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17 SUPERIOR COURT OF THE STATE OF CALIFORNIA
18 IN AND FOR THE COUNTY OF SACRAMENTO

19 AMERICAN NURSES ASSOCIATION;
AMERICAN NURSES ASSOCIATION/
20 CALIFORNIA; CALIFORNIA SCHOOL NURSES
ORGANIZATION; and CALIFORNIA NURSES
21 ASSOCIATION,

22 Plaintiffs/Petitioners,

23 vs.

24 JACK O'CONNELL, STATE SUPERINTENDENT
OF PUBLIC INSTRUCTION; and CALIFORNIA
DEPARTMENT OF EDUCATION,

25 Defendants/Respondents,

26 and

27 AMERICAN DIABETES ASSOCIATION, an
organization,

28 Intervenor.

Case No. 07AS04631

MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF VERIFIED
SECOND AMENDED PETITION
FOR WRIT OF MANDATE AND
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

Date: October 17, 2008

Time: 10:30

Dept.: 33

Judge: Hon. Lloyd G. Connelly

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1 Petitioners and Plaintiffs AMERICAN NURSES ASSOCIATION (“ANA”),
2 AMERICAN NURSES ASSOCIATION/CALIFORNIA (“ANA/C”), CALIFORNIA
3 SCHOOL NURSES ORGANIZATION (“CSNO”) and CALIFORNIA NURSES
4 ASSOCIATION (“CNA”) (collectively “Petitioners”) respectfully submit the following
5 Memorandum of Points and Authorities in Support of Their Verified Second Amended
6 Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief.

7 I. INTRODUCTION.

8 Petitioners are professional organizations representing nurses in California and
9 across the country. Petitioners bring this action to stop Respondents from enforcing or
10 attempting to enforce an unlawful regulation published in the form of a “Legal Advisory” in
11 violation of the Administrative Procedures Act (Cal. Gov’t Code § 11340 *et seq.*), the
12 Nursing Practice Act (Cal. Bus. & Prof. Code § 2700 *et seq.*), the California Education
13 Code and the Constitution of the State of California.

14 On August 8, 2007, Respondent and Defendant Jack O’Connell, Superintendent of
15 Public Instruction for the State of California (“O’Connell”), announced that the State of
16 California had agreed to a settlement of the case known as K. C. et al v. Jack O’Connell, et
17 al., case number C-05-4077MMC, in the U.S. District Court for the Northern District of
18 California (“K. C. v O’Connell”). That case involved the provision of insulin to students
19 who were seeking enforcement of their rights under Title 2 of the Americans with
20 Disabilities Act (“ADA”), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 791
21 *et seq.*) (“Section 504”) and the Individuals with Disabilities Education Act (20 U.S.C.
22 § 1400 *et seq.*) (“IDEA”). The settlement was, in essence, an “end run” attempt to achieve
23 a result that the people of California had twice rejected in the legislative process. The
24 Legal Advisory plainly violates the terms of California’s Nursing Practice Act (“NPA”),
25 Business and Professions Code § 2700 *et seq.*, the Education Code and implementing
26 regulations for both laws.

27 Pursuant to the settlement agreement, which was executed by Respondent
28 O’Connell, in his official capacity as a defendant in that case and on behalf of the

1 California Department of Education (“CDE”), CDE published a statement entitled “Legal
2 Advisory on the Rights of Students with Disabilities in California’s K-12 Public Schools”
3 (“Legal Advisory”). A copy of the settlement agreement is attached hereto as Exhibit 1.
4 The Legal Advisory is attached as Exhibit A to that settlement agreement and is also
5 attached hereto as Exhibit 2, for easy reference.

6 The Legal Advisory is diametrically opposed to the long-standing published policy
7 of CDE, in accord with the Nursing Practice Act, that unlicensed personnel do not have
8 authority to administer insulin to schoolchildren. Prior to the settlement, Defendants’
9 position was that the Nursing Practice Act, Business and Professions Code § 2725(b)(ii),
10 and the California Code of Regulations, Title 5, § 604, authorize only the following classes
11 of persons to administer insulin in California’s public schools under Section 504 and the
12 IDEA: (1) the student, with authorization of the student’s licensed healthcare provider and
13 parent/guardian; (2) a school nurse or school physician employed by the local education
14 agency (“LEA”); (3) an appropriate licensed school employee (i.e., a registered nurse or a
15 licensed vocational nurse) supervised by a school physician, school nurse or other
16 appropriate individual; (4) a contracted registered nurse or licensed vocational nurse from a
17 private agency or registry, or by contract with a public health nurse employed by the local
18 county health department; (5) a parent/guardian who so elects; (6) the parent/guardian’s
19 designee, if parent/guardian so elects, who shall be a volunteer who is not an employee of
20 the local education agency; and (7) an unlicensed voluntary school employee with
21 appropriate training, but only in emergencies as defined by Section 2727(d) of the Business
22 and Professions Code (sometimes referred to as Nursing Practice Act or NPA). See CDE’s
23 Program Advisory on Medication Administration, May 2002 at pp. 6-8, attached as
24 Exhibit 8 to Petitioners’ Request for Judicial Notice, which was filed with the court on even
25 date and is incorporated herein by reference). Section 2727(d) of the Nursing Practice Act
26 defines emergencies as epidemics or public disasters.

27 In a complete reversal of that long-standing published policy, the Legal Advisory
28 authorizes an eighth category of persons to administer insulin in California’s public

1 schools. Specifically, the Legal Advisory authorizes a “voluntary school employee who is
2 unlicensed but who has been adequately trained to administer insulin pursuant to the
3 student’s treating physician’s orders as required by the Section 504 Plan or the IEP
4 (individual education plan under IDEA)” to administer insulin. As justification for creating
5 a new category of individuals authorized to administer insulin in schools, the Legal
6 Advisory states, “when no expressly authorized person is available under categories 2-4,
7 supra, federal law – the Section 504 Plan or the IEP – must still be honored and
8 implemented.” Ex. 2 at p. 13.

9 The NPA provides that “[n]o person shall engage in the practice of nursing, as
10 defined in Section 2725, without holding a license which is in active status issued under this
11 Chapter, except as otherwise provided in this Act.” Business and Professions Code 2732.
12 The Nursing Practice Act further defines the practice of nursing as:

13 “those functions, including basic healthcare, which help people cope with
14 difficulties in daily living which are associated with their actual or potential
15 health or illness problem or the treatment thereof which require a substantial
16 amount of scientific knowledge or technical skill, and includes all of the
17 following ...

18 (b) [d]irect and indirect patient care services, including, but not limited
19 to, the administration of medications”

20 Business and Professions Code § 2725(b). The Attorney General of California has opined
21 that “the purpose of subdivision (b) of 2725 was not to add conduct which did not require a
22 substantial amount of scientific knowledge or technical skill into the definition of the
23 practice of nursing, but to assure that the actions which introduce medications and
24 therapeutic agents into the body of a patient which do require a substantial amount of
25 scientific knowledge or technical skill, such as injections by hypodermic syringe, were
26 included in the definition of nursing.” 71 Op. Cal. Atty. Gen. 190, at p. 20 (1988).

27 The Education Code permits an unlicensed person to “assist” a student who is
28 required to take a medication prescribed by a physician, but does not authorize
administration of such medication. Education Code § 49423.

Not only does the Legal Advisory violate the NPA and the Education Code, but it is

1 also an illegal regulation published in contravention of the requirements of the
2 Administrative Procedure Act. It also was published in violation of Article 3, Section 3.5
3 of the California Constitution, which explicitly states that administrative agencies do not
4 have the power “to refuse to enforce a statute on the basis that federal law or federal
5 regulations prohibit the enforcement of such statute unless an Appellate Court has made a
6 determination that the enforcement of such statute is prohibited by federal law or federal
7 regulation.” The Legal Advisory and Respondents’ well-intended but misguided
8 justification for publishing it is unlawful and the Legal Advisory should be invalidated.
9 While Petitioners support proper implementation of federal anti-discrimination laws
10 through administration of insulin to students who need such care, Respondents must make
11 arrangements for properly licensed healthcare personnel to administer the insulin, as such
12 arrangements are consistent with both federal and state law and are plainly in the best
13 interests of the children.

14 In fact, in the K.C. v. O’Connell case, defendants recognized as much: “To the
15 extent that [ADA] seek[s] relief which will enjoin [the school districts] to disobey state law
16 with regard to insulin injections, [ADA] ask[s] far too much. State law establishes the
17 scope of allowable medical practices, and no authority has been located wherein federal
18 disability laws were held to “trump” such statutes and regulations.” Memorandum of
19 Points and Authorities in Support of Defendants’ Motion to Dismiss in K.C. v. O’Connell,
20 attached as Exhibit 7 to Petitioners’ Request for Judicial Notice. Defendants were correct
21 in the K.C. v. O’Connell case. And while the Legal Advisory met its objective in resolving
22 the K.C. v. O’Connell case, it goes too far and violates long-standing state law.

23 For these reasons and for the further reasons set forth in this Memorandum, the
24 instant Petition for Writ of Mandate should be granted and the Legal Advisory published by
25 CDE should be invalidated. Petitioners’ prayer for declaratory relief also should be granted
26 and Respondents should be enjoined from undertaking any action or activity which
27 implements, enforces or is in any way based upon the unlawful regulation established by
28 the Legal Advisory.

1 II. BACKGROUND AND HISTORY.

2 A. Petitioners and their interests.

3 ANA is a national, nonprofit membership organization representing registered
4 nurses whose practice is affected adversely by Respondents' actions and inactions. ANA is
5 the professional association that represents the interests of the nation's 2.9 million
6 registered nurses. ANA is comprised of 54 constituent member associations, one in every
7 state of the United States, the District of Columbia, Guam, the U.S. Virgin Islands and
8 Federal Military Nurses, with approximately 163,000 members. ANA develops the Code
9 of Ethics for nurses, nursing's Social Policy Statement (the profession's social contract with
10 society) and the Scope and Standards of Nursing Practice. ANA actively promotes patient
11 safety, workplace rights, appropriate staffing, workplace and environmental health and
12 safety and the public health. Among ANA's members are nurses practicing in the State of
13 California, whose employers are directing them and will continue to direct them to provide
14 training and oversight to unlicensed school personnel who will administer insulin to
15 students pursuant to the Legal Advisory. Those registered nurses are and will continue to
16 be at risk of disciplinary action by the State Board of Nursing, including the possible loss of
17 their license to practice nursing, because providing such training and oversight is contrary
18 to the Nursing Practice Act (Business and Professions Code §§ 2759, 2761), or they will be
19 at risk for disciplinary action by their employers for a refusal to comply with the
20 employer's assignment.

21 ANA/C is a constituent member of the American Nurses' Association. ANA/C
22 uniquely represents the interests of the entire profession of nursing within California, as its
23 membership is open to all categories of registered nurses. The mission of ANA/C includes
24 the protection of patient health. ANA/C's membership includes California nurses working
25 in California schools. The ability of those nurses to render safe patient care within the
26 scope of practice defined by the Nursing Practice Act is affected adversely by Respondents'
27 actions and inactions. ANA/C's nurse members have been and will continue to be directed
28 to train unlicensed school personnel to administer insulin to California students and to

1 provide oversight to such unlicensed school personnel. Such activity is in violation of the
2 Nursing Practice Act and jeopardizes their license to practice nursing. Business and
3 Professions Code §§ 2759, 2761.

4 CSNO is an organization with approximately 1,400 members throughout California.
5 Its members provide nursing services in all school settings, servicing children from birth to
6 22 years of age. The goal of CSNO is to promote and strengthen the role of school nurses
7 in the educational community. CSNO’s school nurse members have been and will continue
8 to be told to train and supervise unlicensed school personnel in the administration of insulin
9 in violation of the Nursing Practice Act. Like the members of ANA, ANA/C and CNA,
10 CSNO’s members face a Hobson’s Choice: comply with the directives of their employer
11 and risk losing their licenses to practice nursing or refuse to engage in activity contrary to
12 the Nursing Practice Act and risk discipline by their employer. Business and Professions
13 Code §§ 2759, 2761.

14 CNA and its national arm, the National Nurses Organizing Committee (“NNOC”),
15 is a nonprofit professional nursing association of more than 80,000 registered nurses,
16 approximately 65,000 of whom practice in the State of California. CNA exists and operates
17 for various purposes, including to establish and promote standards of nursing practice in the
18 State of California and to represent registered nurses in relations with their employers
19 concerning terms and conditions of employment and standards of professional practice and
20 patient care. CNA is a leader in California in developing the professional role of registered
21 nurses in meeting new and changing needs of patient care and in assisting the legislature,
22 licensing board and health regulatory agencies in responding to new developments in
23 healthcare.

24 Petitioners bring this action in their own right and in their representative capacities
25 on behalf of their California members and for all registered nurses practicing in the State of
26 California whose professional responsibility, scope of practice, standards of competent
27 performance and independent authority necessary to fulfill their obligations as patient
28 advocates will be immediately and irreparably compromised by the illegal regulation issued

1 by the CDE in the form of the Legal Advisory.

2 B. Respondents.

3 Respondent O’Connell is the Superintendent of Public Instruction for the State of
4 California. He is sued solely in his official capacity. As the Superintendent, he is the ex
5 officio director of education and the executive officer in control of defendant State
6 Department of Education. Education Code §§ 33300 and 33303. Respondent California
7 State Department of Education is an administrative agency in the state government, as
8 provided in Education Code § 33300. As such Respondent is required to publish for notice
9 and comment any regulation it proposes to implement and it may not implement a
10 regulation without having followed such procedure. Government Code § 11346 *et seq.*
11 Respondent O’Connell has limited statutory authority to publish regulations that are
12 “consistent with law.” Government Code § 11152. Respondent CDE has limited statutory
13 authority to adopt regulations that are “not inconsistent with the laws of this state”
14 Education Code § 33031.

15 Respondent ADA was granted leave to intervene in this case by filing a Complaint
16 in Intervention seeking to enforce its alleged right to enforce the unlawful Legal Advisory.

17 C. History.

18 On August 31, 2000, then-Governor Gray Davis signed Senate Bill 1549 into law.
19 This bill added Section 49423.6 to the Education Code and required regulations to be
20 developed regarding the administration of medication in the public schools. The bill
21 required that regulations be developed in consultation with parents, representatives of the
22 medical and nursing professions and others jointly designated by the Superintendent of
23 Public Instruction, the Advisory Committee on Special Education and the Department of
24 Health Services.

25 Thereafter, on February 21, 2002, A.B. No. 481 was introduced into the legislature.
26 See Complete Bill History, A.B. No. 481, attached as Exhibit 9 to Petitioners’ Request for
27 Judicial Notice. That Bill would have amended Education Code § 49423 by permitting
28 unlicensed school personnel to administer medications to school children in California. See

1 Bill Text, A.B. 481, attached as Exhibit 11 to Petitioners' Request for Judicial Notice.
2 Although the A.B. 481 passed through the legislature, it was vetoed by Governor Davis,
3 who noted that it did not contain sufficient immunity language to protect the school district
4 or school personnel from liability. Veto of A.B. 481, attached as Exhibit 12 to Petitioners'
5 Request for Judicial Notice.

6 One year later, on February 20, 2003, A.B. No 942 was introduced into the
7 legislature. See Complete Bill History, A.B. No. 942, attached as Exhibit 13 to Petitioners'
8 Request for Judicial Notice. That Bill again sought to amend Education Code § 49423 by
9 permitting unlicensed school personnel to administer insulin and other medications to
10 pupils in California's public schools. See Bill Text, A.B. 942 and A.B. 942, as amended,
11 attached as Exhibits 14 and 15, respectively, to Petitioners' Request for Judicial Notice.
12 See also, Chaptered Bill Text, A.B. 942, attached as Exhibit 16 to Petitioners' Request for
13 Judicial Notice. The provisions of that Bill that would have permitted unlicensed school
14 personnel to administer insulin in non-emergency situations was stricken before the
15 legislation was enacted. See Bill Text, A.B. 942 and A.B. 942, as amended, attached as
16 Exhibits 14 and 15, respectively, to Petitioners' Request for Judicial Notice. See also,
17 Chaptered Bill Text, A.B. 942, attached as Exhibit 16 to Petitioners' Request for Judicial
18 Notice.¹

19 In 2003, CDE proposed regulations regarding administration of medication in public
20 schools. Numerous written comments regarding the proposed regulations were submitted,
21 including written comments from Petitioner ANA/C. ANA/C's written comments appear at
22 Exhibit B to the Affidavit of Patricia Rae Hunter, R.N., M.N., Executive Director, ANA/C
23 ("Hunter Aff."), attached hereto as Exhibit 3 and filed with the Court on even date.

24 On June 20, 2003, CDE published a Notice of Proposed Rulemaking setting a public
25

26 ¹ A third attempt to pass similar legislation was initiated when, on February 21, 2008,
27 S.B. 1487, "Emergency medical services: diabetes," was introduced into the legislature.
28 On April 2, 2008, the first hearing on the Bill was canceled at the request of the author.
See Complete Bill History, S.B. No. 1487, and Bill Text, S.B. No. 1487, attached as
Exhibits 17 and 18, respectively, to Petitioners' Request for Judicial Notice.

1 hearing on the proposed regulation entitled “*Administering Medications to Pupils or*
2 *Otherwise Assisting People in the Administration of Medication during the Regular School*
3 *Day*” to take place on August 7, 2003. That hearing was attended by the Executive Director
4 of ANA/C, Patricia Hunter (“Hunter”), who testified at the hearing about ANA/C’s
5 objections to the proposed regulation, including: (1) concerns about unlicensed school
6 personnel administering medication by injection in violation of the Nursing Practice Act;
7 and (2) training and supervision of unlicensed school personnel. A copy of Hunter’s notes
8 regarding the testimony that she gave at the public hearing is attached as Exhibit C to the
9 Hunter Aff.

10 Due, in whole or in part, to overwhelming objections, CDE withdrew the proposed
11 regulations. Hunter Aff. at ¶ 6.

12 In or about May 2005, CDE issued a “Program Advisory on Medication
13 Administration” in which CDE expressed that unlicensed school personnel should not be
14 permitted to administer medication by injections, except for emergency medications as
15 permitted by law. See Petitioners’ Request for Judicial Notice, filed with the Court on even
16 date, at Ex. 8.

17 After numerous failed attempts to change the law via the legislative process, on
18 October 11, 2005, Intervenors and four students filed their class action law suit against
19 O’Connell and others (“K.C. v. O’Connell“ or “the underlying case”). That case was not
20 tried to conclusion, but rather was “settled” via the unlawful Legal Advisory.

21 III. ARGUMENT.

22 A. Petitioners are entitled to a writ of prohibition.

23 To obtain a writ of mandate, Petitioners must show a duty on the part of
24 Respondents, a beneficial interest in compelling the performance of that duty and the
25 inadequacy of other legal remedies. Code Civ. Proc. § 1085(a) and § 1086. Petitioners
26 meet the requirements for issuance of the writ of mandate and, accordingly, the Court
27 should issue the writ.

28 CDE clearly is subject to the rulemaking requirements (public notice and

1 opportunity to comment) of Chapter 3.5 of the Administrative Procedure Act (“APA”),
2 Government Code §§ 11346-11351. CDE must follow those requirements if it wants to
3 adopt any regulation of general application.

4 Respondents have a further duty under Government Code § 1152 to publish only
5 those regulations that are “consistent with law” and to adopt only those regulations that are
6 “not inconsistent with the laws of this state,” as required under Education Code § 33031.

7 Respondent O’Connell has a duty, as an officer of the State, to uphold the California
8 Constitution. He swore an oath to uphold the Constitution of the State of California, an
9 oath required of all public officials. Cal. Const. Art. XX, § 3; Gov. Code § 1360. He
10 breached that duty by publishing the unlawful Legal Advisory contrary to Art. III, § 3 of the
11 California Constitution.

12 Respondent CDE admits that it is an administrative agency in the state government
13 as provided in Education Code § 33300. See Defendants/Respondents’ Answer to Verified
14 Second Amended Petition for Writ of Mandate and Complaint for Declaratory and
15 Injunctive Relief at p. 2, line 1. Respondents’ compliance with the APA in its prior
16 (although futile) attempt to adopt regulations governing medication administration in
17 schools demonstrates that they are aware of their duty to comply with the APA’s Notice
18 and Comment requirement. Respondents’ duties are statutorily prescribed and are
19 mandatory. Petitioners have established the first element necessary for issuance of the writ.

20 Pursuant to Code of Civil Procedure § 1086, to obtain a writ of mandate, Petitioners
21 must demonstrate a beneficial interest in compelling the performance of Respondents’ duty.
22 This requirement is greatly relaxed, if not virtually abandoned, if the matter involved is one
23 of public interest or right. Residents of Beverly Glenn, Inc. v. City of Los Angeles, 34 Cal.
24 App. 3d 117, 127 (1973). Petitioner is not required to show any legal or special interest in
25 the result when the question is one of public right and the object of the petition for the writ
26 of mandate is to procure the enforcement of a public duty. Common Cause v. Board of
27 Supervisors, 49 Cal. 3d 432, 439 (1989); Green v. Obledo, 29 Cal. 3d 126 (1981);
28 Timmons v. McMahon, 235 Cal. App. 3d 512, 518 (1991). It is sufficient that Petitioner “is

1 discretion to entertain the writ proceeding and issue the writ because of the importance of
2 the constitutional issue and the adverse impact of any delay on the health, safety and
3 welfare of school children.³

4 Having satisfied all of the essential elements necessary to obtain a Writ of Mandate,
5 the court should issue a Writ of Mandate setting aside, vacating and invalidating the Legal
6 Advisory, for the reasons set forth below.

7 B. Respondents violated the administrative procedure act by publishing an
8 unlawful regulation in the form of the Legal Advisory.

9 Respondent CDE is an “agency” and is required to follow the rulemaking
10 requirements of the Administrative Procedure Act. Government Code § 11000 defines
11 “agency” to include every state office, officer, department, division, bureau, board and
12 commission. Government Code § 11000(a). There is no exception for the California
13 Department of Education or the Superintendent of Public Instruction. Indeed, Respondents
14 admit that they are an agency under Education Code § 33300. See Respondents Answer to
15 Petitioners’ Second Amended Verified Petition for Writ of Mandate and Complaint for
16 Declaratory and Injunctive Relief at ¶ 15.⁴

17 The APA subjects proposed agency regulations to certain procedural requirements.
18 Specifically, pursuant to the APA, “[n]o state agency shall issue, utilize, enforce or attempt

19 ³ The inadequacy of other remedies is a matter of judicial discretion which will not be
20 disturbed in the absence of a showing that the court abused that discretion. W.A. Rose
21 Company v. Municipal Court, 176 Cal. App. 2d 67, 74 (1959); San Joaquin County
22 Employees Association v. City of Stockton, 161 Cal. App. 3d 183, 820 (1984).
23 California courts routinely exercise their discretion in favor of issuing a writ, even
24 where alternative legal remedies are available, where the case involves one of public
25 importance or presents a significant constitutional issue. See, e.g., Brandt v. Superior
26 Court, 37 Cal. 3d 813, 816 (1985); Britt v. Superior Court, 20 Cal. 3d 844, 851 (1978).
27 Moreover, even where alternative legal remedies are available, courts may exercise their
28 discretion in favor of issuing a writ where any delay in adjudicating an issue would
have an adverse impact on the public welfare. See, e.g., Brown v. Superior Court, 5
Cal. 3d 509, 515 (1971). This is certainly one of those cases, since any delay will have
significant impact on the health and safety of California’s public school children.

⁴ Curiously, although Respondents admit that they are an agency in ¶ 15 of their Answer
to Petitioners’ Second Amended Petition for Writ of Mandate and Complaint for
Declaratory and Injunctive Relief, they deny that they are an agency in ¶ 13 of their
Answer.

1 to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general
2 application, or other rule, which is a regulation as defined in Section 11342.600, unless the
3 guideline, criterion, bulletin, manual, instruction, order, standard of general application, or
4 other rule has been adopted as a regulation and filed with the Secretary of State ...”
5 Government Code § 11340.5(a). If any guideline, bulletin or other standard of general
6 applications constitutes a “regulation” within the meaning of the APA, it may not be
7 adopted, amended or repealed “unless it conforms with the basic minimum procedural
8 requirement of Government Code § 11346(a) that are exacting.” Morning Star Company v.
9 State Board of Equalization, 38 Cal. 4th 324, 333 (2006). The agency must give the public
10 notice of its proposed regulation. Government Code § 11346.4. It must issue a complete
11 text of the proposed regulation with a statement of the reasons for it. Government Code
12 § 11346.2(a)(b). It must give interested parties an opportunity to comment (Government
13 Code § 11346.8) and respond in writing to public comments. Government Code
14 §§ 11346.8(a), 11346.9. The agency must forward a file of all materials on which it relied
15 in the regulatory process to the Office of Administrative Law. Government Code
16 § 11347.3(b). The Office of Administrative Law then reviews the regulation for
17 consistency within the law, clarity and necessity. Government Code §§ 11349.1, 11349.3.
18 Any regulation that fails to comply with these with requirements may be judicially declared
19 invalid. Government Code § 11350.

20 The requirements of the APA apply to “regulations.” The Legal Advisory published
21 by CDA pursuant to its settlement in the underlying action constitutes a regulation within
22 the meaning of the APA. The APA defines regulation to mean “every rule, regulation,
23 order, or standard of general application ... adopted by any state agency to implement,
24 interpret, or make specific the law enforced or administered by it, or to govern its
25 procedure.” There is a two-part test for determining whether something constitutes a
26 regulation subject to the APA: (1) the agency must intend its rule to apply generally, rather
27 than in any one specific case; and (2) the rule must “implement, interpret, or make specific
28 the law enforced or administered by the agency.” Government Code § 11342(g).

1 The Legal Advisory in this case satisfies the two-part test for determining whether it
2 is a regulation. Although the Legal Advisory was issued as part of a settlement in a
3 particular case, it is intended to have a general application. A rule is intended to be a
4 standard of general application so long as it declares how a certain class of cases will be
5 decided. It need not apply universally. Roth v. Department of Veteran Affairs, 110 Cal.
6 App. 3d 662, 630 (1980).

7 The Legal Advisory clearly is intended to apply generally to all students with
8 diabetes in California’s K-12 public schools and not only to the parties plaintiff in the
9 underlying action. On its face, the Legal Advisory is directed to “all California school
10 districts and charter schools.” Ex. 2 at page 1. The Legal Advisory contains CDE’s
11 interpretation of Section 504 of the Rehabilitation of Act of 1973 and Title 2 of the ADA
12 and sets forth rules that local education agencies (“LEAs”) must follow to comply. For
13 example, the Legal Advisory prohibits an LEA from having “a blanket policy or general
14 practice that insulin or glucagon administration, or other diabetes related healthcare
15 services, will only be provided by district personnel at one school in the district... .” Ex. 2
16 at page 3.

17 The Legal Advisory also sets forth the position of the CDE about who may
18 administer insulin in California to students with diabetes as a related service under Section
19 504 and the IDEA. Specifically, in the Legal Advisory, CDE interprets and purports to
20 modify the California Nursing Practice Act, stating that “Business and Professions Code
21 § 2725(b)(2) [the Nursing Practice Act] and the California Code of Regulations, Title 5,
22 § 604 authorize the following types of persons to administer insulin in California’s public
23 schools pursuant to a Section 504 plan or an IEP: ... (8) voluntary school employee who is
24 unlicensed but who has been adequately trained to administer insulin pursuant to the
25 student’s treating physician’s orders as required by the Section 504 Plan for the IEP.” Ex. 2
26 at p. 13. The Legal Advisory does not limit this rule to the school district defendants or the
27 parties plaintiff in the underlying action. To the contrary, it has been published to all of
28 California’s K-12 public schools. Undoubtedly, the Legal Advisory applies generally and

1 declares CDE’s interpretation of services that LEAs are required to provide to California
2 school children. Accordingly, it is a regulation that should have been issued only after
3 complying with the procedural requirements of the APA.

4 The Legal Advisory is nothing more than an illegal regulation promulgated by CDE
5 in order to satisfy the requirements of Section 49423.6 of the Education Code while
6 circumventing the APA. Any suggestion by Respondents that the Legal Advisory does not
7 constitute a “regulation” is disingenuous, at best, and is belied by the fact that CDE followed
8 the procedures of the APA in its failed attempt to adopt similar regulations in 2003.

9 By failing to comply with the notice and comment requirements, Respondents have
10 frustrated the intent and purpose of the APA. The requirements of the APA are designed to
11 ensure “bureaucratic responsiveness and public engagement in agency rulemaking.”
12 Morning Star Company, 38 Cal. 4th at 333. “One purpose of the APA is to ensure that those
13 persons or entities who a regulation will affect have a voice in its creation, as well as a
14 notice of the law’s requirements so that they can conform their conduct accordingly.”
15 Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 568-69 (1996), quoting
16 Armistead v. State Personnel Board, 22 Cal. 3d 198, 204-05 (1978). By promulgating the
17 Legal Advisory without complying with the notice and comment requirements of the APA,
18 CDE silenced the voices of all of those persons affected by the regulation, except those who
19 were parties to the underlying action. By implementing the *de facto*, unlawful regulation in
20 violation of the APA, Respondents have put students, licensed nurses and unlicensed
21 personnel at risk of great harm without giving them the courtesy to make their objections
22 known, which is their absolute statutory right.

23 Even worse, because the Respondents implemented this illegal regulation in violation
24 of the APA, the Office of Administrative Law never had the opportunity to review the Legal
25 Advisory for consistency with other laws. In fact, as set forth herein, the Legal Advisory is
26 not consistent with other laws. The Legal Advisory is wholly inconsistent with the intent and
27 express language of the Nursing Practice Act, makes a mockery of Education Code section
28 49423 and is inconsistent with Article III, Section 3.5 of the California Constitution.

1 Respondents' violation of the APA in this case is particularly egregious, since the
2 unlawful regulation is diametrically opposed to the longstanding policy of CDE that
3 unlicensed school personnel do not have authority to administer insulin in schools. See
4 CDE "Program Advisory on Medication," attached as Exhibit 8 to Petitioners Request for
5 Judicial Notice; see, also, Exhibit 7 to Petitioners' Request for Judicial Notice (CDE's
6 Memorandum of Points and Authorities in Support of Motion to Dismiss in K.C. v.
7 O'Connell), at pp. 10, 14.⁵

8 The curious results arising from the inconsistencies between the unlawful Legal
9 Advisory and other laws are particularly revealing and disturbing. For example, the Legal
10 Advisory permits any unlicensed school personnel who volunteers to do so (and receives
11 some unspecified training) to administer, by any mode, any dose of any of the five types of
12 insulin, including mixed short acting and longer acting insulins, to a kindergarten student
13 who receives insulin on a sliding scale and who may be unable to adequately articulate
14 factors that would affect the appropriate dose or timing of insulin that the student should
15 receive. These factors include, and are not limited to, what or how much the student has
16 eaten and at what times the student ate that day, the amount of exercise or other physical
17 exertion that the student has engaged in on that day and other variations in the student's
18 routine that might affect the student's blood glucose levels. On the other hand, if that same
19 student was sitting in an emergency room in a hospital in California, a certified nursing

21 ⁵ It is important to note that in K.C. v. O'Connell, CDE and O'Connell took the same
22 position with respect to who is authorized to administer insulin as Petitioners take in the
23 instant case. For example, in their Motion to Dismiss in the underlying action, CDE
24 and O'Connell stated that the defendant school districts properly "followed state law
25 with regard to those employees who can administer insulin through a syringe. It is
26 plaintiff who seeks to have unlicensed medical professionals to inject her with insulin,
27 ***which is contrary to state law.***" See Ex. 7 to Petitioners' Request for Judicial Notice at
28 p. 10 (emphasis added); see, also, id. at p. 14, stating: "under state law, only licensed
medical professionals, parents and parent designees can administer medication by
injection. (See Education Code sections 44871, 44873, 44874-44878, 49400, 49422(a)
and 49423; CCR, Title 5, sections 600, 601(e)(f)(h) and 604). The CDE, the agency
responsible for promulgating regulations in support of the IDEA, has issued a Program
Advisory that non-medical school staff may not be trained to inject medications such as
insulin."

1 assistant with years of training and experience would not be permitted to administer insulin
2 to that student without violating the Nursing Practice Act. Moreover, a nurse in the hospital
3 would not be able to delegate that task to unlicensed hospital personnel because there is no
4 statutory authority authorizing that delegation. In fact, the administration of insulin is so
5 dangerous that it is standard policy in health care facilities for two registered nurses to
6 check the medication before it can be administered by a registered nurse. See Affidavit of
7 Mary Jean Schumann (“Schumann Aff.”), attached hereto as Exhibit 4 and filed with the
8 court on today’s date, at ¶ 13; and Affidavit of Dale Parent (“Parent Aff.”), attached hereto
9 as Exhibit 5 and filed with the court on today’s date, at ¶ 13.

10 By way of further example, if the school was a health facility licensed pursuant to
11 Section 1250 of Health and Safety Code, the practice authorized by CDE’s unlawful
12 regulation would be prohibited under Section 2725.3 of the Nursing Practice Act, which
13 forbids unlicensed personnel from performing nursing functions in lieu of a registered nurse
14 and explicitly states that unlicensed personnel shall not be permitted to perform functions
15 under the direct clinical supervision of a registered nurse that require a substantial amount
16 of scientific knowledge and technical skills, including the administration of medication.
17 Business and Professions Code § 2725.3. The fact that a young child with limited abilities
18 to express how he is feeling could receive insulin from the school secretary is ludicrous,
19 when an adult, who is perfectly capable of communicating his needs, feelings and
20 circumstances, sitting in a health facility could not receive insulin from unlicensed hospital
21 personnel, who have years of medical training and experience, even if supervised by a
22 registered nurse.

23 The administration of insulin is serious business with potentially lethal results.
24 While Petitioners have no doubt that Intervenor ADA means well, its efforts to achieve a
25 result via the Legal Advisory that it could not achieve in the Legislature are misguided.
26 Still worse, any “benefit” to allowing unlicensed and untrained personnel to administer
27 insulin is far outweighed by its potentially disastrous consequences. These consequences
28 and the obvious conflicts between the Legal Advisory and existing California law would

1 have been raised and considered had Defendants followed the APA. They did not. Thus,
2 the government and the public which it serves were deprived of the opportunity to comment
3 upon and to fully debate the effects and consequences of the Legal Advisory.

4 C. The Legal Advisory violates the Nursing Practice Act.

5 The California Board of Registered Nursing (“CBRN”) is the only agency with
6 statutory authority to interpret and enforce the Nursing Practice Act and define and the
7 practice of nursing. Business and Professions Code § 2725(e). The CBRN’s interpretation
8 of the NPA is that “Administration of medications, including insulin, is a nursing function
9 that may not be performed by an unlicensed person unless expressly authorized by statute.”
10 CBRN’s Official Position re: ADMINISTRATION OF INSULIN IN SCHOOLS BY
11 UNLICENSED PERSONNEL, California Department of Education Case Settlement, K.C.
12 et al. v. Jack O’Connell, et al., November 30, 2007, a certified copy of which is attached
13 hereto as Exhibit 6. See, also, CBRN’s EXPLANATION OF THE SCOPE OF RN
14 PRACTICE, a certified copy of which is attached hereto as Exhibit 7, at pp. 1-3.
15 Accordingly, Respondents have violated the Nursing Practice Act by redefining the practice
16 of nursing and publishing an unlawful regulation that incorrectly interprets the Nursing
17 Practice Act. Moreover, by adopting a regulation that modifies the Nursing Practice Act,
18 Respondents have exceeded the scope of their statutory rulemaking authority. Education
19 Code § 33031; Government Code § 11152.

20 The Nursing Practice Act prohibits unlicensed persons from administering
21 medications, including insulin. Under the NPA, the practice of nursing includes:

22 “those functions, including basic healthcare, that help people cope with
23 difficulties in daily living that are associated with their actual or potential
24 health or illness problems or the treatment thereof, and that require a
substantial amount of scientific knowledge or technical skill, including all of
the following:

25 * * *

26 (2)... the administration of medications and therapeutic agents, necessary to
27 implement a treatment, disease prevention or rehabilitative regimen ordered
by and within the scope of practice of a physician... .”

28 The purpose of this Section of the NPA is “to assure that the actions which

1 introduce medications and therapeutic agents into the body of a patient which do require a
2 substantial amount of scientific knowledge or technical skill, such as injections by
3 hypodermic syringe, were included in the definition of nursing.” 71 Op. Cal. Attorney 190,
4 at page 20 (1988). Insulin is a medication that is introduced into the body of a patient by
5 injection with hypodermic syringe. Schumann Aff. at ¶ 10. In fact, insulin is such a
6 dangerous medication and requires such substantial scientific knowledge to administer that
7 it has been placed on the Institute for Safe Medication Practices List of High Alert
8 Medications. Schumann Aff. at ¶ 11 and Exhibit B thereto. “High alert medications are
9 drugs that bear a heightened risk of causing significant patient harm when they are used in
10 error.” Schumann Aff. at Ex. B. The consequences of an error when administering high
11 alert medications, including insulin, “are clearly more devastating to patients” and require
12 “special safeguards to reduce the risk of errors.” *Id.* For these reasons, it is standard
13 practice in hospitals to require registered nurses to follow special procedures when
14 administering insulin. Schumann Aff. at ¶ 13; Parent Aff. at ¶ 13.

15 The administration of insulin to diabetic school children is a nursing function which
16 requires a particular amount of scientific knowledge and technical skill, not only because
17 insulin is a high alert medication but because, as ADA acknowledged in its complaint in
18 K.C. v. O’Connell:

19 “Both type 1 and type 2 diabetes present serious health risks to school aged
20 children and require careful monitoring and treatment. To maintain health
21 and to prevent serious and potentially fatal consequences, diabetes must be
22 managed 24 hours a day, 7 days a weeks. Treating diabetes requires a
23 careful balancing of insulin intake, food, and physical activity to keep blood
24 glucose levels within the normal range. Blood glucose levels must be
25 frequently monitored and appropriate treatment responses (such as
26 administering insulin or eating a snack) must be taken depending on the
27 measured glucose level. For most school children with type 1 diabetes,
blood glucose levels must be monitored throughout the school day and doses
of insulin (either by injection or by an insulin pump) must be given during
school hours. In addition to blood glucose monitoring, some students with
type 2 diabetes also require insulin and/or oral diabetes medications during
the school day. In many instances, children with diabetes, because of their
age or other conditions, need assistance throughout the school day in
managing their condition to maintain their health and well being.”

28 Petitioners’ Request for Judicial Notice at Ex. 7.

1 The process of administering insulin is a complicated one. Schumann Aff. at ¶ 14.
2 It involves more than filling a hypodermic syringe and pushing a plunger. Schumann Aff.
3 at ¶ 14. It requires an assessment of the patient, including the patient’s history, a physical
4 assessment, which may include: blood glucose monitoring, which might be done in any
5 variety of ways with a variety of different devices; a determination of whether the insulin
6 dose needs to be adjusted to correct for abnormal blood glucose level, for exercise and
7 activity, to match carbohydrate intake or in anticipation of a change in the child’s usual
8 regimen; the selection of a correct syringe to avoid a mistake in dosage; proper preparation
9 of the syringe, assuring sterility in the procedure; adherence to contamination and infection
10 avoidance techniques and practices; proper injection procedure to avoid tissue damage; and
11 post administration assessment for adverse reactions and complications. Schumann Aff. at
12 ¶ 15; Parent Aff. at ¶ 14. Such complications and adverse reactions include, and are not
13 limited to, the following:

- 14 • hypoglycemia, which can include heart palpitation, tremor, tingling of the
15 extremities or tongue, headache, anxiety, blurred vision, blurred speech,
16 abnormal behavior, unsteady movement, personality changes, disorientation,
17 unconsciousness, seizures and death;
- 18 • scarring and poor absorption of the insulin due to improper injection site
19 rotation;
- 20 • systemic allergy, including rash over the entire body, shortness of breath,
21 wheezing, reduction in blood pressure, rapid pulse, sweating, and anaphylaxis;
- 22 • hyperglycemia, which can include drowsiness, thirst, loss of appetite, nausea,
23 vomiting, dehydration and loss of consciousness.

24 All of this requires a tremendous amount of scientific knowledge and technical skill and the
25 exercise of sound nursing judgment. Schumann Aff. at ¶ 16; Parent Aff at ¶ 15.

26 Clearly, the administration of medication is a function requiring a substantial
27 amount of scientific knowledge and technical skill and constitutes the practice of nursing
28 within the meaning of the NPA. Schumann Aff. at ¶ 17; Parent Aff. at ¶ 16.

1 Section 2795(a) of the Nursing Practice Act makes it unlawful for any person to
2 administer insulin, unless that person has been duly licensed under the NPA. Business and
3 Professions Code § 2795(a). An exception exists permitting unlicensed personnel to
4 provide nursing services in case of an emergency. The NPA defines emergency as an
5 “epidemic or public disaster.” Business and Professions Code § 2727(d). Emergencies do
6 not include personnel shortages, fiscal constraints or lack of available licensed personnel.
7 Such situations do not excuse violations of the Nursing Practice Act or give Respondents
8 the right to sanction or direct nurses or unlicensed school personnel to violate the NPA
9 without fear of reprisal.

10 Notwithstanding the clear and unambiguous provisions of the Nursing Practice Act,
11 the Legal Advisory published by CDE requires California public schools to permit
12 unlicensed personnel to administer insulin in direct contravention of the NPA, in situations
13 other than “emergencies.” The Legal Advisory purportedly permits unlicensed personnel to
14 engage in the unlawful practice of nursing. Accordingly, in exchange for “volunteering” to
15 administer insulin, unlicensed school personnel may receive a citation from the Board of
16 Registered Nursing for the unlicensed practice of nursing. Hunter Aff. at ¶ 8; Title 16,
17 California Code of Regulations § 1435.3. In addition, these “volunteers” could be
18 subjected to criminal prosecution and receive criminal punishment, including a fine of up to
19 \$1,000 and imprisonment of up to one year. Business and Professions Code § 2799.⁶
20 Moreover, these “volunteers” open themselves up to liability for injuries to the students
21 resulting from the volunteers’ negligence. The Legal Advisory, like A.B. No. 481 that was
22 vetoed, does nothing to protect these volunteers or the school districts from any liability
23 arising from the medical treatment that they provide.

24 The unlawful Legal Advisory also violates the NPA by requiring licensed nurses to
25 _____

26 ⁶ Stating: “Any person who violates any of the provisions of this chapter is guilty of a
27 misdemeanor and upon a conviction thereof shall be punished by imprisonment in the
28 county jail for not less than 10 days nor more than one year, or by a fine of not less than
twenty dollars (\$20) nor more than one thousand dollars (\$1,000), or by both such fine
and imprisonment.”

1 train and supervise unlicensed school personnel in insulin administration, despite the fact
2 that licensed nurses have no statutory authority to delegate this nursing function. The
3 California Board of Registered Nursing has authority to discipline registered nurses
4 working in a supervisory capacity for authorizing unlicensed persons to perform tasks
5 which they knew the unlicensed person was not capable of performing safely or did not
6 have the authority to perform. Business and Professions Code § 2761; 59 Ops. Cal.
7 Attorney General 537 (1976). Accordingly, nurses whose employers direct them to train
8 and/or supervise unlicensed personnel in the administration of insulin pursuant to the Legal
9 Advisory face the possibility of an enforcement action, which could result in a suspension
10 of their license to practice nursing for a period of one year or revocation of their license.
11 Business and Professions Code § 2759. In addition, licensed personnel who train and/or
12 supervise unlicensed school employees to administer insulin may be held liable for injuries
13 resulting to a student as a result of the negligence of the unlicensed school employee and
14 for negligent training and/or supervision of the unlicensed employee. The Legal Advisory
15 does nothing to protect licensed nurses from the threat of such litigation.

16 By far the worst problem with the Legal Advisory is that it places California's
17 diabetic school children at risk of harm by subjecting them to inferior medical care and
18 treatment by an individual who does not have the education, training and experience to
19 perform the often complicated and always potentially dangerous job of administering
20 insulin. The unlawful regulation issued by CDE in the form of this Legal Advisory places
21 California's diabetic school children at risk of sustaining the very harm which it purports to
22 protect against, and against which the Nursing Practice Act, through its licensing
23 requirements, was enacted to protect.

24 The Legal Advisory conflicts with and authorizes conduct which is in clear violation
25 of the Nursing Practice Act and should be declared void. Furthermore, Respondents should
26 be prohibited and precluded from enforcing or taking any other action in furtherance of the
27 Legal Advisory.

28

1 D. The Legal Advisory violates Education Code section 49423.

2 Education Code section 49423(a) authorizes, in certain limited situations,
3 “designated school personnel” to assist a student in taking certain prescribed medication.
4 The Legal Advisory completely reads “assist” out of the statute and allows non-trained
5 personnel to directly administer insulin. If non-licensed personnel are not authorized to
6 assist with insulin injections, it is plain that such untrained persons cannot administer this
7 drug.

8 That the Legal Advisory violates Education Code section 49423 is apparent when
9 one considers section 49423(b)(2). That section specifically refers to the requirements for a
10 pupil to carry and self-administer auto-injectable epinephrine. That section makes clear
11 that school personnel are not injecting the students and also requires students’ parents or
12 guardians to sign a release. On its face, section 49423(b) does not include insulin. The
13 Legal Advisory violates the Education Code.

14 E. The Legal Advisory was enacted in violation of Article 3 of the California
15 Constitution.

16 Section 3.5 of Article 3 of the California Constitution states:

17 “An administrative agency, including an administrative agency created by
18 the Constitution or an initiative statute, has no power:

19 * * *

20 (c) To declare a statute unenforceable, or to refuse to enforce a statute on the
21 basis that federal law or federal regulation prohibits the enforcement of such
22 statute, unless an Appellate Court has made a determination that the
enforcement of such statute is prohibited by federal law or federal
regulation.”

23 Cal. Const., Art. III, § 3.5 (2008). See Greenier v. Workers Compensation Appeals Board,
24 6 Cal. 4th 1028, 1038 (1993).

25 By adopting the Legal Advisory authorizing unlicensed school employees to
26 administer insulin, Respondents have failed and refused to enforce the licensing
27 requirements of the Nursing Practice Act. As justification, Respondents cite two federal
28 laws: Section 504 of the Rehabilitation Act of 1973 and Title 2 of the ADA. Ex. 2.

1 Specifically, Respondents say that:

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

5 8. Voluntary School Employee Who Is Unlicensed But Who Has Been
6 Adequately Trained To Administer Insulin Pursuant To The Student’s
7 Treating Physician’s Orders As Required By the Section 504 Plan or the
8 IEP.”

9 Ex. 2 at p. 13. Categories 2-4 of the Legal Advisory are references to medical personnel
10 who are licensed in accordance with the Nursing Practice Act. Category number 2 includes
11 school nurses employed by the LEA. Category number 3 refers to “appropriately licensed
12 school employee (i.e., a registered nurse or a licensed vocational nurse) who is supervised
13 by a school physician, school nurse, or other appropriate individual.” Category number 4
14 refers to a “contracted registered nurse or licensed vocational nurse from a private agency
15 or registry, or by contract with a public health nurse employed by the local county health
16 department.” By creating category number 8 (unlicensed voluntary school employees)
17 authorized to administer insulin, Respondents have rendered the licensing requirements of
18 the Nursing Practice Act meaningless. In other words, according to the unlawful Legal
19 Advisory, unlicensed school employees may engage in the unlawful practice of nursing
20 without a license and California’s public schools no longer have any need for a school
21 nurse. It is certainly difficult to imagine that a school nurse would be needed to handle any
22 situation that might arise in the school if the school secretary can perform a task as complex
23 and that carries with it such a risk of adverse consequences as the administration of a high-
24 alert medication to a student with a condition as complicated and serious as diabetes.

25 The unlawful Legal Advisory is entirely unnecessary. Compliance with the federal
26 regulations cited by Respondents as rationale and authority for refusing to enforce the
27 licensing requirements of the Nursing Practice Act would be accomplished by requiring
28 LEAs to provide licensed personnel to administer insulin in California’s public schools. To
the extent possible, legislation should be read and applied in a manner that achieves
consistency, rather than conflict. For whatever reason, Respondents determined to subject

1 all of the stakeholders in this matter to the risks of harm set forth herein, rather than to meet
2 the requirements of Section 504 and the ADA through available, legal methods.
3 Respondents' actions in so doing are difficult to reconcile with their longstanding position
4 that "no authority has been located wherein federal disability laws were held to "trump""
5 the Nursing Practice Act. CDE's Memorandum of Points and Authorities in Support of
6 Motion to Dismiss filed in K.C. v. O'Connell, attached as Ex. 7 to Petitioners' Request for
7 Judicial Notice.

8 Because the unlawful regulation in the form of the Legal Advisory published by
9 Respondents violates Article 3, Section 3.5 of the California Constitution, it should be
10 declared void.

11 F. Respondents violated the scope of their rulemaking authority.

12 Respondent O'Connell may publish regulations that are "consistent with law."
13 Government Code § 11152. Pursuant to Education Code 33031, the State Board of Education
14 may only adopt "rules and regulations not inconsistent with the laws of this state." As noted
15 above, the illegal regulation published and adopted by Respondents in this case is inconsistent
16 with the laws of California. Accordingly, Respondents have exceeded the scope of their
17 statutory authority in publishing and adopting the unlawful Legal Advisory, which is void *ab*
18 *initio*. Moreover, the Legal Advisory violates the California Constitution, as noted above.
19 Fiscal concerns are no excuse to violate the California Constitution. See, e.g., Hartzell v.
20 Connell, 35 Cal. 3d 899, 912 (1984). To the extent that economics came into play in
21 publishing the unlawful Legal Advisory, that question should "very properly be addressed to
22 the legislative department of the state government." Id. at p. 913.

23 G. Petitioners are entitled to declaratory and injunctive relief.

24 The above analysis also establishes that Petitioners are entitled to declaratory and
25 injunctive relief. As noted, this case involves an actual controversy concerning the rights
26 and legal duties of the parties. Petitioners assert that Respondents had a duty to comply
27 with the requirements of the Administrative Procedure Act before publishing the Legal
28 Advisory, which is contrary to the Nursing Practice Act and the Education Code and was

1 published in violation of the California Constitution. Respondents have denied that they
2 have any such duty. See Respondents Answer to Petitioners Verified Second Amended
3 Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief at ¶¶ 2,
4 31, 32, 38-40, and 47.

5 Petitioners attempted to resolve this matter without the aid and intervention of the
6 court. On September 10, 2007, Petitioner ANA/C met with Respondent O’Connell and
7 asked him to rescind the directive regarding the administration of insulin by unlicensed
8 school personnel. He declined to do so. Hunter Affidavit at ¶ 7.

9 Clearly, this matter is an actual case in controversy concerning the legal rights and
10 duties of the parties that will not be resolved without the aid and intervention of this court.
11 Accordingly, Petitioners are entitled to declaratory relief.

12 Likewise, Petitioners are entitled to injunctive relief. Petitioners and their members
13 have suffered and continue to be immediately threatened by irreparable harm as set forth
14 herein. As previously discussed, there exists no adequate remedy at law. Accordingly,
15 Petitioners are entitled to an injunction against Respondents prohibiting and precluding
16 them from enforcing or taking any other action under the unlawful Legal Advisory.

17 IV. CONCLUSION.

18 For the reasons set forth herein, the Court should (a) issue a writ of mandate under
19 Code of Civil Procedure Section 1085 (or, in the alternative, Section 1094.5) (i) setting
20 aside, vacating and invalidating the “Legal Advisory”; (ii) enjoining Respondents from
21 taking any action in connection with the Legal Advisory; (iii) compelling Respondents to
22 act in compliance with all applicable laws and regulations respecting any future decisions
23 and/or findings concerning the acceptable methods for administering insulin to California
24 students; (b) enjoin Respondents from taking any further action to implement or enforce the
25 Legal Advisory; (c) declare that Respondents’ issuance of the Legal Advisory was in excess
26 of their jurisdiction, an abuse of discretion, arbitrary and capricious and in violation of
27 applicable state law, including without limitation, the Administrative Procedure Act, the
28 Nursing Practice Act and the California Constitution.

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Dated: July __, 2008.

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