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6 State Superintendent Jack O'Connell and  
California Department of Education

7 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
8 COUNTY OF SACRAMENTO

9 AMERICAN NURSES ASSOCIATION; )  
10 AMERICAN NURSES ASSOCIATION/ )  
CALIFORNIA; CALIFORNIA SCHOOL )  
11 NURSES ORGANIZATION; and CALIFORNIA )  
NURSES ASSOCIATION, )

12 Plaintiffs/Petitioners, )

13 vs. )

14 JACK O'CONNELL, STATE )  
15 SUPERINTENDENT OF PUBLIC )  
INSTRUCTION; and CALIFORNIA )  
16 DEPARTMENT OF EDUCATION, )

17 Defendants/Respondents. )

18 AMERICAN DIABETES ASSOCIATION, an )  
19 organization, )

20 Intervenor. )

No.: 07AS04631

**DEFENDANTS/RESPONDENTS'  
OPPOSITION TO PETITION FOR  
WRIT OF MANDATE**

Hearing:

Date: October 17, 2008  
Time: 10:30 a.m.  
Dept: 33

(The Honorable Lloyd G. Connelly)

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1 **INTRODUCTION**

2 In the spring of 2007, State Superintendent of Public Instruction Jack O’Connell faced a  
3 dilemma. As State Superintendent, he was responsible for enforcing federal disability laws in the  
4 public schools, including the Individuals with Disabilities Education Act (“IDEA”), the Americans  
5 with Disabilities Act (“ADA”), and Section 504 of the Rehabilitation Act of 1973 (“Section 504”).  
6 The American Diabetes Association and a number of students with diabetes had sued Superintendent  
7 O’Connell, the California Department of Education, and two school districts, charging that local school  
8 districts were failing to provide students with diabetes with the health-related services they needed in  
9 order to insure they received a free appropriate public education in the least restrictive environment, as  
10 required by state and federal law.

11 The chief issue in the lawsuit involved the administration of insulin during the school  
12 day and at school-related activities. The plaintiffs demonstrated that both state and federal law require  
13 schools to provide a means by which qualified students may obtain the insulin they need throughout  
14 the school day and that neither students nor their parents can be required to shoulder the responsibility  
15 themselves. They also presented compelling evidence that some school districts were not meeting  
16 those legal requirements and that parents were forced to visit their children at school in order to  
17 administer insulin.

18 The dilemma, of course, was the lack of school nurses and, in the absence of someone  
19 licensed to administer medication, whether anyone else could provide students with the insulin they  
20 needed to get through the school day. State law on this point is not entirely clear. The law *is* clear that  
21 students may self-administer insulin with authorization from their parents or guardians and from their  
22 health care providers. (Ed. Code, § 49414.5(c).) The law is also clear that parents or guardians, foster  
23 parents, and parent/guardian designees, such as babysitters, may administer insulin to their children.  
24 (*See, e.g.*, Health & Saf. Code, § 1507.25.) Most importantly, section 49423(a) of the Education Code  
25 provides that “any pupil who is required to take, during the regular schoolday, medication prescribed  
26 for him or her by a physician or surgeon, may be assisted by the school nurse or other designated  
27 school personnel,” if the school district obtains a written statement from the physician detailing the  
28

1 dosage and time schedules for the medication and the parent or guardian's written approval for the  
2 school district to assist with the medication.

3           The issue was whether section 49423 permits properly trained unlicensed school  
4 personnel to assist students by administering insulin injections when a nurse is unavailable or whether  
5 doing so violates the more general prohibition against the unlicensed practice of nursing in the Nursing  
6 Practice Act. (Bus. & Prof. Code, §§ 2700 et seq.) Well-settled principles of statutory construction  
7 required that any ambiguity in state law be construed so as to avoid conflict with federal law and with  
8 other state statutes. Accordingly, the State Superintendent agreed to settle the ADA lawsuit with the  
9 issuance of a legal advisory that recognized another, narrow situation in which unlicensed individuals  
10 may administer insulin to students eligible for services under federal law: "when no expressly  
11 authorized person is available" (i.e., no licensed physician, school nurse, or vocational nurse either  
12 employed by the school district or a private agency or registry or a county health department) then a  
13 "voluntary school employee who is unlicensed but who has been adequately trained to administer  
14 insulin pursuant to the student's treating physician's orders" may administer insulin as required by the  
15 student's individualized education program.

16           Having settled one lawsuit, the State Superintendent promptly found himself in another.  
17 The American Nurses Association and other nursing organizations brought this action against the State  
18 Superintendent and the California Department of Education, claiming that the legal advisory violates  
19 the Nursing Practice Act, the Administrative Procedure Act, Education Code section 49423 and  
20 article III, section 3.5 of the California Constitution. As demonstrated below, it does none of these  
21 things. Instead, it harmonizes state and federal law in a way that insures that all eligible students will  
22 have access to a free appropriate public education while at the same time protecting their personal  
23 health and safety.

1 **STATEMENT OF FACTS AND OF THE CASE**

2 **A. The Administration of Insulin in California Schools**

3 In 2003, the Legislature estimated that there were 15,000 students with diabetes in  
4 California's public schools. (Respondents' Request for Judicial Notice [hereinafter "Resp. RJN"],  
5 Exh. 1 at 2; *see also* Intervenor's Br. at 5 for a similar calculation.)<sup>1</sup>

6 Diabetes is a chronic disease which prevents the body from properly using insulin to  
7 convert food and glucose into energy. (Resp. RJN, Exh. 2 at 6.) There are two types of diabetes. (*Id.*  
8 at 7.) Type 1 diabetes is an autoimmune disorder, which leaves the body unable to produce insulin.  
9 (*Id.*) Individuals with type 1 diabetes must accordingly take insulin daily to survive and maintain  
10 appropriate blood glucose levels. (*Id.*) Children and adolescents are most often diagnosed with type 1  
11 diabetes; about 1 in every 400 to 500 children has type 1 diabetes. (*Id.* at 1.) Type 2 is the most  
12 common form of diabetes, in which the body does not produce enough insulin and/or the body's cells  
13 become resistant to insulin. (*Id.* at 8.) Many people with type 2 diabetes are adults and are able to  
14 control the disease with diet and weight loss. (*Id.*) Children with type 2 diabetes may need to take oral  
15 medication, insulin, or both, to control their diabetes. (*Id.*)

16 Diabetes is managed on an individual basis. The goal in treating children with diabetes  
17 is to control blood glucose levels by keeping them within a target range that is determined for each  
18 child by his or her physician. (*Id.* at 15.) Low blood glucose levels may cause hypoglycemia, which  
19 can impair thinking abilities and cause irritability, shakiness or confusion, and if not treated promptly,  
20 cause unconsciousness, seizures or convulsions. (*Id.* at 17.) High blood glucose levels may lead to  
21 hyperglycemia, which may also impair cognitive abilities, as well as cause increased thirst, frequent  
22 urination, nausea, blurry vision and fatigue. (*Id.* at 19.) If not properly managed, hyperglycemia can  
23

24  
25 <sup>1</sup> Respondents rely on intervenor's evidentiary materials to the extent applicable to the factual  
26 assertions in this brief, and to dispute petitioners' factual assertions. Further, although the issue is not  
27 material here, respondents wish to correct the statement in Dale Parent's declaration that CDE's school  
28 nurse consultant asked her to "handle all calls to her office that require nursing input." (Decl. of Dale  
Parent, ¶ 3.) As the declaration of Linda Davis-Aldritt makes clear, this was not the case. (Decl. of  
Linda Davis-Aldritt, ¶¶ 2-3.)

1 lead to heart disease, blindness, kidney failure and amputation. (*Id.*) Accordingly, diabetes must be  
2 managed 24 hours a day, 7 days a week. (*Id.* at 9.)

3           In the past decade, diabetes treatment in children has been revolutionized and  
4 intensified to emphasize continuous disease management as opposed to rigid adherence to meals and  
5 insulin dosages, in order to prevent the long-term complications of diabetes described above. (Resp.  
6 RJN, Exh. 3 at 1; Exh. 2 at 9, 21.) Blood glucose levels are more frequently monitored than they were  
7 in the past, so that they can be more tightly controlled with multiple insulin doses. (Resp. RJN, Exh. 3  
8 at 1.) Improvements in blood glucose monitoring technology, as well as insulin administration  
9 techniques and types of insulin, have made this possible.

10           Accordingly, today proper diabetes management generally requires injections of insulin  
11 throughout the day, as well as monitoring the child's blood glucose levels, particularly before lunch or  
12 snacks, by obtaining a drop of blood by pricking the skin with a lancet, placing it on a test strip, and  
13 inserting the strip into a blood glucose meter. (Resp. RJN, Exh. 2 at 15.) The amount of an insulin  
14 dose is determined according to a chart provided by a patient's physician based on the child's current  
15 blood glucose level and the child's intended food (i.e., carbohydrate) intake, in order to maintain the  
16 student's blood glucose level at the targeted range in his or her detailed diabetes care plan. (*Id.* at 9;  
17 Resp. RJN, Exh. 3 at 2.)

18           Insulin is generally administered in three ways: (1) with a syringe; (2) with a pen that  
19 holds a standardized cartridge of insulin; or (3) with an insulin pump. (Resp. RJN, Exh. 2 at 21.) The  
20 insulin pump is a computerized device the size of a pager that is continuously attached to the skin and  
21 generally worn on a belt or waistband. It is programmed to deliver small, steady doses of insulin  
22 throughout the day, as well as to calculate and provide additional insulin doses when the number of  
23 carbohydrates the child intends to consume is entered. (*Id.* at 22.) When insulin is delivered through  
24 an insulin pen or a syringe, a subcutaneous injection is given just under the skin. In routine diabetes  
25 care, insulin does not need to be given through intramuscular or intravenous injection. (Decl. of  
26 Francine Kaufman, ¶ 8.) Older students often manage their diabetes themselves, and thus self-

1 administer insulin as necessary throughout the school day using one of these three methods.<sup>2</sup> (*Id.* at 9.)  
2 If students are too young or otherwise incapable of safely self-managing their diabetes, school nurses  
3 or other school personnel help children monitor and manage their diabetes. (*Id.*)

4 As described more fully below, diabetes is a disability covered by the Americans with  
5 Disabilities Act and may entitle a student to services under Section 504 of the Rehabilitation Act of  
6 1973 (collectively "Section 504") and under the Individuals with Disabilities Education Act ("IDEA").  
7 Under the IDEA, school districts must develop an individualized education program ("IEP") for  
8 eligible students, which is a written statement detailing the "special education and related services and  
9 supplementary aids and services, based on peer-reviewed research to the extent practicable, to be  
10 provided to the child, or on behalf of the child, and a statement of the program modifications or  
11 supports for school personnel that will be provided for the child . . ." (20 U.S.C.  
12 § 1414(d)(1)(A)(i)(IV). *See* 34 C.F.R. §§ 300.320-300.328 for governing implementing regulations.)  
13 Similar written plans are required for students eligible for services under Section 504, and are called  
14 Section 504 Plans. (34 C.F.R. § 104.33.) IEPs and Section 504 plans for students with diabetes who  
15 require insulin at school or at school-related activities set forth detailed medical accommodations and  
16 health services that the students may require. (Resp. RJN, Exh. 2 at 14.) School nurses and other  
17 personnel are often essential to implementing a diabetes management plan for such students.

18 **B. The Shortage of School Nurses**

19 During the 2006-07 school year, there were 6,286,369 K-12 students enrolled in 1,353  
20 school districts and 9,920 public schools across the state. (Resp. RJN, Exh. 4 at 10.) However, there  
21 were only 2,804 full-time equivalent school nurses working in public schools, for a ratio of 1 nurse per  
22 every 2242 students and 1 nurse per every 3.5 schools. (*Id.* at 28.) In contrast, the federal government  
23 recommends a ratio of 1 nurse to every 750 students. (Resp. RJN, Exh. 5.) This shortage has also  
24 been documented in the legislative history of A.B. 942, which added section 49414.5 to the Education  
25 Code in 2003 to allow the self-administration of insulin by students and to allow unlicensed personnel

26 <sup>2</sup> Students are allowed to self-administer insulin at school under California law with the written  
27 authorization of their health care provider and the written consent of their parent or legal guardian.  
28 (Ed. Code, § 49414.5(c); Cal. Code Regs., tit. 5, § 605.)

1 to administer the medication glucagon to students suffering from unconsciousness, seizures, or  
2 convulsions due to hypoglycemia. A.B. 942's bill analysis noted there is a "severe nursing shortage in  
3 California, especially in K-12 schools," so that in 2003, "[a]ccording to the California School Nurses  
4 Organization, there are only 2,695 credentialed school nurses who serve more than six million children  
5 in the California public school system." (Resp. RJN, Exh. 1.) At that time, only 5 percent of  
6 California schools employed full-time nurses, 69 percent employed part-time nurses, and 26 percent of  
7 schools had no nurse at all, as most school nurses were "roaming" nurses and not full-time at any one  
8 school. (*Id.*)

9           There is also a well-documented shortage of nurses in California that would make a  
10 nurse in every school physically impossible. A recent forecast of the statewide registered nurse  
11 workforce conducted for the California Board of Registered Nursing in 2007 found that California  
12 currently faces a shortage of registered nurses ranging between 10,294 and 59,027 full-time equivalent  
13 registered nurses, depending on whether the forecast of demand is based on current labor market  
14 conditions or on the national average number of full-time equivalent RNs per 100,000 population.  
15 (Resp. RJN, Exh. 6 at 4.) Either way, there are not enough nurses in the state to meet the need in  
16 California schools.

17 **C. The K.C. Litigation and Legal Advisory**

18           On October 11, 2005, the American Diabetes Association (intervenor in this case) and  
19 four students filed suit in the Northern District of California against respondents and two school  
20 districts alleging, on behalf of all K-12 students with diabetes, that respondents were violating  
21 Section 504 and the IDEA because students with diabetes were not receiving health care services  
22 necessary to provide them with a free appropriate public education as required by federal law. (*K.C. v.*  
23 *O'Connell* (N.D. Cal. No. C05-4077 MMC).) Respondents and plaintiffs in that action engaged in  
24 mediation and settled the case in August, 2007 without respondents filing a responsive pleading or  
25 motion.

26           Respondents sought to address the issues raised by the *K.C.* plaintiffs – the lack of  
27 nurses, uncertainty about how health services are best delivered, and the lack of clarity about state and  
28 federal requirements that had hampered access to diabetes care and insulin administration in some

1 school districts – by agreeing to issue a legal advisory to school districts statewide. The legal advisory  
2 reminds all California school districts and charter schools of the important legal rights involving  
3 students with diabetes who have been determined to be eligible for services under either Section 504 or  
4 IDEA and related California law, and clarifies the rights of eligible students with diabetes to ensure  
5 they have access to federally required health care during the school day.

6 Most significantly, the legal advisory addresses who may administer insulin to students,  
7 by first stating that Business and Professions Code section 2725(b)(2) of the Nursing Practice Act and  
8 California Code of Regulations, title 5, section 604 (interpreting Education Code section 49423)  
9 expressly authorize the following types of persons to administer insulin in California’s public schools  
10 pursuant to a Section 504 Plan or an IEP:

- 11 1. Self administration, with authorization of the student’s licensed  
12 health care provider and parent/guardian;
- 13 2. School nurse or school physician employed by the LEA;<sup>3</sup>
- 14 3. Appropriately licensed school employee (i.e., a registered nurse  
15 or a licensed vocational nurse) who is supervised by a school  
16 physician, school nurse, or other appropriate individual;
- 17 4. Contracted registered nurse or licensed vocational nurse from a  
18 private agency or registry, or by contract with a public health  
19 nurse employed by the local county health department;
- 20 5. Parent/guardian who so elects;
- 21 6. Parent/guardian designee, if parent/guardian so elects, who shall  
22 be a volunteer who is not an employee of the LEA; and
- 23 7. Unlicensed voluntary school employee with appropriate training,  
24 but only in emergencies as defined by Section 2727(d) of the  
25 Business and Professions Code (epidemics or public disasters).

26 The legal advisory then states:

27 When no expressly authorized person is available under categories 2-4,  
28 supra, federal law – the Section 504 Plan or the IEP – must still be  
honored and implemented. Thus, a category #8 is available under  
federal law:

<sup>3</sup> An LEA is a local education agency like a school district.



1 **ARGUMENT**

2 **I.**

3 **STANDARD OF REVIEW**

4 Petitioners affirm that in order to obtain a writ of mandate, they have the burden of  
5 showing that respondents have a duty, that petitioners have a beneficial interest in compelling the  
6 performance of that duty, and that other legal remedies are inadequate.<sup>4</sup> (Pct. Br. at 9, citing Code Civ.  
7 Proc., §§ 1085(a) & 1086.) They have failed to meet their burden. “A writ cannot be used to control a  
8 matter of discretion. [Citation.] Where a statute leaves room for discretion, a challenger must show  
9 the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal  
10 standards.” (*Excelsior College v. California Bd. of Registered Nursing* (2006) 136 Cal.App.4th 1218,  
11 1238-1239 [denying writ where petitioner failed to show Board of Registered Nursing abused its  
12 discretion by adopting alleged “underground regulation” establishing “equivalency standard” for out-  
13 of-state nursing licensc applicants and schools].)

14 A writ is warranted in this case only if petitioners demonstrate that respondents abused  
15 their discretion in issuing the legal advisory to (1) remind school districts that they must provide  
16 students with diabetes who qualify under Section 504 or the IDEA a free appropriate public education,  
17 and (2) provide advice as to who may administer insulin to students with diabetes in the absence of a  
18 licensed school nurse in order to meet this federal requirement. As fully demonstrated below,  
19 Superintendent O’Connell and the California Department of Education (1) have been entrusted with  
20 discretion in implementing, enforcing, and providing leadership to school districts regarding  
21 Section 504 and the IDEA under federal and state statutes and regulations, and (2) have lawfully  
22 executed their duties under Section 504, the IDEA, and California law. For these reasons, the writ  
23

24 <sup>4</sup> Petitioners’ request for declaratory relief is not appropriate for review of an administrative decision.  
25 (*Excelsior College v. California Bd. of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1228, fn. 2  
26 [“While declaratory relief may properly test the constitutionality of a statute or regulation, it is not an  
27 appropriate method for judicial review of administrative decisions.”].) Neither is their claim under  
28 Code of Civil Procedure section 1094.5, which applies only to administrative evidentiary hearings.  
(*Id.* at 1237-1238.) Accordingly, respondents direct this brief only to petitioners’ request for a writ of  
mandate under Code of Civil Procedure section 1085.

1 should be denied as a matter of law. If, however, the Court finds that it cannot deny the writ as a  
2 matter of law because of any of the factual issues contained in petitioners' declarations, respondents  
3 respectfully request an opportunity to submit additional evidence at an evidentiary hearing.<sup>5</sup>

## 4 II.

### 5 THE LEGAL ADVISORY COMPLIES WITH STATE AND FEDERAL LAW 6 REGARDING ADMINISTRATION OF INSULIN TO STUDENTS 7 WITH DISABILITIES

#### 8 A. Federal Law Requires Respondents to Provide a Free Appropriate Public Education to 9 Students With Diabetes

10 Petitioners have conceded that federal laws mandate that California schools ensure the  
11 administration of insulin to students with diabetes. (Verified Second Amended Pet. for Writ of  
12 Mandate and Complaint for Declaratory and Inj. Relief, ¶ 1.) Nevertheless, petitioners' brief fails to  
13 grapple in any real way with the federal laws that prompted the legal advisory at issue here. A clear  
14 understanding of these laws – as well as the California laws and regulations that implement them – is  
15 indispensable in understanding the necessity of the compromise reached in the legal advisory.

16 Title II of the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the  
17 Rehabilitation Act of 1973 together protect students from discrimination based upon their disabilities  
18 and ensure students' rights to receive a free appropriate public education. (42 U.S.C. § 12132;  
19 29 U.S.C. § 794; 34 C.F.R. § 104.33.) Because the two Acts create the same rights and obligations and  
20 are treated synonymously, they are referred to in this brief collectively as "Section 504." (*Wong v.*  
21 *Regents of Univ. of Cal.* (9th Cir. 1999) 192 F.3d 807, 811, fn. 2.) Section 504 prevents persons with  
22 disabilities from being excluded from participation in, denied the benefits of, or subjected to  
23 discrimination by a public entity, such as a state public school supported by federal funds. (42 U.S.C.  
24 § 12132; 29 U.S.C. § 794; 34 C.F.R. § 104.33.) Section 504 has been incorporated into state law in  
25 Government Code section 11135. (Gov. Code, § 11135 [incorporating the ADA and Section 504 and  
26 prohibiting discrimination based on disability under any state-funded program or activity].)

27 <sup>5</sup> Respondents join intervenor's objections to some of the evidence submitted in support of petitioners'  
28 brief.

1           Students with diabetes may qualify as disabled under Section 504 and its implementing  
2 federal regulations, and are thus entitled to an individualized Section 504 Plan to ensure they are  
3 provided a free appropriate public education. (*See Fraser v. Goodale* (9th Cir. 2003) 342 F.3d 1032,  
4 1040-1041 [diabetes may be a physical impairment that substantially limits a major life activity like  
5 eating and may thus be protected under Section 504].) Consequently, respondents are required not  
6 only to comply with Section 504 by providing necessary individualized health care such as the  
7 administration of insulin to students with diabetes, but also to ensure that California school districts  
8 comply with state and federal law. (Gov. Code, § 11135 et seq.; 42 U.S.C. § 12132; 28 C.F.R.  
9 § 35.101 et seq.) Indeed, “the Superintendent of Public Instruction is responsible for providing  
10 leadership to local agencies to ensure that the requirements of . . . nondiscrimination laws [like  
11 Section 504 and the IDEA] and their related regulations are met in educational programs that receive  
12 or benefit from state or federal financial assistance and are under the jurisdiction of the State Board of  
13 Education.” (Cal. Code Regs., tit. 5, § 4902.)

14           Additionally, the Individuals with Disabilities Education Act (“IDEA”) supports states  
15 in providing special education and related services to children with disabilities. (20 U.S.C. §§ 1400  
16 et seq.) Its primary purpose is “to ensure that all children with disabilities have available to them a free  
17 appropriate public education that emphasizes special education and related services designed to meet  
18 their unique needs and prepare them for further education, employment, and independent living.”  
19 (20 U.S.C. § 1400(d)(1)(A).) California has implemented the IDEA in Education Code sections 56000  
20 et seq. Education Code section 56363 requires that health and nursing services be provided to eligible  
21 students when necessary. (Ed. Code, § 56363(b)(12).) Respondents have the responsibility of  
22 implementing and monitoring school districts’ compliance with these laws. (*See, e.g.*, Gov. Code,  
23 § 11135 et seq.; Ed. Code, § 56135; Cal. Code Regs., tit. 5, § 4902; 34 C.F.R. §§ 300.149-300.150,  
24 300.600-300.602, 300.606-300.608.)

25           The state regulation implementing the IDEA defines health and nursing services  
26 required for IDEA-eligible children to include the administration of medication by “qualified  
27 personnel.” (Cal. Code Regs., tit. 5, § 3051.12(a)(1).) The regulation contains language similar to that  
28 in Education Code section 49423, discussed below, in providing “[a]ny pupil who is required to have

1 specialized physical health care services during the school day, prescribed for him or her by a licensed  
2 physician and surgeon, may be assisted by a qualified nurse, qualified public health nurse, or other  
3 qualified school personnel, if the school district receives” written statements detailing the procedure  
4 from the licensed physician along with a written statement from the pupil’s parent or guardian granting  
5 consent for the provision of these services. (*Id.*, § 3051.12(b)(3)(E)(1).) “‘Qualified’ for the  
6 designated school personnel shall mean trained in the procedures to a level of competence and safety  
7 which meets the objectives of the training as provided by the school nurse, public health nurse,  
8 licensed physician and surgeon, or other programs which provide the training,” along with competence  
9 in certain emergency procedures and “skill in the use of equipment and performance of techniques  
10 necessary to provide specialized physical health care services for individuals with exceptional needs.”  
11 (*Id.*, § 3051.12(b)(1)(C).)

12           The federal regulations upon which section 3051.12 is based recognize that qualified  
13 school personnel other than nurses are necessary to achieve the IDEA’s purpose, because “most  
14 schools do not have a qualified school nurse on a full-time basis (i.e., a nurse that meets the State  
15 standards for a qualified nurse), and . . . many schools rely on other qualified school personnel to  
16 provide school health services under the direction of a school nurse.” (71 Fed. Reg. 46540, 46574  
17 (2006); 34 C.F.R. § 300.34(a) & (c)(13).) As set out in the legal advisory at issue here, federal and  
18 state law require that students with disabilities be provided with health services by a nurse in order to  
19 have a free appropriate public education, but if a nurse is not available, by “other qualified school  
20 personnel.”

21 **B. California Law Governing the Administration of Medication is Not Entirely Clear**

22 **1. The Nursing Practice Act and related state laws**

23           The California Nursing Practice Act contains the licensing requirements for California  
24 nurses and health facilities. Section 2732 of the Business and Professions Code states that “[n]o  
25 person shall engage in the practice of nursing, as defined in Section 2725, without holding a license  
26 which is in active status issued under” the Nursing Practice Act. Section 2725 defines the practice of  
27 nursing in pertinent part as:  
28

1 . . . those functions, including basic health care, that help people cope  
2 with difficulties in daily living that are associated with their actual or  
3 potential health or illness problems or the treatment thereof, and that  
4 require a substantial amount of scientific knowledge or technical skill,  
5 including . . . (b) [d]irect and indirect patient care services, including, but  
6 not limited to, the administration of medications . . . .

(Bus. & Prof. Code, § 2725(b).)

7 Read alone, section 2725 would appear to require that all medications must be  
8 administered by licensed nurses. That is not the case, however, because the law contains numerous  
9 exceptions. For example, the Act specifically excepts “[t]he performance by any person of such duties  
10 as required in the physical care of a patient and/or carrying out medical orders prescribed by a licensed  
11 physician; provided, such person shall not in any way assume to practice as a professional, registered,  
12 graduate or trained nurse.” (Bus. & Prof. Code, § 2727(e).) It also excepts “[g]ratuitous nursing of the  
13 sick by friends or members of the family.” (*Id.*, § 2727(a).)

14 Most importantly for purposes here, Education Code section 49423 provides that “any  
15 pupil who is required to take, during the regular schoolday, medication prescribed for him or her by a  
16 physician or surgeon, may be assisted by the school nurse or other designated school personnel” if the  
17 school district “obtain[s] both a written statement from the physician detailing the name of the  
18 medication, method, amount, and time schedules by which the medication is to be taken and a written  
19 statement from the parent, foster parent, or guardian of the pupil indicating the desire that the school  
20 district assist the pupil in the matters set forth in the statement of the physician.” (Ed. Code,  
21 § 49423(a) & (b)(1), emphasis added.)

22 State law also recognizes important exceptions with respect to administration of insulin  
23 by laypeople. For example, Health and Safety Code section 1507.25(b) permits relative caregivers,  
24 nonrelative extended family members, foster family home parents, and substitute caregivers of a foster  
25 family home or a certified family home to give subcutaneous injections of insulin to foster children as  
26 prescribed by their physicians. In the school setting, students may self-administer insulin with the  
27 approval of their authorized health care provider and parent or legal guardian. (Ed. Code,  
28 § 49414.5(c); Cal. Code Regs., tit. 5, § 605.) Unlicensed school personnel are allowed to administer  
injections of glucagon in emergency circumstances, when a student with diabetes becomes

1 unconscious, has seizures or has convulsions from hypoglycemia, and his or her blood glucose level  
2 must be raised immediately. (Ed. Code, § 49414.5(a).)<sup>6</sup>

3           **2.     Past efforts to clarify the law**

4           As petitioners chart in their brief, there has been considerable debate as to how  
5 California schools may meet the requirements of Section 504 and the IDEA in the face of the chronic  
6 and longstanding nursing shortage in California.<sup>7</sup> In 1997, the former State Superintendent issued a  
7 letter acknowledging the state's obligations under Section 504 and the IDEA and stating, in part, that  
8 "parents or a designated staff member should administer medications . . ." and that "[a]ll students  
9 should receive necessary services and support from personnel who are authorized, trained, and  
10 supervised in administering medications to students in school." (Decl. of Linda Davis-Aldritt,  
11 Exh. A.) The advice letter suggested that such personnel should be designated by school  
12 administrators and trained by a credentialed school nurse. (*Id.*) Over time, that policy has been  
13 debated in various legislation proposed, passed, and occasionally vetoed by the governor and has been  
14 refined through regulations interpreting Education Code section 49423 and CDE advisories.

15           As noted above, Education Code section 49423 provides that "any pupil who is required  
16 to take, during the regular schoolday, medication prescribed for him or her by a physician or surgeon,  
17 may be assisted by the school nurse or other designated school personnel" if the school district has  
18 obtained written instructions from a physician and parental approval. Petitioners claim that this  
19 provision allows unlicensed personnel to "assist" students with their medication, but does not allow  
20 actual administration of the medication. (Pet. Br. at 3.) This bald assertion, however, does not take  
21

22 <sup>6</sup> The administration of glucagon is not as simple as insulin, because it requires the mixing of  
23 powdered and liquid medications and then injecting a large syringe into the unconscious or seizing  
24 student under increased stress and pressure. (Resp. RJN, Exh. 3 at 19.) Section 49414.5 was therefore  
25 passed to encourage training and dispel concerns regarding liability. (Resp. RJN, Exh. 1.) It was not  
26 meant to limit a school district's ability to provide routine insulin care to students who require it.

27 <sup>7</sup> Petitioners repeatedly and disingenuously cite a motion to dismiss filed only by defendant Fremont  
28 Unified School District in the *K.C.* action, claiming that CDE and the Superintendent argued in that  
29 motion that state law prohibits the injection of insulin by unlicensed personnel, and that federal law  
30 does not "trump" state law. (Pet. Br. at 4, 16, fn. 5, citing Petitioner's Request for Judicial Notice  
31 [hereinafter "Pet. RJN"], Exh. 7.) Respondents, however, never filed a motion to dismiss in the *K.C.*  
32 action, and did not join in the arguments presented by the Fremont Unified School District.

1 into account the broad common meaning of the word “assist,” as demonstrated in section 49423’s  
2 legislative history and interpretive regulations.

3 California Code of Regulations, title 5, section 601(e), promulgated in 2003,<sup>8</sup> defines  
4 “other designated school personnel” under section 49423 to include any school district employee who:  
5 “(1) Has consented to **administer** the medication to the pupil or otherwise assist the pupil in the  
6 administration of medication; and (2) May legally **administer** the medication to the pupil or otherwise  
7 assist the pupil in the administration of the medication.” (Cal. Code Regs., tit. 5, § 601(e), emphasis  
8 added.) Regulation 604(b) likewise provides that in addition to a school nurse, “[o]ther designated  
9 school personnel may **administer** medication to pupils or otherwise assist pupils in the administration  
10 of medication as allowed by law,” as may any individual designated by the pupil’s parent or legal  
11 guardian who is permitted to be on the school site and if a school district employee, the employee’s  
12 “service as a designee would not be inconsistent or in conflict with his or her employment  
13 responsibilities.” (Cal. Code Regs., tit. 5, § 604(b) & (d), emphasis added.) “Assist” and “administer”  
14 are thus used interchangeably in regulations that were promulgated pursuant to the Administrative  
15 Procedure Act and that interpret section 49423.

16 The legislative history on which petitioners rely also demonstrates the  
17 interchangeability of the terms “assist” and “administer.” (Pet. Br. at 7-9.) When section 49423 was  
18 enacted in 1968 as former Education Code section 11753.1, the legislative analysis stated that it  
19 “allows an orderly plan for **administering** medications.” (Resp. RJN, Exh. 8, emphasis added.) From  
20 the beginning, therefore, “assist” and “administer” were used interchangeably with respect to  
21 section 49423.

22 In 2002, the Legislature passed, but the Governor vetoed, A.B. 481, which would have  
23 explicitly permitted unlicensed school personnel to “provide assistance to pupils with diabetes.” (Pet.  
24 RJN, Exh. 11.) It must first be noted that failed amendments to a statutory scheme and “[u]npassed  
25 bills, as evidences of legislative intent, have little value.” (*Grupe Development Co. v. Superior Court*

26 <sup>8</sup> Contrary to petitioners’ inaccurate recitation of the regulatory history, respondents did adopt the  
27 regulations required by Education Code section 49423.6 regarding the administration of medication in  
28 public schools. (Cf. Pet. Br. at 7-9; Cal. Code Regs., tit. 5, §§ 600 et seq.)

1 (*Chino Unified School Dist.*) (1993) 4 Cal.4th 911, 922-923, quoting *Dyna-Med, Inc. v. Fair*  
2 *Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1396.) There is value, however, in  
3 understanding why the Governor vetoed the bill.<sup>9</sup> The Governor’s veto message stated that under  
4 proposed section 49423.1 volunteer unlicensed personnel, in the absence of a nurse, would “administer  
5 insulin or glucagon and perform testing and monitoring of a pupil’s blood glucose level in accordance  
6 with instructions set forth by the pupil’s physician.” (Pet. RJN, Exh. 12.) The Governor then relied on  
7 section 49423 to state that “[e]xisting law already provides that any pupil who is required to take  
8 prescription medication during the regular school day may be assisted by school personnel if a written  
9 statement is obtained from a physician and a written request is made by the pupil’s parent/guardian.”  
10 (*Id.*) Thus, the Governor used the terms “administer” and “assisted” to describe the same activities and  
11 apparently believed that section 49423 was sufficient to allow the administration – as opposed to only  
12 the assisting of administration – of medication provided for in A.B. 481. In other words, the Governor  
13 did not think the bill was necessary to allow unlicensed personnel to administer insulin. The Governor  
14 vetoed the bill because he thought it would create a “costly new state reimbursable mandate” and did  
15 not adequately protect districts from liability. (*Id.*)

16           Petitioners’ brief also fails to mention that one of the petitioners before this Court, the  
17 California School Nurses Organization (CSNO), actually *supported* the enactment of section 49423.1  
18 in A.B. 481. Only 6 years ago, CSNO’s position on the administration of insulin by unlicensed school  
19 personnel was summarized in the legislative record as follows: “[A]s school districts reduce their  
20 school nursing staff, and as more and more students are diagnosed with diabetes, the situation on the  
21 campuses will only grow worse. CSNO argues that students with diabetes have special daily needs,  
22 and this bill will help to ensure that school districts provide the services that should be provided.”  
23 (Resp. RJN, Exh. 9 at 5.) The California Medical Association also supported the bill, stating that  
24 “parents and family members perform these tasks for these children everyday.” (*Id.*)

25  
26  
27 <sup>9</sup> See *In re Marriage Cases* (2008) 43 Cal.4th 757, 797, fn. 17 [quoting Governor’s veto message]; *In*  
28 *re Marriage of Duffy* (2001) 91 Cal.App.4th 923, 937-938 [same].

1 **C. Sections 2725 and 49423 Must Be Harmonized With Federal Law**

2 Petitioners argue that the term “assisted” in section 49423, and presumably, the term  
3 “administer” in Regulations 601 and 604 interpreting 49423, are severely restricted by Business and  
4 Professions Code section 2725 of the Nursing Practice Act, which defines the practice of nursing to  
5 include “the administration of medications” “that require a substantial amount of scientific knowledge  
6 or technical skill.” (Pet. Br. at 23; Bus. & Prof. Code, § 2725(b)(2).) Petitioners claim that because  
7 the Nursing Practice Act arguably defines licensed nursing to encompass the administration of insulin,  
8 trained unlicensed school personnel are barred from administering or assisting in administering insulin  
9 to students, as permitted under Education Code section 49423 and the legal advisory. But while they  
10 vigorously assert that section 49423 must be interpreted in light of section 2725, petitioners refuse to  
11 acknowledge the need to harmonize the Nursing Practice Act with the federal and state laws described  
12 above. The legal advisory is respondents’ explanation as to how school districts may harmonize their  
13 duties under Section 504 and the IDEA and related California law with section 49423, regulation 604,  
14 and section 2725 in order to avoid federal preemption of state law and ensure the health and safety of  
15 students who require insulin throughout the school day and at school-related activities.

16 “[A]ny state legislation which frustrates the full effectiveness of federal law is rendered  
17 invalid by the Supremacy Clause.” (*Perez v. Campbell* (1971) 402 U.S. 637, 652; see U.S. Const.,  
18 art. VI, cl. 2.) “Even where Congress has not completely displaced state regulation in a specific area,  
19 state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when  
20 ‘compliance with both federal and state regulations is a physical impossibility,’ [citation], or when  
21 state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and  
22 objectives of Congress,’ [citation].” (*Fidelity Fed. Savings & Loan Assn. v. de la Cuesta* (1982)  
23 458 U.S. 141, 153.) Thus “[t]o the extent that the applications of state law frustrate federal objections,  
24 they are preempted.” (*Humboldt Oil Co., Inc. v. Exxon Co., U.S.A.* (9th Cir. 1987) 823 F.2d 373, 375,  
25 citing *Ray v. Atlantic Richfield Co.* (1978) 435 U.S. 151, 158.)

26 “In determining whether state and federal law conflict, we must ‘consider the  
27 relationship between state and federal laws as they are interpreted and applied, not merely as they are  
28 written.’” (*California ARCO Distributors, Inc. v. Atlantic Richfield Co.* (1984) 158 Cal.App.3d 349,

1 358, quoting *Jones v. Rath Packing Co.* (1977) 430 U.S. 519, 526.) Thus, “[t]he pertinent questions  
2 are whether the right as asserted conflicts with the express terms of federal law and whether its  
3 consequences sufficiently injure the objectives of the federal program to require nonrecognition.”  
4 (*Id.*, quoting *Hisquierdo v. Hisquierdo* (1979) 439 U.S. 572, 583.) “[I]n deciding whether any conflict  
5 is present, a court’s concern is necessarily with ‘the nature of the activities which the States have  
6 sought to regulate, rather than on the method of regulation adopted. [Citation.]” (*Id.* at 357-358,  
7 quoting *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.* (1981) 450 U.S. 311, 317-318.)

8 “State and federal laws should be accommodated and harmonized where possible so  
9 that preemption can be avoided.” (*Id.* at 359 [interpretation must give statute a reasonably susceptible  
10 meaning]; *In re Brandon M.* (1997) 54 Cal.App.4th 1387, 1393, citations omitted [“[C]ourts should  
11 proceed on ‘the conviction that the proper approach is to reconcile the operation of both statutory  
12 schemes with one another rather than holding one completely ousted.’”].) Thus, when presented with a  
13 state law that conflicts with the purposes and objectives of a federal law, a court should harmonize the  
14 two schemes and interpret the state law to preserve its constitutionality. (*Alameida v. State Personnel*  
15 *Bd.* (2004) 120 Cal.App.4th 46, 56, quoting *California Correctional Peace Officers Assn. v. State of*  
16 *California* (2000) 82 Cal.App.4th 294, 308 [statute should be construed to preserve its constitutionality  
17 whenever possible]; *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 45, citing *Izazaga v.*  
18 *Superior Court* (1991) 54 Cal.3d 356, 371 [“[I]f a statutory provision can, by fair and reasonable  
19 interpretation, be given a meaning consistent with the requirements of the Constitution rather than in  
20 conflict with it, we must so interpret the statute in order to preserve its validity.”].) This is especially  
21 the case where the state law is not entirely clear, like section 49423. “When the statutory language is  
22 ambiguous, the court may examine the context in which the language appears, adopting the  
23 construction that best harmonizes the statute internally and with related statutes.” (*People v. Jefferson*  
24 (1999) 21 Cal.4th 86, 94, citations omitted.)

1           If petitioners' application of section 2725 to section 49423 were strictly adopted,  
2 section 2725 would frustrate the purposes of Section 504 and the IDEA.<sup>10</sup> Eligible students with  
3 diabetes would be denied their federal right to a free appropriate public education because the nursing  
4 shortage and high ratio of nurses to students in the school districts would essentially prevent their  
5 access to insulin, which is necessary for them to function safely during school activities and "meet  
6 their unique needs and prepare them for further education, employment, and independent living," as  
7 required by federal law. (20 U.S.C. § 1400(d)(1)(A).) Such an interpretation cannot stand under  
8 federal preemption law. (*Jevne v. Superior Court* (2005) 35 Cal.4th 935, 959-960, 962-963 [detailed  
9 disclosure requirements under California Standards' rules on neutral arbitrator disclosure for  
10 contractual arbitration agreements were preempted because they impeded and impaired the goals of the  
11 National Association of Securities Dealers' Code regulations, and thus the goals of the federal  
12 Securities Exchange Act, by increasing administrative costs, reducing number of available arbitrators,  
13 and reducing nationwide uniformity and consistency of NASD arbitrations]; *Rim of the World Unified  
14 School Dist. v. Superior Court* (2002) 104 Cal.App.4th 1393, 1399 [state Public Record Act preempted  
15 by federal Family Educational Rights and Privacy Act where state statute required student expulsion  
16 records to be disclosed but FERPA prohibited disclosure].) Indeed, the Ninth Circuit has held that a  
17 state's health and safety regulatory scheme cannot interfere with implementation of the ADA.  
18 (*Crowder v. Kitagawa* (9th Cir. 1996) 81 F.3d 1480, 1485 [Hawaii's 120-day quarantine of  
19  
20

21 <sup>10</sup> Respondents have long recognized that section 504 and the IDEA are primary to state law. The  
22 2003 regulations interpreting section 49423 provide: "Nothing in this article may be interpreted  
23 as . . . affecting in any way . . . (d) The content or implementation of a pupil's individualized education  
24 program prepared in accordance with applicable provisions of federal and state law, or a pupil's  
25 Section 504 Accommodation Plan prepared in accordance with applicable provisions of the federal  
26 Rehabilitation Act of 1973." (Cal. Code Regs., tit. 5, § 610.) Interestingly, despite petitioners'  
27 objections to the validity of the legal advisory at issue in the suit, they have no trouble citing a  
28 similarly issued and nonbinding May 2005 "Program Advisory on Medication Administration," which  
allowed unlicensed school personnel to administer medication except by injection, unless in an  
emergency. (Pet. Br. at 9; Pet. RJN, Exh. 8.) But petitioners fail to note that in the program advisory,  
respondents also recognized the potential for federal preemption. Section XV recommends "that the  
Title 5 regulations and this advisory serve as a guide to LEAs in administering medications to students  
with IEPs and Section 504 plans as long as the regulations or the advisory do not conflict with the  
student's individually determined plan," citing the IDEA and Section 504. (Pet. RJN, Exh. 8 at 17.)

1 carnivorous animals to prevent rabies must yield to federal rights of visually impaired individuals’  
2 access to their guide dogs].)

3 We are mindful of the general principle that courts will not second-guess  
4 the public health and safety decisions of state legislatures acting within  
5 their traditional police powers. [Citation.] However, when Congress has  
6 passed antidiscrimination laws such as the ADA which require  
7 reasonable modifications to public health and safety policies, it is  
8 incumbent upon the courts to insure that the mandate of federal law is  
9 achieved.

10 (Id. at 1485.)

11 Thus, if at all possible, the Nursing Practice Act and section 49423 must be interpreted  
12 to preserve their validity in light of controlling federal law. Well-established principles of construction  
13 also require that the two state statutes be interpreted so as to harmonize with each other. “Where two  
14 statutes touch upon a common subject, we must construe them with reference to each other and seek to  
15 harmonize them in such a way that neither becomes surplusage.” (*Lincoln Place Tenants Assn. v. City  
16 of L.A.* (2007) 155 Cal.App.4th 425, 440, citing *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.)  
17 “Construing statutes in harmony with each other is preferred to a finding of preemption.” (*Id.*, citing  
18 *San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 865.)

19 In addition, harmonizing constructions can and should rely on the familiar principle that  
20 a more specific statute will govern over a more general one. (*Salazar v. Eastin* (1995) 9 Cal.4th 836,  
21 857.) As the California Supreme Court said, “[t]o the extent a specific statute is inconsistent with a  
22 general statute potentially covering the same subject matter, the specific statute must be read as an  
23 exception to the more general statute.” (*Id.*) In this case, section 49423’s provision for administration  
24 of medication by designated unlicensed school personnel in the absence of a school nurse must control  
25 over the more general provision of the Nursing Practice Act.

26 Consistent with these principles, the legal advisory recommends that districts first make  
27 all reasonable attempts to use a nurse to assist students in the administration of insulin, but if a nurse is  
28 not available, the district should train unlicensed school personnel to administer insulin. It does not  
create a simple choice between a licensed nurse and unlicensed school personnel, but requires a district  
to exhaust its nurse options before relying on unlicensed personnel. In this way, the legal advisory  
reconciles the Nursing Practice Act’s licensing restrictions with section 49423’s exception for the

1 administration of medication on doctors' and parents' written statements to allow unlicensed school  
2 personnel to perform the task. As demonstrated below, that interpretation is perfectly consistent with  
3 the Legislature's intent.

4 **D. State Law Can and Should Be Construed to Permit Trained Unlicensed**  
5 **School Personnel to Administer Insulin When a Licensed Nurse is Not Available**

6 Contrary to petitioners' assertion, administration of insulin does not require "a  
7 substantial amount of scientific knowledge or technical skill" within the meaning of section 2725 of  
8 the Nursing Practice Act. To the contrary, the Legislature has recognized that unlicensed laypeople  
9 can safely administer insulin. For example, the law recognizes that lay individuals – including school  
10 children – may self-administer injections of insulin. (Ed. Code, § 49414.5(c); Cal. Code Regs., tit. 5,  
11 § 605; *see also* Resp. RJN, Exh. 2 at 9.) Parents, babysitters, older siblings and other lay people also  
12 routinely administer insulin to children. (Resp. RJN, Exh. 2 at 9; Decl. of Francine Kaufman, ¶ 28; *see*  
13 *Department of Educ. of Hawaii v. Katherine D.* (9th Cir. 1983) 727 F.2d 809, 815, fn. 6 [school district  
14 may provide layperson to suction a tracheostomy tube: "It is indisputable that even a lay person could  
15 have been trained to provide the services Katherine required. Indeed, Katherine's mother, who had  
16 had no medical training, had performed them for some time."].) Indeed, the situation most analogous  
17 to that faced by respondents is the administration of insulin to foster children, who, like students in  
18 public schools during the school day, are entrusted into the State's care. Health and Safety Code  
19 section 1507.25 explicitly allows a variety of unlicensed personnel to administer insulin in the absence  
20 of a foster parent or relative caregiver, including nonrelative extended family members and substitute  
21 caregivers.

22 Just as there are practical reasons why licensed nurses are not required to be present in  
23 the home of every child with diabetes 24 hours a day, so too are there practical reasons why licensed  
24 nurses are not available to administer insulin to students during the school day. Just as parents can  
25 safely permit non-school volunteers to administer insulin to their children, so too can they give  
26 permission to unlicensed school personnel to administer insulin, for instance, in the course of  
27  
28

1 developing their child's IEP or Section 504 Plan with school administrators and members of their  
2 child's health care team.

3           As the intervenor's declarations make clear, the real experts in this field – the doctors  
4 and nurses who treat students with diabetes – consistently recognize that unlicensed personnel can and  
5 should be allowed to administer insulin when a nurse is not available. (Decl. of Francine Kaufman,  
6 ¶¶ 28-35; Decl. of Linda Siminerio, ¶¶ 17-23.) If young children can safely administer insulin to  
7 themselves, and other unlicensed persons in their lives, such as parents and babysitters, and nonrelative  
8 extended family members and substitute caregivers in the case of foster children, may as well, then  
9 surely properly trained school personnel may safely do it. The alternative is to require students'  
10 parents – or the parental designee – to come to school to administer insulin to their children, sometimes  
11 at the risk of their employment, or even worse, cause children to be absent from school if no school  
12 nurse is available and their parents cannot physically come to school. Such a scenario is precisely the  
13 harm that prompted the *K.C.* litigation; it is not only against federal law, it is also against public policy.  
14 Accordingly in 2003, the National Diabetes Education Program, a partnership of the U.S. Department  
15 of Health and Human Services, the National Institutes of Health, the Centers for Disease Control and  
16 Prevention, the United States Department of Education, and expert organizations like intervenor  
17 American Diabetes Association, issued "Helping the Student with Diabetes Succeed: A Guide for  
18 School Personnel," recommending that while school nurses are the most appropriate people to provide  
19 care to a student with diabetes, trained non-medical personnel may also administer insulin, given the  
20 comprehensive nature of diabetes management and the lack of available school nurses. (Resp. RJN,  
21 Exh. 2 at 10.)

22           Reconciliation of section 49423 and 2725 in this way also furthers another provision of  
23 section 2708.1 of the Nursing Act which provides: "Protection of the public shall be the highest  
24 priority for the Board of Registered Nursing in exercising its licensing, regulatory, and disciplinary  
25 functions. Whenever the protection of the public is inconsistent with other interests sought to be  
26 promoted, the protection of the public shall be paramount." (Bus. & Prof. Code, § 2708.1.) Here, the  
27 licensing interest professed by petitioners, while indubitably in the public interest, cannot control over  
28 the protection of students with diabetes. Insulin administration is necessary for students with diabetes

1 to survive and thrive in the school setting. When administration of insulin by a school nurse is not  
2 possible, respondents' provision for administration by trained unlicensed personnel is the only  
3 alternative that serves to protect these members of the public.

4           Petitioners also rely on an outdated Attorney General Opinion to the effect that the  
5 injection of medication by syringe is included in the definition of nursing and is thus not allowed for  
6 unlicensed personnel. (Pet. Br. at 18-19, citing 71 Ops.Cal.Atty.Gen. 190 (1988).) That opinion,  
7 however, considered the question of whether an unlicensed person who performed certain health care  
8 tasks fell under the exception provided under section 2727(b) regarding the incidental care provided by  
9 domestic servants or housekeepers. There was no need for the Attorney General to harmonize the  
10 Nursing Practice Act with Education Code section 49423 and federal law. In contrast, here,  
11 section 49423 and its interpreting regulations explicitly allow the administration of medication, and  
12 Section 504 and the IDEA and their interpreting regulations require the administration of insulin by  
13 school districts to protect students with diabetes from discrimination. The Attorney General's opinion  
14 thus does not address how the Department of Education should reconcile the Nursing Practice Act with  
15 its own duties under the Education Code and federal law like Section 504 and the IDEA, and is of little  
16 value here.

17           Moreover, the Attorney General's Opinion relies in part on a Medicare regulation  
18 which, at the time, stated that subcutaneous injection by syringe was a skilled nursing service eligible  
19 for Medicare. (71 Ops.Cal.Atty.Gen. 190, citing 42 C.F.R. § 409.33(b).) This regulation was amended  
20 in 1998 to remove such injections as a skilled nursing service. (Cf. 42 C.F.R. § 409.33(b).) The  
21 regulatory history reflects evolving improvements in health care technology – particularly with respect  
22 to insulin administration – since 1988:

23           We note that the most frequently administered type of subcutaneous  
24 medication is insulin, which has long been defined as a nonskilled  
25 service with respect to any beneficiary who is capable of self-  
26 administration. Further, with the evolving state of clinical practice over  
27 time, the administration of a subcutaneous injection has now become  
28 commonly accepted as a nonskilled service even in less intensive settings  
such as physician offices and home health agencies, making its  
continued categorization as a skilled service in the SNF context  
increasingly anomalous.

(63 Fed. Reg. 26252, 26284 (1998).)

1           Finally, respondents share petitioners' concern regarding the health and safety of  
2 children who must take insulin throughout the school day. But petitioners are wrong to cite to the  
3 placement of insulin on the Institute for Safe Medication Practices List of High Alert Medications as a  
4 basis for prohibiting unlicensed personnel from administering it. (Pet. Br. at 19.) The reasons for  
5 insulin's heightened risk have largely to do with problems that arise in large health care facilities  
6 regarding the increased vulnerability of hospitalized patients with diabetes to variations in their insulin  
7 dosages and the mixing up of a variety of medications by staff on different shifts handling a large  
8 number of patients, not with individual error in one-on-one settings with healthy children. (Decl. of  
9 Francine Kaufman, ¶ 33.)

10           Similarly, petitioners' claim that "the administration of insulin is so dangerous that it is  
11 standard policy in health care facilities for two registered nurses to check the medication before it can  
12 be administered by a registered nurse" (Pet. Br. at 17) has no bearing in the school setting, where there  
13 is not the same quantity of medication to juggle and where insulin is being administered to healthy  
14 individuals. (*See* Decl. of Francine Kaufman, ¶ 33.) Although such precautions are not necessary, a  
15 physician's order could require that another trained school employee doublecheck the medication if the  
16 student's physician felt it was necessary. Moreover, Health & Safety Code section 1250 and Business  
17 and Professions Code section 2725.3's prohibitions on unlicensed personnel performing certain  
18 functions in lieu of a registered nurse likewise do not apply here, as they pertain only to the  
19 administration of medication in licensed health facilities, not schools. (*Cf.* Pet. Br. at 17.) Finally, if  
20 extra precautions were necessary, administration of insulin by children, parents and other laypeople  
21 outside the hospital or school setting, which the law clearly allows, would raise serious concerns as  
22 well.

23           Ideally, each school would have a licensed nurse available at all time to assist students  
24 with diabetes with their insulin. But the shortage of nurses sometimes makes this impossible. When  
25 that occurs, it is not an option to tell students and their parents that there is no one to administer  
26 insulin. Federal law prohibits this, and the Legislature has made clear its intent not only to comply  
27 with but to incorporate federal law into state special education requirements. (Ed. Code, § 56040(a)  
28 ["A free appropriate public education shall be available to individuals with exceptional needs in

1 accordance with Section 1412(a)(1) of Title 20 of the United States Code and Section 300.101 of  
2 Title 34 of the Code of Federal Regulations.”]; Gov. Code, § 11135(a) [“With respect to discrimination  
3 on the basis of disability, programs and activities (administered or funded by the state) shall meet the  
4 protections and prohibitions contained in Section 202 of the Americans with Disabilities Act of 1990  
5 (42 U.S.C. § 12132), and the federal rules and regulations adopted in implementation thereof, except  
6 that if the laws of this state prescribe stronger protections and prohibitions, the programs and activities  
7 . . . shall be subject to the stronger protections and prohibitions.”].) Under these circumstances, the  
8 only way to effectuate the Legislature’s intent is to interpret Education Code section 49423 to allow  
9 trained unlicensed personnel to administer insulin to students when no licensed nurse is available.

### 10 III.

#### 11 **THE ADMINISTRATIVE PROCEDURE ACT DOES NOT PRECLUDE** 12 **IMPLEMENTATION OF THE LEGAL ADVISORY**

13 By far the lengthiest argument in petitioner’s brief is the one charging that the legal  
14 advisory at issue here violates the state Administrative Procedure Act. As demonstrated below, that  
15 charge is untrue, but even if it were not, petitioners would not be entitled to the writ they request. The  
16 rule is well-established in this state that if a court finds that an agency has accurately interpreted state  
17 law and the issue is a question of law that does not require agency expertise, the court may adopt and  
18 enforce that interpretation itself. (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557,  
19 576-577; *Capen v. Shewry* (2007) 155 Cal.App.4th 378, 390-393.) As the Third District Court of  
20 Appeal put it, “since an administrative agency is mandated to follow the judicial interpretation of a  
21 statute, once that occurs there is no interpretive ambiguity for the agency to resolve and hence no  
22 interpretive regulation that it could enact.” (*Capen, supra*, 155 Cal.App.4th at 390.) That is clearly the  
23 case here.

#### 24 A. **The Legal Advisory Does Not Violate the Administrative Procedure Act**

25 At the outset, it is by no means clear that the state APA even applies to the  
26 Superintendent’s interpretation of federal, as opposed to state, law. Government Code  
27 section 11342.600 defines regulation within the meaning of the APA as follows:  
28

1 "Regulation" means every rule, regulation, order, or standard of general  
2 application or the amendment, supplement, or revision of any rule,  
3 regulation, order, or standard adopted by any state agency to implement,  
4 interpret, or make specific the law enforced or administered by it, or to  
5 govern its procedure.

6 Because federal agencies are primarily responsible for administration of federal law, the  
7 Legislature may not have intended to encumber agency heads with notice and comment procedures  
8 regarding matters over which they have very little control. Where, as here, however, the issue involves  
9 reconciling state law with federal requirements, we will assume for the sake of argument that the state  
10 APA would generally apply to interpretive regulations developed to harmonize state and federal law.  
11 That does not mean, however, that the legal advisory is a regulation subject to the APA. The  
12 Legislature and the courts have recognized that not all agency interpretations are regulations even  
13 when they have been widely distributed to interested parties to advise them about the requirements of  
14 state law.

15 First, the Legislature has recognized the unique role played by the State Department of  
16 Education in advising school districts of their responsibilities as legal subdivisions of the state.  
17 Education Code section 33308.5 allows the Department to issue program guidelines "designed to serve  
18 as a model or example," which "shall not be prescriptive" and which must include written notification  
19 that the guideline is merely exemplary and that compliance with it is not mandatory. Based on that  
20 provision and on sections 49423 and 49423.6, the State Board of Education exercised its authority  
21 under section 33031 to adopt the following regulation allowing the Department to issue an advisory  
22 about administration of medication to students in the public schools:

23 The California Department of Education, with the approval of the State  
24 Board of Education, may issue and periodically update an advisory  
25 providing non-binding guidance on the administration of medication to  
26 pupils and otherwise assisting pupils in the administration of medication.  
27 The advisory shall be a program guideline under Education Code  
28 section 33308.5, and shall meet the requirements of Education Code  
section 33308.5 (including the written notification that the guideline is  
merely exemplary and that compliance with the guideline is not  
mandatory).

(Cal. Code Reg., tit. 5, § 611.)

Petitioners make no mention of section 611, and no doubt they will point out that the  
K.C. legal advisory does not include "written notification that the guideline is merely exemplary and

1 that compliance with the guideline is not mandatory.” That is true. What section 611 does, however,  
2 is make clear the Department’s authority to provide guidance to local school districts faced with  
3 general questions about administration of medication at school.

4 Administration of medication, however, does not always implicate federal disability  
5 rights laws. Instead, it may involve something as simple as providing aspirin or cough syrup to a sick  
6 child. In those cases, the advice would be “merely exemplary” and nonbinding. When a question  
7 arises about administration of medication as part of a student’s Section 504 Plan, however, then the  
8 advice must comport with federal law, which is in fact binding on every local school district. In that  
9 case, the advice falls within two other exceptions to the state APA: the exception for an advisory that  
10 “embodies the only legally tenable interpretation of a provision of law” and the exception that allows  
11 an agency to publicize legal interpretations that it has adopted in litigation or in advice letters.

12 Government Code section 11340.9(f) states that the APA does not apply to “[a]  
13 regulation that embodies the only legally tenable interpretation of a provision of law.” Where, as here,  
14 the only way to reconcile state law with federal is to interpret it to permit trained, unlicensed school  
15 personnel to administer insulin when licensed personnel are not available, such an interpretation  
16 amounts to the “only legally tenable interpretation” within the meaning of the APA. As the Court of  
17 Appeal said in *Excelsior College v. California Board of Registered Nursing* (2006) 136 Cal.App.4th  
18 1218, 1239, “[t]he Board has not created an underground regulation merely by enforcing the actual  
19 language of the statute.”

20 Similarly, it is well-established that the APA does not apply to interpretations of state  
21 law that an agency advances in litigation or in advice letters. (*Tidewater, supra*, 14 Cal.4th at 571;  
22 *Corrales v. Bradstreet* (2007) 153 Cal.App.4th 33; *Excelsior College, supra*, 136 Cal.App.4th  
23 at 1239.) The California Supreme court has made clear that when an agency publishes those advice  
24 letters or its decisions in specific cases, such publications are not subject to the APA:

25 [A]gencies may provide private parties with advice letters, which are not  
26 subject to the rulemaking provisions of the APA. [Citations omitted.]  
27 Thus, if an agency prepares a policy manual that is no more than a  
28 restatement or summary, without commentary, of the agency’s prior

1 decisions in specific cases and its prior advice letters, the agency is not  
2 adopting regulations.

3 (*Tidewater, supra*, 14 Cal.4th at 571.)

4 There can be no principled reason to allow a state agency to publicize and distribute its  
5 interpretations of state law used in enforcement litigation while at the same time prohibiting it from  
6 informing local agencies of the terms under which it settled federal litigation to which it was a party.  
7 This is particularly the case when failure to follow federal law will expose the local agencies to  
8 independent liability of their own. No one benefits if districts are not reminded of their obligations  
9 under federal law and given guidance about how to comply. Indeed, in at least one case, a state  
10 Superior Court ordered the State Superintendent to issue a legal advisory informing local school  
11 districts that a particular provision of the Education Code was unconstitutional. (*Salazar v. Eastin*  
12 (1995) 9 Cal.4th 836, 845 & fn. 4.)<sup>11</sup> Although the California Supreme Court ultimately held that the  
13 statute could be constitutionally applied, it did not question that part of the trial court's injunction that  
14 ordered the state defendants to issue a legal advisory.

15 **B. Even if the APA Applied, the Appropriate Remedy is for this Court to Adopt the State**  
16 **Respondents' Interpretation of State and Federal Law as its Own**

17 In the final analysis, if this Court agrees with respondents that state law can and should  
18 be harmonized with federal law in the manner described in the legal advisory, then there is no need to  
19 go through the notice and comment procedures of the state APA.

20 In *Tidewater, supra*, 14 Cal.4th 557, the California Supreme Court concluded that the  
21 state Division of Labor Standards Enforcement ("DLSE") should have complied with the APA when it  
22 developed an enforcement policy regarding an Industrial Welfare Commission regulation governing  
23 overtime pay for maritime employees. That conclusion, however, did not mean that the DLSE policy

24  
25 <sup>11</sup> The *Salazar* case involved Education Code section 39807.5, which allows school districts to charge  
26 fees if they provide transportation for students to and from school. After the Court of Appeal held that  
27 school districts were not indispensable parties despite the limited role of the state defendants in  
28 administering the statute, the trial court ordered the state to issue a legal advisory informing all districts  
of the trial court's order. (9 Cal.4th at 844-845.)

1 was wrong. Although the policy itself was void for failure to follow the APA, the Court nevertheless  
2 agreed with the DLSE's interpretation of the law and upheld its application, saying:

3 If, when we agreed with an agency's application of a controlling law, we  
4 nevertheless rejected that application simply because the agency failed to  
5 comply with the APA, then we would undermine the legal force of the  
6 controlling law. Under such a rule, an agency could effectively repeal a  
7 controlling law simply by reiterating all its substantive provisions in  
8 improperly adopted regulations. . . . The DLSE's policy may be void,  
9 but the underlying wage orders are *not* void. Courts must enforce those  
10 wage orders just as they would if the DLSE had never adopted its policy.

11 (14 Cal.4th at 577, emphasis in original.)

12 The *Tidewater* rule applies in situations like the one at issue here, where the question  
13 does not require agency factfinding or expertise in order to interpret legislative intent. (*Cf. Morning*  
14 *Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 340-341 [distinguishing *Tidewater* as  
15 involving "a simple interpretive policy" and holding that when agency expertise was necessary, then  
16 proper remedy was to order superior court to stay proceedings to allow agency time to promulgate  
17 regulations under the APA].) The Court is clearly in the best position to determine whether the  
18 Superintendent validly reconciled state law with controlling federal authority, and there is neither any  
19 need to remand the question for rulemaking consistent with the APA nor any feasible way of doing so  
20 without violating the *K.C.* settlement agreement.

21 This case most closely resembles *Capen, supra*, 155 Cal.App.4th 378, in which the  
22 Third District Court of Appeal held that a court "may resolve the ambiguity that gave rise to the  
23 agency interpretation if it is not required to defer to the agency construction" because of special agency  
24 expertise. (155 Cal.App.4th at 391.) Relying on the California Supreme Court's observation in  
25 *People v. Cole* (2006) 38 Cal.4th 964, 987 that it had no reason to believe that a state agency had a  
26 ""comparative interpretive advantage over the courts,""" the *Capen* court held that once a court  
27 definitively construes an ambiguous state law, "there is no interpretive ambiguity for the agency to  
28 resolve and hence no interpretive regulation that it could enact." (155 Cal.App.4th at 390, 392.) In  
that situation, the court of appeal wrote, "[i]t is unclear what purpose compliance with the APA would  
fulfill. Since a purpose of the rulemaking procedures is to provide a hearing at which parties affected

1 by a proposed rule could contribute to its formulation, there would be no point to such a hearing if  
2 nothing could come of it.” (*Id.* at 390, fn. 7.)

3 Thus, if the Court agrees with the State respondents’ interpretation of state and federal  
4 law, it can and should adopt that interpretation as its own, regardless of whether it finds that  
5 respondents should have followed the procedures described in the state APA.

6 **IV.**

7 **THE LEGAL ADVISORY ADHERES TO**  
8 **ARTICLE III, SECTION 3.5 OF THE CALIFORNIA CONSTITUTION**

9 Petitioners correctly note that article III, section 3.5(c) prohibits an administrative  
10 agency from declaring a statute unenforceable or refusing to enforce a statute “on the basis that federal  
11 law or federal regulation prohibits the enforcement of such statute,” unless an appellate court has so  
12 determined. (Pet. Br. at 23.) Petitioners are fundamentally wrong, however, that respondents have  
13 violated section 3.5 because they issued a legal advisory that “failed and refused to enforce the  
14 licensing requirements of the Nursing Practice Act.” (*Id.*) Only the Board of Registered Nursing has  
15 authority over section 2725 of the Nursing Practice Act. (Bus. & Prof. Code, § 2725(c) [guidelines for  
16 policies and protocols under section 2725 “shall be administered by the Board of Registered Nursing”];  
17 *see also* Bus. & Prof. Code, §§ 2708.1, 2715 [Board of Registered Nursing exercises licensing,  
18 regulatory and disciplinary functions and carries out the provisions of the Nursing Practice Act].)  
19 Neither the Department of Education nor the Superintendent of Education could refuse to enforce the  
20 Nursing Practices Act, because they have no such authority in the first place. Any claim under  
21 section 3.5 may therefore be dismissed on this ground alone.

22 Most importantly, the legal advisory in no way determines that the Nursing Practice Act  
23 is unenforceable; in fact, it advises school districts about how to harmonize the Act with their  
24 obligations under federal law. The California Supreme Court has held that an administrative agency  
25 that implements federal regulations does not violate section 3.5 if it interprets state law in order to  
26 avoid conflict with federal statutes and regulations; i.e., it may “effectuate the statute to the maximum  
27 extent allowed under federal law as determined by the relevant federal authorities.” (*Reese v. Kizer*  
28 (1988) 46 Cal.3d 996, 997-998, 1002.) Likewise, there is “nothing in the language of article III,

1 section 3.5 which prevents [an administrative agency] from consulting federal law in order to  
2 determine whether the state statute may be enforced without offending relevant federal regulations.  
3 An administrative agency still remains free to interpret the existing law in the course of discharging its  
4 statutory duties.” (*Regents of the Univ. of Cal. v. Public Employment Relations Bd.* (1983)  
5 139 Cal.App.3d 1037, 1042, emphasis omitted [PERB allowed to determine whether University’s  
6 refusal to permit union to distribute literature to employees through inter-campus mail system, by  
7 relying on University regulations promulgated to comply with federal postal laws and regulations,  
8 violated state law requiring employee organizations’ access to mailboxes to under Government Code  
9 section 3568 of the Higher Education Employer-Employee Relations Act]; *see, e.g., Connerly v. State*  
10 *Personnel Bd.* (2001) 92 Cal.App.4th 16, 49 [while an administrative agency cannot cure a facially  
11 invalid statute, it may save an ambiguous statute by interpreting it in a constitutional manner].)

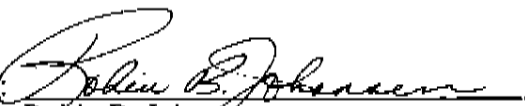
### 12 CONCLUSION

13 Faced with a challenge to the way some school districts were implementing state and  
14 federal law, the State Superintendent looked at the relevant statutes and determined that they can and  
15 should be harmonized. He respectfully requests that this Court do the same and that it deny the  
16 petition for writ of mandate.

17 Dated: September 12, 2008

Respectfully submitted,

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21 By:   
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24 State Superintendent Jack O’Connell and California  
25 Department of Education

26 (00062452-23)

1 **PROOF OF SERVICE**

2 I, the undersigned, declare under penalty of perjury that:

3 I am a citizen of the United States, over the age of 18, and not a party to the within  
4 cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

5 On September 12, 2008, I served a true copy of the following document(s):

6 **Defendants/Respondents' Opposition to Petition**  
7 **for Writ of Mandate**

8 on the following parties in said action:

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- 9  **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed  
10 envelope or package addressed to the person(s) at the address above and  
11  depositing the sealed envelope with the United States Postal Service, with  
12 the postage fully prepaid.  
13  placing the envelope for collection and mailing, following our ordinary  
14 business practices. I am readily familiar with the businesses' practice for  
15 collecting and processing correspondence for mailing. On the same day  
16 that correspondence is placed for collection and mailing, it is deposited in  
17 the ordinary course of business with the United States Postal Service,  
18 located in San Leandro, California, in a sealed envelope with postage  
19 fully prepaid.
- 20  **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope  
21 or package provided by an overnight delivery carrier and addressed to the persons  
22 at the addresses listed. I placed the envelope or package for collection and  
23 overnight delivery at an office or a regularly utilized drop box of the overnight  
24 delivery carrier.
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transmission.

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on  
September 12, 2008, in San Leandro, California.

  
Kristen Snider