because it construed the NPA to prohibit unlicensed school personnel from administering insulin to students with diabetes, whereas it construed Education Code section 49423 to authorize them to do so.

There is no such conflict. As shown, although Education Code section 49423 does indeed grant such authority, the NPA does not impose any such prohibition.

In any event, any such conflict would readily resolved itself. It is " ' "well settled ... that a general provision is controlled by one that is special, the latter being treated as an exception to the former." ' " *Ordlock v. Franchise Tax Bd.*, 38 Cal.4th 897, 910 (2006). The NPA is the general provision dealing with the administration of medication *in California as a whole*; Education Code section 49423 is the special provision dealing with the administration of medication *in California public schools in particular*. Therefore, even if the NPA broadly prohibited *unlicensed persons* from administering medication *to anyone*, Education Code section 49423 would narrowly authorize *unlicensed school personnel* to administer medication *to students*. As

such, Education Code section would be deemed an exception to the NPA and, consequently, would not create a conflict with it.

Second, the Court of Appeal claimed that its radical limitation of Education Code section 49423 was supported by the provision's regulations. (MajOpn/24-25)

Although, as noted by the Court of Appeal, the Education Code section 49423 regulations provide that unlicensed school personnel may administer medication to students "as allowed by law," they make identical provision for school nurses [5 Cal. Code Regs. § 604(a)] and even for parents [*id.* § 604(c)]: *Anyone and everyone* who administers medication to *any* student must do so "as allowed by law." *Id.* § 604(a), (b), (c). By providing that both school nurses and unlicensed school personnel may administer medication to students "as allowed by law," the regulations do nothing more than accommodate any *specific* conditions that may be applicable to the administration of any *specific* medication. For example, even though, under Education Code section 49423, unlicensed school personnel are authorized to administer medication generally, under other provisions they may be subject to specific conditions for specific medications. One instance is close at hand. Education Code section 49414.5 subjects unlicensed school personnel to certain conditions for administering glucagon to students with diabetes. No provision, however, subjects unlicensed school personnel to any conditions for administering insulin.

Third, the Court of Appeal claimed that its radical limitation of Education Code section 49423 was supported by two documents issued by the CDE. (MajOpn/25-28)

In 2005 and 2006, respectively, the CDE issued "Program Advisory on Medication Administration" [2AA/483-514] and "Medication Administration Assistance in California: Frequently Asked Questions" [7AA/1709-10]. In the first document, the CDE "recommended" that, generally, unlicensed school personnel should not administer medication to students if the method of administration is by "injection," which could include insulin. (2AA/488-89) In the second document, the CDE noted that there was no statutory provision "clearly" [7AA/1709], that is, expressly, authorizing unlicensed school personnel to administer insulin to students with diabetes.

But in neither document did the CDE state or imply that unlicensed school personnel were without authority to administer insulin to students with diabetes. In any case, neither document constitutes a regulation and hence neither is entitled to the "great weight" that a regulation would carry. *Morris v. Williams*, 67 Cal.2d 733, 748 (1967). Whatever weight either document might legitimately bear would not be enough to deprive unlicensed school personnel of the authority granted by Education Code section 49423. Since even a regulation that purported to "alter" a statute or "impair its scope" would be "void" [*ibid.*], a document that did not even rise to the dignity of a regulation would be voider still.

Fourth and final, the Court of Appeal claimed that its radical limitation of Education Code section 49423 was supported by actions by the Legislature in this area over the past decade purportedly reflecting a belief that the NPA required that unlicensed school personnel had to be granted authority to administer medication, if at all, expressly, specific medication by specific medication. (MajOpn/28-32)

To put this legislative activity into perspective demands an understanding of the decade-long dispute about the proper construction of Education Code section 49423, which stands as the background to this action and to the prior federal class action in *K.C. et al. v. O'Connell et al.*

For 10 years, advocates for students with diabetes, on the one side, and school nurses and their allies, on the other, have disputed the construction of Education Code section 49423. The former have contended that, although the provision does not authorize unlicensed school personnel to administer insulin to students with diabetes expressly, it effectively authorizes them to do so. The latter, by contrast, have contended that, because the provision does not contain express authorization, it does not contain any authorization at all.

Both advocates for students with diabetes and school nurses and their allies have disputed the construction of Education Code section 49423 under the pressure of certain undeniable numbers: More than 6 million students in California public schools; thousands of students

with diabetes needing insulin at unpredictable as well as predictable times and places during the school day in order to take full advantage of educational opportunities and, indeed, simply to remain safe and healthy; only around 2,800 school nurses, too few in number to meet the needs of all of the thousands of students with diabetes while caring for the entire 6+ million population of students.

At the outset, notwithstanding the Court of Appeal's claim, there is nothing in the NPA that requires that unlicensed school personnel have to be granted authority to administer medication, if at all, expressly, specific medication by specific medication. Neither, as will appears, is there anything outside of the statute.

The major legislative action to which the Court of Appeal referred involved Assembly Bill No. 481. As explained, the Governor vetoed Assembly Bill No. 481. His veto message reflected an understanding that Education Code section 49423 already *authorized* what the bill would have *mandated*—the administration of insulin to students with diabetes by unlicensed school personnel. The Court of Appeal, however, claimed to read the passage of the bill as "some evidence of the Legislature's understanding of the need for statutory *authorization* for unlicensed school personnel to administer insulin ...." (MajOpn/30 (italics added)) Hardly. The bill's passage is evidence only of the Legislature's understanding of the need for statutory *mandate*.

Some of the other legislative actions referred to by the Court of Appeal involve bills that failed to pass—Assembly Bill No. 778 (2001-2002 Reg. Sess.), Senate Bill No. 1487 (2007-2008 Reg. Sess.), and Assembly Bill No. 1802 (2009-2010 Reg. Sess.)—and, as such, provide little support for its radical limitation of Education Code section 49423.

It is well settled that bills that fail to pass "have little value." *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, 43 Cal.3d 1379, 1396 (1987). Specifically, the introduction of a bill that would have authorized unlicensed school personnel to administer insulin to students with diabetes might suggest that some legislators believed that the bill was necessary because Education Code section 49423 did not grant such authority. *See Grupe Development Co. v. Super. Ct.*, 4 Cal.4th 911, 923 (1993). Alternatively, the failure of such a bill might suggest that some legislators believed that the bill was unnecessary because Education Code section 49423 *already* granted that authority. *See ibid.* As a consequence, the " ' "light shed by such unadopted proposals is too dim to pierce statutory obscurities." ' " *Ibid.*

That said, Assembly Bill No. 778, Senate Bill No. 1487, and Assembly Bill No. 1802 do not support the Court of Appeal's radical limitation of Education Code section 49423.

Assembly Bill No. 778 would have added Education Code section 49430 to *require* that "[e]very school district *shall ensure* that,

in the absence of school nurses, there are staff members competent in ... administering insulin ... injections." Assembly Bill No. 778 (2001-2002 Reg. Sess.) as amended May 24, 2001, § 2, at 3 (italics added). Like the Governor's veto of Assembly Bill No. 481 at the same session, the failure of Assembly Bill No. 778 suggests only a similar unwillingness to *mandate* what was *already authorized.*

Senate Bill No. 1487 would have amended Education Code section 49414.5 to add language stating expressly that unlicensed school personnel were authorized to administer *insulin* as well as *glucagon.* The bill, however, was not altogether clear in providing such authorization. *See* Senate Bill No. 1487 (2007-2008 Reg. Sess.) as introduced February 21, 2008, § 1, at 2. As a result, the bill's failure suggests only an unwillingness to enact a provision that might have muddled the issue.

Assembly Bill No. 1802 would have added Education Code section 49414.6 to provide that parents of students with diabetes could designate unlicensed school personnel to administer insulin to their children. Assembly Bill No. 1802 (2009-2010 Reg. Sess.) as introduced February 10, 2010, § 2, at 4-6; Assembly Bill No. 1802 (2009-2010 Reg. Sess.) as amended March 17, 2010, § 2, at 4-6. The bill's failure suggests only an unwillingness to enact a provision that might be construed to authorize parents rather than school districts to determine which unlicensed school personnel could administer insulin.

The rest of the legislative actions referred to by the Court of Appeal provide even less support for its radical limitation of Education Code section 49423.

Assembly Bill No. 559 (2001-2002 Reg. Sess.) added Education Code section 49414 to authorize unlicensed school personnel to administer epinephrine generally, not only to students, but only under certain conditions. The bill's express grant of authority to administer epinephrine generally under specified conditions has no bearing on Education Code section 49423's grant of authority to administer other medications, including insulin, to students free from those conditions.

Next, Assembly Bill No. 942 (2003-2004 Reg. Sess.) added Education Code section 49414.5 to subject unlicensed school personnel to certain conditions in administering glucagon to students with diabetes. The desire of the Legislature to impose specified conditions for administering glucagon says nothing about Education Code section 49423's grant of authority to administer other medications, including insulin, to students without those conditions.

Lastly, Senate Bill No. 1912 (2003-2004 Reg. Sess.) amended Education Code section 49423 and Assembly Bill No. 2132 (2003-2004 Reg. Sess.) added Education Code section 49423.1. Senate Bill No. 1912 and Assembly Bill No. 2132 authorized students to administer epinephrine and inhaled asthma medication, respectively, to themselves, but only under certain conditions. The bills' grant of

authority to students to administer epinephrine and inhaled asthma medication to themselves under specified conditions is not inconsistent with Education Code's section 49423 grant of authority to unlicensed school personnel to administer insulin to students with diabetes without those conditions.

C. Any Prohibition In California Law Against Unlicensed School Personnel Administering Insulin To Students With Diabetes Would Be Preempted By Section 504, The Americans With Disabilities Act, And The IDEA, At Least When A School Nurse Or Other Licensed Person Is Unavailable

1. Any Prohibition Would Be Preempted

If, contrary to our argument, this Court were to conclude that the NPA prohibits unlicensed persons from administering medication categorically, or at least prohibits unlicensed school personnel from administering insulin to students with diabetes; and if it were further to conclude that Education Code section 49423 does not authorize unlicensed school personnel to administer medication to students, including insulin, it would then have to address whether the resulting prohibition in California law against unlicensed school personnel administering insulin to students with diabetes would be preempted by Section 504, the Americans with Disabilities Act, and the IDEA, at least when a school nurse or other licensed person is unavailable.

Under the Supremacy Clause of Article VI of the United States Constitution, federal law may preempt state law and thereby render it without effect. *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819).

Federal law preempts state law when, among other things, state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

"What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal" law in question "and identifying its purpose and intended effect" with respect to the state law at issue. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 373 (2000). State law is a sufficient obstacle to federal law, even if it does not purport to deny a federal right, so long as it burdens the exercise of the right. *See, e.g., Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317-32 (1981) (finding state law providing for damages for abandonment of intrastate rail service a sufficient obstacle to federal law regulating interstate rail service because it burdened a railroad's exercise of its federal right to abandon interstate rail service).

In this action, ADA, as the party claiming preemption, bore the "burden of demonstrating" preemption. *Bronco Wine Co. v. Jolly*, 33 Cal.4th 943, 956 (2004).

Applying these principles, this Court would have to conclude that ADA readily carried its burden. That is because ADA has demonstrated that any California prohibition against unlicensed school personnel administering insulin to students with diabetes would frustrate the purpose of Section 504, the Americans with Disabilities Act, and the IDEA *both* generally *and also* specifically when a school nurse or other licensed person is unavailable.

First, ADA has demonstrated preemption *generally*.

Section 504, the Americans with Disabilities Act, and the IDEA grant, and were intended to grant, students with diabetes and other disabilities a right to a free appropriate public education and related health care services. These federal statutes were enacted to ensure that such students could take advantage of educational opportunities as fully as others, and remain safe and healthy, at no cost to themselves or to their families. *See, e.g., Cedar Rapids Community School Dist. v. Garret F. ex rel. Charlene F.*, 526 U.S. 66, 73-79 (1999); *Irving Independent School Dist. v. Tatro*, 468 U.S. 883, 891 (1984); *Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley*, 458 U.S. 176, 192 (1982); 34 C.F.R. §§ 104.33(b)(1), 104.33(c)(1). Students with diabetes who need the administration of insulin cannot attend school safely if there is no one available to administer insulin. The purpose of the federal statutes is to ensure that students with diabetes get the health care services they need, including the administration of insulin, when they need them in order to attend school safely without potentially harmful delays.

As shown, for many students with diabetes to take full advantage of educational opportunities and, indeed, to remain safe and healthy, they need someone constantly available—that is, immediately present at the scene or no more than a few minutes away—who can administer insulin at all of the times and places, unpredictable as well as predictable, at which they may need insulin.

The burden to be, or to provide, that *someone* cannot be placed on a student's parents. That is because the free appropriate public education and related health care services to which the student is entitled under Section 504, the Americans with Disabilities Act, and the IDEA must in fact be free, and the student's parents may not be required to shoulder the burden that the federal statutes impose on the student's school district.

If, under California law, the person constantly available to administer insulin to a student with diabetes could not be an unlicensed school employee, who then could it be? In most cases, it could not be a licensed person whose services were contracted for. Contracting generally requires advance scheduling, which by definition cannot anticipate the unpredictable times and places at which a student may need insulin. Therefore, it would have to be a school nurse.

But in light of the present and projected severe shortage of school nurses, there are not enough, and will not be enough, school nurses to meet the needs of students with diabetes. The proof is mere

arithmetic. Thousands of students with diabetes need insulin at unpredictable as well as predictable times and places during the school day in California's almost 10,000 public schools. There are only about 2,800 school nurses. The numbers yield a staffing ratio of about 1 school nurse for every 2,200 students. The numbers also show that only about 5 percent of schools have a full-time school nurse, about 69 percent have only a part-time school nurse, and about 26 percent have no school nurse at all. Even if these numbers were somehow to change and each school were somehow to obtain a full-time school nurse, it would not be enough. Even a full-time school nurse could not be available at all of the unpredictable times and places at which a student with diabetes might need insulin.

Perhaps a dramatic increase in the number of school nurses at some future time would solve the problem of administering insulin to students with diabetes? Hardly. The currently-severe shortage of school nurses is projected to remain severe. The result is that there will not be enough school nurses. Perhaps some registered nurses could be persuaded to become school nurses. The fact is, however, that there is currently a severe shortage of registered nurses too, and that shortage is projected to remain severe as well. Therefore even if some registered nurses could be persuaded to become school nurses, market realities would make it prohibitively costly to hire enough. In any case, the practical effects of the problem must be evaluated today, not at some speculative future time at which there might be many more school nurses.

It follows that, if students with diabetes are to be able to exercise their rights under Section 504, the Americans with Disabilities Act, and the IDEA without burden—indeed, if they are to be able to exercise these rights at all—any prohibition in California law against unlicensed school personnel administering insulin to them would have to yield inasmuch as school nurses or other licensed persons cannot be available whenever they are needed. Although the problems that such students face in finding a school nurse or other licensed person to administer insulin might not be universal, they are nevertheless common and systemic. As witnessed by the agreement of experts in the care and treatment of persons with diabetes, there is simply no effective alternative that could provide for the health and safety of these students other than to allow unlicensed school personnel to administer insulin. It is true that, in some cases, a student's parent might be able to go to school to administer insulin. But, in most cases, a parent will be unable to do so because of job or other commitments. In any event, as stated, the federal statutes grant each such student the right to a free appropriate public education, including health care services such as the administration of insulin, at no cost to the student's parents either in time or money. The federal statutes prohibit school districts from shifting the cost to the student's parents.

In *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), the Ninth Circuit reviewed Hawaii law that imposed a 120-day quarantine on all carnivorous animals entering the state. *Id.* at 1481. The court held that the quarantine law denied visually-impaired persons their

rights under the Americans with Disabilities Act to enjoy the benefits of state services by denying them use of their guide dogs. *Id.* at 1485. The court acknowledged that the quarantine law was intended to protect "public health and safety" by keeping the state "one of the few places in the world which is completely free from rabies." *Id.* at 1481, 1485. The court also acknowledged that, during the quarantine period, a visually-impaired person could stay free of charge at an apartment or cottage at the quarantine station and, after an initial 10-day observation period, could train with his or her guide dog on and off the station grounds. *Id.* at 1482. But because it was obligated to "insure that the mandate of federal law is achieved," the court held that the quarantine law could not stand as to guide dogs of visually-impaired persons. *Id.* at 1485.

In *Crowder*, the question was not *how many* visually-impaired persons would be denied their rights under the Americans with Disabilities Act by the Hawaii quarantine law if they were denied use of their guide dogs. Neither was the question whether *any* visually-impaired persons could avoid denial of their rights by, say, relying upon the assistance of a sighted relative. Rather, the question was whether the effects of the quarantine law would frustrate the purpose of the federal statute by burdening the exercise of the federal rights it grants. The answer was yes.

Similarly in this case, the question is not *how many* students with diabetes would be denied their rights under Section 504, the Americans with Disabilities Act, and the IDEA by any prohibition in

California law against unlicensed school personnel administering insulin. Neither is the question whether *any* such students could avoid denial of their rights by, say, relying upon the assistance of a parent. Rather, the question is whether the effects of any such prohibition would frustrate the purpose of these federal statutes by burdening the exercise of the federal rights they grant. Here too, the answer is yes.

The problems faced by students with diabetes in finding school nurses and other licensed persons to administer insulin need not be universal to cause Section 504, the Americans with Disabilities Act, and the IDEA to preempt any prohibition in California law against unlicensed school personnel administering insulin.

Even if not universal, the problems actually faced by students with diabetes in this case are real and widespread. As shown, there have been numerous failures to administer insulin because of the unavailability of a school nurse or other licensed person. Such failures have been widespread in Northern California, in the Central Valley, and in Southern California. In addition, they have appeared not only in schools in relatively poor school districts, but also in schools in relatively affluent school districts.

These problems demonstrate that there are and inevitably will be situations in which school nurses and other licensed persons are unavailable to administer insulin. As the evidence shows, unavailability can result from various causes. For example, a school may not have a full-time, part-time, or even any school nurse at all.

Or a school may desire to have a school nurse but may be unable to hire one because the cost is too great. Or a school may be unable to obtain either a school nurse from another location or another licensed person by contracting in time to administer insulin to a student with diabetes within the few minutes within which the student needs it. What Section 504, the Americans with Disabilities Act, and the IDEA and the medical realities of diabetes require is that someone must be constantly available—again, immediately present at the scene or no more than a few minutes away—who can administer insulin at all of the times and places, unpredictable as well as predictable, at which a student with diabetes may need insulin. Any prohibition in California law against unlicensed school personnel administering insulin would frustrate the purpose of the federal statutes by setting up a system that would allow only school nurses and other licensed persons to administer insulin—a system that would make it impossible to meet the needs of students with diabetes in some situations and prohibitively costly in many others. Any such prohibition would have to yield.

Second, ADA has demonstrated preemption *specifically when a school nurse or other licensed person is unavailable.*

On this point, it is helpful to recall that the Legal Advisory's unlicensed-school-personnel provision states only that a "voluntary school employee who is unlicensed but who has been adequately trained to administer insulin" may administer insulin to a student with diabetes, "pursuant to" the specific "written orders" of the "student's

treating physician[ ]," *when a school nurse or other licensed person is unavailable.* (5AA/1109)

The Legal Advisory's unlicensed-school-personnel provision comes into play only if a school nurse or other licensed person is unavailable to administer insulin to a student with diabetes and only if the unlicensed school employee in question has volunteered and has been adequately trained. Therefore, if a school nurse or other licensed person turned out to be *always* available, an unlicensed school employee would *never* administer insulin.

Even though the Legal Advisory's unlicensed-school-personnel provision comes into play only if those conditions are present, if they *are* present it *must* come into play. The reason is manifest: If a student with diabetes needed the administration of insulin; if a school nurse or other licensed person were unavailable; if an unlicensed school employee were in fact available, and were ready, willing, and able to do; and if California law prohibited that unlicensed school employee from administering insulin to that student, the prohibition would frustrate the purpose of Section 504, the Americans with Disabilities Act, and the IDEA. That is because the prohibition would deprive the student of his or her right to health care services, specifically, the administration of insulin, by prohibiting the only person available to administer insulin from doing so.

In light of the foregoing, in order to avoid frustrating the purpose of Section 504, the Americans with Disabilities Act, and the

IDEA, this Court should conclude that any prohibition in California law against unlicensed school personnel administering insulin to students with diabetes would be preempted, at least when a school nurse or other licensed person is unavailable.

2. The Court Of Appeal's Conclusion That Any Prohibition Would Not Be Preempted Is Erroneous

The Court of Appeal nevertheless concluded that any prohibition in California law against unlicensed school personnel administering insulin to students with diabetes would not be preempted by Section 504, the Americans with Disabilities Act, and the IDEA, even when a school nurse or other licensed person is unavailable. (MajOpn/33-38)

The Court of Appeal held that ADA failed to carry its burden of demonstrating preemption because it supposedly failed to introduce evidence of "specific facts" to prove precisely "what number of schools" have students with diabetes or precisely "how many" students are in need of insulin in the absence of a school nurse or other licensed person. (MajOpn/36)

But in order to carry its burden, ADA did *not* have to introduce quantifiable evidence about students with diabetes in need of the administration of insulin in the absence of a school nurse or other licensed person.

That is because, as noted, "[w]hat is a sufficient obstacle is a matter of judgment" [*Crosby*, 530 U.S. at 373]—not a matter of quantifiable evidence. *See, e.g., Chicago and N.W. Transp. Co.*, 450 U.S. at 324-31 (finding preemption of Iowa law on abandonment of intrastate rail service by federal law without quantifiable evidence)).

Put simply, frustration of the purpose of Section 504, the Americans with Disabilities Act, and the IDEA does not depend on *how many* students with diabetes are burdened in the exercise of their rights to a free appropriate public education and related health care services, including the administration of insulin, by operation of California law. It depends instead on whether *some* students are burdened. The evidence shows that many students have been, are, and necessarily will be burdened.

The Court of Appeal claimed that *Crowder* was "materially distinguishable" from this case. (MajOpn/37) It contrasted the presence of evidence in *Crowder* that some visually-impaired persons needed guide dogs to enjoy state services with the supposed absence of evidence that any student with diabetes needs unlicensed school personnel to administer insulin to enjoy a free appropriate public education. It seemed to believe that the rights threatened in *Crowder* were more important than those at stake here. It is hard to conceive of many rights more important than those of students with diabetes—including the right to take full advantage of educational opportunities and, fundamentally, the right to remain safe and healthy. It is similarly hard to rank the burden experienced by such students in this

case below the burden experienced by visually-impaired persons in *Crowder*. Just as visually-impaired persons are denied their rights to enjoy state services when they are denied use of their guide dogs to travel safely, so too as students with diabetes denied their rights to a free appropriate public education when they are denied the administration of insulin to attend school safely.

The Court of Appeal expressed a belief that, in the future, school districts might be able to provide for the administration of insulin to students with diabetes by "contract[ing] for the services of a licensed nurse, including as necessary a licensed vocational nurse, ... in order to meet the requirements of federal law." (MajOpn/36)

The evidence introduced by ADA precludes any such belief. Contracting for nursing services is nothing new. As stated, contracting generally requires advance scheduling, which by definition cannot take account of the unpredictable times and places at which a student may need insulin. Contracting has been tried many times, and it has failed many times; it may tried yet again, but it will fail yet again and will surely never amount to an adequate statewide solution.

V.
CONCLUSION

The children who are at the heart of this controversy—the thousands of students with diabetes in California public schools—need the administration of insulin several times a day. These children

need it to avoid complications if diabetes is not well managed—the short-term complications of death and, if that is avoided, the long-term complications of blindness, heart disease, kidney disease, and amputation.

That these children need the administration of insulin is not the question. The question is *who* will administer it to them.

The solution urged by the Nurses Associations is that these children should wait for a school nurse, and only a school nurse, despite the reality that school nurses are generally unavailable now and will remain generally unavailable in the future.

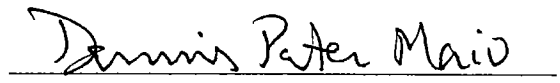
The solution urged by ADA, by those who love these children, and by those who have devoted their lives to caring for them is that unlicensed school personnel—teachers and secretaries and coaches and others—should be allowed to raise their hands and offer to administer insulin to these children in their need. Fortunately, the NPA does not prohibit these people from raising their hands, and Education Code section 49423 actually authorizes them to do so. Even if it were otherwise, any prohibition in California law would be preempted by Section 504, the Americans with Disabilities Act, and the IDEA.

This Court should accordingly reverse the judgment of the Court of Appeal with directions to reverse the judgment of the superior court.[1]

DATED: December 22, 2010.

DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, INC.

REED SMITH LLP

By 
Dennis Peter Maio

Attorneys for Intervener and Appellant American Diabetes Association

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[1] We note that the Nurses Associations claimed that the Legal Advisory's unlicensed-school-personnel provision was invalid *not only* because it was inconsistent with the NPA and not supported by Education Code section 49423, *but also* because it was subject to but not compliant with the Administrative Procedure Act (APA) [Gov't Code § 11340 et seq.]. (MajOpn/5) The superior court agreed. (8AA/2021) The Court of Appeal, however, declined to address the issue. (MajOpn/7) That is because the issue is of no practical consequence. Whether or not the Legal Advisory's unlicensed-school-personnel provision is invalid under the APA, the underlying law, as stated and applied in the text, remains controlling. *See Tidewater Marine Western, Inc. v. Bradshaw*, 14 Cal.4th 557, 577 (1996).

WORD COUNT CERTIFICATE

This Opening Brief on the Merits contains 13,898 words (including footnotes, but excluding cover, tables and this certificate). In preparing this certificate, I have relied on the word count generated by Microsoft Office Word 2003.

Executed on December 22, 2010, at San Francisco, California.

Dennis Peter Maio

PROOF OF SERVICE

American Nurses Association et al. v. O'Connell et al.,
Cal. Sup. Ct. No. S184583
(Cal. App. 3 No. C061150; Sacto. Super. Ct. 07AS04631)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. I am employed in the office of a member of the bar of this court at whose direction the service was made. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, CA 94105. On December 22, 2010, I served the following document(s) by the method indicated below:

OPENING BRIEF ON THE MERITS

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California, addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

Shereen Arent, Esq. American Diabetes Association 1701 North Beauregard Street Alexandra, VA 22311	Client
John S. Poulos, Esq. Carrie Bonnington, Esq. Pillsbury Winthrop Shaw Pittman LLP 2600 Capitol Ave., Suite 300 Sacramento, CA 95816-5930	Attorneys for Respondents American Nurses Association, American Nurses Association/California, California School Nurses Organization, and California Nurses Association Telephone: 916-329-4700 Facsimile: 916-441-3583 Email:carrie.bonnington@pillsburylaw.com

Alice L. Bodley, Esq. Jocelyn Winston, Esq. E. Maureen Cones, Esq. American Nurses Association 8515 Georgia Avenue, N.W. Suite 400 Silver Spring, MD 20910	Attorneys for Respondents American Nurses Association, American Nurses Association/California, and California School Nurses Organization Telephone: 301-628-5127 Facsimile: 301-628-5345 E-mail:alice.bodley@ana.org
Pamela S. Allen, Esq. Linda M. Shipley, Esq. California Nurses Association Legal Department 2000 Franklin St., Suite 300 Oakland, CA 94612	Attorneys for Respondent California Nurses Association Telephone: 510-273-2271 Facsimile: 510-663-4822 E-mail: pallen@calnurses.org
Ava C. Yajima, Esq. Marsha A. Bedwell, Esq. Michael E. Hersher, Esq. California State Department of Education Legal Department 1430 N Street, Room 5319 Sacramento, CA 95814	Attorneys for Appellants Jack O'Connell and California Department of Education, the Board of Education, and its members Telephone: 916- 319-0860 Facsimile: 916- 319-0155 E-mail: AYajima@cde.ca.gov MBedwell@cde.ca.gov MHersher@cde.ca.gov
Robin B. Johansen, Esq. Kari Krogseng, Esq. Remcho, Johansen and Purcell, LLP 201 Dolores Ave. San Leandro, CA 94577	Attorneys for Appellants Jack O'Connell, State Superintendent of Public Instruction; State Department of Education Telephone: 510-346-6200 Facsimile: 510-346-6201 E-mail: rjohansen@rjp.com
Arlene Mayerson, Esq. Larisa Cummings, Esq. Charlotte Lanvers, Esq. Disability Rights Education and Defense Fund, Inc. 3075 Adeline Street, Suite 210 Berkeley, CA 94703	Attorneys for Appellant American Diabetes Association Telephone: 510-644-2555 Facsimile: 510-841-8645 E-mail: amayerson@dredf.org lcummings@dredf.org clanvers@dredf.org

Eve R. Hershcopf, Esq. Interim Directing Attorney Child Care Law Center 100 McAllister Street San Francisco, CA 94102	Attorney for Child Care Law Center, Disability Rights California, Child Care Inclusion Challenge Project, and BANANAS (Amici curiae in support of Petition for Review) Telephone: 415-558-8005
Patricia Cleary Dukes, Esq. Epilepsy Foundation of America 8301 Professional Place Landover, MD 20785-2353	Attorney for Epilepsy Foundation of America (Amicus curiae in support of Petition for Review)
Daniel Einhorn, MD, FACP, FACE President American Association of Clinical Endocrinologists 245 Riverside Avenue, Suite 200 Jacksonville, FL 32202	American Association of Clinical Endocrinologists (Amicus curiae in support of Petition for Review)
Myles Abbott, MD District Chair American Academy of Pediatrics, California District 107 S. Fair Oaks Ave., Suite 318 Pasadena, CA 91105	American Academy of Pediatrics, California District (Amicus curiae in support of Petition for Review)
Clerk of Superior Court Sacramento County Attn: Hon. Lloyd G. Connelly, Judge Gordon D. Schaber Sacramento County Courthouse 720 Ninth Street Sacramento, CA 95814-1398	Clerk of the Court of Appeal Third Appellate District 621 Capitol Mall, 10th Floor Sacramento, CA 95814-4734

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on December 22, 2010, at San Francisco, California.

Myra R. Taylor

Myra R. Taylor