**Case No.** S184583

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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AMERICAN NURSES ASSOCIATION, *et al.*
Plaintiffs and Respondents

v.

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

AMERICAN DIABETES ASSOCIATION
Intervenor and Appellant

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## APPLICATION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT AND APPELLANT JACK O'CONNELL AND INTERVENOR AND APPELLANT, THE AMERICAN DIABETES ASSOCIATION

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

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

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## APPLICATION FOR LEAVE TO FILE BRIEF

## OF *AMICI CURIAE*

Pursuant to Rule 8.520(f) of the California Rules of Court, Attorneys for *Amici Curiae* the Los Angeles Unified School District, Children's Rights Clinic, Disability Rights Advocates, Disability Rights California, Disability Rights Legal Center, Disability Rights Texas and The Legal Aid Society – Employment Law Center (collectively, "*Amici Curiae*"), respectfully request this Court's permission to collectively file the accompanying *amici curiae* brief in support of Appellants the American Diabetes Association.

This application is timely made within thirty (30) days after the filing of the reply brief on the merits. Cal. R. Ct. 8.520(f)(2).

### I. IDENTITY OF *AMICI CURIAE*

**The Los Angeles Unified School District** ("LAUSD") is the State's largest school district and has responsibility for the health and safety of the 671,088 students (11% of the total public school students in the State) enrolled in its 873 schools. LAUSD is also the State's largest employer of school nurses, employing approximately 450 school nurses.

**The Children's Rights Clinic** ("CRC") was founded in 2008 with the mission of teaching law students practical lawyering skills while providing high quality legal representation to low-income families in Los Angeles County in the area of special education. The CRC represents children with disabilities and their families to ensure that they receive the support and services that they are entitled to under the Individuals with Disabilities Education Improvement Act and the Rehabilitation Act of 1973. The CRC assists parents in obtaining assessments, special education,

Section 504 services, mental health care and related services for children with disabilities. The CRC also works to ensure that children receive a free and appropriate public education. Parents are represented at Individualized Education Program meetings, mediations, Section 504 meetings, and administrative hearings. In addition, CRC staff conducts trainings for parents and providers with respect to educational matters.

**Disability Rights Advocates** ("DRA") is a non-profit public interest law firm that specializes in high-impact civil rights litigation and other advocacy on behalf of persons with disabilities throughout the United States. DRA works to end discrimination in areas such as access to public accommodations, public services, employment, transportation, education and housing. DRA's clients, staff and board of directors include people with various types of disabilities. Based in Berkeley, California, DRA strives to protect the civil rights of people with all types of disabilities.

**Disability Rights California** is a non-profit agency which has provided advocacy services for Californians with disabilities for over thirty years. It has five offices (Sacramento, Fresno, Oakland, Los Angeles, and San Diego) and a variety of satellite sites throughout the state to serve its constituency. Disability Rights California provides legal counsel and direct representation in administrative and court proceedings to individuals with physical/orthopedic, sensory, cognitive, psychiatric, and other disabilities. Disability Rights California is designated as a Protection and Advocacy Agency pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15041 *et seq.*, the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 *et seq.*, the Protection and Advocacy of Individual Rights Program, 29 U.S.C. § 794e, other, and California Welfare and Institutions Code § 4900 *et seq.*

Disability Rights California also contracts with the State of California to serve people with developmental disabilities and people in state psychiatric hospitals. Disability Rights California has extensive experience advocating for children with disabilities in schools and in the community, including representing or counseling thousands of families annually in special education, discrimination, and other school related matters.

**The Disability Rights Legal Center** ("DRLC") is a non-profit legal organization that was founded in 1975 to represent and serve people with disabilities. Individuals with disabilities continue to struggle against ignorance, prejudice, insensitivity and lack of legal protection in their endeavors to achieve fundamental dignity and respect. The DRLC assists people with disabilities in attaining the benefits, protections and equal opportunities guaranteed to them under the Rehabilitation Act of 1973, the Americans with Disabilities Act, Individual with Disabilities Education Improvement Act and other federal and state laws. The DRLC is a recognized expert in the field of disability rights.

**Disability Rights Texas** ("DRT") is a non-profit organization designated by the Governor of Texas to protect and advocate for the rights of individuals with disabilities, pursuant to the Developmental Disabilities Assistance and Bill of Rights Act of 2000, 42 U.S.C. § 15041 et seq., the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. § 10801 et seq., and the Protection and Advocacy of Individual Rights program, 29 U.S.C. § 794e. In accordance with its federal mandate, DRT has the authority, *inter alia*, to pursue administrative, legal and other appropriate remedies to ensure the protection of rights of persons with disabilities. The agency's Board of Directors has established case priorities to ensure that students with disabilities receive the support they need to

learn in integrated settings with their non-disabled peers, and to ensure that people with disabilities have full and equal access to government facilities, programs and services.

**The Legal Aid Society – Employment Law Center** ("LAS-ELC") is a public interest legal organization that advocates to improve the working lives of disadvantaged people. Since 1970, the LAS-ELC has represented clients in cases covering a broad range of employment-related issues including discrimination on the basis of race, gender, age, disability, pregnancy, and national origin. The LAS-ELC has represented, and continues to represent, clients faced with discrimination on the basis of their disabilities, including those with claims brought under the Americans with Disabilities Act and the Fair Employment and Housing Act (FEHA). The LAS-ELC has also filed *amicus curiae* briefs in cases of importance to disabled persons. Further, the LAS-ELC sponsored the Prudence Kay Poppink Act, passed by the California legislature in 2000, which clarified a number of the disability discrimination provisions in California's FEHA. The LAS-ELC has particular expertise in the interpretation and application of state and federal disability nondiscrimination statutes.

## II. INTERESTS OF AND ASSISTANCE OFFERED BY *AMICI CURIAE*

The *Amici Curiae* are all organizations that serve constituencies directly affected by the outcome of the decision in this case. As non-profit, governmental, and/or advocacy organizations, the *Amici Curiae* have substantial experience working with students who require medication while at school and possess a thorough understanding of the challenges and consequences of protecting the educational rights and ensuring the health and welfare of students with disabilities within a school environment. The

outcome of this case will directly affect how the *Amici Curiae* serve their clients and the quality of educational opportunities available to their clients.

The *Amici Curiae* believe that their respective backgrounds, expertise, interests and views in connection with the issues presented in this case will be helpful in resolving these issues currently before the Court. Based on this background, the *Amici Curiae* will focus on issues not yet briefed in this case – the practical consequences and constitutional violations that arise from refusing to allow trained school personnel who are not licensed nurses to administer medication to students who require it while at school.

## III. CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully request that the Court accept the accompanying brief for filing in support of Appellants.

Dated: May 11, 2011

Respectfully submitted,

By: Jason D. Russell (P.O.)

Jason D. Russell
Attorney for Amici Curiae the Los Angeles Unified School District, Children's Rights Clinic, Disability Rights Advocates, Disability Rights California, Disability Rights Legal Center, Disability Rights Texas and The Legal Aid Society – Employment Law Center

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## MISCELLANEOUS

## I. STATEMENT OF ISSUES

*Amici Curiae*[1] join in the Statement of Issues tendered by Intervenor and Appellant American Diabetes Association, but respectfully submit that there is a fourth issue that should be considered by the Court that has not been tendered previously by any of the parties, namely:

> 4. If the Nursing Practice Act ("NPA") (Cal. Bus. & Prof. Code § 2700, *et seq.*) is interpreted to prohibit trained school personnel who are not licensed nurses from administering medicine to students when a nurse is unavailable, does that interpretation render the NPA unconstitutional, as applied to students requiring the administration of medicine to attend school, because it deprives students of their right to a free public education guaranteed by the State Constitution (Cal. Const. art. IX, § 5) insofar as "[i]t is the policy of the State of California to afford all persons in public schools, regardless of their disability . . . , equal rights and opportunities in the educational institutions of the state." Cal. Educ. Code § 200 (emphasis added).

## II. INTRODUCTION

It is not overstatement to say that the lives of tens of thousands of California children hang in the balance and their very health and well-being is at stake in this case. If the Court of Appeal's interpretation of the NPA is affirmed, it will force parents to make a Hobbesian choice: send their

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[1] "*Amici Curiae*" on this brief are the Los Angeles Unified School District, Children's Rights Clinic, Disability Rights Advocates, Disability Rights California, Disability Rights Legal Center, Disability Rights Texas and The Legal Aid Society – Employment Law Center.

children to school to receive their constitutionally guaranteed education but risk that their child will become ill or even die because they need medicine to attend school and a licensed nurse is not available at their school to administer it, or secure their children's safety by keeping them home, away from the schools and all the benefits surrounding a public education, because only then can parents assure that their children receive vitally needed medicine.

The Court of Appeal's decision interpreting the NPA and Section 49423 of the Education Code to prohibit trained school personnel who are not licensed nurses from administering critically needed insulin shots to students with diabetes in the absence of a nurse is erroneous and should be reversed for the reasons detailed in Appellants' Opening and Reply briefs. *Amici Curiae* write separately because, although not addressed by any of the parties to date, the Court of Appeal's interpretation of the NPA deprives students who require the administration of medicine to attend school of their right to a free public education guaranteed by the State Constitution. Cal. Const. art. IX, § 5. This constitutional question is uniquely suited to be answered by this Court and should be resolved by construing the NPA in a fashion that avoids the constitutional question (*i.e.*, permits trained school personnel to administer medicine when a licensed nurse is unavailable) or, alternatively, by finding that Section 2725 of the NPA is unconstitutional as applied to students who need medicine to attend school.

As established by Appellants, the Court of Appeal's interpretation of Section 2725 of the NPA is too broad and its interpretation of Section 49423 of the Education Code is too narrow. The erroneous interpretations together produce a constitutional infirmity. Specifically, reading the statutes to prohibit trained school personnel from administrating necessary

insulin shots to students with diabetes violates the State's constitutional mandate that every child be provided a free public education—and in a non-discriminatory manner. Because many students who need insulin medication attend a public school that does not, and cannot, employ a nurse, by demanding that only a nurse may administer insulin to a student with diabetes, the statutes as construed by the Court of Appeal produce an infringement of fundamental rights guaranteed by the State Constitution.

Consistent with settled rules of construction, statutory provisions should be interpreted to avoid unconstitutionality. "If the law is reasonably open to two constructions, one that renders it unconstitutional and one that does not, the court must adopt the interpretation that upholds the law's constitutionality." 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 45:11 (7th ed. 2007); see also In re Smith, 42 Cal. 4th 1251, 1269 (2008) ("Our common practice is to 'construe[ ] statutes, when reasonable, to avoid difficult constitutional questions.'") (citation omitted). Here, the NPA and 49423 of the Education Code can and should be construed, for the reasons set forth in Appellants' briefs, to permit trained school personnel to administer insulin shots to students with diabetes when a licensed nurse is unavailable. Only the Appellants' interpretation adheres to the State Constitution, as well as state and federal disability laws.

If an interpretation avoiding the constitutional question is rejected, then Section 2725 of the NPA should be deemed unconstitutional as applied to children who need medicine to attend school because it violates the right to a free public education guaranteed to every California child by the State Constitution. As this Court has long recognized, "education remains a fundamental interest 'which [lies] at the core of our free and

representative form of government.'" Butt v. State, 4 Cal. 4th 668, 683 (1992), quoting Serrano v. Priest, 18 Cal. 3d 728, 767-68 (1976) (Serrano II). And, '"[i]n applying our state constitutional provisions guaranteeing equal protection of the laws,"' this Court also has long held that, '"we shall continue to apply strict and searching judicial scrutiny' to claims of . . . state interference with basic educational rights." Butt, 4 Cal. 4th at 683. "[D]enials of basic educational equality . . . are subject to strict scrutiny." Id. at 692.

Application of this "strict and searching judicial scrutiny" ineluctably leads to the conclusion that the NPA cannot stand, as currently construed, without interfering with the basic educational rights guaranteed to every California child under the California Constitution. Under strict scrutiny, "the state must shoulder the burden of establishing that [the act] in question is necessary to achieve a compelling state interest." Serrano II, 18 Cal. 3d at 768. The State has not – and could not – demonstrate that Section 2725 is necessary to further a compelling interest. The purported purpose of Section 2725 is to protect students' health by ensuring that they safely receive required medication. However, interpreting the NPA to forbid trained school personnel from administering medication to a student when no nurse is available does the exact opposite – it endangers students' health and reduces student safety. The illogic of this interpretation of the law is easily demonstrated by the fact that under the NPA, insulin can be administered by a long list of persons who are not licensed nurses – it can be self-administered by young children and administered by parents, siblings or friends – but cannot be administered by a school employee who has been trained by a nurse and is acting pursuant to a doctor's written orders when no nurse is available. Such a law surely does not serve a

compelling interest, and thus, Section 2725, as interpreted by the appellate court, cannot survive strict scrutiny.[2]

Moreover, the scope of the problem created by the Court of Appeal's erroneous interpretations is not fully uncovered by the parties' briefs or lower court decisions. Simply put, the practical effect of denying children necessary medication would be disastrous. The purpose of this brief is to help the Court understand the inevitable and devastating consequences of the appellate court's interpretation of the NPA. First, this brief discusses the numbers of California children whose education, health and lives are at stake in this case. Second, the brief demonstrates how the appellate court's decision will deny California students the right to education guaranteed under California's Constitution and state and federal law, and how it will threaten students' lives. Finally, this brief examines the potential alternatives to allowing trained school personnel to administer medication in the absence of a school nurse and demonstrates how each of these alternatives is inadequate to protect children's rights.

If the Court of Appeal's holding is affirmed, thousands of California parents with children with diabetes will be forced to choose between (1) risking their child's health and safety by sending the child to a school without the authority to administer a simple insulin shot, (2) quitting their jobs and stationing themselves nearby the school at every hour to be immediately available to administer insulin if necessary, or (3) home-

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[2] The only other interest fostered by an interpretation preventing non-nurses from giving medicine to children is the financial interest of the nurses' unions. By restricting the number of people who can administer medicine, these unions insure that their members are more likely to have jobs. But such a pecuniary interest surely cannot stand strict scrutiny when its impact threatens the lives of tens of thousands of children and denies these children their fundamental right to a public education.

schooling their child. No parent should be forced to make such a decision and, indeed, the State Constitution and federal and state disability laws forbid that they be required to do so.

For these reasons, as more fully set forth below, the Court of Appeal's holding is erroneous and should be reversed. The applicable provisions of the NPA and the Education Code should be construed to allow trained personnel who are not licensed nurses to administer medication to children who require it while at school when no nurse is available. Alternatively, the Court should hold that the NPA is unconstitutional as applied to children who need to have medicine administered to attend school.

## III. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

At the heart of this dispute is the undeniable fact that most California schools do not have a nurse available to administer the insulin medication needed by thousands of children with diabetes. The complications that follow from this deficiency, however, exceed even the dangerous predicament previewed by the Appellants and the lower courts.

### A. The Vast Majority Of California Children Requiring Medication While at School, Do Not Attend A School With A Nurse

This case arises in the context of certain California public school children with diabetes who require insulin administration through injections or use of an insulin pump while at school, but the Court's decision here will affect a much larger number of children. Although there is no statewide mechanism to calculate the precise number of California public school children who require (or may require) the administration of medication while at school, children may require that assistance in three types of situations: (1) as part of a scheduled regimen to treat a chronic condition,

(2) in response to emergency medical situations and (3) to treat a temporary condition.

As referenced throughout Appellant's briefs and amply supported by the record, an estimated 14,000 public school students in California have diabetes and require insulin while at school, many of whom require someone to administer the medication to them. 3AA/713.[3] However, tens of thousands of children with other common, chronic conditions, also require administration of medication that can easily be provided by trained personnel other than a licensed nurse while at school and are directly and catastrophically impacted by the current interpretation of the NPA. For example, one in six California children, or 1.5 million children, have been diagnosed with asthma, including more than 350,000 who require medication daily to control their asthma,[4] and an estimated 266,000 school-aged children in California have been diagnosed with Attention Deficit Disorder or Attention Deficit Hyperactivity Disorder and may be required to take medication to remain properly engaged while at school.[5]

In addition to students who require medication at certain regular times throughout the school day, students may also require medication while at school in response to medical emergencies. Students with epilepsy

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[3] The Appellant's Appendix is cited as "__AA/AA."

[4] UCLA Center for Health Policy Research. 2007 California Health Interview Survey. http://www.rampasthma.org/wp-content/uploads/2010/04/RAMPAsthmaCaliforniaWeb.pdf.

[5] A 2005 CDC report estimates that 4.3% of children ages 4 – 17 have been reported to have ADHD and taken medication for the disorder (see Mental Health in the United States: Prevalence of Diagnosis and Medication Treatment for Attention-Deficit/Hyperactivity Disorder, September 2, 2005, http://www.cdc.gov/mmwr/preview/mmwr/rhtml/mm5434a2.htm); the 266,000 figure used is based on 4.3% of California's public school students as of the 2009-10 school year.

may experience a condition known as status epilepticus and may require an emergency medication to be administered to prevent severe health risks including brain damage or death. School aged children are also susceptible to severe reactions following certain food allergies and insect bites and may require medication in emergency situations as well. Unlike administering medication to treat chronic conditions, which in some cases can be scheduled at certain specified times, one cannot anticipate when or how frequently medication might be required in these and other emergency medical situations.[6]

Finally, in addition to students who require medication to treat chronic conditions and in emergency situations, other students require medication on a temporary, non-emergency basis to protect against infection or sickness, or treat a temporary pain or illness (*e.g.*, applying antibiotic ointment, eye drops, ear drops, etc.). In contrast to the quantifiable number of students who require medication to treat a specific condition, this last category of students potentially includes every California public school student since all students are susceptible to becoming sick and requiring medication at some point during their time attending school.

The numbers of California students who require medication while at school stand in alarming contrast to the number of California public school nurses. California law does not require schools, or even school districts, to

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[6] Not all medication for chronic conditions may be scheduled at specified times. For example, insulin injections to treat hyperglycemia are frequently needed at unpredictable times in response to varying food intake or activity levels. See 3AA/715.

employ a school nurse.[7] Although federal guidelines call for a student-to-nurse ratio of 750:1[8], in 2010, California had only 2,901 nurses working in the State's 10,223 schools serving the State's 6.3 million students – a ratio of over 2,100:1.[9]

According to the California School Nursing Organization and the Association of School Nurses: California ranks behind 40 other states in its student to nurse ratio; there are about 7,000 schools throughout the State with no school nurse (roughly 70% of all California schools) on any given school day; and about half of California's school districts do not have a nurse for the entire district.[10] Given that only 5% of California's public schools employ full-time nurses millions of students attend a school without a full-time nurse.[11]

This deficiency will likely not be cured in the foreseeable future. Local school districts are in the midst of arguably the most dire budgetary crisis in California state history and cannot afford to use limited and delegated funds to pay full-time school nurses for regular and extracurricular school activities. Over the past two years, California has cut

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[7] See O. Nwabuzor, "Shortage of Nurses: The School Nursing Experience," ONLINE JOURNAL OF ISSUES IN NURSING, Vol. 12, No. 2 (February 26, 2007).

[8] Id.

[9] Press Release, California Department of Education "State Schools Chief Jack O'Connell Honors School Nurses; Notes Budget Crisis Impact on Nurses in California Schools," (May 11, 2010), http://www.cde.ca.gov/nr/ne/yr10/yr10rel49.asp.

[10] Kathy Hundemer, (Government Relations Chair of the California School Nurses Organization), Op. Ed., California's School Nurse Crisis, LOS ANGELES TIMES, May 28, 2010.

[11] App. Op. Br. at 7.

$17 billion from K-12 public education,[12] and additional cuts are predicted for the 2011-2012 school year; as of March 2011, 19,000 public school employees statewide had received lay-off notices in anticipation of public education cuts.[13] Simply stated, there is not enough money for teachers, much less nurses. According to former State Superintendent of Public Instruction Jack O'Connell, "school nursing jobs are often one of the first to be cut by the budget ax."[14] A survey of school districts found that 48 percent of responding school districts had cut counselors, nurses and psychologists as a result of budget cuts.[15]

Compounding the problem is the shortage of nurses generally in our State. The California Board of Registered Nursing estimates that the State's registered nurse shortage is between 10,294 and 59,027 full-time positions,[16] and the State's shortage is expected to reach 116,600 by 2020.[17] With this shortage of nurses, it is both unreasonable and untenable to

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12 Press Release O'Connell, supra note 9.

13 Smith, J. The Teacher Layoff Epidemic Spreads, THE ATLANTA POST, Mar. 16, 2011, available at http://atlantapost.com/2011/03/16/the-teacher-layoff-epidemic-spreads/.

14 Press Release O'Connell, supra note 9.

15 Press Release, California Department of Education "State Schools Chief Jack O'Connell Releases School District Budget Cuts Survey Results," (June 10, 2010), http://www.cde.ca.gov/nr/ne/yr10/yr10rel71.asp.

16 Spetz, Joanne, Ph.D., "Forecasts of the Registered Nurse Workforce in California," Conducted for the California Board of Registered Nursing, Center for California Health Workforce Studies, University of California, San Francisco, September 20, 2007, http://www.rn.ca.gov/pdfs/forms/forecasts2007.pdf.

17 Governor's California Nurse Education Initiative Annual Report, September 2006, http://www.labor.ca.gov/pdf/CNEIAnnualReport100406.pdf.

expect thousands of nurses to be employed by schools that are fiscally unable to hire them even if nurses were available to be hired.

Faced with this tremendous gap between the number of students requiring medication and the number of school nurses, and the impossibility of narrowing the gap in the foreseeable future, many school districts throughout the State have implemented the only viable solution – allowing trained school personnel who are not licensed nurses to administer medication to students who require it while at school when a nurse is not available. This pragmatic solution follows from an interpretation of the relevant statutes that avoids a statutory construction that renders the laws unconstitutional as applied. Importantly, it is also consistent with federal disability and education laws, as well as the settlement agreement between parents of children with diabetes and the State in a prior action.

Prohibiting school districts from relying on this practical solution will result in certain inevitable consequences that violate students' rights and the law.

### B. Many Students Need Assistance To Administer Their Medication

Medical experts have opined that students with diabetes who cannot reliably receive necessary medication risk serious health consequences by attending school. See, e.g., 3AA/627; 3AA/715. Thus, the State's inability to accommodate students' disabilities undeniably will put their health at risk. The regular administration of medication is crucial to the health of students with chronic conditions. See 3AA/715 ("The consequence of failing to control blood glucose levels through insulin administration or other appropriate therapies can be severe."); 3AA/627 ("Not giving insulin in a timely manner . . . can cause the child to experience short term

complications . . . [and] long-term health consequences, including delayed growth and diabetes complications like kidney failure, blindness and heart disease.").

There are numerous examples of students whose health and safety were risked by the failure to ensure that a trained person was available at the school to administer medication. See 5AA/1256 (untrained school personnel taught student how to unlock insulin pump in violation of parents' and doctor's orders); 5AA/1245 (student who also has emotional disabilities was not provided with trained adult supervision of diabetes care at school or on bus to school). For example, students have even been forced to modify physician-mandated insulin protocols to accommodate schools that cannot provide adequate diabetes care. See 3AA/724 ("I am aware of parents who have requested that their child's treatment regimen be changed . . . because of the refusal of school personnel to administer insulin."); 3AA/796 ("Parents have asked me, at the urging of their schools, to place their child on an insulin regimen with only two shots a day, so that insulin need not be routinely given at school.").[18]

[18] Self-administration is available to some but not all diabetic students. Older students may be able to self-administer their medication, but children younger than ten may not be ready for full responsibility. See 3AA/718,721. Other students with certain disabilities may never develop the capability to safely administer their own medication. 3AA/718. Further, recently diagnosed students will likely require assistance at the outset. Id. In addition, self-administration is obviously not reasonable for emergency medical treatment (as in the case of a glucagon injection to treat hypo-glycemia or a Diastat injection to stop a cluster of seizures). Id.

### C. Many Children With Diabetes Will Miss School Without Access To Medication

Many students who require but cannot receive their medication must miss school. The record includes evidence of students being excluded from the public school system as a result of the school district's failure to ensure that the students' medication would be properly administered. See 3AA/676 (parents forced to home-school student because the school required the mother take primary responsibility for the administration of insulin at school because there was only a nurse available two days a week); 5AA/1204 (school principal told mother that her child was not allowed to attend school when her blood sugar level was above a certain level and parents were forced to keep student home from school for several days).[19]

Students also miss class time waiting for medication. For example, students have been excluded from class by being forced to wait for a parent or off-site nurse to arrive to administer medication. See 5AA/1205-06 (student missed lunch with her classmates, recess, and so much class time that she had to complete additional homework assignments most days of the week); 5AA/1245-46 (child "missed opportunities to learn every time she feels poorly as a result of poor management of her diabetes at school"). For students with diabetes, delayed administration of insulin can also exclude students from learning even when in the classroom. See 3AA/627 (delays in insulin administration can result in prolonged hyperglycemia

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[19] Students with other conditions are just as likely to miss school if they are denied their medications. For example, 11% of California's school-age children who have been diagnosed with asthma (134,000) miss five or more days of school per year as a result of their condition where they do not receive proper and timely medication. See http://www.childrennow.org/index.php/learn/facts_asthma.

which can result in a child's inability to focus, see the board, pass a test or remember what is being taught).

### D. The Court Of Appeal's Holding Has Broad Consequences

#### 1. The Holding Reaches Beyond Public Schools

The lower court's erroneous reconciliation of the statutes at issue is so broad that it has the potential to negatively affect medication administration outside of public schools as well. For example, children in group homes, foster homes and other child care facilities could be denied access to necessary medication. Nurses in licensed child care centers and family child care homes throughout California are rare. Currently, child care providers can administer numerous medications if they follow specific guidelines. Cal. Health & Safety § 1596.797; Cal. Health & Safety 1596.798; Cal. Code Regs. tit. 22, § 101226.

#### 2. The Holding Reaches Beyond The School Day And Schoolhouse

Ensuring that every public school that enrolls a student who needs, or may need, medication while at school employs a full-time nurse will not be sufficient. Even if a school employs a nurse, students will be excluded from other parts of public education, like field trips and extracurricular activities taking place after school and off-campus. Employed nurses can be absent or unavailable on occasion or might be required to attend to multiple students in different locations at the same time. Further, students who require medication must be allowed to participate in extracurricular activities on the same basis as students not requiring medication. Hartzell v. Connell, 35 Cal. 3d 899, 909 (1984) (extracurricular activities "constitute an integral component of public education"). Many of these activities take place after school and off-campus. For these reasons, unlicensed, trained

school personnel would still need to administer medication to students while at away sports competitions, field trips, during after school practices and on the bus.

### 3. The Holding Ignores Medical Emergencies

In addition to students who require medication at certain regular times throughout the school day, students may also require medication while at school in response to medical emergencies. For example, students with epilepsy can experience a condition known as status epilepticus and may require emergency medication to prevent health risks including brain damage or death.[20] School-aged children are also susceptible to severe reactions following certain food allergies and insect bites and may require medication in emergency situations as well. Unlike administering medication to treat chronic conditions, which in some cases can be scheduled at certain specified times,[21] one cannot anticipate when or how frequently medication might be required in these and other emergency medical situations.

### 4. The Holding Potentially Reaches Every Child

In addition to students who require medication to treat chronic conditions and in emergency situations, other students require medication on a temporary, non-emergency basis to protect against infection or

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[20] Status epilepticus is a life-threatening condition in which the brain is in a state of persistent seizure. Traditionally, it is defined as one continuous unremitting seizure lasting longer than 30 minutes, or recurrent seizures without regaining consciousness between seizures for greater than 30 minutes. See http://www.epilepsyfoundation.org/about/types/types/statusepilepticus.cfm.

[21] Not all medication for chronic conditions may be scheduled at specified times. For example, insulin injections to treat hyperglycemia are frequently needed at unpredictable times in response to varying food intake or activity levels. See 3AA/715.

sickness, or treat a temporary pain or illness. In contrast to the quantifiable number of students who require medication to treat a specific condition, this last category of students potentially includes every California public school student since all students are susceptible to becoming sick and requiring medication.

### E. California Parents Must Make Choices Detrimental To Their Families

The record includes numerous examples of parents who were required to attend to their children's medical needs at school because the school district would not provide someone to administer a child's medication. One mother was told that because she was "'just a stay at home mom,' there was no reason that [she] could not go to school every day to administer insulin." 3AA/673; see also 3AA/637 (parent of six-year-old child with Type 1 diabetes told that no nurses were available at the school, so if child needed insulin, parent would be responsible for administration); 5AA/1243 (parent of eleven-year-old child told that she or an individual designated by her family would have to be available to administer insulin to daughter if needed); 5AA/1202-03 (mother of seven-year-old told that either mother or a family member would have to go to the school to administer insulin, and that the school would only dial 911); 5AA/1292-93 (mother of six-year-old forced to make daily trips to school because no staff member would administer insulin to her child).

The record also includes examples of parents who were forced to quit their jobs or could not seek work. See 5AA/1244 ("I had to quit my job that fall because I was unable to respond to calls from K.C., and I was not able to leave my patients to go to school when needed"); 3AA/641 ("To this date, I am unable to seek employment because I have no clear

assurances that school personnel will administer insulin to my child at unscheduled times."); 3AA/678 (mother unable to earn income in order to be constantly available to go to school to administer insulin).

### F. Children With Diabetes Will Not Learn To Live With Their Medical Condition

A potentially long lasting consequence of the holding will be the psychological effect on children with diabetes. A key component of treating any child with any disease or disability is teaching them that they can equally participate in society with their peers and, moreover, helping them learn to live accordingly.[22] Requiring students to miss educational opportunities and social experiences although they can fully function normally like their childhood peers undermines this goal. If the Court of Appeal's holding is affirmed, our children with diabetes will suffer long-term in their development and they will not fully learn how to live normal lives with their diabetic condition. Compounding this concern is the rising rate of diabetes in children.[23]

## IV. ARGUMENT

### A. This Court Reviews The Interpretation Of The NPA *De Novo* And Should Construe It, If Reasonable, To Avoid A Constitutional Issue

Issues of statutory interpretation and constitutional questions are reviewed *de novo*. In re Conservatorship of Whitley, 50 Cal. 4th 1206, 1213-14 (2010) (statutory interpretation); Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara County Open Space Auth., 44 Cal. 4th 431, 448-49 (2008) (finding courts exercise independent judgment in matters involving

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[22] See, e.g., Jean Betschart Roemer, ADA Guide To Raising A Child With Diabetes, (3rd Ed., 2011)

[23] Children and Diabetes-More Information, Center for Disease Control, http://www.cdc.gov/diabetes/projects/cda2.htm.

constitutional interpretation); Ramirez v. Yosemite Water Co., Inc., 20 Cal. 4th 785, 794 (1999) (statutory construction is a question of law). In carrying out that function, this Court has long held that "[o]ur common practice is to 'construe[] statutes, when reasonable, to avoid difficult constitutional questions.'" In re Smith, 42 Cal. 4th at 1269 (citing Le Francois v. Goel, 35 Cal. 4th 1094, 1105 (2005)). See also Myers v. Philip Morris Co., 28 Cal. 4th 828, 846-47 (2002) ("An established rule of statutory construction requires us to construe statutes to avoid 'constitutional infirmit[ies].'").

Appellants have done a masterful job demonstrating that the NPA and the Education Code can reasonably be interpreted in a manner that permits public schools to allow trained personnel to administer medicine to students who need it when a licensed nurse is not available. *Amici Curiae* will not repeat those arguments or belabor them other than to note, through incorporation by reference, that because Appellants have demonstrated a reasonable interpretation of the NPA, to the extent that *Amici Curiae* demonstrate below that the contrary interpretation proffered by Respondents creates a constitutional infirmity, Appellant's interpretation should be given preference to avoid the constitutional issue.[24]

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[24] Although none of the parties previously raised the constitutional question, the failure to raise the argument below is no impediment to this Court's *de novo* consideration of the issue. See, e.g., Hale v. Morgan, 22 Cal. 3d 388, 394 (1978) (holding a "litigant may raise for the first time on appeal a pure question of law" and noting that "courts have several times examined constitutional issues raised for the first time on appeal, especially when… important issues of public policy are at issue."); People v. Hines, 15 Cal. 4th 997, 1061 (1997) (allowing a Constitutional argument not raised at trial).

### B. Refusing To Allow Trained School Personnel To Administer Medication When A Nurse Is Unavailable Denies Students The Fundamental Right To A Free And Non-Discriminatory Education Guaranteed By The California Constitution To All Californians

#### 1. The Right To Education Is A Constitutionally Protected Fundamental Right In California And Any Impingement On That Right Is Subject To Strict Judicial Scrutiny

The right to a public education is enshrined in California's Constitution and guaranteed to all Californians. Cal. Const. art. IX, § 5 ("The Legislature shall provide for a system of common schools by which a free school shall be kept up and supported in each district . . . ."). It is unquestionably a fundamental right. Serrano v. Priest, 5 Cal. 3d 884, 608-09 (1971) (Serrano I) ("[T]he distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a 'fundamental interest.'"). This Court has repeatedly affirmed that the right to education is a fundamental interest protected by California's Constitution and has zealously guarded that right against any infringement. See, e.g., Butt, 4 Cal. 4th at 683; Serrano II, 18 Cal. 3d at 766.

Under California law, "denials of basic educational quality are . . . . subject to strict scrutiny." Butt, 4 Cal. 4th at 692. This fundamental right in California is so strong that any denial of the right is subject to strict scrutiny.[25] Id. See also Hernandez v. City of Hanford, 41 Cal. 4th 279, 299

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[25] A constitutional violation may arise by less than a denial of the right to an education in its entirety; a plaintiff need only demonstrate that he was denied an education "substantially equivalent" to that provided elsewhere in the State to prevail on a claim that his right to education has been violated. See Serrano I, 5 Cal. 3d at 589 (claim was not that certain students received no funding for their education, but only that their funding was less than what other students received); Butt, 4 Cal. 4th at 703-704 (refusing to allow a school district to reduce the number of days in its academic year by less than one-fifth of the number of days than other schools). Indeed, the mere possibility of the denial or limitation of a right to basic educational equality has been enough for this Court to find a *(cont'd)*

(Cal. 2007) (in cases "touching on 'fundamental interests,'" courts must adopt "'an attitude of active and critical analysis, subjecting the [law] to strict scrutiny.'"). Under strict scrutiny, "*the state* bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose." Serrano II, 18 Cal. 3d at 368; Serrano I, 5 Cal. 3d at 597.

Concomitantly, the State is constitutionally **mandated** to provide **free** public schools for all children.[26] Cal. Const. art. IX, § 1 ("A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the Legislature shall encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement."); Cal. Const. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise."). The Constitution also prohibits unlawfully

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constitutional violation. See Hartzell, 35 Cal. 3d at 904 (finding that a $25 fee for extracurricular activities violate the free-school guarantee, even though "[t]here was no evidence that any student was prevented from [participating in extracurricular activities] because of the fees.").

[26] To be certain, the Court may find a violation of the right to education even where State action is the indirect cause of the violation and even where the State's inaction may cause the violation. For example, in Serrano I, it was not that the State established disparate per pupil funding levels among school districts – in fact, the State actually provided supplemental funds to help address inter-district funding disparities. Serrano I, 5 Cal. 3d at 593. Still, it was enough that the State's school finance system allowed the per student funding disparities for this Court to find a constitutional violation that the State was obligated to correct. Id. at 614-15; see also Butt, 4 Cal. 4th at 681 ("Because access to a public education is a uniquely fundamental personal interest in California, our courts have consistently found that the State charter accords broader rights against State-maintained educational discrimination than does federal law. Despite contrary federal authority, California constitutional principles require State assistance to correct basic "interdistrict" disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.").

discriminating against students in the context of their educational rights. See Butt, 4 Cal. 4th at 685 (holding that the California Constitution prohibits maintenance and operation of the public school system in a way which denies basic educational equality to the students of a particular district); Ward v. Flood, 48 Cal. 36, 51 (1874) (holding that the Legislature may not discriminate against children in fulfilling its mandate to provide a system of education for the youth of the State). The State bears the ultimate responsibility for ensuring basic educational equality and an individual school district's financial situation cannot justify disparities. See Butt, 4 Cal. 4th at 685 ("the State itself bears the ultimate authority and responsibility to ensure that its district-based system of common school provides basic equality of educational opportunity.").

A review of three of this Court's prior seminal decisions illustrate the key legal principles that guide the analysis of the question now before the Court. First, in Serrano I, this Court invalidated California's system of funding public schools which, because of its heavy reliance on local property taxes, resulted in certain school districts spending significantly more per student than other school districts. 5 Cal. 3d at 592-93. In Serrano, this Court found that the State's school funding system "conditions the full entitlement to [education] on wealth, classifies its recipients on the basis of their collective wealth and makes the quality of a child's education depend upon the resources of his school district and ultimately the pocketbook of his parents." Id. at 614. Accordingly, this Court struck down the State's school funding system as unconstitutional. Id.

This Court refused to allow a school district to end its academic year six weeks early in an attempt to address the school district's budget

shortfall. 4 Cal. 4th at 674. This Court found that such an unplanned truncation of the school year would cause an "extreme and unprecedented disparity in educational service and progress" available to the students in that school district. Id. at 687. This Court ruled that the California Constitution prohibits maintenance and operation of the public school system in a way which denies basic educational equality to the students of a particular district. Id. at 685. This Court also held that, notwithstanding the local school district's authority and control over its budget, the "State itself bears the ultimate authority and responsibility to ensure that its district-based system of common schools provides basic equality of educational opportunity." Id.

Finally, in Hartzell, this Court refused to allow a school district to charge students a fee in order to participate in extracurricular activities. 35 Cal. 3d at 905. In Hartzell, the school district adopted a policy requiring students to pay $25 to participate in extracurricular activities and established a scholarship program for students who could not pay the fee. Id. at 904. Even though there was no evidence in the case that any student was prevented from participating in any extracurricular activities because of the fee, this Court ruled that the fees violated California's free school guarantee. Id. at 904-05. The Court held that a school district's financial hardships cannot be used as a defense to violate California's free school guarantee and held that "[e]ducational opportunities must be provided to all students without regard to their families' ability or willingness to pay fees or request special waivers." Id. at 913.

The cases cited above involve three important principles in the context of the current case. The first principle is that courts may find a violation of the right to education even where State action is the *indirect*

cause of the violation and even where the State's *inaction* may cause the violation. For example, in the Serrano case, it was not that the State established disparate per pupil funding levels among school districts – in fact, the State actually provided supplemental funds to help address inter-district funding disparities. Still, it was enough that the State's school finance system *allowed* the per student funding disparities for this Court to find a constitutional violation that the State was responsible to correct. This Court held:

> Because access to a public education is a uniquely fundamental personal interest in California, our courts have consistently found that the State charter accords broader rights against State-maintained educational discrimination than does federal law. Despite contrary federal authority, California constitutional principles require State assistance to correct basic "interdistrict" disparities in the system of common schools, even when the discriminatory effect was not produced by the purposeful conduct of the State or its agents.

Butt, 4 Cal. 4th at 681 (emphasis added).

The second principle is that a constitutional violation may arise by less than a denial of the right to an education in its entirety; a plaintiff need only demonstrate that he was denied an education "substantially equivalent" to that provided elsewhere in the State to prevail on a claim that his right to education has been violated. For example, in the Serrano case, the claim was not that certain students received no funding for their education, but only that their funding was less than what other students received. In the Butt case, the Court refused to allow a school district to reduce the number of days in its academic year by less than one-fifth of the number of days that other schools were in session. In some cases, the mere possibility of the denial or limitation of a right to basic educational equality has been enough for this Court to find a constitutional violation. For

example, in Hartzell, this Court found that charging a $25 fee to participate in extracurricular activities violated the right to California's free-school guarantee, even though "[t]here was no evidence that any student was prevented from [participating in extracurricular activities] because of the fees." Hartzell, 35 Cal. 3d at 904.

A final and consistent principle from this Court's cases involving the fundamental right to education is that the State bears the ultimate responsibility for ensuring basic educational equality, and an individual school district's financial situation cannot justify differences in this educational equality. As this Court held in the Butt case, "the State itself bears the ultimate authority and responsibility to ensure that its district-based system of common school provides basic equality of educational opportunity." 4 Cal. 4th at 685.

### 2. The NPA, If Applied As Urged By Respondents, Would Deny Entirely Or At Least Substantially Alter The Education That Is Constitutionally Guaranteed To California Students

The record in this case includes declarations by medical experts stating that if a student cannot reliably receive required medication, they risk serious health consequences by attending school. See, e.g., 3AA/627; 3AA/715. Therefore, students who require medication while at school, but are unable to receive the medication, will be excluded from attending school.

The risk that students who require medication while at school will be excluded from California's public schools is not theoretical. The record in this case includes evidence of students being excluded from the public school system as a result of the school district's failure to ensure that the

students' medication would be properly administered.[27] See e.g., 3AA/676 (parents forced to home-school student because the school required the mother take primary responsibility for the administration of insulin at school because there was only a nurse available two days a week); 5AA/1204 (school principal told mother that her child was not allowed to attend school when her blood sugar level was above a certain level and parents were forced to keep student home from school for several days). If the appellate court's ruling is upheld, more students will be excluded from California's public schools.

Students are also excluded from public schools when they are forced to miss class time waiting for a parent or off-site nurse to arrive to administer medication. Again, the record abounds with evidence of students being excluded from class to wait for a parent or off-site nurse to arrive to administer medication. See, e.g., 8AA/1205-06 (student missed lunch with her classmates, recess, and so much class time that she had to complete additional homework assignments most days of the week); 8AA/1245-46 (child "missed opportunities to learn every time she feels poorly as a result of poor management of her diabetes at school."). For students with diabetes, delayed administration of insulin can also exclude students from learning even when in the classroom. See 3AA/627 (delays in insulin administration can result in prolonged hyperglycemia which can

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[27] While the record includes substantial evidence of students being excluded from school, given the facts of this particular case, the evidence in the record is limited to only cases involving insulin administration. However, the appellate court's decision indisputably will lead to many more students being excluded from school if trained school personnel are not allowed to administer medication in the absence of a school nurse.

result in a child's inability to focus, see the board, pass a test or remember what is being taught).

Even if a school employs a nurse, a requirement that only licensed nurses can administer medicine will mean that students necessarily will be excluded from other core aspects of a public education, like field trips and extracurricular activities taking place after school and off-campus. This Court has held that extracurricular activities "constitute an integral component of public education" and are included in the free school guarantee in the California Constitution. Hartzell, 35 Cal. 3d at 909. However, the record shows that students requiring medication face particularly high barriers to participating in field trips and extracurricular activities. See e.g., 153AA/1195 (student was only able to attend school field trips if her parent was also able to attend). The need for care at extracurricular events highlights the importance of allowing trained school personnel who are not licensed nurses to administer medication even at schools with full-time nurses. If field trips or activities involve travel away from the school, a nurse may not always be available to attend. Medical experts agree that because "care must be provided during field trips, extracurricular activities and other times when the school nurse is not present on site" relying on even a full-time nurse "is not sufficient to provide adequate care." 3AA/723; see also 3AA/796 ("[I]nsulin may be needed during field trips, extracurricular activities, and at other times when the school nurse cannot administer insulin. This underscores the importance of having on-site staff trained to administer insulin at any time during the school day or during school activities.").

By excluding students from school entirely because the school is unable to reliably provide someone to administer medication, or partially

by making them miss class for excessive periods of time to wait for someone to administer medication or excluding them from participating in field trips and extracurricular activities that are integral to the public education experience, the State denies these students "the opportunity to receive the schooling furnished by the state . . . on an equal basis" and therefore, violates their constitutional rights. Butt, 4 Cal. 4th at 680.

### 3. Respondents Have Not, And Cannot, Demonstrate That Their Interpretation Of Section 2725 Is Necessary To Further A Compelling State Interest; In Fact The Opposite Is True

Where, as here, a statute is construed or given effect in such a way as to deny entirely or to prevent a student from enjoying the "substantially equivalent" education enjoyed by another student, that statute is subject to strict scrutiny and "the state bears the burden of establishing not only that it has a compelling interest which justifies the law but that the distinctions drawn by the law are necessary to further its purpose." Serrano II, 18 Cal. 3d at 368 (emphasis in original); Serrano I, 5 Cal. 3d at 597. Under the facts presented here, Respondents have not, and simply could not, meet their heavy burden under this exacting standard.

To date, Respondents have identified one interest that is supposedly fostered by their insistence that only licensed nurses can administer medicine to school children: that licensed nurses are best suited to administer medicine and, therefore, the safety of children is enhanced by limiting authorization to administer medicine only to licensed nurses. However, that interest, although initially inviting, is demolished by two key facts. First, through no fault of the students, millions of California students do not have access to a full-time nurse and thus have no one to administer medicine to them. In other words, the students are actually worse off and

their health and safety are reduced because rather than having a trained educational professional (albeit not a licensed nurse), students can either not receive their medicine while at school or not go to school at all. The nurses' fail to acknowledge the shortage, arguing instead that the record is supposedly not sufficiently well-developed to establish this incontrovertible fact. (See Resp. Br. at 7, 45 n.17.)[28]

Second, it is simply not credible to suggest that there is a "compelling need" to have a licensed nurse administer insulin and other medication when California already expressly acknowledges that unlicensed school personnel can and do administer insulin. See Cal. Educ. Code § 49423(b)(1). Moreover, as Appellants correctly note, in today's society, insulin is administered far more often by unlicensed (and untrained) individuals than it is by licensed nurses with no demonstrable harm from doing so. See 3AA/720-23; 4 AA/817-902; 6AA/1647, 1649-50. Surely, if an untrained individual can administer medication, it must be preferable for students in those instances where a nurse is unavailable to have a competent adult who has received training and is acting under a physician's orders administer the necessary medicine.

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[28] In the footnote where Respondents address the nursing shortage, Respondents' attempt to blame schools without acknowledging their own obvious financial interest in this issue. Respondents assert that students are not being denied their necessary medicine due to any lack of nurses, but rather because "the schools [supposedly] make licensed personnel unavailable by refusing to hire or contract with them." (Resp. Br. at 45 n. 17.) Such a contention ignores the unprecedented budgetary crisis that is resulting in teachers being laid off. Respondents suggest, without evidentiary support, that schools would intentionally jeopardize the health and welfare of their students for pecuniary reasons. However, it is Respondents' position of artificially limiting who can administer medicine to schoolchildren that seems to be affected by their desire to secure more jobs for their constituents.

Thus, while Respondents assert that "[t]he license matters" (Resp. Br. at 44 n.15), in fact the Legislature already has concluded that unlicensed personnel may administer medicine, and specifically insulin, because such medicines do not require any specialized training or knowledge to administer. In fact, so long as administered consistently with a physician's instructions, administering insulin or virtually any other medicine can be done quite safely. (See Appellants' Op. Br. at 9-10 and 19-25.) Perhaps the best evidence that a "license does [not] matter," is that while Respondents ominously argue that "[insulin] is so dangerous and requires substantial scientific knowledge to safely administer" (Resp. Br. at 5), the Legislature has expressly concluded that elementary school children can self-administer insulin. Cal. Educ. Code § 49414.5. If a seven year-old can administer insulin to themselves, then respectfully the drug cannot "require substantial scientific knowledge to safely administer." (Resp. Br. at 17.)

As Respondents cannot establish that it is necessary to construe the NPA in the fashion urged in the Court of Appeal, much less that it furthers a compelling interest, Section 2725 of the NPA should be held unconstitutional to the extent it precludes school children who need medicine to attend school from receiving medicine from trained school personnel who are not licensed nurses.

### C. Alternatives To Allowing Trained School Personnel Who Are Not Licensed Nurses to Administer Medication Are Inadequate

Although *Amici Curiae* have demonstrated that there is not, and cannot, be a compelling interest in enforcing Section 2725 as construed by the Court of Appeal, it is worth analyzing whether there are any reasonable alternatives that would allow Respondents' construction to stand without causing untold harm to tens of thousands of California school children.

*Amici Curiae* respectfully submit that there are three potential alternatives to allowing trained school personnel who are not licensed nurses to administer medication to children while at school: (1) require children to self-administer the medication; (2) require parents to come to school or to identify a family member or friend (other than school personnel) to administer the medication; or (3) ensure that every school that enrolls a student who requires medication administration while at school or at school-related activities employs a full-time nurse and back-up nurse for when the full-time nurse is unavailable. As shown below, none of these alternatives are viable.

### 1. Many Children Are Unable To Self-Administer Medication

In California, children may enroll in public school at age five, although certain children with disabilities may begin attending public school as young as three years old. See Cal. Educ. Code § 8235(a). At some point, some students may be able to self-administer their medication, but students as young as five and three years old can hardly be expected to safely administer their own medication. See 3AA/718, 721. Further, certain students with disabilities may never develop the capability to safely administer their own medication. See 3AA/718. Those students newly diagnosed with a chronic condition will also likely require assistance for a time while learning to manage the disease. Id. In addition, self-administration is most certainly not a reliable alternative for situations in which a child requires emergency medical treatment (as in the case of a Diastat injection to stop a cluster of seizures). Id. Therefore, self-administration is not a viable alternative.

### 2. Requiring Parents to Assume Responsibility For Administering Medication Violates Disability Laws And California's Free-School Guarantee

The second alternative is to require parents, other family members or friends to administer medication to children who require it while at school. However, this alternative misallocates the State's responsibility under state and federal disability law and violates California's free-school guarantee.

State and federal disability rights laws require that the State make reasonable accommodation for persons with disabilities and that the State provide services and support to students with disabilities. Cal. Educ. Code § 56001(a). Requiring a family member or friend to come to the school to administer medication to a student with a disability misallocates the responsibility for making public education accessible. It is the obligation of the State, not of the individual with a disability or her family, to provide accommodations, support and services under state and federal disability law. See, e.g., Putnam v. Oakland Unified Sch. Dist., No. C-93-3772W, 1995 WL 873734 at *12 (N.D. Cal. Jun. 9, 1995) ("It was not Putnam's burden to find a way for the District to make a school program accessible to her. Rather, it was the District's burden to offer her either a fully accessible school or a school whose program would be readily accessible to her by means such as the provision of aides and reassignment of classes to accessible facilities."). Providing accommodation for any disability should not be a condition of a child attending school, regardless of a family's willingness to bear the burden..

Also, requiring parents to be available to administer medication to a student could place a financial burden on certain families in violation of California's guarantee to a free and appropriate education. The California Constitution requires the State to "provide for a system of common schools

by which a free school shall be kept up and supported in each district . . . ." Cal. Const., art. IX, § 5; see also Butt, 4 Cal. 4th at 680. As this Court has said, "[i]n guaranteeing 'free' public schools, article IX, section 5 fixes the precise extent of the financial burden which may be imposed on the right to an education - none." Hartzell, 35 Cal. 3d at 912; see also Cal. Educ. Code § 56031 (special education "means specially designed instruction, at no cost to the parent, to meet the unique needs of individuals with exceptional needs . . . .").

As this Court carefully explained in Hartzell:

> The free school guarantee reflects the people's judgment that a child's public education is too important to be left to the budgetary circumstances and decisions of individual families. It makes no distinction between needy and nonneedy families.
>
> ***
>
> The free school guarantee lifts budgetary decisions concerning public education out of the individual family setting and requires that such decisions be made by the community as a whole. Once the community has decided that a particular educational program is important enough to be offered by its public schools, a student's participation in that program cannot be made to depend upon his or her family's decision whether to pay a fee . . . .

Hartzell, 35 Cal. 3d at 911-12.

The record in this case cites numerous examples of parents who were required to attend to their children's medical needs at school because the school district would not provide someone to administer a child's medication. One mother was told that because she was "'just a stay at home mom,' there was no reason that [she] could not go to school every day to administer insulin." 3AA/673; see also 3AA/637 (parent of six year-old child with Type 1 diabetes told that no nurses were available at the school, so if child needed insulin, parent would be responsible for administration.); 5AA/1243 (parent of eleven year-old child told that she or

an individual designated by her family would have to be available to administer insulin to daughter if needed.); 5AA/1202 (mother of seven year-old told that either mother or a family member would have to go to the school to administer insulin, and that the school would only dial 911); 5AA/1292-93 (mother of six year-old forced to make daily trips to school because no staff member would administer insulin to her child).

The record also includes examples of parents who were forced to quit their jobs or could not seek work. See e.g., 5AA/1244 ("I had to quit my job that fall because I was unable to respond to calls from K.C., and I was not able to leave my patients to go to school when needed"); 3AA/641 ("To this date, I am unable to seek employment because I have no clear assurances that school personnel will administer insulin to my child at unscheduled times."); 3AA/678 (mother unable to earn income in order to be constantly available to go to school to administer insulin).

Not only does placing the responsibility of administering medication on a child's family violate the free-school guarantee, but it could also discriminate among students on the basis of wealth. More affluent families may be better able to afford to have a parent or other family member available to come to a child's school on a daily basis to administer medication, while less affluent families or single-parent families where the parent has a full-time job would not be able to do so. In this way, requiring the family to be responsible for administering medication while at school could condition a child's health, welfare and ability to attend school on family affluence. This Court has found such a result violates the students' right to an education under California's Constitution. See Serrano I, 5 Cal. 3d at 614 (holding that the school funding system, which conditioned the full entitlement to an education on the affluence of a student's family, was

unconstitutional). For these reasons, requiring a child's family to assume responsibility for the students' medication administration – a practice widely used throughout the State – violates students' rights and California law.

Even if shifting the burden to parents was legal, it would simply not work as a practical solution for all children, because many parents have full-time jobs and do not work in sufficient proximity to their child's school to allow them to be primarily responsible for administering their child's medication. This solution would also prohibit students who require medication from attending field trips and traveling away from the school for extracurricular activities (e.g., sports matches) when doing so would place them out of reach of a parent who was responsible for administering their medication.

### 3. Providing A Full-Time Nurse At Every School Is Not Realistic And Would Not Adequately Address The Problem

The final alternative to allowing trained school personnel who are not licensed nurses to administer medication to students who require it during school hours is to ensure that every public school that enrolls a student who needs, or may need, medication while at school employs a full-time nurse. As demonstrated above, this alternative is not fiscally feasible in California for the foreseeable future. Nor is it realistic in light of the growing shortage of licensed nurses, which would prevent schools from hiring sufficient nurses even if the schools otherwise had sufficient funds. And, in any event it is not an adequate remedy as such relief would still deny students with disabilities the full benefit of the school program available to their non-disabled peers.

Currently, only 5 in every 100 public schools in California employ a full-time nurse. 6AA/1399. Over the past two years, public education in California funding has been reduced by $17 billion, and additional cuts are predicted for the 2011-2012 school year (as of April 2011, 19,000 public school employees statewide had received lay-off notices in anticipation of public education cuts).[29] Even if money were not an issue, given California's nursing shortage, the possibility of having a full-time nurse at every public school is not feasible for the foreseeable future.

But assuming for argument's sake that California had the money to hire a full-time nurse at every school and also had a sufficient number of qualified nurses to be hired – two conditions that are impossible at least for the foreseeable future – practical considerations would still require allowing trained school personnel who are not licensed nurses to administer medication. First, even if every school employed a nurse, the nurse might be absent on occasion, be away from campus temporarily, or might be attending to a student at another part of campus when another student required medication on a scheduled or emergency basis. Further, as discussed above, students who require medication must be allowed to participate in extracurricular activities on the same basis as students not requiring medication. Many of these activities take place after school and off-campus. Trained school personnel who are not licensed nurses would still need to administer medication to students participating in sports competitions, on field trips, during after school practices and on the bus going to and from school. Upholding the laws that prohibit discrimination against persons with disabilities and protecting the right to a free and

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[29] Smith, supra note 13.

appropriate education require that students who require medication while at school be able to receive it at all times, not only when a scheduled nurse is available. Therefore, even if a school nurse were available at every campus, other trained school personnel would still need to be able to administer medication when the nurse was not available in order to protect students' rights.

### D. Construing The Statutes Consistent With The State Constitution Would Also Conform To Federal And State Laws Protecting Disability Rights

Properly construing the Nursing Practice Act and the Education Code results in a statutory interpretation that is not only consistent with the State Constitution but also consistent with federal and state disabilities laws.

#### 1. Federal Disability Laws

Throughout the past forty years, Congress has made ending the exclusion of persons with disabilities a priority and a guiding principal in extending civil rights to persons with disabilities. Before Congressional intervention in the 1970s, some state laws condoned and permitted the exclusion of students with disabilities from public schools. See, e.g., Pa. Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 282 (E.D. Pa. 1972) (describing a state law that excluded students deemed "uneducable and untrainable" by reason of a mental disability from public schools); Mills v. Bd. of Educ. of D.C., 348 F. Supp. 866, 869 (D.C.D.C. 1972) (describing the exclusion from public schools of an estimated 12,340 handicapped children within the District of Columbia). In response to this discrimination, Congress passed a number of laws to ensure that persons with disabilities would not be excluded from public life. Significantly, in the Rehabilitation Act of 1973, Congress provided: "No otherwise qualified handicapped individual in the United States . . . shall, solely by

reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .” 29 U.S.C. § 794. See also Hayes v. Comm’n on State Mandates, 11 Cal. App. 4th 1564, 1582-92 (1993) (discussing the early efforts to ensure handicapped children received equal educational opportunities).

In 1975, after finding that “one million of the handicapped children in the United States are excluded entirely from the public school system and will not go through the education process with their peers,” Congress passed the Education for All Handicapped Children Act (EAHCA) 20 U.S.C. §1400. In 1990, this law was revised and renamed the Individuals with Disabilities Education Act (IDEA). The purpose of IDEA is to assure that all children have available to them “a free appropriate public education that emphasizes special education and related services designed to meet their unique needs . . . to assure that the rights of handicapped children and their parents or guardians are protected.” 20 U.S.C. §1400 (d)(1)(A-B); see also In re Carl R., 128 Cal. App. 4th 1051, 1065 (2005) (“The impetus for the IDEA arose from the efforts of parents of disabled children to prevent the exclusion or expulsion of disabled children from public schools.”). The IDEA conditions the receipt of federal funds on each state assuring that “a free appropriate public education will be available for all children with disabilities” 20 U.S.C. §14127(a)(1)(A).

In 1990, after finding that “discrimination against individuals with disabilities persists in such critical areas as . . . education” and that “individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion,” Congress passed the Americans with Disabilities Act (ADA). 42 U.S.C. § 12101(a)(3). The

ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

In 1997, Congress amended the IDEA after finding that "because of the lack of adequate services within the public school system, families were often forced to find services outside the public school system, often at great distance from their residence and at their own expense." Individuals with Disabilities Education Act, Amendments of 1997, Pub. L. No. 105-17, 1997 HR 5, (c)(2)(E). Congress affirmed its purpose of ensuring "that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living" and that "the rights of children with disabilities and parents of such children are protected." Id. at page III, Stat. 42.

**2. California Disability Laws**

California has also enacted comprehensive legislation to ensure that persons with disabilities are not excluded from public programs and services. For example, in 1968, the Legislature enacted the California Disabled Persons Act guaranteeing people with disabilities the same right as the general public to access public facilities. Cal. Civ. Code § 54. Similarly, in 1992, it amended the Civil Rights Act to provide protection for persons with disabilities and to provide that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their . . . disability, . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." Cal. Civ. Code § 51(b).

California's protections for persons with disabilities are particularly strong with respect to the fundamental right to an education. The Education Code begins with the proclamation that "[i]t is the policy of the State of California to afford all persons in public schools, regardless of their disability . . . , equal rights and opportunities in the educational institutions of the state." Cal. Educ. Code § 200 (emphasis added). It further declares that "[t]he Legislature finds and declares that all individuals with exceptional needs have a right to participate in free appropriate public education and special educational instruction and services for these persons are needed in order to ensure the right to an appropriate educational opportunity to meet their unique needs." Cal. Educ. Code § 56000(a).

### 3. Diabetes Is A Disability And Must Be As Protected As Other Disabilities

As discussed above, federal and state lawmakers over the past forty years have sought to ensure that persons with disabilities are not excluded from public services and have expressly provided that children cannot be excluded from public schools on the basis of their disabilities. Diabetes is a disability. Rohr v. Salt River Project Agric. Improvement and Power Dist., 555 F.3d 850, 858-60 (9th Cir. 2008) (holding that diabetes qualifies as "a physical impairment" under the ADA and thus may be recognized as a disability). In interpreting statutes, courts consider not only the particular statute in question but also the entire legislative scheme of which it is part. See e.g., Curle v. Superior Court, 24 Cal. 4th 1057, 1063 (2001); Wilcox v. Birtwhistle, 21 Cal. 4th 973, 977 (1999). Thus, as applied here, in resolving interpretive issues concerning the administration of medication to children with diabetes in our public schools, the NPA, the Education Code and the federal and state disabilities laws must be harmonized. See

NORMAN J. SINGER, 3B SUTHERLAND STATUTORY CONSTRUCTION § 76:13, pp. 226-230 (6th ed. 2003 rev.) (legislation that impinges on civil liberties is strictly construed so as to have the "least possible effect" on the affected civil liberties) (citing Beck v. W. Coast Life Ins. Co., 38 Cal. 2d 643, 653 (1952)). See also U.S. Const. art. VI, cl. 2 (Supremacy Clause).

This is no different than that which occurs with other disabilities. The exclusionary impact of a school's refusal to allow trained personnel to administer medication to students is analogous to refusing to provide wheelchair accessibility to accommodate students with ambulatory disabilities. Compare D.R. ex rel. Courtney R. v. Antelope Valley Union High Sch. Dist., 746 F. Supp 2d 1132, 1147 (C.D. Cal. Oct. 8, 2010) (school district's refusal to give student in wheelchair the key to the elevator excluded the student from school's program on the basis of her disability was a violation of federal law); Putnam, 1995 WL 873734 at *11 (high schools with bathrooms and eating areas that were inaccessible to student requiring the use of a wheelchair resulted in the student being "excluded from and discriminated against in the high school program" in violation of federal law). There can be little doubt that it would be unlawful for schools to refuse to allow personnel to assist students in a wheelchair.

#### 4. California Students Will Unlawfully Face Increased Health And Safety Risks Because The State Has Failed To Meet Its Obligations

Under federal disability law, physical safety is an integral component of an appropriate education. See Students of California School for the Blind v. Honig, 736 F.2d 538, 545-46 (9th Cir. 1984), vacated on other grounds, 471 U.S. 148 (1985), cited approvingly in Campos v. S.F. State Univ., No. C-97-2326 MMC, 1999 WL 1201809, at *7 (N.D. Cal.

June 26, 1999); Mountain View-Los Altos Union High Sch. Dist. v. Sharron B.H., 709 F.2d 28, 30 (9th Cir. 1983). The State is required to make schools for students with disabilities "as safe as other schools," and make "such reasonable adjustments as are necessary to make a school for [] multi-handicapped students as safe as other California schools are for their nonhandicapped students." Honig, 736 F.2d at 547; see also Jennifer C. v. Los Angeles Unified School Dist., 168 Cal. App. 4th 1320, 1327-1328 (2008) (holding that schools must account for students' "special needs" when providing for their safety). Prohibiting disabled students access to the medication that they need for their survival and safety – or denying them access to a public education – is facially inconsistent with that mandate. Moreover, the State is constitutionally obligated to ensure the safety of public school students. Cf. Cal. Const. art. I, § 28(c) ("All students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.").

## V. CONCLUSION

For these reasons, the Court should reverse the Court of Appeal and interpret the Nursing Practices Act and the Education Code consistent with the mandates of the State Constitution and federal and state disability laws, and hold that trained, unlicensed school personnel may administer medication to children with diabetes in our public schools.

Dated: May 11, 2011

Respectfully submitted,

By: Jason D. Russell (P.O.)

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief was produced using Microsoft Word, was prepared using a proportionately spaced typeface consisting of 13 points, and that, as determined by this software, the brief, exclusive of the cover pages, application, and tables, contain 11,959 words and is therefore in compliance with Rule 8.204(b) and (c) of the California Rules of Court.

Dated: May 11, 2011

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## PROOF OF SERVICE

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 300 South Grand Avenue, Suite 3300, Los Angeles, California 90071.

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